NO. 18-_____

In the Supreme Court of the United States

PHILIP ZODHIATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. HEMLEY, ESQ.
COUNSEL FOR PETITIONER
GRAVEL & SHEA PC
76 ST. PAUL STREET, 7TH FLOOR
P.O. BOX 369
BURLINGTON, VT 05402-0369
(802) 658-0220
RHEMLEY@GRAVELSHEA.COM

JANUARY 8, 2019

SUPREME COURT PRESS (888) 958-5705 BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Petitioner Philip Zodhiates was convicted of violation of the International Parental Kidnapping Crime Act by aiding and abetting and conspiring to assist a mother's effort to remove her daughter from the United States to protect her from abuse. Petitioner was sentenced to three years of incarceration followed by one year probation. At trial, the prosecution relied heavily on 28 months of cell-site location information ("CSLI") detailing Petitioner's whereabouts which had been seized from a telecommunications company through use of a grand jury subpoena—not a warrant issued by an independent judicial officer based on probable cause.

Disregarding this Court's intervening decision in *Carpenter v. United States* (issued June 22, 2018), holding that the Fourth Amendment requires a warrant based on probable cause to obtain CSLI data, the Second Circuit decision (issued August 21, 2018) applied the good faith exception to the exclusionary rule, thereby sanctioning a federal prosecutor's calculated use of the unconstitutionally seized CSLI to obtain Petitioner's conviction.

1. Does the good faith exception to the exclusionary rule allow use at trial of CSLI illegally seized by a prosecutor prior to this Court's decision in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), under *Davis v. United States*, 564 U.S. 229 (2011)?

2. Alternatively, does the term "binding appellate precedent" as used in *Davis v. United States*, 564 U.S. 229, 241 (2011), permit lower courts to consider non-binding but persuasive, authority from other circuits?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. THE SECOND CIRCUIT ERRED WHEN IT APPLIED THE GOOD FAITH EXCEPTION IN *ZODHIATES*, IN DIRECT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT IN *CARPENTER*, *DAVIS* AND *KRULL* 6

A. The Government Did Not Rely on the Stored Communications Act When It Obtained Mr. Zodhiates' CSLI; Therefore the Good Faith Exception Cannot Apply ... 6

B. The Second Circuit Relied on Incorrect Appellate Precedent in Applying the Good Faith Exception 9

C. The Government's Reliance on *Smith* and *Miller* Was Not Objectively Reasonable, Especially Where the Government Actor Was a Career Prosecutor 16

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD SETTLE THE QUESTION OF WHAT CONSTITUTES "BINDING APPELLATE PRECEDENT" 17

CONCLUSION.. 19

APPENDIX TABLE OF CONTENTS

Opinion of the Second Circuit (August 21, 2018) 1a

Amended Judgment in a Criminal Case (March 31, 2017)... 17a

Decision and Order of the District Court (January 20, 2016).. 24a

Report and Recommendation of the District Court of New York (September 15, 2015)........ 59a

Order of the Second Circuit Denying Petition for Rehearing En Banc (October 10, 2018) 88a

Relevant Statutory Provisions 18 U.S.C. § 2703(a)-(d) 89a

Subpoena to Testify Before a Grand Jury #20WR00025-2389 (August 25, 2011) 94a

Subpoena to Testify Before a Grand Jury #2010R00025-2390 (August 25, 2011)............. 99a

TABLE OF AUTHORITIES

Page

CASES

Carpenter v. United States,
138 S.Ct. 2206 (2018) ....passim

Davis v. United States,
564 U.S. 229 (2011) ....passim

Herring v. United States,
555 U.S. 135 (2009) 9

Illinois v. Krull,
480 U.S. 340 (1987) 4, 6, 8, 9

In Re Pen Register & Trap/Trace Device with Cell Site Location Auth.,
396 F.Supp.2d 747 (S.D. Texas 2005)............. 8, 15

In re United States for an Order Authorizing the Release of Historical Cell-Site Info.,
809 F.Supp.2d 113 (E.D.N.Y. 2011)................. 14

In re United States Order Authorizing the Release of Historical Cell-Site Info.,
736 F.Supp.2d 578 (E.D.N.Y. 2010)................. 14

In re United States Orders Pursuant to 18 U.S.C. § 2703(d), 509 F.Supp.2d 76
(D. Mass. 2007) 8

Olmstead v. United States,
277 U.S. 438 (1928) 17

Smith v. Maryland,
442 U.S. 735 (1979) ....passim

United States v. Aguiar,
737 F.3d 251 (2d Cir. 2013).......................passim

TABLE OF AUTHORITIES—Continued

Page

United States v. Baez,
878 F.Supp.2d 288 (D. Mass. 2012) 13

United States v. Bain,
874 F.3d 1 (1st Cir. 2017) 18

United States v. Forest,
355 F.3d 942 (6th Cir. 2004) 15

United States v. Jones,
565 U.S. 400 (2012) 5, 11, 14

United States v. Karo,
468 U.S. 705 (1984) 12, 18

United States v. Katzin,
769 F.3d 163 (3d Cir. 2014) 16, 18

United States v. Knotts,
460 U.S. 276 (1983) ....passim

United States v. Leon,
856 F.Supp.2d 1188 (D. Haw. 2012) 13

United States v. Maynard,
615 F.3d 544 (D.C. Cir. 2010) 14

United States v. Miller,
425 U.S. 435 (1976) ....passim

United States v. Pineda-Moreno, 617 F.3d 1120,
2010 U.S. App. LEXIS 16708 (9th Cir. 2010) 15

United States v. Sparks,
711 F.3d 58 (1st Cir. 2013) 18

United States v. Stephens,
764 F.3d 327 (4th Cir. 2014) 13, 18

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ....passim

STATUTES

18 U.S.C. § 2 2
18 U.S.C. § 371 2
18 U.S.C. § 1204 2
18 U.S.C. § 2703(c)(2) 6, 7, 8
18 U.S.C. § 2703(d) 6, 8, 14
28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Zodhiates, through his attorneys, Gravel & Shea PC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Philip Zodhiates seeks review of the Second Circuit's ruling in *United States v. Zodhiates*, 901 F.3d 137 (2d Cir. 2018). *See* Appendix at App.1a. 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, App.88a. The opinion of the district court denying Mr. Zodhiates' motion to suppress is published at 166 F.Supp.3d 328. *See* Ruling on Motion to Suppress, App.24a.

JURISDICTION

The judgment of the Second Circuit was entered on August 21, 2018. The petition for rehearing was denied on October 10, 2018. Mr. Zodhiates' Renewed Application for Recall and Stay of the Mandate filed in this Court was denied on January 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

The Stored Communications Act, 18 U.S.C. § 2703 (a)-(d) is set forth in the appendix at App.89a.

STATEMENT

Following a jury trial in the Western District of New York, Petitioner was convicted of conspiracy to obstruct parental rights in violation of 18 U.S.C. § 371 and international parental kidnapping in violation of 18 U.S.C. § 1204 and § 2. *See* Amended Judgment at App.17a. Petitioner was sentenced to a total of three years' incarceration to be followed by one year of supervised release, on both counts.

Philip Zodhiates was convicted of conspiring with Lisa Miller and others to remove her daughter, Isabella Miller-Jenkins, from the United States, and to retain Isabella outside the United States "with intent to

obstruct the lawful exercise of parental rights," and of aiding and abetting the removal of Isabella Miller-Jenkins "with intent to obstruct the lawful exercise of parental rights" of Ms. Miller's former partner Janet Jenkins.

In 2009, Ms. Miller and Ms. Jenkins were battling for custody over Isabella, who was born to Ms. Miller while the couple was in a Vermont civil union. At Petitioner's trial, the government introduced evidence that Lisa Miller left the United States early in the morning on September 22, 2009. On that same day, there were a series of phone calls between a phone associated with Mr. Zodhiates and phones associated with Liberty Counsel, which represented Ms. Miller in the Virginia litigation. The government introduced CSLI that indicated that on September 20 and 21, 2009, two cellular phones associated with Philip Zodhiates were in close proximity to a cellular phone associated with Lisa Miller. The government also introduced evidence: that Lisa Miller's cellular phone stopped making calls on September 21; that, based on CSLI, the two cellular phones associated with Mr. Zodhiates traveled from Virginia to Buffalo, New York on September 21, 2009; and that Lisa Miller left the United States with her daughter Isabella Miller by crossing the Rainbow Bridge into Canada early in the morning on September 22, 2009. Finally, the government introduced CSLI evidence that the two cellular phones associated with Mr. Zodhiates returned from Buffalo, New York to Virginia on September 22, 2009. In all, the government relied on 28 months of CSLI which had been obtained by the government through a grand jury subpoena issued by a prosecutor, not by a neutral magistrate or judge based on probable cause.

Before trial, Petitioner moved to suppress the CSLI that the government obtained through grand jury subpoena. The district court denied his motion relying on *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979).

Petitioner appealed his conviction to the Second Circuit Court of Appeals, which, despite this Court's intervening decision in *Carpenter v. United States*, 138 S.Ct. 2206 (2018) issued on June 22, 2018, affirmed his conviction on August 21, 2018, and subsequently denied his motion for rehearing on October 10, 2018.

REASONS FOR GRANTING THE PETITION

In *Zodhiates*, the Second Circuit held that the Government's warrantless acquisition of Mr. Zodhiates' CSLI was indeed a search which enjoys the protection of the Fourth Amendment, but it avoided application of this Court's ruling in *Carpenter*, by erroneously applying the good faith exception to sanction admission of the fruits of the search. By doing so, the Second Circuit violated not only the holding of *Carpenter*, but also this Court's decisions in *Davis v. United States*, 564 U.S. 229 (2011), and *Illinois v. Krull*, 480 U.S. 340 (1987).

The good faith exception to the warrant requirement does not apply where the Government misconstrued its authority under 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"). The good faith exception also does not apply where the Government failed to 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). That standard is especially heightened where the law enforcement officer responsible for the unconstitutional seizure is a career prosecutor.

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 had not acted 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 "binding appellate precedent[s]" authorizing warrantless government access to CSLI, when those cases had no connection to seizure of an individual's detailed personal location privacy information. The relevant precedent when the seizure occurred was *United States v. Knotts*, 460 U.S. 276 (1983), as enhanced by *United States v. Jones*, 565 U.S. 400 (2012). Moreover, 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. 138 S.Ct. at 2216-17. Lastly, when the Second Circuit failed to consider existing appellate precedent from its sister circuits, the court incorrectly applied its own expansive and near unlimited definition of "binding appellate precedent."

Review of the Second Circuit's decision would give this Court an opportunity to correct the Second Circuit's erroneous definition of "binding appellate

precedent" meeting the pressing need for this Court to settle the issue among the circuit courts of appeal to prevent warrantless acquisition of CSLI determined to be protected by this Court.

I. THE SECOND CIRCUIT ERRED WHEN IT APPLIED THE GOOD FAITH EXCEPTION IN *ZODHIATES*, IN DIRECT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT IN *CARPENTER*, *DAVIS* AND *KRULL*.

A. The Government Did Not Rely on the Stored Communications Act When It Obtained Mr. Zodhiates' CSLI; Therefore the Good Faith Exception Cannot Apply.

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 circumvented review by a neutral magistrate in obtaining 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.

In violation of the SCA, 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). Additionally, the grand jury subpoena 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 sought only what was authorized 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, Appendix at App.94a, 99a. (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 acts 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. Zod-

hiates' CSLI was sought by a career federal prosecutor who carefully and deliberately drafted a subpoena that exceeded 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 be constrained in application 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* permit 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. There was no binding appellate precedent which authorized deliberate avoidance of a statute.

B. The Second Circuit Relied on Incorrect Appellate Precedent in Applying the Good Faith Exception.

In *Carpenter*, with respect to CSLI, 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 <u>two lines of</u>

> cases, both of which inform our understanding of the privacy interests at stake.

Carpenter, 138 S.Ct. at 2214-15 (emphasis added). 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 distinguished the technology involved in *Knotts* as only "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 284-85. The *Carpenter* Court noted that the *Knotts* Court had 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.

The second line of cases involved the third-party doctrine, which 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 data 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. As this Court explained in *Carpenter*:

> 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*, or any binding rule below establishing a good faith exception for CSLI, the Second Circuit relied on those cases when it ruled the good faith exception allowed Government lawyers to seize and use CSLI in a prosecution based 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 to CSLI based on the third-party doctrine

and instead should have relied on the 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 to CSLI. The CSLI involved in *Zodhiates* is easily distinguishable from, and significantly more egregious than, the beeper involved in *Knotts*. Even prior to *Carpenter*, no prosecutor could reasonably or in good faith rely on the *Knotts* case to seize 28 months of Mr. Zodhiates' physical location and movements without a warrant.

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 also 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.

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*, in which the court discussed that "binding precedent," in the context of statutory interpretation, refers to precedent "of this Circuit and the Supreme Court." *Aguiar*, 737 F.3d at 261. As it applied to "binding appellate precedent," however, the *Aguiar* court itself looked beyond just the Second Circuit and the Supreme Court. *Aguiar*, 737 F.3d at 262 ("Our conclusion that the officers here relied in good faith on *Knotts* in placing the GPS device on Aguiar's vehicle is reinforced by the fact that several sister circuits reached similar conclusions.").

In spite of its holding in *Aguiar*, the Second Circuit failed to look to its sister circuits when it examined the existing "binding appellate precedent" with respect to the use of CSLI in *Zodhiates*.

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 supporting the application of the good faith exception using 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 Second Circuit considered the precedent of its sister circuits—as it did in *Aguiar*—the Second Circuit 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. *See Aguiar*, 737 F.3d at 262. Because there was no specific precedent, let alone a consensus among the circuits, authorizing 28 months of 24-hour "dragnet" surveillance of a person's physical location and movements without a warrant, the Government did not act in objectively reasonable reliance on appellate precedent. Instead, it acted on objectively unreasonable reliance on an absence of appellate precedent.

---

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

C. The Government's Reliance on *Smith* and *Miller* Was Not Objectively Reasonable, Especially Where the Government Actor Was a Career Prosecutor.

Moreover, because of the factual dissimilarities of *Zodhiates*, on the one hand, and *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 [fell] 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 in a particular case, the Second Circuit should have gone farther and examined the culpability of the law enforcement officers. As the Third Circuit stated

> *Davis* did not begin, nor end, with binding appellate precedent. Rather, binding appellate precedent informed—and ultimately 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 by a career prosecutor 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 requiring this Court's review.

In *Carpenter*, this Court 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. at 2217 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, in a pre-*Carpenter* world, 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.

II. THIS COURT SHOULD SETTLE THE QUESTION OF WHAT CONSTITUTES "BINDING APPELLATE PRECEDENT".

As discussed, *supra* at I.B., the Second Circuit failed to apply consistently its own definition, as established in *Aguiar*, of "binding appellate precedent."

Rather than look to its sister circuits as it did in *Aguiar*, the Second Circuit ignored precedent both within the Second Circuit, as well as in other circuits, that indicate a warrant would be required before obtaining an individual's CSLI.

The issue is far from settled. The Third Circuit looked to other circuits in its analysis of "binding appellate precedent" for purposes of application of the good faith exception. *See Katzin*, 769 F.3d at 180-81 ("Thus, at the time the agents acted, in addition to the 'beeper' authority of *Knotts* and *Karo*, three circuit courts expressly approved their use of a GPS or GPS-like device, and the lone dissenting voice involved surveillance of a far longer duration."). In contrast, the First Circuit continues to grapple with "what universe of cases" law enforcement can rely on in the "reasonable-reliance-on-precedent-test" and whether the holding in *Davis* can be extended to include non-binding precedent. *United States v. Sparks*, 711 F.3d 58, 63 (1st Cir. 2013); *see also United States v. Bain*, 874 F.3d 1, 20 n.11 (1st Cir. 2017). The Fourth Circuit has similarly not yet reached the question of whether an officer can rely in good faith on non-binding precedent. *United States v. Stephens*, 764 F.3d 327, 336-37 (4th Cir. 2014). Such a split in the Circuits on the appropriate extension of *Davis* can only be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT B. HEMLEY, ESQ.
COUNSEL FOR PETITIONER
GRAVEL & SHEA PC
76 ST. PAUL STREET, 7TH FLOOR
P.O. BOX 369
BURLINGTON, VT 05402-0369
(802) 658-0220
RHEMLEY@GRAVELSHEA.COM

JANUARY 8, 2019