No. 18-900

IN THE

Supreme Court of the United States

PHILIP ZODHIATES, *Petitioner*,

v.

UNITED STATES, *Respondent*.

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

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Inc. Policy Analysis Center, Fitzgerald Griffin Foundation, and Restoring Liberty Action Committee in Support of Petitioner

JAMES N. CLYMER
CLYMER BODENE, P.C.
Lancaster, PA 17603

J. MARK BREWER
BREWER & PRITCHARD
Houston, TX 77057

JOSEPH W. MILLER
LAW OFFICES OF JOSEPH MILLER, LLC
Fairbanks, AK 99708

HERBERT W. TITUS*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
**Counsel of Record*

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INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, Free Speech Defense and Education Fund, Gun Owners Foundation, Policy Analysis Center, and Fitzgerald Griffin Foundation are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). DownsizeDC.org, Free Speech Coalition, and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs in this case in the Second Circuit:

- United States v. Zodhiates, Brief *Amicus Curiae* of Downsize DC Foundation, *et al.* (July 5, 2017), and

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- United States v. Zodhiates, Brief *Amicus Curiae* of Downsize DC Foundation, *et al.* in Support of Petition for Rehearing *En Banc* (September 6, 2018).

SUMMARY OF ARGUMENT

Applying the third party doctrine as the "objectively reasonable ... appellate precedent[s]" upon which a federal prosecutor may rely to obtain a grand jury subpoena authorizing a warrantless search without probable cause, the Second Circuit decided that the extensive physical location and movement information seized was not subject to the exclusionary rule under this Court's "good-faith" exception established in Davis v. United States.

But, as Chief Justice Roberts established in Carpenter v. United States, there is a "world of difference between the limited types of personal information" permitted to be seized under the third-party doctrine and "the exhaustive chronicle of location information casually collected by wireless carriers today." Thus, Carpenter established two distinct lines of Fourth Amendment precedents, one of which prohibits warrantless involuntary surveillance searches for a person's physical location and movements, and the other of which permits voluntary third-party disclosures of specified information. The upshot of these two distinct categories is that those cases that fit within the third-party doctrine permitting a warrantless search cannot be read to support a warrantless involuntary surveillance search,

and therefore cannot support any claim to the good-faith exception to the exclusionary rule.

In an attempt to avoid this outcome here, the Second Circuit panel ruled that the division of the two lines of precedent did not emerge until this Court's 2012 opinion in United States v. Jones, one year after the prosecutor obtained the grand jury subpoena here, whereas the third-party doctrine has been in full bloom since 1976. Overlooked by the panel, but not by this Court, Carpenter traced the surveillance line back to United States v. Knotts, decided in 1983. Additionally overlooked by the panel, on August 6, 2010, the Jones GPS warrantless surveillance operation had already been found wanting by the D.C. Court of Appeals, decided one year before the prosecutor obtained the grand jury subpoena here.

The Second Circuit's description of the facts of the case never bothered to mention that the seizure of 28 months of Zodhiates' confidential personal location information was effected not by the police in an enforcement role, but by a prosecutor acting in an investigatory capacity. Although that prosecutor certainly could have sought the records by a subpoena issued by a court, he made a deliberate and tactical choice to issue it himself, acting on behalf of a grand jury. There was no police or prosecutorial exigency involved. There was no search incident to police arrest.

The court below referred to the seizure as having been made by the Government. But that description obscures one of the important issues in this case. In

Davis v. United States, this Court discussed the "good-faith" exception as having application to improper searches by police, not prosecutors. Indeed, the Court in Davis relied so clearly on the fact that the search had been conducted by the police, it easily can be read to apply only to police, which would render it wholly inapplicable here.

As Chief Justice Roberts pointed out in Carpenter, the information collected by cell phone service providers such as Sprint, AT&T, Verizon, and in this case nTelos, creates a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years." Carpenter v. United States, 138 S.Ct. 2206, 2220 (2018).[2] As the Chief Justice wrote earlier: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." Riley v. California, 134 S.Ct. 2473, 2494-95 (2014) (citation omitted).

If this Court allows prosecutors to take advantage of the atextual "good-faith" exception to the Fourth Amendment, how much more frequently will

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[2] *See, e.g.,* A. Crocker and J. Lynch, "Victory! Supreme Court Says Fourth Amendment Applies to Cell Phone Tracking," Electronic Frontier Foundation (June 22, 2018). https://www.eff.org/deeplinks/2018/06/victory-supreme-court-says-fourth-amendment-applies-cell-phone-tracking.

Americans be subjected to police seizures of such information, followed by arguments by prosecutors that it should be admitted into evidence at trial? The question presented in this Petition is truly a matter of great import that should be decided by this Court.

ARGUMENT

I. IN DISREGARD OF CARPENTER V. UNITED STATES, THE COURT BELOW MISTAKENLY RELIED ON UNITED STATES V. MILLER AND SMITH V. MARYLAND TO JUSTIFY ITS DECISION THAT THE EXCLUSIONARY RULE DID NOT APPLY TO THE UNLAWFUL, WARRANTLESS SEARCH FOR PETITIONER'S CELL SITE LOCATION INFORMATION.

The Petition for Certiorari asserts that "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 warrentless government access to [Cell Site Location Information], when those cases had no connection to seizure of an individual's detailed personal location privacy information." Petitioner continued to explain that the relevant line of this Court's authority was to be found elsewhere. Petition for Certiorari (Pet. Cert.) at 5. Petitioner is exactly correct.

Indeed, without so much as a smidgeon of a discussion, the Second Circuit panel assumed that qualified as "objectively reasonable ... appellate

precedent[s]" upon which the prosecutor could have relied to justify a warrantless search for Petitioner's CSLI, entitling him to invoke the good-faith exception to the exclusionary rule. United States v. Zodhiates, 901 F.3d 137, 143 (2d Cir. 2018). According to Carpenter v. United States, 138 S.Ct. 2206 (2018), however, the prosecutor's involuntary and unlimited surveillance of Petitioner's "physical location and movements" was, for Fourth Amendment purposes, *toto caelo* different from the government search in Miller and Smith which was for a limited amount of information "'voluntarily turn[ed] over to third parties.'" Carpenter at 2215-16. This is not splitting hairs. Indeed, as Chief Justice Roberts put it in Carpenter:

> There is a **world of difference** between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straight forward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information. [*Id.* at 2219 (emphasis added).]

Thus, the Carpenter Court divided involuntary surveillance and voluntary third-party searches into two "set[s] of cases." The first set "addresses a person's expectation of privacy in his physical location and movements." Carpenter at 2215. "In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with

others." *Id.* at 2216. As for the latter set, popularly known as the "third-party" doctrine, the Carpenter Court "trace[d] its roots to Miller," decided in 1976. *Id.* As for the former set, the Carpenter Court identified it as having been first recognized, albeit in nascent form, in United States v. Knotts, 460 U.S. 276, decided in 1983. *See* Carpenter at 2215.

Despite this clear demarcation between (i) involuntary surveillance and (ii) voluntary disclosure cases, the Second Circuit panel apparently persists in its belief that the Smith and Miller third-party doctrine continues to operate as the relevant appellate precedent governing the application of the good-faith exception to the operation of the exclusionary rule in both sets of cases. *See* Zodhiates at 144 n.5. That is not true under the principles discussed in Knotts, and the Carpenter Court left the distinction unchanged, as it expressly "decline[d] to extend Smith and Miller to the collection of CSLI" (*id.* at 2220):

> [T]his case is not about "using a phone" or a person's movement at a particular time, it is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in Smith and Miller. [Carpenter at 2220.]

In a last-ditch effort to deny to Petitioner the benefit of the surveillance line of precedents, the Second Circuit panel ruled that the line did not emerge

until this Court's decision in United States v. Jones, 565 U.S. 400 (2012) — which was decided one year "after the Government's 2011 subpoena and consequently is not relevant to our good faith analysis." Zodhiates at 144. This ruling is wrong for three reasons. First, according to this Court in Carpenter, the Knotts decision "addresse[d] a person's expectation of privacy in his physical location and movements," marking that case as the beginning of the first set of "surveillance" cases. Carpenter at 2215. Second, as Carpenter noted, Knotts (which addressed only rudimentary location technology) anticipated and forewarned of the threat of "more sweeping modes of surveillance." And third, before the search in Zodhiates on August 6, 2010, the United States Court of Appeals for the District of Columbia Circuit ruled in favor of Jones' contention that an extended GPS monitor violated his Fourth Amendment protected privacy. *See* United States v. Maynard, 615 F.3d 544, 556-67 (D.C. Cir. 2010), aff'd *sub nom*. United States v. Jones.

Although it is true that this Court's 2012 ruling in favor of Mr. Jones in this Court came after the subpoena had been issued in this case in 2011, the D.C. Circuit's 2010 ruling came on time. There is simply no excuse for the Second Circuit to have wholly ignored this earlier date. It is simply not objectively reasonable for the prosecutor in this case to have believed that the third-party appellate precedents supported his decision to conduct a warrantless search for Petitioner's CSLI.

II. DISREGARDING THIS COURT'S DECISION IN DAVIS V. UNITED STATES, THE COURT BELOW MISSTATED AND ERRONEOUSLY APPLIED THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

A. The Court Below Misstated the Good-Faith Exception.

Setting the factual background undergirding its resolution of the Fourth Amendment issue in this case, the Second Circuit panel assiduously omitted the fact that the search and seizure in this case came by way of a Grand Jury subpoena. Instead, the panel sanitized the record, carefully choosing a generic reference to describe the actions of a career federal prosecutor at key points, beginning with the fact that "the **Government's** investigation" into the Petitioner's activities "commenced in 2010...." Zodhiates at 141 (emphasis added). Then, the panel added that at some point "[d]uring the course of the investigation, the **Government** issued subpoenas ... to nTelos Wireless [seeking] billing records spanning 28 months and other information pertaining to two cell phones ... listed in the customer name [of] a ... company owned by Zodhiates." *Id.* at 141 (emphasis added). And in its summary of the pretrial phase of this proceeding, the panel recalled that the District Court denied Petitioner's motion to suppress the cell phone evidence on the ground that "the **Government** violated the Fourth Amendment." *Id.* (emphasis added).

Typically, such obscuring of the actions of a "career prosecutor" would pass without notice, but not here.

As Petitioner has contended in section I.C. of his certiorari petition: "The Government's Reliance on *Smith* and *Miller* Was Not Objectively Reasonable, Especially Where the Government Actor Was a Career Prosecutor." *See* Petition for a Writ of Certiorari ("Pet.") at 16-17. Instead of addressing the issue of the specific government act of seizing the records, the Second Circuit panel buried the issue, ruling that Petitioner Zodhiates was "not entitled to have the records suppressed because":

> under the "good faith" exception, when **the Government** "act[s] with an objectively reasonable good-faith belief that their conduct is lawful," the exclusionary rule does not apply. Davis v. United States, 564 U.S. 229, 238 (2011). [Zodhiates at 143 (emphasis added).]

This statement is, first of all, a misleading misquotation of Davis, extending the "good-faith" exception as if the rule applied to **all** government actors. In pertinent part, however, the actual passage reads: "But when **the police act** with an objectively 'reasonable good-faith belief' that their conduct is lawful...." Davis v. United States, 564 U.S. 229, 238 (emphasis added).

This is not the first time that the Second Circuit has overstated this Court's "good-faith" exception as established in Davis. In United States v. Aguiar, 737 F.3d 251 (2d Cir. 2013), the court below upheld "**searches** conducted in objectively reasonable reliance on appellate precedent existing at the time of the

search" (Zodhiates at 143 (emphasis added)), as if Davis had adopted a monolithic rule excepting **all** searches, regardless of the nature and circumstances of the search, and no matter the identity of the government agent conducting the search. But that generic reading of both the nature of the search and the identity of the searcher disregards the fact-sensitive question posed to the Davis Court — whether "suppression [of the evidence] would do nothing to deter **police** misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety." Davis at 232 (emphasis added).

It is even more important to remember that the exclusionary rule originated with this Court so that "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." Weeks v. United States, 232 U.S. 383, 393 (1914).

B. The "Good-Faith" Exception Applies to Police Enforcement Conduct, Not to Prosecutorial Investigative Conduct.

As the Second Circuit recognized in Aguiar, "Davis involved officers who conducted a search of an automobile contemporaneously with an arrest." Aguiar at 259. Indeed, the entire opinion in Davis was devoted to ascertaining how best to "'compel respect for the constitutional guaranty'" of the Fourth Amendment by means of the exclusionary rule — the

"sole purpose [of which] is to deter future Fourth Amendment violations" — without "exact[ing] a heavy toll on both the judicial system and society at large." Davis at 236-37. To that end, the Davis Court "recalibrated [its] cost-benefit analysis in exclusion cases to focus the inquiry on the 'flagrancy of the **police** misconduct' at issue," arriving at a set of rules that "'var[y] with the culpability of the law enforcement conduct' at issue.'" *Id.* at 238 (emphasis added). As a result, the Davis Court came up with a set of police-specific rules, which it summarized, as follows:

> When the **police** exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the **police** act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force'" and exclusion cannot "pay its way." [*Id.* at 238 (emphasis added) (citations omitted).]

Unmistakably, this rule was "calibrated" by the Court to govern the application of the exclusionary rule and its exceptions to the "cop on the beat." From beginning to end, the Davis opinion is replete with references to ordinary police activity. The case itself addresses and resolves a Fourth Amendment challenge to a search of an automobile that was incident to an arrest. And the Court concludes its opinion as

establishing a definitive foundation for promoting "conscientious police work." *See* Davis at 240-41.

C. The Question Whether Prosecutorial Conduct Should Be Measured by the Good-Faith Exception Is of Great Import.

Searches in the field by police are not the same as searches conducted by professional federal prosecutors. This is a matter of great judicial import. Prosecutors are expected to know all the Fourth Amendment rules, and their applicability, not just have an "objectively good-faith belief" that their investigative strategy appears to be reasonable to them. Also, prosecutors have control over their enforcement environment, whereas the police often find themselves in a volatile, life- threatening environment, requiring split-second decisions, arguably justifying a lower standard of behavior.

Federal prosecutors have access to a large body of information and data from which they can learn about nearly every aspect of federal law. The Justice Manual,[3] formerly known as the U.S. Attorneys' Manual, provides significant guidance and answers to many questions that a prosecutor might have, or at least points the prosecutor in the direction to find applicable case law on a topic. Prosecutors also have access to subject matter experts at Main Justice, and can attend courses on an array of topics at the Department of Justice's National Advocacy Center.

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[3] https://www.justice.gov/jm/justice-manual.

They also have law degrees. Thus, prosecutors should be presumed to be aware of the state of settled law, as well as areas of law that are not settled. By contrast, "[p]olicemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting).

Furthermore, the environment in which prosecutors work could not be more different from that in which police officers must execute their duties. Prosecutors work in offices, usually relatively secure environments. They are expected to deliberate before they make decisions. The good-faith exception was not developed for such an environment.

Thus, unlike police law enforcement conduct, prosecutor investigative actions should be evaluated by an uncompromised institutional standard subject to a higher standard.[4] In short, prosecutors could be held

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[4] Petitioner is not the first to contend "that in applying the good faith doctrine United States Attorneys should be held to a higher standard than police officers." *See* United States v. Alvarez, 2016 U.S. Dist. LEXIS 72803 at *21 (N. Cal. 2016). Also in United States v. Pembrook, 119 F. Supp. 3d 577 (E.D. Mich. 2015), the district court noted that the defendant had argued that "suppression ... will result in significant deterrence [because], as opposed to cases where police perform a search in haste, this case involved a deliberate decision by a United States Attorney, someone with a deeper understanding of Fourth Amendment jurisprudence." Pembrook, at 595. Although the district judge there acknowledged that the argument had been made, she

to "strict compliance with binding precedent." *See* Davis at 240. Indeed, a case could be made that Davis decided this issue already, and the good-faith exception to the exclusionary rule is "police-conduct specific" to the exclusion of prosecutors and other government actors. After all, the Davis opinion is full of both descriptive and prescriptive references to "police conduct," indicating that the exclusionary rule applies only to such conduct. If so, then the court below clearly misapplied Davis to this case.

Even if Davis were read to leave the issue of prosecutorial behavior unresolved, this Court should grant this petition to allow Petitioner to present his case that the Davis good-faith doctrine for police does not apply to prosecutors. After all, as the Davis Court acknowledged, the "exclusionary rule — is a 'prudential' doctrine ... created by this Court to 'compel respect for the constitutional guaranty.'" *Id.* at 236 (citations omitted). Thus, the "rule's sole purpose ... is to deter future Fourth Amendment violations." Davis. at 236-37. To that end, this Court's "cases have thus limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" *Id.* at 237.

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reserved judgment, having concluded that it would not have affected the outcome.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES N. CLYMER
CLYMER BODENE, P.C.
408 West Chestnut St.
Lancaster, PA 17603

J. MARK BREWER
BREWER & PRITCHARD, P.C.
800 Bering Dr., Ste. 201
Houston, TX 77057

JOSEPH W. MILLER
LAW OFFICES OF JOSEPH
Miller, LLC
P.O. Box 83440
Fairbanks, AK 99708

HERBERT W. TITUS*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amicus Curiae*

*Counsel of Record
February 7, 2019