

No. 17-1552

In the
Supreme Court of the United States

JEANETTE M. BRUCE,

Petitioner,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

*On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This petition should be granted with the decision of the District of Columbia Court of Appeals vacated and remanded for consideration of this Court's decisions on the *non-discretionary* Constitutional right of the people to protection of their cell phone data from unreasonable searches as established in *Carpenter v. United States*, 585 U.S. ___, No. 16-402 (6/22/18), and *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (6/25/14). GVRs have already been granted in at least six other cases which were held pending the decision in *Carpenter*. See, e.g., *Zanders v. Indiana*, No. 17-166.

Here, the District of Columbia Superior Court called non-party witness Jeanette Bruce (Petitioner) to the well of the court and threatened her with \$5,000 per day contempt penalties if she did not turn over her personal cell phone for inspection by a defendant public utility pursuant to an obviously intrusive and overbroad subpoena. The lower court threatened these fines after twice ruling that the privacy interests in cell phones that this Court articulated in *Riley* were “wholly inapplicable” because Petitioner had ventured outside her home and taken a photograph of a fire on her neighbors’ property, and despite Petitioner having already voluntarily produced the photograph she took to the defendant and the plaintiffs.

The District of Columbia Court of Appeals affirmed that decision—which also denied Petitioner fees and expenses for the “undue burden” the inspection subpoena imposed on her—by reasoning that the “privacy concerns of non-parties” are “discretionary” and subject to a standardless “balancing” approach by the trial court. App. at 11-13. The Court of Appeals’ decision failed to apply the Fourth Amendment

principles this Court announced in *Riley* and *Carpenter*—even though *Riley* had been issued three years earlier.¹

Carpenter supports Petitioner’s GVR request in two ways: *Carpenter* holds that:

- (A) The Fourth Amendment does not contain a “categorical” exception for subpoenas, nor does it offer more “lenient scrutiny,” Slip op. 19-20, and
- (B) A person who is protected by the Fourth Amendment does not “surrender” that protection by “venturing into the public sphere” carrying a cell phone. *Id.* at 12.

I. The DCCA’s Ruling Did Not Follow *Carpenter* or *Riley*.

In the past four years, this Court has issued two major rulings on the privacy rights that people possess in their personal cell phones and digital data related to those cell phones under the Fourth Amendment’s “right of the people to be secure in their ... papers, and effects, against unreasonable searches and seizures.”

¹ The Court of Appeals’ ruling on “mootness” (App. 9-10) is a red herring because the Court of Appeals proceeded to reach Petitioner’s “privacy concerns” in Section II.B (App. 11-15) and because this Court has ruled repeatedly that an appeal is not “moot” unless it is “impossible for the court to grant any relief whatsoever.” *Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992); accord, *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013). Here, Rule 45(c) expressly makes relief available for failing to “take reasonable steps to avoid imposing undue burden or expense.”

Riley recognizes that before modern cell phones, a search of a person's effects was "limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Id.* at 2489. But because cell phones now "hold for many Americans the privacies of life," searching a person's cell phone now "implicate[s] privacy concerns far beyond those implicated by the search of a cigarette pack, wallet, or purse." *Id.* at 2488-90, 2495. Cell phones can store literally "millions of pages of text, thousands of pictures, or hundreds of videos," including "sensitive personal information." *Id.*

Four years later, this Court issued its second major decision on cell phone information in *Carpenter*, again upholding Fourth Amendment protection. *Carpenter* observed that people "carry cell phones with them all the time" and that cell phone information "provides an intimate window into a person's life, revealing not only his particular movements, but through them, his 'familial, political, professional, religious, and sexual associations.'" Slip op. 12-13 (quoting Justice Sotomayor's concurring opinion in *United States v. Jones*, 565 U.S. 400, 415 (2012)). *Carpenter* extended *Riley* by ruling that "cell phones and the services they provide are such a pervasive and insistent party of daily life that carrying one is indispensable to participation in modern society," and that this results in people carrying with them, virtually at all times, a "vast store of sensitive information" including records of where they have been. *Id.* at 7, 17.

Carpenter thus concluded that a subpoena for cell phone location data under the Stored Communication

Act is “a search within the meaning of the Fourth Amendment” and that simply showing that the data may be “relevant and material to an ongoing investigation” under the Act falls “well short of the probable cause required for a warrant.” *Id.* at 17-19.

Without applying *Riley* or *Carpenter*, the District of Columbia Court of Appeals here ruled that whether a subpoena imposes an undue burden, including consideration of the privacy concerns of a non-party, “is discretionary.” App. at 13. The Court of Appeals further ruled that the trial court had, “in its considerable discretion,” “balanced” Ms. Bruce’s “privacy concerns” even though neither the trial judge nor the Court of Appeals referenced any standard related to that balancing. *Id.* Far from balancing her “privacy concerns,” the Superior Court had “flatly” rejected *Riley* as “wholly inapplicable,” *id.* at 26 and 70, and twice opined that Petitioner had given Respondent Pepco the right to inspect and copy her cell phone because “when people put themselves within the public domain they run some risk that things that would otherwise be private are [public].” *Id.* at 65, 90.

Neither the Superior Court nor the Court of Appeals considered the “reasonable steps” that Respondent Pepco could have taken to avoid any intrusive inspection of Petitioner’s personal cell phone, as mandated by Rule 45, including asking her to download another copy of the photograph she had already voluntarily produced, or accepting her expert’s certification that the “hash value” of the photograph she had produced was identical to the photograph on

her cell phone.² When Petitioner did not comply with Respondent’s subpoena commanding her to produce her cell phone for inspection, the Superior Court engaged in no analysis of the alternatives she offered, but enforced the subpoena and threatened Petitioner with \$5,000 per day fines for contempt. App. at 69.

A. The Fourth Amendment Does Not “Categorically” Except Subpoenas or Subject Them to “Lenient Scrutiny.”

As *Carpenter* makes clear, the Fourth Amendment protection against unreasonable searches cannot be placed in the discretion of a trial or magistrate judge who may or may not properly weigh the Constitutional right, or who may use a “categorical” exception for the right to privacy or “lenient scrutiny.” If the protection is discretionary or if the right is subject to “lenient scrutiny,” there is no protection of the Constitutional right. Slip op. 19-20; *see also United States v. Payner*, 447 U.S. 727, 733 (1980) (rejecting “standardless discretion” in “application of the exclusionary rule to enforce the Fourth Amendment”).³

Justice Alito’s dissent in *Carpenter* maintained that a subpoena duces tecum is different than a Fourth Amendment search because “a subpoena duces tecum

² “Hash values” authenticate whether a copy of an electronic file is “identical to the original.” Fed. R. Evid. 902(14) advisory committee’s note (2017 Amendment).

³ Justice Gorsuch’s dissent in *Carpenter* also recognizes that no responsible reading of the Fourth Amendment should “depend on whether a judge happens to agree that your subjective expectation to privacy is a ‘reasonable’ one.” Slip op. at 6.

permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects.” Slip op. 11. According to the majority, Justice Alito’s dissent posited “a categorical rule ... subjecting subpoenas to lenient scrutiny without regard to the suspect’s expectation of privacy in the records.” Slip op. 19. But *Carpenter* first determined that “this Court has never held that the government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.” *Id.* *Carpenter* next rejected the theory that “the choice to proceed by subpoena provide[s] a categorical limit on Fourth Amendment protection.” *Id.* at 20. According to *Carpenter*, if that was so, the “digital contents of a cell phone ... may be collected by subpoena for no reason other than ‘official curiosity.’” *Id.* at 20-21. *Carpenter* rejected “the radical implications of this theory” in order to “prevent the subpoena doctrine from overcoming any reasonable expectation of privacy.” *Id.* at 21. As *Carpenter* stated, the “Founding-era understanding” was that people are to be protected against “rummaging” through their papers and effects without probable cause and that it is “an unreasonable search” to do so. *Id.* at 6.

When Respondent Pepco’s subpoena commanded Petitioner to produce her cell phone for inspection and copying, and the Superior Court enforced that command, over Petitioner’s objections about her right to privacy and less intrusive alternatives, and the Superior Court threatened her with contempt and fines, this was not the same as simply asking her “to conduct the search for the relevant documents

[her]self.” Indeed, that is precisely what Petitioner repeatedly offered to do and, in fact, did on two occasions, but Respondent Pepco and the Superior Court rejected it. *See* 9/26/2014 Mot. to Quash at 3, 5. Respondent told the Superior Court it had to take control of her cell phone and root through everything on it for itself. App. at 89-90; 10/13/14 Opp. to Mot. to Quash at 10-11.

Court-ordered inspections of cell phones, computers or other electronic storage devices are fraught with Fourth Amendment issues, whether the devices belong to a non-party or a party. The courts generally avoid those issues by not allowing such inspections unless they are based on much more than suspicion or speculation and no less intrusive alternatives are available. *See, e.g., Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 11-12 (D.D.C. 2009) (forensic examination is never the “default” but should be used when there is “simply no other way in which to seek this information”); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (“mere skepticism” insufficient “to warrant drastic electronic discovery measures”).⁴

Petitioner wishes to make clear that she is not contending that on remand the Court of Appeals must hold that “probable cause” is required. *Carpenter* says that “[t]his is certainly not to say that all orders compelling the production of documents will require a

⁴ Even for taking discovery from parties, the Federal Rules now codify “the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection.” Rule 34(b)(2)(B), advisory committee’s note (2015 Amendment).

showing of probable cause” and that records may be acquired through subpoenas “in the overwhelming majority of investigations.” Slip op. 21. Here, Rule 45 (under both the D.C. Superior Court Rules and the Federal Rules) mandates that the party issuing a subpoena “must take reasonable steps to avoid imposing undue burden or expense” and further mandates that “[t]he court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees— on a party or attorney who fails to comply.” Because Rule 45 has a mandatory duty to “take reasonable steps to avoid imposing undue burden” and a mandatory requirement for the court to “enforce” this duty, Petitioner believes the District of Columbia Court of Appeals may be able to apply Rule 45 to protect the Fourth Amendment right consistent with *Riley* and *Carpenter* without resort to a separate determination of probable cause as required in *Carpenter*. See *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (“probable cause is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable”).

The standard under the Stored Communications Act at issue in *Carpenter* was in contrast to Rule 45 because the only question under the Stored Communications Act is whether the evidence “might be pertinent to an ongoing investigation—a ‘gigantic’ departure from the probable cause rule.” Slip op. 19. The Stored Communications Act thus did “not determine a target’s expectation of privacy,” *id.* at 9 n.2; nor did it contain any “duty” to “take reasonable steps to avoid imposing undue burden.”

B. Venturing Into the Public Sphere” with a Cell Phone Does Not “Surrender” the Fourth Amendment’s Protection.

Carpenter has further rejected the kind of waiver the Superior Court relied on in ruling that the non-party Petitioner had given Respondent Pepco the right to inspect her cell phone because “when people put themselves within the public domain they run some risk that things that would otherwise be private are [public].” App. at 90; *see also* App. at 65 (disregarding her privacy concerns because she “went out on her own and took [a] photograph[] of the matter that has become a public matter”).

Carpenter specifically rejects such waivers, ruling that particularly because people “carry cell phones with them all the time,” “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere” with their cell phone. Slip op. 12-13.

II. The Fourth Amendment Protects People from Court Orders Coercing Them to Permit Inspection of a Personal Cell Phone Subject to a \$5,000 Per Day Fine for Contempt.

An outward distinction between this case and *Carpenter* is that the party who issued the subpoena commanding an inspection of a non-party’s papers and effects here was a regulated public utility, rather than the United States or another government entity. Although the Court of Appeals’ June 29, 2017 decision drew no such distinction, Respondent’s Opposition maintains that “the obtaining of information through

subpoena” does not “convert private action into state action.” Opp. at 17.⁵

While this Court has not addressed this issue, the Tenth Circuit has held that merely “employ[ing] the device of a subpoena duces tecum” does not “rise to the level of acting together with or obtaining significant aid from” the government. *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1988). However, once a litigant enlists the court’s “coercive powers,” including threats of contempt and \$5,000 per day fines, as here, in order to enforce the subpoena, especially a subpoena commanding an *inspection* of a non-party’s papers and effects, there is obviously “significant aid from” the government. The coercion to comply with the non-party inspection subpoena results from the rules related to subpoenas and the judiciary’s power “to enforce the subpoena through their contempt powers” of fines or imprisonment. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 200 (1946); *accord*, *Shelley v. Kraemer*, 334 U.S. 1, 14-18, 20 (1948) (state action “refers to exertions of state power in all forms,” including by the use of judicial “coercive power”).

⁵ Although Respondent portrays itself for purposes of opposing this petition as a “private actor,” Opp. at 16-17, Respondent is actually a “regulated public utility” with quasi-governmental powers. *See, e.g., Lathroum v. Potomac Electric Power Co.*, 309 Md. 445, 446, 451 (Md. 1987). And, while the government of the District of Columbia government did not join with Respondent in *issuing* the non-party inspection subpoena here, the District of Columbia was both a defendant and third-party defendant in this case who joined with Respondent in seeking enforcement of the subpoena duces tecum to inspect Petitioner’s cell phone. *See* 11/17/14 Deposition of Charles Culley, at 162-173.

Absent the judicial coercion, a non-party like the Petitioner could simply say, “No, thanks” when asked to inspect and copy the contents of her personal cell phone.

While it is not always viewed as a statutory rule, Rule 45 establishes a statutorily-prescribed subpoena power under which the issuance of a subpoena is subject to certain rules and duties. *See* 28 U.S.C. §656; D.C. Code §§11-942, 11-946. Essentially, Rule 45 permits litigants to enlist the government’s coercive powers to enforce their demands for documents and other information, including demands to inspect the personal files and effects of non-parties. The central requirements of Rule 45 are twofold: First, there is the duty to “take reasonable steps to avoid imposing undue burden,” and second, there is the obligation of the courts to “enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.”

Here, the Superior Court issued four orders to enforce the non-party inspection subpoena Respondent had issued and coerce the Petitioner to produce her personal cell phone for inspection. App. 19, App. 28, App. 32, App. 36. The Superior Court backed up those orders by further threatening Petitioner with a fine of “\$5,000 a day” and contempt if she did not comply. App. at 69. The judicial orders and the judicial coercion clearly constitute state action, and they equally clearly failed to conform with the standards established both by Rule 45 and by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant this petition, vacate the District of Columbia Court of Appeals' June 29, 2017 decision, and remand for further consideration consistent with this Court's decisions in *Carpenter* and *Riley*.

Respectfully submitted,

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