# In the Supreme Court of the United States



MARK A. WITASCHEK,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

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

#### PETITION FOR A WRIT OF CERTIORARI

BRUCE FEIN, ESQ.

COUNSEL OF RECORD

BRUCE FEIN LAW

300 NEW JERSEY AVENUE, N.W.
SUITE 900

WASHINGTON, DC 20001
(202) 465-8728

BRUCE@FEINPOINTS.COM

#### **QUESTIONS PRESENTED**

Petitioner Mark Witaschek was convicted in the District of Columbia courts of two counts of income tax evasion. The incriminating evidence consisted primarily of materials gathered by the D.C. Office of Tax and Revenue pursuant to twenty-six administrative summonses issued to third parties. Mr. Witaschek moved to suppress that evidence as violative of the Fourth Amendment. Relying on the third-party doctrine as declared in *Miller v. United States*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), the D.C. Superior Court denied the motion to suppress, and the Court of Appeals affirmed.

#### THE QUESTIONS PRESENTED ARE:

- 1. Whether the Fourth Amendment's third-party doctrine should be overruled, limited, or held inapplicable when the government collects massive digitally recorded data revealing a detailed mosaic of an individual's private life without satisfying any threshold of suspicion or vetting by a neutral magistrate consistent with *Carpenter v. United States*, 138 S.Ct. 2206 (2018).
- 2. Whether the District of Columbia Court of Appeals erred in upholding the denial of Petitioner's motion to suppress by concluding that criminal investigators of the Office of Tax and Revenue held an objectively reasonable, good faith belief in the constitutionality of twenty-six (26) suspicionless administrative summonses used to gather 4,000 predominantly irrelevant documents providing a detailed mosaic of Petitioner's personal life over a period of seven years.

#### PARTIES TO THE PROCEEDINGS

#### Petitioner

• Petitioner is Mark A. Witaschek, who was the defendant in the District of Columbia Superior Court and the appellant in the District of Columbia Court of Appeals.

## Respondent

• Respondent is the District of Columbia, which brought a criminal action in Superior Court against Mr. Witaschek and was the appellee in the Court of Appeals.

### LIST OF PROCEEDINGS

Court of Appeals for the District of Columbia No. 19-CT-165

Mark A. Witaschek, *Appellant*, v. District of Columbia, *Appellee* 

Date of Final Opinion: July 22, 2021

Superior Court of the District of Columbia No. 2018 CRT 004321

United States of America v. Mark Witaschek Date of Final Judgment: February 22, 2019

# TABLE OF CONTENTS

Page
QUESTIONS PRESENTEDi
PARTIES TO THE PROCEEDINGSii
LIST OF PROCEEDINGSiii
TABLE OF AUTHORITIES vii
OPINIONS BELOW1
JURISDICTION1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE
REASONS FOR GRANTING THE PETITION 5
I. This Court Should Repudiate the Fourth Amendment's Obsolete Third-Party Doctrine Under the Fourth Amendment in the Digital Age as Foreshadowed in United States v. Jones, 565 U.S. 400 (2012) and Carpenter v. United States, 138 S.Ct. 2206 (2018) in Favor of a Reasonableness Test in the Totality of Circumstances, Including Whether the Seized or Searched Communications or Information Had Been Shared With
THIRD PARTIES 5

TABLE OF CONTENTS - Continued
Page
II. THE DISTRICT OF COLUMBIA COURT OF
APPEALS WRONGLY EXTENDED THE
OBJECTIVE, GOOD FAITH EXCEPTION TO THE
EXCLUSIONARY RULE IN A WAY THAT
CONFLICTS WITH THIS COURT'S DECISIONS
IN DAVIS V. UNITED STATES, 564 U.S. 229
(2011) AND UNITED STATES V. LEON, 468
U.S. 897 (1984)
CONCLUSION23

# TABLE OF CONTENTS - Continued Page APPENDIX TABLE OF CONTENTS OPINIONS AND ORDERS Opinion of the Court of Appeals for the District of Columbia (July 22, 2021) ...... 1a Judgment and Sentence of the Superior Court of the District of Columbia (February 22, 2019)...... 15a Transcript of Sentencing Verdict Delivered by Judge Soltys Following Order of the Superior Court of the District of Columbia Denying Motion to Suppress Order Denying Motion to Reconsider Order Denying Motion to Suppress OTHER DOCUMENTS Affidavit of Mark A. Witaschek

# TABLE OF AUTHORITIES

	Page
CASES	
Agostini v. Felton, 521 U.S. 203 (1997)	13
Almeida–Sanchez v. United States, 413 U.S. 266 (1973)	21
Berger v. New York, 388 U.S. 41 (1967)	21
Burnet v. Coronado Oil & Gas, 285 U.S. 393 (1932)	12
Carpenter v. United States, 138 S.Ct. 2206 (2018)	passim
Davis v. United States, 564 U.S. 229 (2011)	5, 17, 22
In re Winship, 397 U.S. 358 (1970)	15
Katz v. United States, 389 U.S. 347 (1967)	6, 7, 11
Klayman v. Obama, 957 F.Supp.2d 1 (D.D.C. 2013)	18
Lane v. Wilson, 307 U.S. 268 (1939)	21
Mapp v. Ohio, 367 U.S. 643 (1961)	5, 14, 15
McNabb v. United States, 318 U.S. 332 (1943)	14
Michigan v. DeFillippo, 443 U.S. 31 (1979)	21

# TABLE OF AUTHORITIES - Continued Page Miller v. United States. 425 U.S. 435 (1976) ...... passim Mitchell v. Forsyth, New Jersey v. TLO. Olmstead v. United States. 277 U.S. 438 (1928) ...... passim Pierson v. Ray, Screws v. United States. Sibron v. New York, Smith v. Maryland, 442 U.S. 735 (1979) ...... passim Torres v. Puerto Rico, United States v. Jones. 565 U.S. 400 (2012) ...... passim United States v. Leon, United States v. Phibbs.

Veronica Sch. Dis. v. Acton.

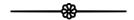
Weeks v. United States,

TABLE OF AUTHORITIES - Continued
Page
Ybarra v. Illinois,
444 U.S. 85 (1979)
Ziglar v. Abbasi,
137 S. Ct. 1843 (2017)
CONSTITUTIONAL PROVISIONS
U.S. Const. amend. IV passim
OTT A THE LITTLE C
STATUTES
28 U.S.C. § 12571
28 U.S.C. § 1291
D.C. Code § 47-4310
JUDICIAL RULES
Sup. Ct. R. 21
OTHER AUTHORITIES
Founders Online,
From John Adams to William Tudor, Sr.,
29 March 1817, NATIONAL ARCHIVES,
https://founders.archives.gov/documents/
Adams/99-02-02-6735
H.L. Mencken,
Prejudices, Second Series (1920)



#### OPINIONS BELOW

Petitioner was tried and convicted of two counts of evading District of Columbia income taxes for 2011 and 2012 in the Superior Court of the District of Columbia. District of Columbia v. Witaschek, No. 2018-CRT-4321 (judgment of conviction entered Feb. 22, 2019). App. 15a-17a.Petitioner's motion to suppress based on the Fourth Amendment was denied on October 25, 2018. App. 49a. Petitioner's motion for reconsideration of the motion to suppress was denied December 21, 2018. App. 73a. Petitioner's conviction was affirmed by the Court of Appeals for the District of Columbia, including affirmation of the Superior Court's denial of Petitioner's motion to suppress. Witaschek v. District of Columbia, No. 19-CT-165 (July 22, 2021), 254 A.3d 1151 (D.C. 2021). App.1a.



#### JURISDICTION

This Court possesses jurisdiction over this petition for certiorari pursuant to 28 U.S.C. § 1257. The judgment sought to be reviewed was entered on July 22, 2021. On October 1, 2021, Chief Justice Roberts granted Petitioner's Application for an Extension of Time to file the petition to December 7, 2021. Sup. Ct. No. 21A52.

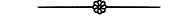
# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

#### U.S. Const., amend. IV

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.

# D.C. Code § 47-4310(a)(1)

For the purpose of ascertaining the correctness of a return . . . the Mayor may: (1) Summon any person to appear and produce all books, records, or other data which may be relevant or material to the inquiry . . .



#### STATEMENT OF THE CASE

Petitioner Mark Witaschek was convicted of unlawful possession of ammunition in violation of the D.C. Code on March 27, 2014, in the District of Columbia Superior Court. The items possessed were inert lead projectiles (without gunpowder, brass cases, or primers) designed for antique or replica muzzle-loading rifles, not functional cartridges that can be fired in modern firearms. Petitioner's motion for a new trial was granted, which caused Respondent to dismiss the charges.

Contemporaneously with that dismissal, the District of Columbia's Office of Tax and Revenue (OTR) opened a criminal investigation of Petitioner over \$57,000 of alleged unpaid District of Columbia income taxes for 2011 and 2012. No civil resolution of this modest tax dispute was sought.

OTR's Special Agent James Hessler invoked D.C. Code § 47-4310 to issue twenty-six (26) suspicionless administrative summonses to an extraordinarily broad universe of recipients: four banks; two employers (one summoned twice); one investment company; two insurance companies (one summoned twice); four real estate agencies; three property owner/management companies; four children's schools; a hotel (summoned twice); and two service providers. App.51a-59a. Yielding more than 4,000 documents (of which only five percent or less were relevant to the tax evasion charges), the summonses unveiled a detailed mosaic of Petitioner's life: for example, the attendance records of Petitioner's children enrolled in private religious schools and support for churches and charities. The summonses collectively revealed every personal expense of Petitioner for nearly seven (7) years. App.77a.

D.C. Code § 47-4310(a) endows OTR criminal investigators, on their say-so alone without vetting by a neutral magistrate, to issue limitless summonses to obtain documents about a taxpayer in the speculative hope that something might turn up relevant to a tax investigation. Nothing is off limits to an OTR dragnet snooping into the lives of taxpayers-a working definition of a fishing expedition.

Petitioner's motion under the Fourth Amendment to suppress the information obtained from the OTR's twenty-six suspicionless administrative summonses was denied by the Superior Court, App.49a, as was Petitioner's motion for reconsideration. App.73a. Petitioner was convicted of evading approximately \$57,000 in District of Columbia income taxes for 2011 and 2012. App.15a.

A three-judge panel of the District of Columbia Court of Appeals affirmed, App.1a. The Court of Appeals declined to "definitely decide" the primary issue raised by Petitioner and briefed by the parties: whether the twenty-six suspicionless administrative summonses vielding 4.000 documents painting a detailed mosaic of Petitioner's personal life violated the Fourth Amendment. App.9a. Instead, it held that suppression was unwarranted because "OTR acted in objectively reasonable good-faith in reliance on then existing case law in issuing the summonses . . . . " App.12a. The Court reached that startling conclusion, among other things, by evaluating the privacy invasion occasioned by each discrete summons against Fourth Amendment precedents. App. 10a-12a. Instead, it should have evaluated the cumulative effect of the twentysix invasions to determine whether any previous judicial decision had come within shouting distance of approving such a comprehensive encroachment on the details of Petitioner's personal life.



I. THIS COURT SHOULD REPUDIATE THE FOURTH AMENDMENT'S OBSOLETE THIRD-PARTY DOCTRINE UNDER THE FOURTH AMENDMENT IN THE DIGITAL AGE AS FORESHADOWED IN UNITED STATES V. JONES, 565 U.S. 400 (2012) AND CARPENTER V. UNITED STATES, 138 S.CT. 2206 (2018) IN FAVOR OF A REASONABLENESS TEST IN THE TOTALITY OF CIRCUMSTANCES, INCLUDING WHETHER THE SEIZED OR SEARCHED COMMUNICATIONS OR INFORMATION HAD BEEN SHARED WITH THIRD PARTIES.

Almost a century ago in *Olmstead v. United States*, 277 U.S. 438 (1928), this Court excluded conversations seized by wiretapping from the ambit of Fourth Amendment protection notwithstanding the ubiquity of the telephone as a primary means of communication. Chief Justice William Howard Taft argued:

By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place.

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

*Id.* at 465.

Justice Louis D. Brandeis, in a dissenting opinion, presciently answered:

[A] principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

Id. at 473.

Some 39 years later, history vindicated Justice Brandeis in *Katz v. United States.* 389 U.S. 347 (1967). Writing for the Court, Justice Potter Stewart amplified:

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the

privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

Id. at 353.

In a concurring opinion, Justice John Harlan enunciated a reasonable expectation of privacy standard as superseding the trespass doctrine:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

*Id*. at 361.

Possibly to simplify complex reasonable expectation of privacy jurisprudence, the Court perhaps injudiciously volunteered that information shared with third parties forfeits Fourth Amendment protection. United States v. Miller, 425 U.S. 435 (1976). There, the Court denied Fourth Amendment protection to a handful of subpoenaed bank records from a period of less than four months, and amplified: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." [citations omitted]. Id. at 443.

That statement in *Miller* was unnecessary. The Court could have found the bank record seizures reasonable under the Fourth Amendment because of the minor and unalarming encroachment on the defendant's privacy.

The Court reiterated the third-party doctrine of *Miller* in *Smith v. Maryland*, 442 U.S. 735 (1979). There, the Court held that a customer lacks any Fourth Amendment protection in phone numbers dialed: "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." *Id.* at 744.

Again, as with *Miller*, the third-party thesis was unnecessary to the decision. The Court could have upheld revealing data from the company's pen register as reasonable in the totality of circumstances, because only a tiny fraction of the defendant's life was disclosed by the telephone numbers dialed, like a single finger of a complete body.

After *Smith* and *Miller* came the digital age featuring mobile phones, tablets, laptops, the internet, Zoom, surveillance drones, facial recognition, and other ubiquitous, automatic recording of digital information. Concealing private and intimate information or communications from third-party providers became a pipe dream except for hermits. Electronic footprints are now impossible to avoid in business and private affairs.

Justice Brandeis foresaw that revolutions in communications or information technologies would necessitate evolving applications of the Fourth Amendment to keep abreast of new social conditions in his far-seeing *Olmstead* dissent:

The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?

# 277 U.S. at 474 [footnotes omitted].

The third-party doctrine was severely rattled in a five-member concurrence written by Justice Sotomayor in *United States v. Jones, supra.* Among other things, Justice Sotomayor observed:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. [citations omitted] This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane

tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

Jones, 565 U.S. at 416.

The third-party doctrine was further undermined in *Carpenter v. United States*, *supra*, at 2216-2217. There, the Court held that cell-site location information (CSLI) was protected by the Fourth Amendment notwithstanding the sharing of the location information with the cell phone customer's service providers. Writing for the Court, Chief Justice Roberts elaborated:

[W]hile 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* [v. Maryland] 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.

#### Id. at 2216-17.

The Chief Justice further reasoned that the Fourth Amendment is implicated if a government search reveals a detailed mosaic of the target's life:

Although such records are generated for commercial purposes, that distinction does not

negate *Carpenter*'s anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data 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." [citing *Jones*, 565 U.S. at 415 (opinion of Sotomayor, J.)] These location records "hold for many Americans the 'privacies of life." [citations omitted].

#### Id. at 2217.

The essential principle of the *Carpenter* decision is that the government's seizure of CSLI revealed a detailed mosaic of the defendant's life. The decision did not turn on the instrument by which the pieces of the mosaic were obtained.

Since the *Carpenter* decision more than three years ago, digital technology and applications have advanced at warp speed. Life for most Americans is unthinkable without leaving digital footprints of their private or professional lives. Society is shocked or outraged when such information in the hands of internet service providers, search engines, or online companies is hacked or shared without customer consent with advertisers or others.

This Court should not be blind to what all the world knows. The third-party doctrine is divorced from the reasonable privacy expectations of ordinary citizens. The doctrine should be disowned like the trespass doctrine of *Olmstead* was in *Katz*. Exposing commu-

nications or information to third parties should be but one element in determining whether a search or seizure satisfies the ultimate Fourth Amendment test of reasonableness based on the totality of circumstances. *Veronica Sch. Dis. v. Acton*, 515 U.S. 646, 652 (1995); *New Jersey v. TLO*, 469 U.S. 325, 337 (1985).

The relative ease of application of the third-party doctrine is outweighed by its deficiency in protecting the heart of the Fourth Amendment. As H.L. Mencken quipped, "For every complex problem, there is a solution that is simple, neat, and wrong." H.L. Mencken, PREJUDICES, Second Series (1920).

This Court should follow the sage counsel of Justice Brandeis in *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406-408 (1932) (dissenting opinion) to re-evaluate the now obsolete reasoning of *Miller* and *Smith*:

But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. [footnotes omitted].

The confused state of the third-party doctrine caused the District of Columbia Court of Appeals in this case to bypass the serious Fourth Amendment issue raised by the OTR's twenty-six suspicionless administrative summonses disclosing a detailed mosaic of Petitioner's life. Instead, the Court retreated to

the objective, good faith exception to the exclusionary rule, discussed below.

The Court of Appeals was powerless to reject the third-party doctrine because only this Court possesses authority to overrule its precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

This Court should grant certiorari to decide whether the third-party doctrine, which features in countless cases, should be abandoned as the sole touchstone, and the reasoning of *Miller* and *Smith* be reduced to one factor of many in establishing whether a comprehensive, non-judicially vetted intrusion into a citizen's private life is reasonable.

II. THE DISTRICT OF COLUMBIA COURT OF APPEALS WRONGLY EXTENDED THE OBJECTIVE, GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *DAVIS V. UNITED STATES*, 564 U.S. 229 (2011) AND *UNITED STATES V. LEON*, 468 U.S. 897 (1984).

In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court ordained the exclusionary rule as a remedy for Fourth Amendment violations in criminal cases to deter police transgressions. The rule created an incentive for the police and the government generally to turn square corners to protect the cherished right to be let alone from unjustified government snooping. *Olmstead v. United States*, 277 U.S. at 478 (Brandeis J., dissenting).

It honored the bedrock principle that noble ends do not justify ignoble means. As Justice Felix Frankfurter observed in *McNabb v. United States*, 318 U.S. 332, 347 (1943): "The history of liberty has largely been a history of observance of procedural safeguards."

The multiple reasons advanced in *Mapp* for the exclusionary rule have been amply vindicated by reason and experience. The *Mapp* Court endorsed *Weeks v. United States*, 232 U.S. 383 (1914), which applied the exclusionary rule to the federal government. The *Weeks* Court provided the rationale:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The 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.

Id. at 293.

The constitutional predicate of *Weeks* as embraced in *Mapp* was that scrupulous government adherence to the Constitution was more important to the rule of law and justice than was convicting the guilty through unlawful means. That precept is no novelty. The due process requirement of proving guilt beyond a reason-

able doubt in criminal cases is similar. As Justice John Harlan explained in a concurring opinion in *In re Winship*, 397 U.S. 358, 372 (1970): "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

The *Mapp* Court noted that the FBI had not been handicapped in law enforcement because of *Weeks*. *Mapp*, 367 U.S. at 659-660. It added that the rule of law would be compromised without the exclusionary rule:

The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States [277 U.S. at 485]:

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. \*\*\* If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

*Id.* at 659.

The exclusionary rule was born of necessity to give the Fourth Amendment a heart and lungs. Criminal prosecution of police violators is rare both because of strict mens rea requirements, see e.g., Screws v. United States, 325 U.S. 91 (1945), and the dependency of prosecutors on the police to build their cases. Civil damages suits are problematic because of the good faith defense announced in *Pierson v. Ray*, 386 U.S. 547, 557 (1967); the availability of immediate appellate review under 28 U.S.C. § 1291 of rulings denying a good defense based on law, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); and the sharp limitations on implying private rights of action for constitutional torts, including Fourth Amendment violations, declared in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017). Internal discipline for Fourth Amendment infractions is uncommon because of the professional organizational instinct for protecting its own.

In *United States v. Leon*, 468 U.S. 897 (1984), nevertheless, the Court recognized an exception to the exclusionary rule for evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant. Speaking for the Court, Justice Byron White elaborated: "It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.* at 921.

In this case, in contrast to *Leon*, the twenty-six administrative summonses were issued by the OTR without any vetting by a neutral magistrate and without any threshold of suspicion or probable cause. The entire rationale for the good faith reliance exception under *Leon* was vitiated. A judge or magistrate determines probable cause for a search warrant, a determination upon which the police officer may reasonably rely. But in Mr. Witaschek's case, not only was there no neutral vetting of the summonses, there was no probable cause or reasonable suspicion threshold to forestall a fishing expedition.

In *Davis v. United States*, 564 U.S. 229, 239 (2011), the Court extended the exclusionary rule exception to cases "when the police conduct a search in objectively reasonable reliance on binding judicial precedent"-in that case, a "bright-line" rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest.

Davis, however, cannot validate the OTR's 4000-page fishing expedition involving twenty-six suspicionless summonses that revealed a detailed mosaic of Petitioner's life over nearly seven years. In Davis, the police relied on a "bright-line" Fourth Amendment rule governing vehicle searches incident to arrest not open to question. Here, in contrast, prevailing 2014 third-party doctrine precedents relied upon by the OTR and the Court of Appeals were anything but bright-line. App.9a-12a. In 2012, two years before the OTR summonses, five Supreme Court Justices voiced skepticism of the doctrine in Jones. And Carpenter was a foreseeable offspring of Jones in denying application of the third-party doctrine to CSLI and in confining Miller and Smith to their untroublesome facts.

In 2013, the United States District Court for the District of Columbia rejected application of *Smith* to validate the National Security Agency's dragnet search and seizure of telephony metadata initiated after 9/11:

The question before me is <u>not</u> the same question that the Supreme Court confronted in *Smith*. To say the least, "whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment," *id.* at 736, 99 S.Ct. 2577—under the circumstances addressed and

contemplated in that case—is a far cry from the issue in this case.

Indeed, the question in this case can more properly be styled as follows: When do present-day circumstances—the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies—become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like *Smith* simply does not apply? The answer, unfortunately for the Government, is now."

Klayman v. Obama, 957 F.Supp.2d 1, 31 (D.D.C. 2013), vacated and remanded on other grounds, Obama v. Klayman, 800 F.3d 559 (D.C. Cir. 2015).

In the instant case, the District of Columbia Court of Appeals errantly insisted that the twenty-six OTR summonses were issued in objectively reasonable reliance on binding third-party doctrine precedents. App.12a. But no prior third-party doctrine case came within shouting distance of sanctioning OTR's fishing expedition that yielded 4,000 predominantly irrelevant documents which together portrayed a detailed mosaic of Mr. Witaschek's life—the touchstone of a Fourth Amendment violation as voiced in Justice Sotomayor's five-justice concurrence in *Jones*.

The undisputed record established that the twentysix (26) summonses disclosed details of the following about Petitioner:

1. Divorce and child custody issues;

- 2. Child attendance at public and private schools;
- 3. Doctors and clinics utilized by Petitioner;
- 4. Petitioner's medications;
- 5. Petitioner's life insurance applications;
- 6. Petitioner's life insurance with attached medical and financial information;
- 7. Retirement benefits;
- 8. College savings and planning;
- 9. Children's college applications;
- 10. Attorneys paid and retained for various legal matters;
- 11. Expenses for clothing, food, entertainment, vacations, children's sports, and other activities;
- 12. Cars purchased and repaired;
- 13. Family members supported through gifts;
- 14. Birthday and holiday gifts;
- 15. Support for churches and charities and church memberships;
- 16. Health club memberships; and,
- 17. Utilities, including mobile and landline telephone, gas and electric, water, and sewer expenses.

The summonses yielded every personal expense Petitioner made over nearly seven years. App.77a, 79a.

The twenty-six (26) summonses also revealed information about Petitioner's political associations,

including party contributions, candidate support and political group memberships and donations. App. 79a. The summonses directed to employers, insurance companies, brokerage firms, real estate agencies, marketing companies, subcontractors who worked for Petitioner, banks, and more revealed Petitioner's professional affiliations. App. 79a. In giving notice to these firms that Petitioner was under criminal investigation, the summonses jeopardized these business relationships and placed Petitioner in a position of weakness in contract renegotiations. *Id.* The summonses further disclosed Petitioner's sexual associations through dating club memberships and locations where Petitioner entertained dating partners and more. *Id.* 

The Court of Appeals stumbled by examining each summons discretely to test for Fourth Amendment validation under the case law rather than appraising the invasion of Petitioner's privacy caused by the twenty-six summonses collectively. App.9a-12a. None of the cases cited by the Court of Appeals came close to the detailed disclosures of Mr. Witaschek's life spanning nearly seven years *See*, *e.g.*, *United States v. Phibbs*, 999 F. 2d 1053 (6th Cir. 1993) (credit card statements and telephone records). App.11a.

A wholesale invasion of privacy under the Fourth Amendment is not lessened by fragmenting the invasion administratively so that each fragment in isolation falls short of the threshold needed to establish a constitutional violation.

The *Carpenter* case is illustrative. Suppose the requests for CSLI had been splintered so that countless discrete judicial orders under the Stored Communications Act were confined to one hour each. Collectively, the CSLI disclosures would not have escaped Fourth

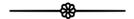
Amendment condemnation simply because each one hour search or seizure of cell records did not in isolation paint a detailed mosaic of the defendant's life. The Constitution forbids "sophisticated as well as simple-minded modes" of violation. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

The Court of Appeals also erred in suggesting OTR's reliance on D.C. Code § 47-4310(a)(1) automatically satisfied the objective, good faith exception to the exclusionary rule. App.9a. This Court made clear in *Leon*, 468 U.S. at 912 n.8, that the good faith exception does not apply to searches pursuant to statutes that authorize violations of the Fourth Amendment:

We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. See. e.g.. Ybarra v. Illinois, 444 U.S. 85 (1979); Torres v. Puerto Rico, 442 U.S. 465 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967). "Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment." Michigan v. DeFillippo, 443 U.S. [31, 39 (1979)]. The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here.

The D.C. statute relied upon by OTR in issuing the twenty-six suspicionless summonses by its own terms authorized Fourth Amendment violations. Under the statute, there is no vetting of a summons by a neutral magistrate. There is no threshold of suspicion or relevance that is required to issue a summons. There is no limit on the number of summonses that can be issued in any tax investigation. The statute goes far beyond the hated British Writs of Assistance that provoked the heralded remonstrance of James Otis. John Adams later recounted: "Then and there was the first scene of the first Act of opposition to the Arbitrary claims of Great Britain. Then and there, the Child Independence was born." From John Adams to William Tudor, Sr., 29 March 1817, Founders Online, NATIONAL ARCHIVES, https://founders.archives.gov/ documents/Adams/99-02-02-6735.

The Court should grant the petition for a writ of certiorari because the Court of Appeals for the District of Columbia decided an important exclusionary rule question in a way that conflicts with *Davis* v. *United States*, 564 U.S. 229 (2011) and *United States v. Leon*, 468 U.S. 897 (1984).



#### CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari to the District of Columbia Court of Appeals should be granted as to Questions 1 and 2.

Respectfully submitted,

BRUCE FEIN, ESQ.

COUNSEL OF RECORD

BRUCE FEIN LAW

300 NEW JERSEY AVENUE, N.W.
SUITE 900

WASHINGTON, DC 20001
(202) 465-8728

BRUCE@FEINPOINTS.COM

Counsel for Petitioner

**DECEMBER 6, 2021**