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 OF THE RELIGIOUS FREEDOM COALITION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the Religious Freedom Coalition is a non-profit organization which advocates in Washington, D.C. for the defense and preservation of America's Christian heritage and advocates for persecuted Christians in Africa and the Middle East. By such means as direct interaction with lawmakers, letters, phone calls and petition campaigns, the Religious Freedom Coalition seeks to be the voice of social-conservative Americans who honor God and hold to our traditional values.

The Religious Freedom Coalition also advocates in Congress for assistance to and protection of persecuted Christian minorities in Africa and the Middle East. An important part of its mission is to inform the public about the most persecuted religious group in the world, namely Christians.

For more than three decades William J. Murray, chairman of the Coalition in Washington, D.C. has been at the forefront of social conservatism. During the early 1980's he served as director of Freedom's Friends, an organization which reached out to the victims of communism worldwide. In the 1990's he founded the first commercial Bible publishing company in the Soviet Union. For many years his organizations

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. All parties have received timely notice and have consented to the filing of this brief.

operated evangelistic tours to the Soviet Union for Christians.

Mr. Murray continues to work for the rights of Christians in America and persecuted Christians around the world. Under his guidance the Religious Freedom Coalition assists Christian refugees from Iraq and Syria as well as Palestinian Christian families and Christian schools in the West Bank. He has traveled to the Middle East and Africa numerous times. Murray has been a part of fact finding mission in such areas as Kosovo, Sudan, Morocco, Iraq, Syria, Lebanon, Jordan and China.

Mr. Murray is the author of seven books including his best-selling autobiography, *My Life Without God*, which details his childhood in the dysfunctional home of atheist/Marxist leader Madalyn Murray O'Hair. His latest book is *Utopian Road to Hell*, which examines the failures of attempts throughout history to implement centrally planned economies and governments.

Your *Amicus* has filed several briefs on issues of great national importance in the past, and submits that given its strong interest in the issues presented and its expertise in religious persecution, this brief may be helpful to the Court.

SUMMARY OF ARGUMENT

The proliferation of digital data and the ubiquitous use of smart phones in virtually every walk of life have led to a dramatic loss of privacy and unprecedented potential for government surveillance. Scott McNealy, co-founder and longtime CEO of Sun Microsystems, famously observed 20 years ago that privacy issues are a "red herring." "You have zero privacy anyway. Get over it." Katherine Noyes, Scott McNealy on privacy: You still don't have any, PCWorld (June 25, 2015), https://www.pcworld.com/article/2941052/scott-mcnealy-on-privacy-you-still-don't-have-any.html. The remarkable advances in technology since then have only increased the assault on our freedom from governmental intrusion.

Carpenter v. United States[2] recognized the growing threat of unlimited government access to private citizens' data. But *Carpenter* was only the beginning; unless this Court enforces its application in cases like this one it will have been a pyrrhic victory whose reaffirmation of the rule requiring a search warrant in order to search and seize private Cell Search Location Information (CSLI) will have been swallowed whole by the "good faith" exception.

The good faith exception was judicially created *ex nihilo* only recently, and was properly cabined to apply only where the *police* had first obtained a *warrant* that was later determined to be unlawful; it was never intended to apply where a *prosecutor* effected a *warrantless* seizure of private information. The limits

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[2] __ U.S. __, 138 S. Ct. 2206 (2018).

on the use of the good faith exception should be firmly established by this Court here.

In addition, this case smacks of religious persecution because Zodhiates' actions in assisting a single mother and her minor daughter occurred in the context of a highly controversial case of first impression to establish parental rights in a former same sex partner. The "good faith" exception should properly apply to Philip Zodhiates, not the overly zealous prosecutor who improperly seized Mr. Zodhiates' CSLI.

The Fourth Amendment[3] has arguably become the weakest link in the chain of protections under the Bill of Rights. *Carpenter* represents a start in strengthening its buffer in the age of information. But if that decision is to have continuing vitality, it must be applied in cases like this one.

[3] The Fourth Amendment 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." U.S. Const., Amend. IV.

REASONS FOR GRANTING THE WRIT

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[4]

I. This Court Should Accept Certiorari in order to Strengthen *Carpenter* and to Clarify the Limits of the Good Faith Exception to the Exclusionary Rule where the Prosecutor Conducts a Warrantless Search of CSLI.

The exclusionary rule is a reasonable response to an illegal warrantless search infringing a private citizen's personal liberty. This Court first invoked the rule to preclude federal officers from introducing illegally seized evidence at trial over 100 years ago in *Weeks v. United States*, 232 U.S. 383 (1914). Almost 50 years later it was made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

Over the next few decades this Court engaged in what Justice Brennan called the "gradual but determined strangulation" of the exclusionary rule by recognizing a growing number of exceptions. *United States v. Leon*, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting). Judicially created *ex nihilo* only three decades ago, the "good faith" exception holds that evidence obtained in a search made by the police on the basis of a "facially valid search warrant" that is "subsequently held to be defective" need not be automatically excluded from evidence at trial. *United States v. Leon*, 468 U.S. at 905, 902.

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[4] *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

The exception thus requires that the *police* first obtain what appears to be a facially valid *warrant*. In this case, a *prosecutor* conducted the search *without* a warrant having even been sought. Application of the good faith exception under these circumstances thus constitutes a broad expansion of that narrow exception, and should be curtailed.

Carpenter was a welcome reaffirmation of "the fundamental constitutional importance"[5] of the liberties protected by the Fourth Amendment and the need to rein in government snooping on private citizens. Since it was decided, however, every lower court to consider its application to Cell Site Location Information ("CSLI") has nevertheless applied the good faith exception and admitted the illegally seized records into evidence, just as the Second Circuit did here. *See United States v. Taylor*, No. 17-00126, *3 (W.D. Mo. 2019) (collecting cases). Good faith has become the exception that swallowed the rule, leaving *Carpenter* a paper tiger and the citizen an open target for governmental abuse.

As James Madison observed in The Federalist No. 48: "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." *Id*. (J. Cooke ed. 1961). The power of the government to encroach upon the rights of a free people by means of CSLI is virtually limitless. Unless this Court acts to "effectually restrain[ ]" it the Fourth Amendment will be rendered "a blank paper by construction." Thomas Jefferson, letter to William C. Nicholas, Sept. 7, 1803,

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[5] *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

http://www.constitution.org/tj/ltr/1803/ltr_18030907_nicholas.html.

The Court explained in *Carpenter* that exigent circumstances might justify an exception to the requirement of a warrant for obtaining CSLI, but pointedly failed to mention the good faith exception. 138 S. Ct. at 2222. If it was the Court's intention to subtly signal that the good faith exception should not be applied in CSLI cases, the lower courts have misunderstood the message. This case presents an opportunity to make explicit what *Carpenter* left implicit.

Application of the exclusionary rule is not simply about "the imperative of judicial integrity"[6] -- though that is important -- or deterrence of future law enforcement actions.[7] It is about the integrity and vitality of fundamental constitutional rights and the protection of those rights when they have been violated by an overreaching government. It is all the more necessary in an age when privacy is vanishing like a vapor on a warm summer day and government surveillance growing like a cancer on the body politic.

Excluding illegally seized evidence is no more inappropriate than reclaiming a stolen fortune from an innocent citizen who happened upon it while out for an afternoon stroll. It is not about punishing law enforcement; it is about invigorating the right to be free from unwarranted government intrusion.

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[6] *E.g., Illinois v. Gates*, 462 U.S. 213, 245 n.14 (1982).

[7] *E.g., Leon*, 468 U.S. 897, 973-74 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

Conversely, to allow the "good faith" exception to swallow the exclusionary rule because some wrongdoer citizen might go free is to teach that the end justifies the means and to allow the wrongdoing government actors to go free while sometimes an innocent citizen goes to prison. As Justice Brandeis counseled many years ago,

> Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also State v. Carter*, 322 N.C. 709, 370 S.E.2d 553, 559 (N.C. 1988) ("The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure.")

Precisely because "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society" the rule requiring a search warrant for CSLI should be strictly applied and enforced. *Carpenter*, 138 S. Ct. 2206, 2220 (quoting *Riley v. California*, 573 U.S. __, 134 S. Ct. 2473, 2484 (2014)).

II. The Court Should Grant Certiorari to Reaffirm the Importance of Religious Freedom.

A. The rationale behind the good faith exception supports Petitioner here.

The rationale for the good faith exception to the exclusionary rule is often couched in terms of the courts' "truth-finding function" and a concern that *some* guilty defendants may go free. *See, e.g., Leon*, 468 U.S. at 907-08. But applying the good faith exception ensures that *all* guilty government actors go free, as stated above.

Moreover, implicit in the good faith exception is the unfairness of punishing those who unwittingly and in good faith happen to have violated the law. Here, however, that logic operates in favor of Mr. Zodhiates, and against the career prosecutor and his cohorts.

Philip Zodhiates devoted himself to helping Christian ministries in his professional life and helping the less fortunate in his private life. His rendering aid to Lisa Miller, a single mother of very modest means, was but another chapter in a long book of long deeds.

In the fall of 2009, Ms. Miller had full custody of her daughter, IMJ. There was no pending court order requiring her to relinquish custody. In Virginia, where Mr. Zodhiates met Ms. Miller, same sex marriage was illegal and civil unions unrecognized.[8] Indeed, at that

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[8] This Court did not declare prohibitions against same sex marriage unconstitutional until June 2015, almost six (6) years after the actions of Mr. Zodhiates here. *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2071 (2015).

time even then-President Obama, who later became a champion of same sex marriage, was publicly opposed to it.[9]

Mr. Zodhiates had little reason to suspect that his acting the good Samaritan with Ms. Miller and IMJ might one day send him to federal prison.

B. The incredible series of unfortunate events in the life of Lisa Miller.[10]

Ms. Miller's daughter was born in Virginia in April 2002, where Ms. Miller and Ms. Jenkins were living at the time. The birth certificate listed only one parent, Lisa Miller. They had undergone a civil union ceremony in December 2000 while in Vermont for a vacation. That union carried no legal weight in Virginia.

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[9] *See, e.g.,* Becky Bowers, President Barack Obama's shifting stance on gay marriage, Politifact.com (May 11, 2012), https://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/ (reporting that in 2008 Mr. Obama stated: "*I believe marriage is between a man and a woman. I am not in favor of gay marriage.*"). He did not declare his support for same sex marriage until May 9, 2012 -- almost three (3) years after the events giving rise to Mr. Zodhiates' prosecution. *Id.*

[10] These facts are largely taken from *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 2006 VT 78 (Vt. 2006) and from Matthew Hoffman, "Exclusive Interview with Lisa Miller, Ex-Lesbian Fighting for Custody of Own Child against "Civil Union" Partner," LifeSiteNews (Oct. 27, 2008), https://www.lifesitenews.com/news/exclusive-interview-with-lisa-miller-ex-lesbian-fighting-for-custody-of-own.

Ms. Jenkins made no attempt to adopt IMJ, either in Virginia or in Vermont after they moved there in August 2002. In September 2003 Lisa moved back to Virginia with IMJ when her relationship with Ms. Jenkins ended.

Ms. Miller only initiated "divorce" proceedings in November 2003 at the request of Ms. Jenkins, who was in bankruptcy and thought the divorce would benefit her financially. Ms. Miller, acting pro se and on the advice of the Vermont clerk's office, checked a box on the form provided that mistakenly listed IMJ as a child of the civil union and asked the court to award Ms. Jenkins visitation with IMJ.

When Ms. Miller's attorney purported to waive her argument that Ms. Jenkins had no parental rights to IMJ, Ms. Miller fired the attorney and attempted to resurrect the argument once she was finally able to find another attorney she could afford. It was too late; the court refused to allow the matter to be revisited.

After the Vermont court ordered visitation, Ms. Miller at first reluctantly complied. After the first overnight visit, IMJ told Ms. Miller that Ms. Jenkins had stripped naked and taken a bath with IMJ. On another occasion, Ms. Jenkins took IMJ to the fair, but she lost her at one point.

That was bad enough. But when IMJ returned after a week-long visit to Vermont in August 2007, it was "devastating." Ms. Jenkins would rarely allow IMJ -- only five (5) at the time -- to call Ms. Miller, and when she did call she was crying uncontrollably. She had nightmares about graphic movies Ms. Jenkins had let her watch. She began openly masturbating, which she

had never done before. She put a comb to her neck at one point and said she wanted to kill herself.

Ms. Miller was understandably concerned that abuse had occurred. She testified that IMJ told her that Ms. Jenkins, whom IMJ barely remembered from her infancy, had her get into a bath with Ms. Jenkins, unclothed. IMJ begged Ms. Miller not to make her go back.

Ms. Miller introduced affidavits from a counselor and therapist supporting her claim of potential abuse, but because the witnesses were in Virginia and the court in Vermont and Ms. Miller would not allow IMJ to testify for fear it would further traumatize her, the evidence was not accorded much weight, and the court declined to order visitation to cease.

Ms. Miller initiated legal action in Virginia under the Defense of Marriage Act and, later, the Virginia Marriage Amendment. Initially, she obtained a court order in her favor. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 824, 276 Va. 19 (Va. 2008). That ruling was reversed on appeal, however, and ultimately the Virginia courts refused to interfere with the Vermont family court proceedings.

Worse still, Ms. Miller's best arguments were never reviewed by the Virginia Supreme Court due to technical errors in perfecting the appeals. Miller's appeal of a decision holding that the Parental Kidnapping Prevention Act governed the dispute rather than the Defense of Marriage Act was dismissed for failure to file a notice of appeal. Then, her appeal of a later court of appeals decision in which she urged that the Virginia Marriage Amendment protected

Miller had failed to assign error to the court of appeals' failure to consider that argument. *Id.* at 826-27.

Ms. Miller sought review in this Court three different times. Each time certiorari was denied.

In the end, on November 20, 2009 -- two months after the events giving rise to the prosecution of Mr. Zodhiates -- the Vermont family court signed the order granting Ms. Jenkins' motion to transfer custody of IMJ to Janet Jenkins. But the order did not require the transfer to take place until January 1, 2010.

C. The harsh punishment of Mr. Zodhiates smacks of religious persecution.

When Lisa Miller disappeared in 2009 she became the subject of a massive manhunt spanning the world. *See, e.g.,* John Curran and Filadelfo Aleman, "Lesbians' Child Custody Battle Turns Into International Manhunt," Associated Press (June 27, 2011), https://abpworldgroup.com/2011/06/27/lesbians'-child-custody-battle-turns-into-international-manhunt/. The FBI has been involved, three men have been charged and/or convicted of federal crimes, and a Mennonite camp in Nicaragua has been turned upside down. *Id.*

The sheer intensity of the search for Ms. Miller and the zeal to prosecute those affiliated with her in any way are undoubtedly fueled by the powerful gay and lesbian activist organizations that have represented or are still representing Ms. Jenkins. These organizations include the ACLU, Lambda Legal Defense and Education Fund, and the Southern Poverty Law Center among others.

The systematic targeting of conservative Christians who stand for biblical values is well documented. While the banning of MAGA caps is celebrated, the mere affirmation of biblical teaching on marriage and homosexuality -- unchanged for 2,000 years -- is condemned as "disgusting." *See, e.g.,* Clay Cane, "Karen and Mike Pence's Astonishing Moral Hypocrisy," Jan. 20, 2019, https://www.cnn.com/2019/01/16/opinions/karen-pence-evangelical-hypocrisy-clay-cane/index.html (calling it "deplorable" for Karen Pence to dare teach in a Christian school affirming marriage as between one man and one woman).

Mr. Zodhiates thus finds himself a political prisoner punished as much for his ideological outlook as his actions. The political nature of his prosecution is further reflected in the two separate federal lawsuits filed by Ms. Jenkins and her activist attorneys, one in Vermont and one in Virginia, naming Mr. Zodhiates, Ms. Miller's former attorneys, and various others as partners in a grand conspiracy to deprive Ms. Jenkins of her parental rights.

In short, if ever there was a case in which retroactive application of the exclusionary rule was appropriate, this is it. Mr. Zodhiates' alleged assistance to Ms. Miller was motivated by the utmost good faith.

CONCLUSION

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

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