

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WALTER FERNANDEZ, :

4 Petitioner : No. 12-7822

5 v. :

6 CALIFORNIA :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, November 13, 2013

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:05 a.m.

14 APPEARANCES:

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16 behalf of Petitioner.

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21 United States, as amicus curiae, supporting
22 Respondent.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next today in Case 12-7822, Fernandez v. California.
5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

8 MR. FISHER: Mr. Chief Justice, and may it
9 please the Court:

10 The doctrine of third-party consent is best
11 understood as establishing a rebuttable presumption.
12 When the police arrive at a house at which multiple
13 people live, they can assume, according to social
14 custom, that if one person grants consent to enter, that
15 person is speaking for everybody who lives in the
16 dwelling.

17 But when somebody is present and tells the
18 police officer that he refuses consent, that presumption
19 is reversed. Then when the police full well know that
20 one person doesn't have a delegated authority to speak
21 for the others, they must respect the objection. And a
22 failure to do so violates the Fourth Amendment.

23 In other words, Matlock already gives the
24 police all of the benefit of the doubt. Even when
25 people are nearby and have a -- might have an interest

1 in objecting, the police can assume, as this put -- as
2 this Court put it in Randolph, that asking that other
3 person wouldn't make a difference very often, and
4 therefore, they can presume that they would also consent
5 to the search. So all we're --

6 JUSTICE BREYER: That's the reason -- maybe
7 I should put to you at the outset the problem with the
8 case that's bothering me. Neighbors hear a noise.
9 Police come to the door. Man and wife are there. She,
10 as in this case, has a bump on her nose, holding a baby
11 and is crying and blood on her shirt. The police, for
12 whatever set of reasons, arrest the husband. The woman
13 says, Mr. Policeman, I would like you to come in the
14 house. I'd like you to look at a couple of the closets.
15 I'm worried about what's in them. I can't quite tell
16 you what it is. I don't know. But I'd like you to look
17 through the house.

18 Now, is that woman never to be able to get a
19 policeman in the house? Never? I mean, months go by.
20 She owns the house, too. And by the way, I've tried to
21 keep out of my hypothetical any other basis for getting
22 in. It's not a -- she's not a danger. The husband's
23 gone. She is -- no destruction of evidence. She won't
24 destroy it. You see -- and so that -- she owns the
25 house. Can she never invite the policeman in?

Official

1 MR. FISHER: She can invite them in, Justice
2 Breyer, and the police, within about 15 minutes, can get
3 a warrant and come right in and --

4 JUSTICE BREYER: On what basis?

5 MR. FISHER: Pardon me?

6 JUSTICE BREYER: On what basis?

7 MR. FISHER: On the basis that I think that
8 you've just described that she said there's
9 essentially --

10 JUSTICE BREYER: No, she says, I don't know
11 what's in the closet, Mr. Policeman. I don't know that
12 it has anything to do with my bloody nose. I just would
13 like you to take a look around.

14 Now, see, I tried to keep out probable
15 cause.

16 MR. FISHER: Okay.

17 JUSTICE BREYER: I've tried to eliminate any
18 other basis. And that's what is worrying me on the --
19 worry stemming from, but it's her house, too. Can't she
20 invite people into her house, too, whom she wants,
21 including the policeman?

22 Now, that's the example that got me to write
23 separately in the other case. That's the example that
24 keeps gnawing on my mind, and I -- and I'd like you to
25 address it.

1 MR. FISHER: Well, Justice Breyer, I've
2 never seen a case like that, but there'd be two things I
3 would say if one arose. One is, under Coolidge -- under
4 the Coolidge case, she could simply go get the things in
5 the closet and give it to the police officer. And that
6 would take care of the problem, as Justice Thomas
7 pointed out in his separate opinion in Randolph. In
8 addition, she may well be able to invite the police into
9 the dwelling sometimes, but that's very different than
10 what's going on here.

11 JUSTICE BREYER: How could she invite them
12 in? The husband has said, never, I don't want a
13 policeman to set foot in my house, and it's not just
14 the closet. She wants the police to take a good look
15 around.

16 MR. FISHER: Well, no, I'm sorry. Then I
17 misunderstood. In that case, it would violate the
18 Fourth Amendment for the police to come in. But I think
19 the hypotheticals that one might think of and that can
20 arise, as certainly the other side pointed out in the
21 brief, leave out three very important things that I
22 think you need to ask under the Fourth Amendment social
23 customs analysis.

24 The first is you need to remember that we're
25 asking about whether a stranger -- because the police

1 officer can step into the shoes of what a stranger would
2 be allowed to do -- whether a stranger would feel like
3 that was acceptable reason to come into the house, not
4 just because they'd been invited by the wife but
5 vis-à-vis what the objector had said. And it's very
6 different when you ask about a stranger as opposed to
7 what the other side would like to say, a neighbor or --

8 JUSTICE ALITO: Mr. Fisher, I wasn't here
9 for Randolph. I have trouble getting my mind around
10 this entire problem. I would never think of telling my
11 co-tenant that she could not invite her friends or other
12 people into the house. And so I don't understand why
13 the fact that one is a joint tenant is not the end of
14 the analysis. Why shouldn't it be?

15 MR. FISHER: Because I think -- that was
16 just the point I was trying to make, Justice Alito. A
17 friend is different than a police officer. Remember
18 what the objection said in this case. It said, you
19 can't come in. And he said, I know my rights. And so,
20 translated as best we can translate that kind of a
21 statement to the social setting that we're supposed to
22 translate it to, it's saying --

23 JUSTICE KENNEDY: Suppose her friend is a
24 forensics professor at the law school.

25 MR. FISHER: I think it's still very --

1 JUSTICE KENNEDY: And she said, you know,
2 I'm concerned there might be evidence of a crime here; I
3 don't want any part of it, I want you to give me your
4 expert opinion on that.

5 MR. FISHER: I think it's very different --

6 JUSTICE KENNEDY: I don't know why you want
7 us to write an opinion saying that the police are
8 different from anybody else. There's just no -- no
9 authority for that.

10 MR. FISHER: No. I think the police can
11 stand into the shoes, as this Court put it in Jardines,
12 Justice Kennedy, of a stranger. They are not a friend.
13 They are able -- they are able to do what a stranger
14 caller could do at the house, and that's a very
15 different question than what a friend might do. And
16 there's two other things that I think are critical --

17 JUSTICE ALITO: Why is it different? Why is
18 it a different question? If I own premises, I can
19 invite in a friend. I can invite in a relative. I can
20 invite in a complete stranger if I want to do that.

21 MR. FISHER: That's the ordinary
22 presumption, but what this Court held --

23 JUSTICE ALITO: Why is it a presumption?
24 It's a right, is it not?

25 MR. FISHER: It may be a property right, but

1 it's trumped by the constitutional right of another
2 resident of the dwelling to forbid the police for
3 entering without a warrant. That's the holding in
4 Randolph. And I understand that there's a debate on that.

5 JUSTICE ALITO: I understand that. Why
6 should it -- well, all right. Why should I feel myself
7 bound by that?

8 MR. FISHER: Well, because it's this Court's
9 precedent and no one on the other side is asking to have
10 it overturned.

11 JUSTICE SCALIA: Well, asking to extend it,
12 asking to extend it. One doesn't have to overrule it to
13 say, we're not going to follow it to its logical
14 conclusion.

15 MR. FISHER: Well, I think, Justice Scalia,
16 that's a fair way to put the question here, which is
17 once somebody does exactly what this Court said they had
18 a right to do in Randolph, which is say, you cannot come
19 in my house, what happens next? And our proposal in
20 this case is that the police cannot nullify that
21 objection simply by involuntarily removing the person
22 from the premises.

23 CHIEF JUSTICE ROBERTS: But Randolph, I
24 forget exactly how many times, but repeatedly said it
25 was discussing a case involving the physical presence.

1 And it had to do that because it was drawing a very
2 formalistic line.

3 If the other person had been in the back
4 room instead of at the door or if the other person had
5 been away for a minute, Randolph by its terms would not
6 apply, because it said physical presence. So it's not
7 even extending Randolph to its logical conclusions. It
8 specifically said, we are not reaching anything beyond
9 physical presence.

10 MR. FISHER: Well, I think, Mr. Chief
11 Justice, if I could fairly characterize the case, there
12 is physical presence in this case. Mr. Randolph -- I'm
13 sorry. Mr. Fernandez was physically present and
14 enforced -- invoked his Randolph rights. So the
15 question is what happens next? And my --

16 JUSTICE KENNEDY: What happens next? What
17 happens next for ten hours, ten days? He was in custody
18 for 500 plus days and for all that time, the co-tenant,
19 the wife, cannot invite the police to look for a shotgun
20 where the four-year-old knows that it is and she may not
21 know how to handle the weapon? She can't get a
22 policeman to assist her for 500 days? This is not
23 Randolph. This is a vast extension of Randolph.

24 MR. FISHER: Well, two things,
25 Justice Kennedy. All we are saying is that the

1 objection for Randolph has to last as long as the police
2 make it impossible for somebody to enforce it. So once
3 they remove you and make it impossible for you even to
4 camp on doorstep, which is what the other side would
5 require, at a bare minimum, if Randolph means anything,
6 it has to mean that.

7 To answer your hypothetical directly, the
8 police can simply get a warrant. If you look at the
9 lower court cases, they all arise immediately after an
10 arrest, which is why --

11 JUSTICE KENNEDY: But Justice Breyer's
12 question was very carefully phrased to indicate, at
13 least to me, that there was no probable cause. You're
14 asking the property owner to invoke a legal form that is
15 itself highly invasive. She doesn't want a warrant.
16 She wants the police to come in for advice.

17 MR. FISHER: If she wants that, she has
18 numerous ways to help the police, Justice Kennedy. It's
19 hard for me to think of many examples, just to be fair,
20 where by providing oral information about what she might
21 be worried about, what she might think is in the house,
22 in combination with the fact that the defendant has
23 already been arrested, that would not provide probable
24 cause. As I've said, I have not seen such a case that
25 has ever actually arisen.

1 JUSTICE ALITO: You can say that in lots of
2 consent search cases. I don't think that answers the
3 question of whether the person has validly consented.
4 Is there a rule that says you can't have a consent
5 search where there's probable cause because where
6 there's probable cause, you can get a warrant and,
7 therefore, you can't consent to the search? Is there a
8 case that says that?

9 MR. FISHER: No. Of course not.

10 JUSTICE ALITO: Well, so why should that be
11 the rule here?

12 MR. FISHER: No. I'm simply answering -- I
13 think what I'm trying to do is answer the practical
14 question that Justice Breyer and Justice Kennedy have
15 raised about what if the police can't come in under the
16 really fallacious theory that she's consenting not only
17 on her behalf --

18 JUSTICE ALITO: You have a woman who has
19 been beaten up. She's got bruises. She's standing on
20 the doorstep of her house. And she says to the police:
21 I'd like you to come into the house and see evidence of
22 what my husband has been doing to me. And you say she
23 can't do that. She has -- it's her house, but she can't
24 invite the police in?

25 MR. FISHER: Remember, there are two people

1 that have rights in that scenario, her and the
2 defendant -- or the suspect. And what the Constitution
3 says is that searches of homes presumably have to be
4 done under warrant. Now, if somebody consents and the
5 police have no reason to doubt that that consent speaks
6 not only for the person standing in front of them but
7 also for an absent person, they can enter, and that's
8 what happens most of the time.

9 But in the rare occasion where somebody
10 says, I invoke my rights, I want to insist upon the
11 warrant requirement, the police ought to do that. I
12 don't think it's too much to ask.

13 CHIEF JUSTICE ROBERTS: What about what we
14 said in King just last year or the year before -- it's a
15 quote: "There are many entirely proper reasons why
16 police may not want to seek a search warrant as soon as
17 the bare minimum of evidence needed to establish
18 probable cause is acquired. The police may want to ask
19 an occupant of the premises for consent to search
20 because doing so is simpler, faster, and less burdensome
21 than applying for a warrant."

22 That seems to me to entirely refute the idea
23 that oh, well, what they should do is get a warrant.

24 MR. FISHER: Mr. Chief Justice, the police
25 can do that and presumably, no matter what you hold in

1 this case, they will continue to do that. And in the
2 vast majority of cases, they will continue to get valid
3 consent. The only question you have in this case is
4 what about the rare circumstance where somebody invokes
5 his rights.

6 In Randolph there -- I understand what you
7 said in King, but in Randolph the Court specifically
8 referred to the Fourth Amendment's partiality towards
9 searches of the home conducted pursuant to a warrant.

10 JUSTICE BREYER: That doesn't answer this question,
11 you see, because once you say right, you assume the
12 answer. I mean, if the wife has -- to the extent she
13 has the ability to ask anyone into the house, even over
14 the husband's objection, then the conclusion is he
15 doesn't have a privacy right or a reasonable expectation
16 of privacy vis-à-vis what his wife wants. And if you
17 decide it the other way, he does. And the hard problem,
18 I mean the hard problem for me, is -- but I'll ask the
19 other side that -- under what circumstances, when, how
20 do we work out? And the answer in Randolph was social
21 expectation. And, frankly, I don't know what the social
22 expectation is.

23 MR. FISHER: Let me try to walk you through
24 it, because I think it is vital here. The answer to
25 your question, Justice Breyer, is the holding of

1 Randolph says when the other tenant objects, then the
2 police cannot come in. And so I think the question that you
3 need to ask in this case for social expectations
4 purposes and it's critical that it's framed the right
5 way, and I do want to point out the three things I was
6 mentioning earlier. You have to ask whether a stranger,
7 under these circumstances, would feel like he had
8 consent, not just from the person standing in front of
9 him but on behalf of the others, to conduct a general
10 search of the dwelling.

11 Even if you think that somebody coming back
12 would think they could be invited in because the
13 objector is no longer gone, that is leagues away from
14 what the police asked to do here and what they are
15 contending they had the right to do, which is conduct a
16 general search of the premises. And on page 7 of the
17 reply brief, we point out again and again how this Court
18 has distinguished between mere entry and search.

19 And the third thing --

20 JUSTICE SOTOMAYOR: Finish.

21 MR. FISHER: If I could just put it on the
22 table, and then I'll answer your question. The third
23 thing that's critical is what I mentioned a moment
24 earlier, the nature of the objection here. The nature
25 of the objection isn't simply you can't come in. It

1 isn't I'm busy. You can come back later. It is I -- I
2 know my rights. And I think translated into a social
3 setting with a stranger, that means I have private
4 things in here that I do not want you to see.

5 And would somebody coming back an hour later
6 think that over that kind of an objection, they could
7 get consent from the other person to search through the
8 belongings, I think that's the question you have to ask.

9 JUSTICE SOTOMAYOR: What do you make of the
10 language in Randolph about pretext?

11 MR. FISHER: About pretext?

12 JUSTICE SOTOMAYOR: Yes. Does it help you
13 in any way?

14 MR. FISHER: In all fairness, I don't know
15 that it does. It certainly doesn't help me on the facts
16 of this case, because we're not establishing any bad --
17 or not alleging any bad faith. I think the government
18 and the State have both pointed out, quite rightly, that
19 this Court has shunned pretext inquiries throughout the
20 Fourth Amendment, and so I'm not sure that you want to
21 go down that road here. But, Justice Sotomayor, that
22 points out a very big problem. Their rule is a recipe
23 for the evisceration of Randolph because as soon as --

24 JUSTICE SOTOMAYOR: Sure. Because all they
25 have to do is arrest and remove people.

1 MR. FISHER: All you have to do is arrest
2 and remove them, and that's the facts of this case. But
3 even if you didn't have the authority to arrest and
4 remove them, the police always have the authority to
5 exert control over the situation when they arrive at a
6 dwelling and to say to a homeowner, sir, would you
7 please come out to the curb and talk to me here, and I'm
8 going to separate you from the other tenant.

9 Under their theory, even that ordinary,
10 boring part of police procedure extinguishes somebody's
11 Randolph rights immediately. And so their rule simply
12 gives the police total control, whether for good faith
13 or for bad faith -- and I don't think you're going to
14 want to have to try to answer that question -- to
15 immediately extinguish someone's Randolph's rights the
16 moment they're invoked.

17 JUSTICE GINSBURG: Mr. Fisher, and you can
18 stick with this case. Once he's arrested on a robbery
19 charge, he can be held for many, many days. Why isn't
20 it appropriate to assume, not when he's asked to come
21 out and talk to the police for two minutes, but when
22 he's incarcerated on a robbery charge, that the premises
23 are no longer open to him, that he's no longer at home
24 there?

25 MR. FISHER: I think I'd agree with what

1 you're saying, Justice Ginsburg. If somebody is
2 convicted of a crime and then imprisoned, I think they
3 lose their equal ownership over the dwelling that is a
4 lynchpin --

5 JUSTICE GINSBURG: Well, in the -- in the
6 interim. He's been charged, not convicted, and he's --
7 he's in jail awaiting trial.

8 MR. FISHER: I'm not sure that a charge
9 would be enough to take -- take one out of the social
10 setting where one would assume that somebody's
11 objections still stood.

12 JUSTICE KENNEDY: He was in jail for
13 500-plus days, and you're saying that for all that time,
14 the co-occupant has no complete control over the
15 premises.

16 MR. FISHER: Justice Kennedy, at least until
17 he's convicted, I don't think he does. Now, you don't
18 have to go -- if that really is what's troubling you,
19 let me tell you something that I think you can decide
20 the case on a more narrow ground. It's enough to decide
21 this case, and indeed, the vast majority of lower court
22 cases, to say so long as the police make it impossible
23 for somebody to enforce the Randolph objection, either
24 by being at their home to protect it on their own, or at
25 least to have a conversation with the cotenant to try to

1 work it out amongst themselves, which is, remember,
2 exactly what Randolph says, is that voluntary
3 accommodation has to be the solution.

4 So at least with -- you know, at least in a
5 case like this where there's an hour and somebody's
6 gone, the police return right away, it is virtually
7 impossible. I think there their objection has to stand.
8 After 500 days, if you really wanted to at least leave
9 it open for another case, you could say there we could
10 imagine that he could have a conversation with the
11 cotenant, try to work out the solution to the problem,
12 and that she could speak for him solely to the police at
13 that point --

14 CHIEF JUSTICE ROBERTS: Well, what's the
15 conversation between the husband and the battered wife,
16 bleeding, holding the four-year-old baby going to look
17 like? Presumably, it has to take place away from the
18 police because it's -- you know, it's a private
19 conversation. So the spouse abuser says to the police
20 just give me a few minutes. Let me talk to my wife.
21 And that conversation is going to lead to some
22 accommodation that you'd be prepared to honor?

23 MR. FISHER: Well, I think, Mr. Chief
24 Justice, in that situation, the police would probably do
25 well to do exactly what they did here, which is remove

1 him from the premises, arrest him, and then all they,
2 again, have to do is get a warrant. In Los Angeles
3 County, it takes them 15 minutes on average to get a
4 telephonic warrant. And under Illinois --

5 CHIEF JUSTICE ROBERTS: Well, I quoted you
6 the lang -- I quoted you the language from King from
7 last year where we said that's not an adequate answer.

8 MR. FISHER: Well, I think to be fair, in
9 this Court's cases, they've -- sometimes you've said --
10 and we've quoted those other cases in the reply brief --
11 that the administrative efficiency is not a good enough
12 reason to dispense with the warrant requirement.

13 I think every one of these cases is
14 context-specific, and the one thing that the Fourth
15 Amendment has, I think, meant in this Court is that the
16 home is special, and that when the police want to enter
17 a home -- Florida against Jardines last term, I think,
18 also fairly said that we prefer warrants.

19 I think Jardines is actually a very useful
20 case to think about in thinking about the social
21 expectation problem here, because the very same kind of
22 hypotheticals that -- some of which I've received today
23 and the other side is raising about a neighbor or a
24 friend coming back, those were the government's exact
25 arguments in Jardines, that somebody can come to the

1 front door and knock and ask if anybody's there. And so
2 why can't a police officer do the same? And this Court
3 was careful at page 1417 of that decision to say that's
4 not the question.

5 The question is whether a stranger can come
6 onto the premises with trained dogs to explore the
7 curtilage of somebody's house. And that's a very odd
8 question to ask, I think, because very few strangers are
9 going to do that. But that's the question this Court
10 insisted on asking.

11 And I think translated to this case a
12 version, the same kind of question is what the Court has
13 to do here, is ask a stranger, after being told, I
14 invoke my rights. I want to keep what's inside private
15 from you. I don't consent to any search, whether a
16 stranger coming back an hour later would think that when
17 they asked the other tenant can I come inside and
18 search, that that tenant --

19 JUSTICE ALITO: But Jardines was based on an
20 understanding of property rights, wasn't it?

21 MR. FISHER: Which --

22 JUSTICE ALITO: It was based on an
23 understanding of property rights, Jardines?

24 MR. FISHER: I don't know that it was any
25 more than Randolph. I mean, what the Court has said is

1 that property rights inform the Fourth Amendment
2 analysis. They don't utterly control it, but that the
3 sanctity of the home is something the Fourth Amendment
4 treats as special. And I think the property right that
5 Mr. Fernandez had here was -- which is undiminished by
6 his arrest, and the other side hasn't disputed that
7 it -- hasn't disputed this, is that he had a property
8 right to keep the police out of his dwelling absent a
9 warrant.

10 And all we're asking is for that right to be
11 preserved, at least so long as the police themselves
12 render it impossible for him to enforce that right.
13 Literally impossible for him to enforce that right. The
14 other side's theory, even taking away the police arrest,
15 I think if I understand it correctly, would require
16 somebody to basically pitch a tent on their front steps
17 in order to -- to prevent the police from entering
18 without a warrant.

19 JUSTICE KENNEDY: Well, when you say the --
20 the police prohibit him from exercising that right,
21 there was an arraignment before a magistrate. The
22 judicial system ordered him -- ordered him confined.

23 MR. FISHER: Well, fair enough, Justice
24 Kennedy. But at the time the search was made, it was
25 only an hour later while the police had custody over him

1 before any of that happened.

2 JUSTICE GINSBURG: Was there any indication
3 why the police didn't get a warrant in that hour
4 interval?

5 MR. FISHER: No, I don't think there's any
6 testimony to that effect, Justice Ginsburg. And so what
7 we're left with is the State's brief, which has
8 primarily the administrative efficiency argument that
9 Mr. Chief Justice has made. I understand in -- in
10 Maryland against King, this Court took that in
11 consideration, but I think in numerous other Fourth
12 Amendment cases, the Court has said that's not enough.

13 CHIEF JUSTICE ROBERTS: It's not purely an
14 -- there's -- the language I quoted said any number of
15 reasons. One reason may be if the police leave and the
16 woman is there -- we're dealing with gang violence --
17 that other members of the gang may come and say, you
18 know, retrieve the contraband in the house. Going to
19 get a warrant is not a sufficient answer in -- in every
20 case. There are -- there's a reason that the law has
21 recognized the efficacy of consent in allowing the
22 police to enter.

23 MR. FISHER: Well, Mr. Chief Justice, in
24 those other permutations, you have, first of all, the
25 exigent circumstances doctrine. But even short of that,

1 you have Illinois versus McArthur, which allows the
2 police to have everybody exit a dwelling and stabilize
3 the situation until they can get a warrant.

4 CHIEF JUSTICE ROBERTS: Well, you don't
5 think there would be exigent circumstances in the case
6 of -- this case, do you?

7 MR. FISHER: No, I don't think so. I was
8 just -- in your hypothetical, there might have been if I
9 understood it correctly, but --

10 JUSTICE BREYER: That's -- that's the
11 initial problem I started with in this case. The
12 policeman is standing at the door. She owns the house.
13 She says, come in. Come in. Maybe it's I'd just like
14 to talk to you. Maybe it's I'd like to show you a few
15 things. The four-year-old says the spouse hit her.
16 That's why she's bleeding. She later says, oh, no, it
17 wasn't the spouse. It was a woman named Veronica.

18 Maybe that's all true here. But you could
19 surely imagine cases where you had a little window of
20 opportunity to find out what was going on in that house,
21 which is hers. And now you say no, as long as the
22 husband who may have beaten her up six times is now
23 being held in jail lest he do it again, policemen can't
24 go in, even when she's willing to talk to them, even
25 when she's willing to show them a few things, we know

1 not what.

2 Now, perhaps, I should just sweep that --
3 that problem aside and pay -- say it isn't controlling.
4 But that's what's worrying me.

5 MR. FISHER: No, Justice Breyer, I
6 understand that's -- that's a concern, but there are two
7 very easy ways for the police to deal with that. One is
8 Coolidge. They can say -- you can say: Go get the things
9 you're worried about and bring them to us, and the
10 problem is solved.

11 Alternatively, the police can say: Thanks
12 for telling us. I'm glad you did. I want to help you.
13 Your husband has objected or your boyfriend has objected
14 to us searching. Could you please step outside for 15
15 minutes, you and the little boy step outside for 15
16 minutes, we'll call a judge and get an official warrant
17 and we'll be inside in 15 minutes. Meanwhile, we'll
18 protect you.

19 I don't think that's too much to ask to
20 preserve the privacy and the sanctity of the home.

21 If the Court doesn't have any other
22 questions, I think I'll stop here and reserve for
23 rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Fisher.

1 Mr. Karlin.

2 ORAL ARGUMENT OF LOUIS W. KARLIN

3 ON BEHALF OF THE RESPONDENT

4 MR. KARLIN: Mr. Chief Justice, and may it
5 please the Court:

6 A present co-tenant's consent to search is
7 not nullified, must not be nullified or rendered invalid
8 by an absent tenant's prior objection. Everyone knows
9 that when they choose to live together and one person is
10 absent the other person has the authority. That person
11 has the authority to admit visitors of her choice, to --
12 and certainly to consent to a search of a shared
13 premises.

14 Here Ms. Rojas had the authority, as the
15 sole present tenant, to call the shots, to admit
16 visitors of her choice, and to consent to a search.

17 JUSTICE GINSBURG: Would that be so if
18 Fernandez left -- he's made known his objection and then
19 he says I'm going to pick up something at the drugstore.
20 The minute he leaves, can the police then say to his
21 cohabitant, do you consent? She says, yes. Police come
22 in?

23 MR. KARLIN: Yes, Your Honor, it would.
24 When a person leaves a residence, and this was the
25 linchpin of Randolph, when a person leaves the

1 residence, social expectations change, they change
2 dramatically. You're not faced with the situation of
3 pushing past someone who is saying "stay out." When
4 someone leaves, I will think differently about my
5 permission to come in, regardless of --

6 JUSTICE SOTOMAYOR: So what's left of
7 Randolph if we accept your rule-- all the police have to do
8 is arrest anyone if they have probable cause, and if
9 they don't, all they have to do is remove them from the
10 premises and just talk to the co-tenant even though
11 they've heard an objection?

12 MR. FISHER: Well, Your Honor --

13 JUSTICE SOTOMAYOR: When is Randolph ever
14 going to survive after this, assuming we accept
15 your rule?

16 MR. KARLIN: Justice Sotomayor, Randolph
17 remains efficacious for the narrow situation it was
18 crafted to object -- to address. A person says: Stay
19 out, you may not search; the police may not search. And
20 that remains in effect under the formalistic rule of
21 Randolph while that person remains in the premises.

22 Now --

23 JUSTICE SOTOMAYOR: So there's nothing left
24 to Randolph. The police just remove the person.

25 MR. KARLIN: Well, the police can't just

1 remove a person --

2 JUSTICE SOTOMAYOR: Remove them to the
3 stoop, into the police car, to the station? How far
4 before Randolph dies?

5 MR. KARLIN: Well, certainly, as in this
6 case where there's a valid arrest, that person is gone.
7 That person is absent by any standard, and that's an
8 objectively reasonable thing the police officers did.
9 Can they just remove him? It would be a different case
10 probably if they just removed him without probable
11 cause.

12 JUSTICE BREYER: Smith goes up to the house
13 and Mrs. and Mr. Jones -- Mrs. Jones: Please come in.
14 Mr. Jones: Stay out. Well, I mean, Randolph says most
15 people wouldn't go in, in those circumstances.

16 So now Mrs. Jones says: Tell Smith -- my
17 husband, rather: Smith, you tell my husband that
18 there's a telephone call for him at the local pharmacy,
19 and so he does so now he's not there. And so now they
20 can go in. I mean, that seems like more fantastic than
21 people entering the house in the first case.

22 And so there does seem to me to be a real
23 Problem here, if you write Randolph and agree to it, as I
24 did, that you're going to say, okay, the police can just
25 get him out of the way for a little while, legitimately,

1 get him out of the way, maybe there really was a phone
2 call, and now they go in the house. I mean, I don't see
3 how I could write that without saying I was wrong in
4 Randolph, which I still think I was right. So therefore
5 I --one thing here. What about saying that that "stay
6 out of my house" is at least valid for a reasonable time
7 thereafter? And an hour and a half is not a reasonable
8 time thereafter, at least when -- when the police got
9 him out of the way.

10 MR. KARLIN: Well, the reason the hour and a
11 half rule I think would be wrong is that it would
12 effectively rob the co-tenant of her authority over the
13 -- over that space. When he's gone, she really is in
14 charge, and that is the social expectation. That's
15 Matlock. That's the underlying assumption in Matlock,
16 that when we're gone, we assume the risk --

17 JUSTICE BREYER: That's all true, but can
18 you answer my straight-faced question, which is how can
19 I do this with a straight face, both come out one way in
20 Randolph and say when the police get him out of the way
21 knowing about what he doesn't want, that's all different.
22 Can you explain how I can do that with a straight face?

23 MR. KARLIN: I think there are two things
24 here. One, your concurrence was very narrow, and it
25 said when he was physically present, and if

1 circumstances change, the results should change.

2 The second reason is that this Court in
3 Kentucky v. King gave a very good response to this
4 scenario and said if there is a Fourth Amendment
5 violation in the run-up to -- there it was the exigent
6 circumstances search -- so here in the run-up to the
7 consent, the analysis is different. Here of course we
8 have a legitimate arrest. The person is absent by any
9 standard.

10 Social expectations in this case would say
11 someone wanted to give assistance to Ms. Rojas. Social
12 expectations would say: I've just seen the objector,
13 having abused her, being hauled away to jail. Social --
14 and now I want to help her. Social expectations would
15 say he should help. And it doesn't matter if it's a
16 stranger, or a friend, or the repairman to come in and
17 look at the wall heating unit where the sawed-off
18 shotgun was. Randolph didn't draw that -- that
19 distinction.

20 JUSTICE KAGAN: Mr. Karlin, don't you find
21 that a little bit odd? I mean, this social expectations
22 analysis applied to a case in which a police officer has
23 power that no person, no stranger has. The police
24 officer has just put the man in handcuffs and taken him
25 away. A stranger does not have that power.

1 So it's a bit odd to say: Well, social
2 expectations say that the stranger can walk into the
3 house, you know, having just carted the person away.
4 He can't do that.

5 MR. KARLIN: The social expectation analysis
6 in Randolph really wasn't intended to address that
7 question. The social expectation was that -- sort of a
8 tie-breaker. We know that under general law, co-tenant
9 consent controls. It's valid per se. But what do we do
10 when someone is saying "stay out"?

11 So the reason for using the social
12 expectation question was to say what would a caller do,
13 what would a visitor do, confronted with that. And the
14 question it was answering was: Would the person feel
15 okay to enter? It didn't answer the second question of
16 what happens after. What happens after had already been
17 answered by this Court in Matlock when it said the whole
18 basis for the co-tenant consent is that it's shared
19 authority. So once you're in --

20 JUSTICE SOTOMAYOR: Did Matlock -- there was
21 no objecting defendant.

22 MR. KARLIN: Correct.

23 JUSTICE SOTOMAYOR: It's the presumption
24 that still survived, that absent an objection you have a
25 consent, you assume whoever has control over the

1 premises has consented. That's a different situation.
2 That's not Matlock. Matlock doesn't control here.

3 MR. KARLIN: What -- what controls in
4 Matlock is the underlying reasoning that it's no longer
5 a question of agency, and that really is the theory of
6 Petitioner. Matlock rejected the notion of agency.
7 What it said was in determining co-tenant consent, each
8 co-tenant exercises his or her own rights on her own or
9 his own. So when one is gone, it is that person's own
10 right. It's not a question of what would this person do
11 on behalf of the absent tenant. It is what this person
12 would do on his or her own behalf.

13 JUSTICE KAGAN: You see, I thought that
14 Randolph rejected that analysis. I thought that
15 Randolph said -- and you could agree with it or disagree
16 with it -- but it said, and I'm quoting here, "The
17 cooperative occupant's invitation adds nothing to the
18 government's side to counter the force of an objecting
19 individual's claim to security against the government's
20 intrusion into his dwelling place." So, when you have
21 an objection, Randolph says, the objection trumps. And
22 the fact that there is a cooperative occupant there,
23 well, again, I'm just quoting, "It adds nothing."

24 MR. KARLIN: But, Your Honor, in -- in this
25 case when the objection was made, the police weren't

1 searching. When the police went to search, there was
2 only one occupant there. Mr. Fernandez was long gone.
3 And the whole premise of Randolph is that you have a
4 present person saying come in and you have a present
5 person staying out. Yes, the -- the lead opinion in
6 Randolph said they cancel each other out. But we don't
7 have that here.

8 When there is only one person at the door,
9 there is no Randolph dilemma. There's no dilemma.

10 JUSTICE KAGAN: I guess this goes back to
11 my -- my other question. I find it impossible to get my
12 head around this case without recognizing that we don't
13 have it here, because the police have taken the objector
14 away. And so the police themselves have, you know,
15 properly exercised a power that is the reason we don't
16 continue to have the situation that Randolph concerned.

17 MR. KARLIN: Right. But the police action
18 at every step in this case was not merely reasonable,
19 but really exemplary. And when that statement was made,
20 stay out, it was completely unenforceable. So the
21 question is whether that prior statement somehow
22 continues forward to bar, essentially to hold Ms. Rojas
23 hostage to this prior objection. He's no longer there.
24 He never had any legitimate expectation that in his
25 absence he could enforce this edict. So I think that

1 the -- the presence-absence dichotomy is really
2 critical.

3 And -- oh, the concern was raised that,
4 well, we're saying you've got to camp out on the lawn in
5 order to enforce this. But We're not saying that. A
6 Randolph objection is valid when it's made and it's
7 valid and it continues to remain valid while you're in
8 the premises.

9 Now, is there nothing you can do? There are
10 things you can do. You can create, for lack of a better
11 word, a nonshared space. So, you can have a locked box.
12 You can have a closet to which only you have access.
13 You can have a locked office to which only you have
14 access. So there are things you can do. Of course, you
15 could also choose to live alone. You could choose to
16 live with someone who would enforce your rights. These
17 are all things that are open to a -- to a cotenant.

18 JUSTICE KAGAN: You don't disagree, do you,
19 Mr. Karlin -- and I don't want to put words in your
20 mouth -- but you don't disagree that the expectation of
21 privacy does not decline after the arrest is made. In
22 other words, that Mr. Fernandez's expectation of privacy
23 remains the same.

24 MR. KARLIN: I do not dispute that. I think
25 that's Chimel or Chimel and that established that. The

1 question is not his expectation of privacy. The
2 question is whether his -- in his absence, this prior
3 statement can trump the authorized tenant who's in
4 charge.

5 JUSTICE SOTOMAYOR: I'm -- I'm a little
6 confused. I thought that when the cotenants gave
7 permission to search, that gave permission to open
8 anything in the premises, to search the entire premises.
9 You're talking about a locked closet or a locked box.
10 Why would it --

11 MR. KARLIN: Your Honor, in -- in Rodriguez
12 and in -- the question is apparent authority to give
13 consent to shared spaces. So you -- the police can only
14 enter and search spaces that are shared. They cannot go
15 into spaces where the cotenant does not have apparent
16 authority to grant release. So if that's a place she
17 doesn't have access to, no. You know, this is mine,
18 stay out. Here's, you know, a lock, a padlock on it.
19 It would be probably unreasonable for the police to say,
20 you know, we think you have authority to grant us
21 consent to look in that box.

22 JUSTICE SOTOMAYOR: I own the house.

23 MR. KARLIN: Yes. But again --

24 JUSTICE SOTOMAYOR: I'm letting the person
25 use it by sufferance, not by -- but it's still my

1 closet.

2 MR. KARLIN: If it's -- if it's a locked --
3 we can have a variety of -- of living arrangements and
4 there can certainly be within a home a space that
5 is truly yours.

6 JUSTICE SOTOMAYOR: I would certainly
7 recommend to every married couple now to have a
8 prenuptial agreement on access rights.

9 (Laughter.)

10 MR. KARLIN: But I do think that -- that you
11 can create spaces that, from all reasonable appearances,
12 are -- are yours.

13 JUSTICE BREYER: I don't think there's --
14 reading your brief and the other, I don't think this is
15 a case where she wanted to talk to the police. Is it?
16 The policeman says he wants to get in there because he's
17 afraid a hostage -- a child is being held hostage. And
18 why wouldn't that give him grounds for -- was it an
19 exigency? I mean, why wouldn't he get in on other
20 grounds there? The exigent circumstances, the child
21 might be held hostage. Isn't that a good ground for
22 going in immediately without a warrant?

23 MR. KARLIN: Well, in this case, that's
24 exactly what they did --

25 JUSTICE BREYER: Yes.

1 MR. KARLIN: -- and no one is contesting
2 that.

3 JUSTICE BREYER: Yes. They say they could do
4 that. So the problem is when they came back.

5 MR. KARLIN: Yes. So we really have the --

6 JUSTICE BREYER: Okay. When they came back,
7 and she says apparently -- or what they give the
8 impression, as I read it quickly, that it isn't a case
9 where when they came back, she wanted particularly to
10 give evidence to the police.

11 MR. KARLIN: No. The -- the police said
12 we've arrested Petitioner and now we want to conduct a
13 search for evidence, so.

14 But looking at this pragmatically,
15 realistically, why wouldn't she want to hand over the
16 shotgun directly, assuming she could get it out,
17 assuming she wanted to handle it? Well, she's living at
18 the epicenter of gang territory with an abusive
19 boyfriend. She -- certainly, the power's there under
20 Coolidge, that authority is there, but realistically,
21 wouldn't she want to say -- to avoid directly handing
22 over the -- the -- instruments of criminality? It seems
23 to me quite a reasonable thing to do to say it's okay to
24 search, but I don't want to be handing you directly the
25 evidence.

1 JUSTICE KAGAN: Mr. Karlin, there is in this
2 case some indication that she was not inviting this
3 search, that she in the end consented, but only after
4 the police suggested that her child could be taken away
5 and, you know, the facts of this case are not I'm
6 standing at the door dying for you to come in.

7 MR. KARLIN: Well, with regard to the
8 voluntariness, that was established as a matter of fact
9 and is not being challenged. This search was voluntary
10 and has been held that.

11 Now, at the suppression hearing when Officer
12 Cirrito testified on rebuttal, he said, no, we never
13 threatened that. And his testimony really makes a lot
14 of sense because they never began the domestic abuse
15 investigation until after they had come back upstairs
16 and gotten consent. And what he said was once they
17 found the sawed-off shotgun, they had to alert child
18 services. So the court found that Ms. Rojas's consent
19 was not coerced, and it implicitly rejected those
20 allegations.

21 To conclude, the judgment of the California
22 Court of Appeals should be affirmed. Ms. Rojas is a
23 sole present tenant, was entitled to give the police
24 consent to search the shared residence. Her authority
25 to decide what's best for herself and her family should

1 not be held hostage to an absent tenant's objection.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Palmore?

4 ORAL ARGUMENT OF JOSEPH R. PALMORE,
5 FOR UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENT

7 MR. PALMORE: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 An individual's consent to admit visitors
10 into her own home may not be prospectively negated by
11 the earlier objection of an absent tenant. Each
12 co-occupant assumes the risk that the other will admit
13 visitors not to his liking and this Court has adopted a
14 mirroring rule of Fourth Amendment consent. We read
15 Georgia versus Randolph as establishing a narrow
16 exception to that rule in a situation in which the two
17 co-occupants are standing in the doorway disputing and
18 disagreeing on whether to admit the visitors.

19 JUSTICE GINSBURG: Then you could reduce
20 Randolph to nothingness by saying the police -- as long
21 as the police act lawfully to get the objector out, then
22 they can override, then his objection doesn't count.

23 MR. PALMORE: Justice Ginsburg, Randolph was
24 a self-consciously, narrowly written and explained
25 decision. On its own terms it is -- it is narrow. And

1 we read it as -- as establishing a narrow,
2 circumstance-specific exception to the general rule in
3 this area.

4 The general rule in this area is articulated
5 by the Court in Matlock. And it's the assumption of
6 risk idea, that when you live with another you assume
7 the risk that they will admit visitors not to your
8 liking. And Randolph puts a gloss on that rule which
9 says when you live with another, you put -- you assume
10 the risk of your inability to control access to the
11 premises when you are not there.

12 When you are there, the two occupants are
13 standing in the doorway disagreeing on whether to admit
14 the visitor, what Randolph said was the tie goes to the
15 objector. When the objector is absent, there is no tie,
16 and the normal rule applies. The normal rule is that
17 each occupant has the authority in her own right to
18 admit visitors to her own home.

19 Mr. Fisher's presentation began with his
20 articulation of a view that the -- that this area of
21 co-occupant consent is based on agency principles, that
22 the reason in a Matlock situation that we allow the
23 present tenant to consent and we didn't ask the -- the
24 potentially objecting defendant who was sitting in the
25 squad car at the curb is because we all -- we can assume

1 that she speaks for him.

2 But that's not what Matlock said. Matlock
3 said she has the authority to give consent in her own
4 right. She lives there too, and she can decide whom to
5 admit to her home.

6 Justice Kennedy, you highlighted the issue
7 that under Petitioner's view there is in a sense a
8 continuing objection and it's entirely unclear when it
9 ends. And in this case, the defendant was in custody.
10 He was arrested on probable cause. And he was in
11 custody through the duration, through the -- through the
12 trial. And it -- we -- the standard on the other side
13 is completely unmanageable, because unless the consent
14 is going to be viewed as perpetual, that it kind of
15 hovers like a phantom above the doorstep --

16 JUSTICE SOTOMAYOR: Why did they need to
17 search?

18 MR. PALMORE: Excuse me?

19 JUSTICE SOTOMAYOR: Why did they need to
20 search? I mean, to look around the house, yes, but if
21 this is a search only for purposes of domestic violence
22 what in her story made them think there was evidence
23 anywhere that was locked up that had -- that there had
24 been any time to lock it up or dispose of it?

25 MR. PALMORE: Justice Sotomayor, in this

1 case --

2 JUSTICE SOTOMAYOR: I think this was just a
3 pure: We want to -- we want to find something else.

4 MR. PALMORE: Well, he had been identified
5 as -- as the robber, so you will recall the facts.
6 There was a robbery. They go -- in fact, I think
7 Mr. Karlin was correct that there was really kind of
8 exemplary police work at every step in this case. These
9 officers were in the gang intelligence unit. They went
10 to this alleyway because knew that that was a likely
11 place a gang member would go --

12 JUSTICE SOTOMAYOR: So they were looking for
13 evidence not on the ground that they arrested him on,
14 but on an independent crime?

15 MR. PALMORE: Well, there are two -- the
16 sequence is important. They are -- they're in the alley
17 because they think there may be a connection to the
18 robbery. Then they hear screaming from the apartment
19 and fighting. Then they think they have a domestic
20 violence situation, which they do. They go to the door.
21 She answers the door, bloodied and bruised. They take
22 him out to separate the two and to figure out what's
23 going on in the domestic violence situation.

24 As they are taking him out, they recognize
25 the tattoo, that he matches the description of the

1 robbery suspect and then there's a show of
2 identification. At that point, it becomes both a
3 robbery investigation and a domestic violence
4 investigation. And he's put under arrest.

5 JUSTICE SOTOMAYOR: Did they have probable
6 cause to get a warrant?

7 MR. PALMORE: Pardon me?

8 JUSTICE SOTOMAYOR: Once he was identified,
9 did they have probable cause to get a warrant?

10 MR. PALMORE: I think they almost certainly
11 did have probable cause to get a warrant at that -- at
12 that point. But the Chief Justice is quite correct that
13 in *Kentucky v. King* this Court made clear that the
14 possibility that the police could have pursued an
15 alternative means of obtaining the evidence --

16 JUSTICE BREYER: So we have everything here -- the
17 things -- the everything -- the search at issue was a
18 search solely for evidence?

19 MR. PALMORE: Yes, yes.

20 JUSTICE BREYER: The objecting party was
21 present and made his objection known clearly and
22 directly to the officers seeking to enter the house?

23 MR. PALMORE: Yes.

24 JUSTICE BREYER: A little earlier, but he
25 did.

1 The officers did not justify their search on
2 grounds of possible evidence destruction. And as far as
3 the record reveals, the officers might easily have
4 secured the premises and sought a warrant permitting
5 them to enter.

6 All these factors are there, and the other
7 offsetting factors, that the officer -- the invitation
8 could reflect the victim's fear about being left alone
9 with an abuser. No, because the abuser is not there. It could
10 also indicate the availability of the evidence in the
11 form of a willingness to speak that might not otherwise
12 exist. As far as we know, that isn't present.

13 Therefore, it fits totally within Randolph,
14 but for one thing: The police themselves took him away.

15 Now, I mean, it's not -- it's not really a
16 subterfuge, but it might look like that you've just
17 eroded Randolph for no reason you get around your point
18 by saying at least that known consent -- I mean known
19 objection -- has enough force to last for a reasonable
20 time, which isn't the best way of writing perhaps a
21 Fourth Amendment opinion. But it does have the --
22 leaves it up to the lower courts to figure out what is, and
23 it maintains some life in Randolph.

24 Okay. That's a fairly long question, but
25 you see where I'm going. And your -- your answer is

1 what?

2 MR. PALMORE: Your Honor, I don't think a
3 reasonable time requirement like that is readily
4 administrable. It doesn't provide a clear answer to
5 officers in the field on what their rights are to --

6 JUSTICE SOTOMAYOR: How about a clear
7 answer? Getting a warrant.

8 MR. PALMORE: Your Honor, that's just
9 inconsistent with Kentucky v. King and --

10 JUSTICE SOTOMAYOR: Get a -- when you have
11 probable cause to believe a crime has been committed,
12 and here clearly you admit there would have been
13 probable cause to search, there's no exigency, there's
14 no looking for evidence related to the crime that drew
15 you particularly there, the screaming, but you've just
16 got to secure the premises and get a warrant.

17 I don't know why that's so difficult for
18 police officers to understand. Your first obligation
19 under the Fourth Amendment is get a warrant.

20 MR. PALMORE: Justice Sotomayor, this Court
21 has not adopted that kind of less restrictive means
22 analysis in this area. And again Kentucky v. King is --
23 is clear on this point, that the reasonableness of
24 police actions has to be judged based on those actions
25 themselves. And if they are reasonable on their face,

1 they're not rendered unreasonable because the officers
2 could have obtained a warrant or could have obtained the
3 evidence in some other way.

4 And in a case like this -- and it's also
5 important to note that consent is not a disfavored
6 doctrine that -- that needs to be confined to narrow
7 categories. This Court has said, going back to
8 *Schneckloth v. Bustamonte*, that consent is actually
9 favored, that we want people to cooperate with law
10 enforcement.

11 JUSTICE KAGAN: Mr. Palmore, could I ask
12 what you think that this sentence means in *Randolph*?
13 There's a -- there's a statement that says: "So long as
14 there is no evidence that the police have removed the
15 potentially objecting tenant from the entrance for the
16 sake of avoiding a possible objection." What do you
17 think that means? When do you think it would apply?

18 MR. PALMORE: Your Honor, that was of course
19 dicta in *Randolph* because there was no -- that wasn't
20 presented, and it isn't presented here either because
21 there's no such allegation. We actually agree, I think
22 perhaps all of us at these tables agree, that -- that to
23 the extent there is an inquiry like that it has to be an
24 objective inquiry. So we read that as alluding to a
25 possibility that if the -- if the officers arrested

1 someone without probable cause or took some other step
2 that was objectively unreasonable under the Fourth
3 Amendment, that that might raise an issue.

4 JUSTICE KAGAN: So it would only apply if
5 the -- if the taking the person away from the home was
6 unreasonable. But as long as that was lawful, whether
7 you did it by saying, you know, come walk around the
8 block with me or whether you actually had probable cause
9 to arrest and you took him to the stationhouse, either
10 way, that this language would not apply.

11 MR. PALMORE: We don't think that language
12 would apply. We think that language has to be read in
13 light of the entire corpus of this Court's Fourth
14 Amendment jurisprudence, which has consistently rejected
15 such subjective tests and looked only to the objective
16 reasonableness of officers' actions.

17 JUSTICE KAGAN: And has anybody ever found
18 that conduct fit within that language? Has any court
19 ever used that language in any way to state that this,
20 you know, this goes beyond the bounds?

21 MR. PALMORE: I haven't found any such case.
22 I did look and there -- there are plenty of defendants
23 that make that argument. I haven't found one where
24 it -- where it succeeded. And often, the courts, as
25 part of their analysis say, no, the removal wasn't done

1 for that purpose. It was done because there was
2 probable cause to believe that you committed a crime.
3 So they fall back on the normal rule, which is the
4 objective test of the reasonableness of the actions.

5 JUSTICE KENNEDY: I think the property law
6 cases that you cite, pages 24-25 of your brief, I had
7 thought originally that this would be the principal
8 focus of our decisions in these cases, but it's -- it's
9 marginally in your favor. It's not really very strong.
10 I mean, you have an 1839 North Carolina case and the CJS
11 case. There's just not a lot of help in property law.

12 MR. PALMORE: May I answer, please?

13 You're right, Justice Kennedy. I don't
14 think the property law is -- crisply presents this kind
15 of disputed consent issue, though it is clear under
16 property law that cotenants have full access to the
17 property and they may license entry to the same extent
18 that they have access and that the visitor steps into
19 their shoes and it would not be liable for trespass.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Fisher, you have six minutes left.

22 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

23 ON BEHALF OF THE PETITIONER

24 MR. FISHER: Thank you. I'd -- I think I'd
25 like to use as my jumping off point Justice Breyer's

1 last question where he went through, I believe, the
2 elements in his concurrence. They're all present in
3 this case. And -- and as to the test, the
4 reasonableness test, if you have any qualms about that
5 being the test, you can do the case even more narrowly
6 and it would take care, again, of the vast majority of
7 cases that have arisen post Randolph, and simply say the
8 objection has to be valid so long as it's impossible for
9 him to enforce it. So long as it's impossible for him
10 to be physically present and enforcing it, through no
11 voluntary action of his own, at least then the objection
12 has to be valid.

13 And the lockbox example the other side
14 gives, even that isn't available to Mr. Fernandez. Once
15 he objected and knew the police were interested in his
16 dwelling, he didn't have an opportunity even to do that.
17 If he had private papers -- remember, we have to think
18 of all different kinds of cases that might arise for --
19 where the police were seeking consent. He couldn't even
20 take that --

21 JUSTICE KENNEDY: So the cotenant has much
22 less authority to allow people to enter if her other
23 cotenant is -- is a criminal than if he's a law-abiding
24 citizen? That's the result.

25 MR. FISHER: No, because --

1 JUSTICE KENNEDY: That's -- that's the
2 result of the way you allocate the rights and duties of
3 the cotenant who allows the -- the person to enter.

4 MR. FISHER: No, Justice Kennedy, because if
5 he's a law-abiding citizen, the police couldn't take him
6 away and he could stay there or, at a minimum, the
7 police might be able to reposition him as I think
8 they've acknowledged that occurred --

9 JUSTICE KENNEDY: No, no. The law-abiding
10 citizen says I'm going away for three days, don't let
11 anybody in the house, but the cotenant can overcome
12 that, but not in the case of the -- well, I'm
13 interrupting your -- your rebuttal.

14 MR. FISHER: No, I -- but to be
15 intellectually coherent you might say, no, even then the
16 police couldn't override it. I don't think there's any
17 reason to believe that the police could then think -- if
18 somebody said, I object to you entering the dwelling and
19 doing -- doing a -- a general search. Now, I have a
20 business trip next week for three days. I want you to
21 let -- you know, I still object and do not want any
22 warrantless general searches of my home. I think there,
23 the police would have a hard time arguing that they had
24 valid third-party consent from the person in the
25 dwelling.

1 JUSTICE BREYER: Well, the problem, for as
2 long as he can't enforce it -- he's the worst criminal
3 in the world; right from the house to 20 years in
4 Sing-Sing. So she can't right -- let anyone in the
5 house, the police department, for 20 years. That can't
6 be right.

7 MR. FISHER: No, because I think once he's
8 imprisoned, you might say he has a new domicile, Justice
9 Breyer.

10 (Laughter.)

11 MR. FISHER: I think he's lost ownership
12 control over that house.

13 But I think what this case reduces to,
14 Justice Kennedy, to get back to your question, is really
15 what respect is owed this Court's Randolph decision. I
16 think the questions have adequately pointed out that if
17 you adopt the other side's position on the facts of this
18 case where the police forcibly remove somebody to the
19 dwelling, Randolph reduces to nothing. Literally
20 nothing.

21 It's also about what respect is owed to
22 somebody invoking somebody's constitutional rights. In
23 another case last term, this -- a plurality of this
24 Court went to lengths to explain how important it is
25 that people invoke their constitutional rights. And,

1 presumably, when they do, the police need to respect it.
2 We live in a constitutional system that deals with
3 individual dignity, not just of homeowners, but of
4 people who enforce -- who -- who raise their rights and
5 they need to be respected.

6 Now, you have left these -- you know, if
7 there were insuperable practical problems to enforcing
8 Randolph in this setting, maybe you would want to reduce
9 it to nothing and effectively overrule it. But I don't
10 think there's any good reason to do that because I think
11 you have a very easy rule that will resolve almost all
12 the cases that I've offered you, and it will deal
13 with -- by exigent circumstances doctrine, by the
14 warrant -- ease of getting a warrant, by Illinois v.
15 McArthur, which lets the police bring somebody outside,
16 all of those things can very easily deal, I think, with
17 the concerns that the Court has before it.

18 CHIEF JUSTICE ROBERTS: Counsel, I don't
19 understand how you can say it would render Randolph a
20 dead letter. The -- Randolph was expressly limited to
21 physical presence. It expressly acknowledged that it
22 was formalistic, and even the concurring opinion said,
23 quote, "The Court's opinion does not apply where the
24 objector is not present and objecting."

25 So what you're really arguing for is an

1 extension of Randolph, not an undermining of it.

2 MR. FISHER: No, I think when Randolph said
3 it was being formalistic, it didn't mean we're
4 establishing a meaningless right. And so, yes, the
5 facts of that case where somebody who's physically
6 present, the facts of this case begin with somebody
7 who's physically present, and I think this Court ought
8 to treat its opinion as having some genuine meaning in
9 the real world that you're not --

10 JUSTICE ALITO: Well, why doesn't your rule
11 express profound disrespect for the -- the cotenant who
12 was standing at the door and who has -- who says, I've
13 just been beaten up by my cotenant and I want you to
14 come into my house and see the evidence of what my
15 cotenant has done to me. And you say to that cotenant
16 who's standing by the door you do not have the right to
17 invite the police into your house to look for evidence
18 of what was done to you.

19 MR. FISHER: Two things, Justice Alito.
20 First, that's not the facts of this case. Remember,
21 they come back earlier solely looking for evidence --

22 JUSTICE ALITO: All right. But it would
23 apply in that case, would it not?

24 MR. FISHER: It would. And there, I think,
25 it is not too much disrespectful to say to her, I'd like

1 to help you, we will help you. Your boyfriend has
2 objected. Let us just get a warrant and we'll be right
3 with you and we'll help you. I don't think that's too
4 disrespectful. It respects her rights and the
5 constitutional system under which we live.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the
9 above-entitled matter was submitted.)

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