Application No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

v.

PHILIP ZODHIATES, *Applicant*.

APPLICATION FOR RECALL AND STAY OF THE MANDATE

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To the Honorable Ruth Bader Ginsburg, Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Defendant Philip Zodhiates, through his attorneys, Gravel & Shea PC, respectfully moves for a recall and stay of the mandate of the United States Court of Appeals for the Second Circuit pending the filing and disposition of a petition for a writ of certiorari before this Court. *See* Rule 23; 28 U.S.C. § 2101(f). The petition as planned will ask this Court to consider three questions: (1) what constitutes "binding appellate precedent" for purposes of application of the good faith exception to the exclusionary rule; (2) whether collection of cell site location information ("CSLI") without a warrant, in the absence of binding appellate

precedent authorizing such action, is entitled to the benefit of the good faith exception; and (3) whether a prosecutor should be held to a higher standard than a police officer in seeking the protection of the good faith exception.

PROCEDURAL POSTURE

Philip Zodhiates seeks review of the Second Circuit's ruling in *United States v. Zodhiates*, 901 F.3d 137 (2d Cir. 2018), attached hereto as Attachment A. Mr. Zodhiates filed a petition for rehearing or, in the alternative, for rehearing *en banc*, which was denied on October 10, 2018. *See* Order Denying Petition for Rehearing, attached hereto as Attachment B. Mr. Zodhiates also previously sought a stay of the mandate from the Second Circuit, but such relief was denied on October 26, 2018. *See* Order Denying Stay of the Mandate, attached hereto as Attachment C. Since the denial of the stay, Mr. Zodhiates has been ordered to surrender to FCI Ashland, Kentucky, on December 5, 2018. In light of the serious risk of harm created by execution of the judgment in Mr. Zodhiates' case, Mr. Zodhiates now requests a recall and stay of the mandate from the Circuit Justice, and a direction that the surrender date be suspended. *See* 28 U.S.C. § 2101(f). Because the Second Circuit has denied relief, "the relief sought is not available from any other court or judge." Rule 23.3.

The Government opposes this Application.

ARGUMENT

This Court has established three conditions under which the Circuit Justice may issue a stay pending the disposition of a petition for writ of certiorari: whether the applicant has demonstrated

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Conkright v. Fommert, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (internal quotation marks and alteration omitted). Additionally, "in a close case it may be appropriate to balance the equities" between the parties, "as well as the interests of the public at large." *Id.* (internal quotation marks omitted). Because Mr. Zodhiates meets each of the prerequisites, a recall and stay of the mandate is warranted.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI AND A SIGNIFICANT POSSIBILITY OF REVERSAL.

In *Zodhiates*, the Second Circuit held that the Government's warrantless acquisition of Mr. Zodhiates' CSLI was indeed a search, but it ignored the basis for this Court's ruling in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), erroneously applying the good faith exception to sanction admission of the fruits of the search. By doing so, the Second Circuit violated not only *Carpenter*, but also *Davis v. United States*, 564

U.S. 229 (2011), and *Illinois v. Krull*, 480 U.S. 340 (1987). Such an error gives rise to the "reasonable probability" that four Justices of this Court "will consider the issue sufficiently meritorious to grant certiorari." *Conkright v. Fommert, supra.*

First, the good faith exception does not apply where the Government failed to act within the scope of a statute. *Krull*, 480 U.S. at 360 n.17 ("we decline the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute"). Second, the good faith exception does not apply where the Government did not act in "objectively reasonable reliance on binding appellate precedent." *See Davis*, 564 U.S. at 232; *United States v. Aguiar*, 737 F.3d 251, 262 (2d Cir. 2013).

When the Second Circuit applied the good faith exception to the Government's acquisition of CSLI in this case, it failed to consider that the Government did not act in compliance with the relevant statute. Additionally, the Second Circuit erroneously treated *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), as though they were precedents authorizing warrantless government access to CSLI, when those cases had no connection to an individual's detailed personal location privacy information. The relevant precedent there was *United States v. Knotts*, 460 U.S. 276 (1983), as enhanced by *United States v. Jones*, 565 U.S. 400 (2012). In *Carpenter*, this Court made

clear that *Smith* and *Miller* did not authorize the warrantless search of CSLI, and it was error for the Second Circuit to treat those cases as if they did.

A. The Government did not rely on the Stored Communications Act when it obtained Mr. Zodhiates' CSLI. The good faith exception cannot apply under *Krull* and *Davis*.

In *Carpenter*, the Government requested, at most, 152 days of the defendant's CSLI pursuant to a court order under the Stored Communications Act ("SCA"), 18 U.S.C. § 2703(d). In *Zodhiates*, the Government deliberately avoided any judicial review and obtained 28 months of Mr. Zodhiates' CSLI by subpoena, pursuant to the purported authority granted it by a different prong of the SCA, 18 U.S.C. § 2703(c)(2), which requires no warrant or judicial oversight.

The Government attempted to avoid the Fourth Amendment warrant requirement by requesting CSLI by grand jury subpoena pursuant to 18 U.S.C. § 2703(c)(2). The subpoena reveals that the Government's request far exceeded what is permitted by the SCA. Had the Government intended to issue a subpoena consistent with the authority granted to it under the SCA, it would have included only the language of what was allowed under the statute:

> (A) name; (B) address; (C) local and long distance telephone records, or records of session times and durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including

> any temporarily assigned network address; and (F) means and source of payment for such service (including any credit or bank account number).

18 U.S.C. § 2703(c)(2). Instead, the Government sought an expansive list:

> . . . 1) *All subscriber information*, including but not limited to account number, phone numbers serviced by your company, subscriber name, social security number, billing and *service addresses*, alternate/other contact phone numbers including "Can-Be-Reached" (CBR) numbers, email addresses, text messaging addresses, and other identifying information; . . .
> 4) *Detail records of phone calls made and received* (including local and incoming call records if a cellular account) and *name of long distance carrier* if not your company; . . .
> 6) Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including *any IP address* assigned for each session or connection); . . .

Grand Jury Subpoenas, dated Aug. 9, 2011, attached hereto as Attachment D (emphasis added). Information that exceeded the scope of the statute required a court order under 18 U.S.C. § 2703(d). *See In re United States Orders Pursuant to 18 U.S.C. § 2703(d)*, 509 F. Supp. 2d 76, 80, n.8 (D. Mass. 2007) (historical location information outside of scope of § 2703(c)(2) could be obtained by court order under § 2703(d)); *In Re Pen Register & Trap/Trace Device with Cell Site Location Auth.*,

396 F. Supp. 2d 747, 758 (S.D. Texas 2005) (§ 2703(c)(2) does not allow requests for "the physical location(s) where the mobile phone was used").

Where the Government acted entirely outside of its statutory authority under the SCA, the good faith exception cannot apply. This Court declined to extend the good faith exception to such instances in *Krull*:

> At this juncture, we decline the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute. Not only would such a ruling be premature, but it does not follow inexorably from today's decision. As our opinion makes clear, the question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence. The answer to this question might well be different when police officers act outside the scope of a statute, albeit in good faith.

Krull, 480 U.S. at 360, n.17. *Zodhiates* did not involve a police officer who made a hasty, good faith decision relying on a statute while on patrol; rather, Mr. Zodhiates' CSLI was sought by a career federal prosecutor who carefully drafted a subpoena that fell outside the scope of any statutory authority under the SCA. If the good faith exception is to have meaning and effect, then it must continue to abide by one of the fundamental purposes of the exclusionary rule: to deter deliberate disregard for Fourth Amendment rights. *See Davis*, 564 U.S. at 238,

citing *Herring v. United States*, 555 U.S. 135, 143 (2009). The *Davis* Court applied the good faith exception where the "officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way." *Id.* at 239-40. In the absence of strict compliance with statutory authority, neither *Davis* nor *Krull* support the application of the good faith exception here. Indeed, in *Zodhiates*, the Second Circuit did not apply the good faith exception under *Krull*, perhaps because the Court agreed that the Government failed to act within the scope of the SCA. Instead, the Second Circuit applied the good faith exception, citing *Davis'* "objectively reasonable reliance on binding appellate precedent." *See Davis*, 564 U.S. at 232.

B. The Second Circuit relied on incorrect appellate precedent when it applied the good faith exception.

In *Carpenter*, this Court acknowledged that:

> personal location information maintained by a third party – does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

Carpenter, 138 S. Ct. at 2214-15. The first line of cases relates to "a person's expectation of privacy in his physical location and movements." *Id.* at 2215, citing *Knotts*, 460 U.S. 276. The *Carpenter* Court noted that the technology relied on in *Knotts* involved "rudimentary tracking facilitated by [a] beeper" and that its use by the Government was "limited" to a "discrete 'automotive journey.'" *Id.*, citing *Knotts*, 460 U.S.

at 284, 285. Because *Knotts* was limited to such rudimentary technology, the Court left open "whether 'different constitutional principles may be applicable' if 'twenty-four hour surveillance of any citizen of this country [were] possible.'" *Id.*, citing *Knotts*, 460 U.S. at 283-84. It was this line of cases on which the *Carpenter* Court relied to hold that acquisition of CSLI required a warrant.

The second line of cases, referred to as the third-party doctrine, contemplates that "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" *Id.*, quoting *Smith*, 442 U.S. at 743-44. The act of sharing with a third party is not the only aspect of the inquiry, however; the Court also "consider[s] 'the nature of the particular documents sought' to determine whether 'there is a legitimate "expectation of privacy" concerning their contents.'" *Carpenter*, 138 S. Ct. at 2219, quoting *Miller*, 425 U.S. at 442.

The third-party doctrine was developed at a time before the development of modern cellular technology:

> while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements. We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell

> phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

Carpenter, 138 S. Ct. at 2216-17. In spite of the *Carpenter* Court's rejection of *Smith* and *Miller*, the Second Circuit continued to rely on those cases when it applied the good faith exception to the Government's reliance on the third-party doctrine as binding appellate precedent in *Zodhiates*. *See Carpenter*, 138 S. Ct. at 2217 ("We decline to extend *Smith* and *Miller* to cover these novel circumstances."). Similarly, the Second Circuit should have declined to apply the good faith exception based on the third-party doctrine and instead relied on the notions of privacy of physical location and movements considered in *Knotts*.

Had the Second Circuit understood that *Knotts* is the "binding appellate precedent" to which the Government should have looked, the court could not have concluded that the good faith exception would be applicable. The facts in *Zodhiates* are easily distinguishable from, and significantly more egregious than, the facts in *Knotts*. If the Government – and the Second Circuit – considered *Knotts*, it would have been clear that no law enforcement officer could reasonably rely on the

Knotts facts to obtain 28 months of Mr. Zodhiates' physical location and movements.

The surveillance in *Knotts* involved the placing of a beeper on an automobile which monitored the automobile's movements on a single trip on public roads. *Knotts*, 460 U.S. at 278. Mr. Zodhiates' CSLI, by contrast, revealed 28 months of his physical location and movements, including in private locations inaccessible to conventional surveillance. *See United States v. Karo*, 468 U.S. 705, 714 (1984) (using a beeper to monitor movement of a container within private homes was a violation of the Fourth Amendment). While the *Knotts* Court ultimately held that the placement of a beeper was not unlawful for purposes of a single automobile trip, the Court foreshadowed that different "dragnet-type law enforcement practices" might eventually occur and that "different constitutional principles may be applicable." *Knotts*, 460 U.S. at 284.

C. The Second Circuit relied on an incorrect interpretation of "binding appellate precedent" when it applied the good faith exception.

At the time the Government obtained the subpoena for Mr. Zodhiates' CSLI, not only was it obvious just how distinguishable the facts – and the technology – were from *Smith, Miller,* and *Knotts*, it was also obvious that the legal landscape as to CSLI was fraught with disagreement and inconsistency. In the face of such disagreement, courts have discussed that more might be required of a law enforcement actor before he can simply act on the absence of a specific prohibition.

See United States v. Stephens, 764 F.3d 327, 341 (4th Cir. 2014) (Thacker, J., dissenting) ("*Davis* did not, however, answer 'the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled'"), quoting *Davis*, 564 U.S. at 250 (Sotomayor, J., concurring); *Aguiar*, 737 F.3d at 260, quoting *United States v. Baez*, 878 F. Supp. 2d 288, 289 (D. Mass. 2012) ("where, as here, law enforcement officers at the time they act have a good faith basis to rely upon a substantial consensus among precedential courts. . ."); *United States v. Leon*, 856 F. Supp. 2d 1188, 1193 (D. Haw. 2012) (as there was no binding precedent authorizing the practice at the time, *Davis* did not control, but "after examining precedent as of 2009, the court finds that the agents' conduct in the use of the GPS tracking device was objectively reasonable").

In reaching its conclusion in *Zodhiates*, the Second Circuit cited its case *Aguiar*, which established that for the purposes of the good faith exception under *Davis*, "binding appellate precedent" on which law enforcement could rely was precedent "of this Circuit and the Supreme Court." *Aguiar*, 737 F.3d at 261. This reliance on *Aguiar* was misplaced. At the time the *Aguiar* court determined that the good faith exception could apply to the Government attaching electronic devices to automobiles, there was no Second Circuit precedent saying otherwise, but there was existing Supreme Court precedent on the same type of

technology. *Id.* In contrast, when the Government obtained Mr. Zodhiates' CSLI there was no "binding appellate precedent" in the Second Circuit or the Supreme Court permitting warrantless seizure of CSLI, but, there *was* precedent, including within the Second Circuit, suggesting acquisition of CSLI *would* require a warrant. *See United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd on other grounds, United States v. Jones*; *In re United States for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011) ("The fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone must be rejected."); *In re United States Order Authorizing the Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010) (holding that while it had previously allowed court orders under § 2703(d), the law was no longer uniformly in support of warrantless cellular location tracking of individuals, especially in light of *Maynard*, and therefore a warrant supported by probable cause would now be required).[1] Had the

[1] In addition, a number of District Courts, and at least two other Circuit Courts, had criticized the application of the third-party doctrine to CSLI. *See, e.g., United States v. Forest*, 355 F.3d 942, 951-52 (6th Cir. 2004) (rejecting application of *Smith* to cell site data, but deciding on narrower ground that the surveillance took place on public highways, where there is no legitimate expectation of privacy); *United States v. Pineda-Moreno*, 617 F.3d 1120, 2010 U.S. App. LEXIS 16708, *4 (9th Cir. 2010) (Kozinski, C.J., dissenting) ("The [CSLI and GPS] electronic tracking devices used by the police in this case have little in common with the primitive devices in *Knotts*."); *In re Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. at 765 ("permitting surreptitious conversion of a cell phone into a tracking device without probable cause raises serious Fourth Amendment concerns, especially when

(continued on next page)

Second Circuit considered the precedent of its sister circuits, including the D.C. Circuit and the Sixth and Ninth Circuits, it would have reached the conclusion that the Government did not obtain Mr. Zodhiates' CSLI in good faith and should have instead applied for a warrant. Because there was no consensus or authority that said that 28 months of 24-hour "dragnet" surveillance of a person's physical location and movements was permissible without a warrant, the Government did not act in objectively reasonable reliance on appellate precedent. Instead, it acted on objectively *un*reasonable reliance *on an absence of* binding appellate precedent.

Because of the factual dissimilarities of *Zodhiates*, on the one hand, *Smith* and *Miller* on the other, this case is unlike the hypothetical scenario raised in the Third Circuit's opinion in *Katzin*, where the "conduct under consideration clearly falls well within rationale espoused in binding appellate precedent, which authorizes nearly identical conduct." *United States v. Katzin*, 769 F.3d 163, 176 (3d Cir. 2014). Regardless of whether there is a similar rationale, the *Katzin* court also discussed another critical component of the analysis: the culpability of the law enforcement officers. After all,

> *Davis* did not begin, nor end, with binding appellate precedent. Rather, binding appellate precedent informed – and ultimately

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the phone is monitored in the home or other places where privacy is reasonably expected.").

> determined – the Supreme Court's greater inquiry: whether the officers' conduct was deliberate and culpable enough that application of the exclusionary rule would "yield meaningfu[l] deterrence," and "be worth the price paid by the justice system."

Id. at 178, citing *Davis*, 564 U.S. at 238. Mr. Zodhiates' case involves law enforcement behavior which was "deliberate and culpable" and therefore it cannot be said that there was "objectively reasonable reliance on binding appellate precedent." Such a departure from *Davis'* original intent is undoubtedly a meritorious issue warranting this Court's review.

In *Carpenter*, this Court has now answered decisively the question it left open in *Knotts* about dragnet surveillance: "It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." *Carpenter*, 138 S. Ct. 2217 at n.3. For the Second Circuit to hold that the Government could in good faith obtain 28 *months* of CSLI when the Government knew that the question posed by this Court in *Knotts* remained unanswered is error. After all, the notion that the Supreme Court could, and indeed does, extend Fourth Amendment protections to newly developed technology is not foreign to the Government. As the Court noted in *Carpenter*, Justice Brandeis raised the issue in his dissent nearly 100 years ago in *Olmstead*: "the Court is obligated – as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government' – to ensure

that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2223, quoting *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928). The Government knew that it should have obtained a warrant, or at the very least a court order under the SCA, for such invasive types of technology. It should not benefit from the good faith exception, especially where the Government deliberately ignored existing precedent directing it to obtain a warrant.

D. A prosecutor should be held to a higher standard.

In *United States v. Goldstein*, 2018 U.S. App. LEXIS 24741 (3d Cir., Aug. 30, 2018), the Third Circuit recently vacated Rabbi Goldstein's 2017 conviction, allowed his petition for rehearing, and specifically requested supplemental briefing on the collection of CSLI collected in compliance with the SCA post-*Carpenter*. Rabbi Goldstein's case involved a court order under the SCA to obtain 57 days of CSLI. *United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017), vacated as to Goldstein by *Goldstein*, 2018 U.S. App. LEXIS 24741. Rabbi Goldstein was accused and convicted of involvement in a scheme with two other rabbis to assist Orthodox Jewish women to obtain divorces from their "recalcitrant husbands." *Id.*

Rabbi Goldstein argues that the good faith exception should not apply, in part because prosecutors should be held to a higher standard than a police officer. Rabbi Goldstein contends, much like Mr. Zodhiates does, that the prosecutors who collected his CSLI without a warrant

should have been aware of, and guided by, precedent which suggested that CSLI was protected by the Fourth Amendment.

Now that *Carpenter* has completely eliminated any question regarding an individual's expectation of privacy in CSLI, the Third Circuit must decide whether the prosecutors can excuse their conduct with the good faith exception. If the Third Circuit agrees that prosecutors should be held to a higher standard and/or that the good faith exception does not apply where a prosecutor is or should be aware of existing precedent that would prohibit his conduct, then the decision of the Third Circuit would conflict with the Second Circuit's ruling in Mr. Zodhiates' case. Such a conflict is the type that must be resolved by this Court.

II. THERE IS GOOD CAUSE FOR A STAY.

There is good cause for a stay, as Mr. Zodhiates will suffer irreparable harm if this Court denies his motion for a recall and stay of the mandate.

Mr. Zodhiates has had some serious health issues. He had a heart attack in 2005 which set off high blood pressure issues, and required medicating for the blood pressure, as well as high cholesterol. Three years ago, he was diagnosed with diabetes, which also requires medication. He is currently regularly seeing a chiropractor for significant back pain, and suffers pain from arthritis.

His wife, Kathie, has some significant issues with pain, including significant nerve damage caused by oral surgery in 2013, causing constant pain and is under continuing care of dental experts resulting in regular and repeated visits. She is currently being assessed for other health issues, including unresolved serious vision issues and diagnostic tests for a cyst on her ovary, which could be cancerous. She is very much dependent on her husband for transportation and care.

Mr. Zodhiates is responsible for his ailing 90-year old mother who has been hospitalized a total of 18 weeks during the past two years from falls, resulting in becoming permanently wheelchair-bound. His assistance is called upon frequently for her needs.

He also is also currently solely responsible for care of the livestock on his farm.

Finally, Mr. Zodhiates is the sole proprietor of a small business in Waynesboro with three full-time and three part-time employees. It is not known if the business will be able to continue to operate in Mr. Zodhiates' absence. If not, it would result in the loss of employment of these persons, with harm to them and their families.

Should Mr. Zodhiates be required to report to prison on December 5, 2018, to serve his three-year prison sentence, and then this Court were to grant certiorari and reverse, Mr. Zodhiates would suffer irreparable harm. By the time such a scenario were to fully unfold,

however, Mr. Zodhiates would have likely already completed serving the majority of his sentence. In the alternative, if Mr. Zodhiates is permitted to remain in the community pending the Supreme Court's review of his petition for writ of certiorari, there is no harm done. Mr. Zodhiates poses no flight risk, nor is he a danger to the public. He should not be imprisoned "before he has a fair opportunity to seek Supreme Court review." *Mickens v. Taylor*, 243 F.3d 840, 871 (4th Cir. 2001) (Michael, J., joined by Motz & King, JJ., dissenting from denial of stay).

CONCLUSION

For the foregoing reasons, Mr. Zodhiates respectfully requests that this Court grant his motion for a recall and stay of the mandate pending the filing and disposition of a petition for a writ of certiorari.

Dated: Burlington, Vermont
November 12, 2018

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