APPEAL NO. 22-13005-F

In The
United States Court of Appeals
For The Eleventh Circuit

DONALD J. TRUMP,

***Plaintiff – Appellee*,**

versus

UNITED STATES OF AMERICA,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, D. CT. NO. 9:22-CV-81294-AMC (THE HONORABLE AILEEN M. CANNON)

FOURTH AMENDMENT SCHOLAR *AMICUS* BRIEF IN SUPPORT OF NEITHER PARTY AND TAKES NO POSITION AS TO AFFIRMANCE OR REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Clark D. Cunningham is filing in support of neither party. Amicus curiae is a natural person; no corporation is involved in the filing of this amicus brief. Other than the parties themselves and their counsel, amicus curiae is not aware of any trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations or other entities that have an interest in the outcome of this case or appeal.

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Government has filed this appeal from the September 5, 2022, decision of U.S. District Court Judge Aileen M. Cannon, ordering appointment of a special master to review material seized in a search of Plaintiff's residence at Mar a Lago on August 8, 2022, and enjoining the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further court order.

On September 8, 2022, the Government filed a motion in the District Court requesting a stay to the extent that the September 5 order (1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were seized on August 8 and (2) requires the Government to disclose those records to a special master for review. In its motion, the Government indicates that if the District Court does not grant a stay by Thursday, September 15, it intends to seek relief from this Court.

This *amicus* brief suggests that a request that seized documents be reviewed by a special master rather investigative agents is grounded directly in the Fourth Amendment, and in particular in the Amendment's guarantee of the "right to be secure in papers." Contrary to the Government's arguments in this case, such a request should not be measured against the narrow grounds for relief available under a Rule 41 motion for return of property.

This brief, submitted in support of neither party, was entirely authored by *amicus curiae*. No party or their counsel played any role in its preparation, nor did any party or other person, other than the *amicus curiae*, contribute money intended to fund the preparation and submission of this brief.

The parties have not consented to the filing of this brief and so this brief is accompanied by a motion for leave to file.

IDENTITY AND INTEREST OF FOURTH AMENDMENT SCHOLAR AMICUS CURIAE

Clark D. Cunningham is Professor of Law and the W. Lee Burge Chair in Law & Ethics at the Georgia State University College of Law.[1] He received the Association of American Law Schools (AALS) annual scholarly paper award for his application of linguistic theory to interpreting the meaning of "search" in the Fourth Amendment. His article on "Remembering Why We Have the Fourth Amendment" was published by the Yale Law Journal in 2016. In 2021 the Supreme Court of Georgia requested that he participate in oral argument as a neutral amicus in a case raising the question "when is a search warrant for the contents of an electronic device "executed" under the Fourth Amendment."

The U.S. Supreme Court has repeatedly cited his work on applying linguistics to statutory interpretation. He is the immediate past chair of the AALS Section on Law

[1] Employer is provided for identification only; this brief is not filed on behalf of Georgia State University, the University System of Georgia, or the State of Georgia.

and Interpretation.[2] The U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Sixth Circuit have acknowledged *amicus* briefs filed in support of neither party in which he has participated. *In re Trump*, 958 F.3d 274, 286 (4th Cir. 2020) (*en banc*); *Wright v. Spaulding*, 939 F.3d 695, 700 n.1 (6th Cir. 2019).

ARGUMENT

I. Plaintiff's request for special master and injunction against review of documents is best understood as vindicating the constitutional "right of the people to be secure in their … papers"

The Fourth Amendment[3] guarantees "the people" four rights: the right to be secure in their persons, the right to be secure in their houses, the right to be secure in their papers, and the right to be secure in their effects. When items of property ("effects") are the subject of a warrant, the harm occurs and is completed when the property is seized, and the remedy is the subsequent return of the property. Fed. R. Crim. P. 41 reflects this understanding. However, when documents ("papers") are the subject of a warrant, more is at stake than simple possession. This distinction underlies the Supreme Court's decision in *Riley v. California*, holding that merely obtaining lawful possession of a cell phone was not sufficient under the Fourth Amendment to permit the government to "read" the digital information stored on the phone; a warrant

[2] A complete Cunningham CV is available at: http://www.clarkcunningham.org/

[3] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

specifically authorizing examination of such information must be obtained. 573 U.S. 373, 134 S. Ct. 2473 (2014). When the government seizes a phone as a physical object, the subject of the warrant loses possession of "an effect" but when the government subsequently "reads" the contents of a phone, "the privacies of life" are revealed to government scrutiny. *Id.* at 2494-95.

"[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era." *Riley*, 134 S. Ct. at 2494. Writs of assistance authorized British officials to break into colonial homes to search for smuggled goods. Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 Yale L.J. F. 216, 219-221 (2016), also available at https://www.yalelawjournal.org/forum/apple-and-the-american-revolution-remembering-why-we-have-the-fourth-amendment-1. The Fourth Amendment's protections of the right to be secure in houses and effects arises most directly from colonial resistance to writs of assistance. The best way to understand why the Founders also opposed "general warrants" is to look at a series of cases that took place in England in the 1760s, that also explain why a specific right "to be secure in papers" is included in the Fourth Amendment.[4]

The most famous of these cases involved John Wilkes, a member of the British Parliament who stood in opposition to the majority party. In 1762 King George III

[4] *Boyd v. United States*, 116 U.S. 616, 626-27 (1886).

requested issuance of a general warrant to find out who had authored a pamphlet, entitled *The North Briton No. 45*, that he considered to be seditious libel. Agents executing the warrant entered the house of John Wilkes and conducted a search for papers that would show Wilkes was the author of the pamphlet. The agents encountered a locked cabinet that they suspected contained the kind of papers they were looking for. The King's Secretary of State was consulted and he instructed the agents to engage a locksmith to break open the box. Papers were found within the box and the agents took all the papers, including "a pocket-book of Mr. Wilkes," put them all in a sack and delivered them to the Secretary of State. When Wilkes asked for return of his papers, the Secretary of State wrote back that "such of your papers as do not lead to your guilt, shall be restored to you. Such as are necessary for that purpose it was our duty to turn over to those whose office it is to collect the evidence and manage the prosecution against you." *Cunningham*, 126 Yale L.J. F. at 221-22, 226.

Wilkes brought a successful lawsuit against the agents who seized his papers, and the verdict was famous in the colonies as well as in England. What has been called one of the most cherished artifacts in American history, *The Sons of Liberty Bowl*, crafted by Paul Revere in 1768, features on one side the phrase "Wilkes & Liberty" accompanied by the words "No. 45," referencing the subject of the King's warrant, *The North Briton No. 45*, and an image of a general warrant torn in half. *Id.* at 223.

John Adams recorded an event in 1769 he attended along with 350 members of the Sons of Liberty at which 45 toasts were offered – the number selected in honor of Wilkes and *The North Briton No. 45*. Seth Keller, *Unique Patriotic Toasts from Boston's Sons of Liberty*, https://www.sethkaller.com/item/1418-23891-Unique-Patriotic-Toasts-from-Boston%E2%80%99s-Sons-of-Liberty

A lawsuit brought by another victim of the King's general warrant produced a decision on appeal that has become one of the most widely cited judicial opinions in Fourth Amendment jurisprudence.[5] The court stated: "[p]apers are . . . [our] dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."[6] *See Cunningham*, 126 Yale L.J. F. at 222.

Both writs of assistance and general warrants permitted "rummag[ing] through homes in an unrestrained search for evidence of criminal activity. *Riley*, 134 S. Ct. at

[5] *Boyd*, 116 U.S. at 626-27.
[6] Cited with approval, *id.* at 628.

2494. "Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Id.* To prevent such abuse of government power, the Fourth Amendment contains a "particularity" requirement, that warrants must "particularly describe[e] the place to be searched, and the persons or things to be seized." This requirement is intended to prevent such practices as applied against John Wilkes, in which "all papers" found in a locked cabinet were seized and then subsequently reviewed looking for inculpatory documents.

According to the detailed property inventory filed in this case, District Court Docket # 39-1, Aug. 30, 2022, the Government seized over 1600 items that were not governmental documents. It seems unlikely that the Government had probable cause to seize all of these items;[7] yet the Government has stated it is only returning copies of the non-governmental documents to Plaintiff while retaining the originals. *The United States' Motion for a Partial Stay Pending Appeal* 5, Docket 69, Sep. 8, 2022.

The Government apparently conducted some degree of review of all the documents in order to report how many fell into the categories of (a) non-governmental, (b) governmental and marked classified, and (c) governmental not

[7] The government has indicated that even documents that do not bear a classification marking may be relevant to the issue of whether Plaintiff improperly commingled classified documents with both other governmental records and his own personal materials. However, according to the detailed property inventory, a number of the seized boxes did not contain any documents marked classified. District Court Docket # 39-1, Aug. 30, 2022 (see items # 8, 9,12, 16, 17, 20, 21, 24, 27 30, 31 and 32).

marked classified. Thus the guarantee of "security in papers" has apparently already been violated to some extent by the Government viewing all the documents seized.

The "security in papers" may be further violated when the Government takes upon itself the review of documents that may be privileged.[8] Even if a "filter team" determines that a document is privileged, the confidentiality of the document has been destroyed when government agents read it, regardless of whether the government refrains from using the document in a subsequent prosecution. Further, it appears that the Government's "filter team," which was only tasked with identifying documents that might be protected by attorney-client privilege, had decided on its own by August 30 which documents should be segregated as potentially privileged, without notice to Plaintiff or judicial review of its determination, *United States' Response to Motion for Judicial Oversight and Additional Relief* 32, Docket 48, Aug. 30, 2022. It also appears from the District Court's Order that the filter team then turned over to the investigative team documents it determined were not privileged. *Order* at 15 (finding that potentially privileged documents were erroneously delivered to the investigative team).

[8] This brief takes no position on the questions of whether Plaintiff, as a former president, is precluded from asserting executive privilege when the current Executive Branch seeks to review a document, or whether, even if Plaintiff can assert such a privilege, it can be "categorically" overcome for classified documents without any judicial determination.

II. Protection of Fourth Amendment rights should not be limited to the narrow grounds for obtaining relief under Fed. R. Crim. P. 41

Both the District Court and the Government assume that Plaintiff's request for a special master and for an injunction against further review of his documents must be evaluated according to factors set out in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975), for deciding a motion to return property pursuant to Fed. R. Crim. P. 41. *See United States' Response to Motion for Judicial Oversight and Additional Relief*, Docket # 48, Aug. 30, 2022; *Order*, Docket # 64, Sep. 5, 2022. These factors are: (1) whether seizure of the property "displayed a callous disregard for the constitutional rights of [the plaintiff]"; (2) whether the plaintiff has a need for the property whose return he seeks; (3) whether the plaintiff would be irreparably harmed by denial of the return of the property; and (4) whether the plaintiff has an adequate remedy at law. *Richey*, 515 F.2d at 1243. (The District Court, however, decided that failure to meet the first factor did not preclude granting Plaintiff's requests. *Order* at 9.)

Although Plaintiff's lawsuit does request return of items not within the scope of the warrant and a detailed receipt of property, his requests for a special master and injunction against further review, as discussed above, are best understood as efforts to protect his "security in papers" directly under the Fourth Amendment. *Motion for Judicial Oversight and Additional Relief* at 1-2, Docket 1, Aug. 22, 2022 ("President Trump, like all citizens, is protected by the Fourth Amendment"); *Movant's Supplemental Filing in Support*

of Motion for Judicial Oversight and Additional Relief 4, Docket 28, Aug. 26, 2022 ("Fourth Amendment concerns underly[] Movant's requests").

Richey indicates that it is taking the factors for granting a Rule 41 motion from *Hunsucker v. Phinney*, 497 F.2d 29 (5th Cir. 1975). However, both cases indicate a preoccupation with the question of jurisdiction. *Hunsucker* concludes that the only possible basis of jurisdiction for considering the plaintiff's Rule 41 motion was a very narrow "anomalous" jurisdiction based on a federal court's inherent authority over those who are its officers. *Id.* at 32. The high barriers to relief established by *Hunsucker* and *Richey* seemed to be based on the courts' view that such jurisdiction is "exceptional." *Id.* *Hunsucker* acknowledged that the Supreme Court had recently authorized a direct federal cause of action under the Fourth Amendment, in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but distinguished *Bivens* because the jurisdictional amount for federal question jurisdiction, 28 U.S.C. § 1331(a), had not been shown by Hunsucker. *Id.* at 32, 35 n. 12.

However, since *Richey* and *Hunsucker*, 28 U.S.C. 1331(a) has been amended to eliminate the jurisdictional amount requirement. Pub. L. 96-486 (1980). Thus *Richey* and *Hunsucker* can be distinguished not only because they address the narrow issue of return of property (vs. the right to be secure in papers), but also because they are based on an outdated, cramped view of jurisdiction to vindicate Fourth Amendment rights.

The more appropriate approach to constitutional claims was stated by the Supreme Court in *Bell v. Hood*: "[I]t is established practice for this Court to sustain the

jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution … Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 327 U.S. 678, 66 S. Ct. 773, 777 (1946). *See also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.")

CONCLUSION

In what may be the highest profile Fourth Amendment case for the current generation of Americans, the current situation is unfortunate.

The Government was surely aware that the seizure of documents for which it lacked probable cause was likely; the warrant not only authorized seizing "any other contents" of any box found to contain documents with classification markings but also "any other containers/boxes that are collectively stored or found together" with such a box. *Notice of Filing of Redacted Documents*, Magistrate Docket 17, Aug. 11, 2022. The Government was also aware that Plaintiff had previously asserted a "protective assertion of executive privilege" as to documents stored at Mar a Lago. *United States Response to Motion for Judicial Oversight and Other Relief*, *Attachment B*, Docket # 48-1, Aug. 30, 2022.

Given such awareness, in the proposed warrant submitted with its warrant application the Government could have specified that all materials seized would be

immediately delivered into the custody of the court without any examination or review, subject to further proceedings to determine methods of review for which the subject(s) of the search would have notice and the opportunity to be heard. (Special custodial provision could have been made for documents seized with classification markings.) In the alternative, the magistrate judge could have so provided in the warrant he approved.

Either of these alternatives would have prevented government agents from reading Plaintiff's documents that may have been improperly seized beyond the appropriate scope of the warrant or that might be protected by one or more applicable privileges. Failing these preventive measures, Plaintiff is seeking the best remedy still available to protect his "right to be secure in his papers" by asking that any further review of his documents be halted and that further review be done by a special master.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Fourth Amendment Scholar *Amicus* Brief in Support of Neither Party complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,916 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this Brief of Appellants complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 point Garamond.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of September, 2022, I caused this Fourth Amendment Scholar *Amicus* Brief in Support of Neither Party to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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