BRIEF FOR APPELLANT

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 24-CO-162

UNITED STATES OF AMERICA, Appellant,

v.

DAMAIRZIO M. WELLS, Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
JOHN P. MANNARINO
D. WILLIAM LAWRENCE
MEGAN E. MCFADDEN
* DANIEL J. LENERZ
DC Bar #888283905
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Daniel.Lenerz@usdoj.gov
(202) 252-6829

Cr. No. 2023-CF3-004555

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ISSUE PRESENTED

Whether the trial court erred when it applied the exclusionary rule to suppress evidence obtained as a result of GPS monitoring of a supervised releasee imposed by the Court Services and Offender Supervision Agency (CSOSA) in a manner this Court subsequently declared improper, where the trial court found no misconduct by CSOSA or its employees, and where the 20-year history of CSOSA's use of GPS monitoring in accordance with formal regulations promulgated by both CSOSA and the U.S. Parole Commission, with Congress's and this Court's knowledge and assent, precludes any such finding and otherwise establishes that application of the rule is not necessary to deter CSOSA from committing future Fourth Amendment violations.

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BRIEF FOR APPELLANT

INTRODUCTION

The Supreme Court has made clear that the exclusion of evidence in response to a Fourth Amendment violation, while sometimes necessary, should be done "only as a 'last resort.'" *(Willie Gene) Davis v. United States*, 564 U.S. 229, 237 (2011) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.* This cost-benefit analysis focuses "on the 'flagrancy of the police misconduct' at

issue." *Id.* at 238 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)). "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." *Id.* (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). However, "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.* (cleaned up).

The trial court's order excluding the GPS evidence in this case violated these basic precepts. When appellee Damairzio Wells's Community Supervision Officer (CSO) required him to wear a GPS monitor as a sanction for Wells's violation of the conditions of his supervised release, she did so in reliance on CSOSA policy, which was based in turn on longstanding regulations promulgated by both CSOSA and the United States Parole Commission. Those agencies promulgated their regulations pursuant to formal, notice-and-comment rulemaking, and CSOSA informed Congress on numerous occasions that it imposed GPS monitoring as an administrative sanction. Over the past decade, this

Court has repeatedly discussed CSOSA's use of GPS monitoring as a sanction imposed without express court or Parole Commission direction, and has rejected multiple Fourth Amendment challenges to that practice. Although a divided panel of the Court recently determined that CSOSA had exceeded its statutory authority when it promulgated the regulations pursuant to which its CSOs impose GPS monitoring, that disagreement with CSOSA's interpretation of its legal authority hardly establishes that CSOSA or Wells's CSO acted with "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *(Willie Gene) Davis*, 564 U.S. at 237 (quotation marks omitted). To the contrary, both CSOSA and Wells's CSO engaged in precisely the kind of good-faith conduct that "lacks the culpability required to justify the harsh sanction of exclusion." *Id.*

STATEMENT OF THE CASE

Factual Background

At approximately 6:00 p.m. on July 3, 2023, Wells met his victim, A.J., in the parking lot of America's Best Wings on Alabama Avenue, SE (Record on Appeal (R.) 43 at 1). Wells drove A.J. to the intersection of Burns Street and Fairlawn Avenue, SE, where he pulled out a gun,

pointed it at A.J., and ordered her to leave her belongings and get out of the vehicle (*id.*). She did so, and then Wells drove away with A.J.'s iPad, Android phone, iPhone, purse, and wallet (*id.*).

A.J. borrowed a phone and called 911 (R.43 at 2). When the police arrived, she recounted the crime and described her assailant, including that he was not wearing a shirt and had tattoos all over his face, neck, and body (*id.*). Soon thereafter, Metropolitan Police Department (MPD) investigative analysts identified Wells as a "GPS High Hit" based on data from a GPS device he was wearing that indicated Wells had been in the locations A.J. identified at times corresponding to her description of the crime (*id.*). Data from Wells's GPS device showed that, after robbing A.J. at gunpoint, he had gone to 5325 Bass Place, SE (*id.*).

MPD officers went to that address and, at approximately 7:20 p.m., saw Wells, who was not wearing a shirt and had tattoos on his face, neck, and body (R.43 at 3). They detained him and searched the public area of the apartment building at 5325 Bass Place (*id.* at 4). Officers found A.J.'s iPad and Android phone inside a shopping bag behind a trashcan in the laundry room (*id.*). After A.J. identified Wells as her assailant, the officers arrested and searched Wells and found A.J.'s bank card and food-

stamp card in his pocket (*id.*). Officers then obtained search warrants for Wells's apartment and car (*id.*). They found a gun in Wells's apartment and matching ammunition and cartridge casings in his car (*id.*).

Procedural History

On November 30, 2023, a grand jury indicted Wells for armed robbery and various firearms offenses (R.31). Wells subsequently moved to suppress the evidence from his GPS device and all other evidence MPD obtained because of its use of that data (R.42). Wells argued that, under this Court's recent decision in *Davis v. United States*, 306 A.3d 89 (D.C. 2023), CSOSA had improperly imposed GPS monitoring without a warrant and without statutory authority (R.42 at 3).[1]

The government opposed Wells's motion (R.43). It did not dispute that Wells's CSO had required him to wear a GPS monitor as an administrative sanction based on Wells's non-compliance with the conditions of his supervised release (*id.* at 6), and that this Court's subsequent decision in *Davis* meant that Wells's CSO had lacked authority to do so in the absence of an express order by the Superior

[1] The government refers to the Supreme Court's opinion as *(Willie Gene) Davis*, *see supra* at 1, and to this Court's opinion as *Davis*.

Court or the U.S. Parole Commission (*id.* at 7). The government argued, however, that exclusion was not appropriate because neither Wells's CSO nor CSOSA had acted with the culpability necessary to justify application of the exclusionary rule (*id.* at 15-18). In reply, Wells primarily argued that exclusion was necessary to deter CSOSA as an agency from committing future Fourth Amendment violations (R.52). He also asserted that "judicial economy compels th[e] Court to send this case to the D.C. Court of Appeals for further clarification," and that, "[i]n the interest of justice and judicial efficiency, th[e] Court should suppress the GPS evidence in this case, as *Davis* mandates it to do" (R.53 at 1, 4).

In a February 1, 2024, oral ruling, the Honorable Erol Arthur granted the motion to suppress (2/1/24 p.m. Transcript (Tr.) 9). In Judge Arthur's view, this Court's opinion in *Davis* provided "a roadmap" and required suppression (*id.* at 7-9). Judge Arthur rejected the government's exclusionary rule argument because *Davis* "didn't address that issue," and because he was "not willing at this stage . . . to sidestep the [C]ourt's ruling in *Davis*," which is what he "believe[d] the Government [wa]s asking [him] to do" (*id.* at 8, 9). Judge Arthur thus suppressed both the

GPS evidence and its fruits (*id.*). The government timely appealed (R.57). *See* D.C. App. R. 4(b)(1).

STATEMENT OF JURISDICTION

This Court has jurisdiction under D.C. Code § 23-104(a)(1).

SUMMARY OF ARGUMENT

The trial court erred when it excluded the GPS evidence in this case. Contrary to the trial court's stated reason for suppressing the evidence, this Court's opinion in *Davis* did not decide whether application of the exclusionary rule is appropriate under these circumstances. And fundamental exclusionary rule principles demonstrate that it is not. As the Supreme Court has repeatedly made clear, exclusion is appropriate only when the relevant conduct is sufficiently culpable that exclusion can meaningfully deter it, and where the benefits of deterrence outweigh the substantial costs imposed when courts must ignore reliable, trustworthy evidence.

Here, this cost-benefit analysis tilts decisively against exclusion. Neither Wells's CSO nor CSOSA as an agency acted with the requisite deliberate, reckless, or grossly negligent disregard for Fourth

Amendment rights necessary to justify exclusion. Wells's CSO acted in objectively good-faith reliance on CSOSA's longstanding regulations, formal policy, and this Court's decision upholding CSOSA's use of GPS monitoring against constitutional attack. CSOSA's agency-level actions were similarly nonculpable. CSOSA's decades-long use of GPS monitoring as an administrative sanction was based on regulations it had promulgated pursuant to formal, notice-and-comment rulemaking, which interpreted its statutory authority and implemented the Parole Commission's requirement that supervised releasees comply with CSOSA's administrative-sanctions regime. At no time until this Court's decision in *Davis* did anyone—the Parole Commission, Congress, or this Court—suggest that CSOSA's use of GPS monitoring as an administrative sanction was improper. There was thus no misconduct by CSOSA to deter. And even if exclusion might have some minimal theoretical deterrent value, that benefit is outweighed by the high cost of suppression, which would affect not only this case, but the many pending cases where the government's investigation relied upon GPS data obtained as a result of motoring imposed by CSOSA over the past two decades.

ARGUMENT

I. *Davis* Does Not Control the Exclusionary Rule Issue Presented in this Appeal.

The trial court excluded the evidence in this case based on its incorrect belief that this Court's opinion in *Davis* was controlling on that issue. As *Davis* itself makes clear, a decision is not binding where the parties have not "raised [the issue] . . . to the court's attention and trained the 'judicial mind' upon it." 306 A.3d at 97 (quoting *District of Columbia v. Sierra Club*, 670 A.2d 354, 359-60 (D.C. 1996)). Stated more fully:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question. A point of law merely assumed in an opinion, not discussed, is not authoritative.

Murphy v. McCloud, 650 A.2d 202, 205 (D.C. 1994) (cleaned up).

In *Davis*, applicability of the exclusionary rule was merely "assumed in [the] opinion, not discussed." *Murphy*, 650 A.2d at 205 (quotation marks omitted). The parties did not brief the applicability of the exclusionary rule and the Court's opinion did not discuss whether exclusion was required under governing exclusionary rule precedent.

Instead, the majority opinion simply stated that "the GPS data collected from Mr. Davis should have been suppressed under a special needs analysis." *Davis*, 306 A.3d at 111. This conclusory statement does not resolve the exclusionary rule issue now before the Court, which was "neither brought to the attention of the court nor ruled upon[.]" *Murphy*, 650 A.2d at 205 (quotation marks omitted). For that reason, *Davis* is "not authoritative," *id.*, on the question whether the exclusionary rule should apply despite the lack of any bad faith or misconduct by Wells's CSO or CSOSA as a whole.

II. Application of the Exclusionary Rule is Inappropriate Here, Where There was no Misconduct and Suppression is Unnecessary to Deter Future Fourth Amendment Violations.

The trial court's exclusion of the evidence in this case was erroneous as a matter of fundamental exclusionary rule principles. As the Supreme Court has repeatedly made clear, for exclusion to be justified, "the benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141. Here, where both CSOSA and Wells's CSO acted in good faith, the benefits of deterrence are minimal to nonexistent. And exclusion of GPS evidence "would come at a high cost to both the truth and the public

safety," *(Willie Gene) Davis*, 564 U.S. at 231, not just in this case, but in the many cases where the government's investigation relied upon GPS data obtained as a result of monitoring imposed by CSOSA.

A. Additional Background

1. Statutory and Regulatory History

Congress created CSOSA in the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, § 11233(a), 111 Stat. 251, 748-51 (Revitalization Act). At the time, Congress tasked CSOSA with "supervis[ing] any offender who is released from imprisonment for any term of supervised release imposed by the Superior Court of the District of Columbia[,]" § 11233(c)(2), and ordered it to "develop and operate intermediate sanctions programs for sentenced offenders[,]" § 11233(b)(2)(F). Congress made those supervised releasees "subject to the authority of the United States Parole Commission[,]" and granted the Commission, with some exceptions, "the same authority as is vested in the United States district courts by [18 U.S.C. § 3583(d)-(i).]" § 11233(c)(2).

Soon thereafter, both the Parole Commission and CSOSA promulgated formal regulations pursuant to notice-and-comment

rulemaking interpreting this statutory grant of authority.[2] In its regulations, the Commission adopted conditions that "shall apply to every term of supervised release[.]" Offenders Serving Terms of Supervised Release Imposed by the Superior Court of the District of Columbia, 65 Fed. Reg. 70466, 70468 (Nov. 24, 2000) (interim rule with request for comments). Among other things, the Commission required each supervised releasee in the District of Columbia to "submit to the sanctions imposed by his Community Supervision Officer (within the limits established by the CSOSA Administrative Sanctions Schedule)[.]" *Id.* at 70469. The Commission's regulations provided that those "[g]raduated sanctions may include . . . curfew with electronic monitoring[.]" *Id.*

Although the language of Commission's regulations changed over time, the substance stayed the same: all supervised releasees "supervised by CSOSA . . . must comply with the sanction(s) imposed by the

[2] With some exceptions, "Section 553 of the Administrative Procedure Act [5 U.S.C. § 553] requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, modification, or repeal." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

supervision officer and as established by an approved schedule of graduated sanctions." 28 C.F.R. § 2.204(a)(6)(vi). *See* Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 79 Fed. Reg. 51254, 51259 (Aug. 28, 2014) (final rule). None of the comments that the Parole Commission received in response to its most recent notice of proposed rulemaking that included this requirement, 78 Fed. Reg. 11998, 12001 (Feb. 21, 2013)—including comments from the Public Defender Service, 79 Fed. Reg. at 51254–55—asserted that this delegation of authority to CSOSA was improper.

CSOSA, in turn, created a sanctions schedule that listed "[a]dministrative sanctions available to" CSOs, including "electronic monitoring for a specified period of time." Community Supervision: Administrative Sanctions Schedule, 66 Fed. Reg. 48336, 48338 (Sept. 20, 2001) (interim rule with request for comments). When promulgating its final rule formalizing this regulation, 28 C.F.R. § 810.3(b), CSOSA explained that "[r]egulations issued by the [Parole Commission] . . . authorize[d] CSOSA's community supervision officers to impose graduated sanctions[.]" Community Supervision: Administrative

Sanctions, 68 Fed. Reg. 19738, 19738 (Apr. 22, 2003). These administrative sanctions gave each CSO "a range of corrective actions . . . which can be applied short of court or [Parole Commission] approval." *Id.* The purpose of the sanctions was to allow CSOs "to respond as swiftly, certainly, and consistently as practicable to non-compliant behavior," which would both "reduce the number of violation reports sent to the releasing authority (for example, the sentencing court or the United States Parole Commission)[,]" and also "prevent crime, reduce recidivism, and support the fair administration of justice[.]" *Id.* Both the Parole Commission and CSOSA recognized that the Commission retained authority to "override the imposition of a graduated sanction at any time[.]" 65 Fed. Reg. at 70469; *see also* 66 Fed. Reg. at 48338 (similar); 28 C.F.R. § 810.3(c) ("the [Parole Commission] may override the imposition of any of the sanctions in paragraph (b) of this section").

CSOSA began using GPS as a form of electronic monitoring under its administrative-sanctions regime in fiscal year 2004. *See Advancements and Continual Challenges in the Parole, Supervised Release and Revocation of D.C. Code Offenders: Hearing before the H. Subcomm. on Fed. Workforce, Postal Service, and D.C. of the Comm. on*

Oversight and Gov't Reform, 110th Cong. 22 (2008) (statement of Paul A. Quander, Jr., Director, CSOSA). Following that pilot program, in May 2009, CSOSA issued a policy statement allowing CSOs to sanction offenders by requiring them to submit to GPS monitoring. *See* Policy Statement 4008, "Global Positioning System (GPS) Tracking of Offenders" (May 7, 2009), *available at* https://perma.cc/2DWK-CPQB. The policy statement provided, among other things:

> In response to non-compliant behavior or identified risk, the CSO may implement GPS monitoring as a sanction on the offender for up to thirty (30) calendar days. Where aggravating circumstances exist, such as continuous curfew violations, new arrest, loss of contact, or positive drug tests, the length of time the offender is placed on GPS tracking may be extended for up to a total of ninety (90) calendar days, upon documented approval of an S[upervisory]CSO.

Id. at 5.

The Parole Commission was well aware that CSOSA used GPS monitoring as an administrative sanction: CSOSA "reports regularly to the Commission on each offender it supervises for the Commission," and also schedules "internal and informal" reprimand sanction hearings with Commissioners for offenders whose "behavior is becoming questionable[.]" *The Local Role of the U.S. Parole Commission: Increasing Public Safety, Reducing Recidivism, and Using Alternatives to Re-*

incarceration in the District of Columbia: Hearing before the H. Subcomm. on Fed. Workforce, Postal Service, and D.C. of the Comm. on Oversight and Gov't Reform, 111th Cong. 10 (2009) (statement of Isaac Fulwood, Jr., Chairman, U.S. Parole Commission). Likewise, CSOSA repeatedly informed Congress that it used GPS monitoring as an administrative sanction without express Commission or court approval. *See Davis*, 306 A.3d at 114-15 (Thompson, J., dissenting) (identifying examples). For example, the same year that CSOSA adopted its GPS Policy Statement, CSOSA's Acting Director testified that, "[t]hrough a system of graduated sanctions, CSOSA imposes increasingly restrictive penalties on offenders for violating their release conditions. Sanctions can include . . . GPS monitoring[.]" *The Local Role of the U.S. Parole Commission*, 111th Cong. 27 (statement of Adrienne Poteat). During that hearing, Representative Eleanor Holmes Norton declared herself "fascinated" by CSOSA's use of GPS monitoring and asked numerous questions about its efficacy. *Id.* at 90, 102.

At no time did Congress suggest that CSOSA's imposition of GPS monitoring as an administrative sanction exceeded CSOSA's statutory authority. To the contrary, in 2016, Congress expanded CSOSA's

authority so that it could offer incentives in addition to imposing sanctions. *See* District of Columbia Courts, Public Defender Service, and Court Services and Offender Supervision Agency Act of 2015, Pub. L. 114-118, § 3(a), 130 Stat. 9, 13 (2016). Specifically, Congress amended D.C. Code § 24-133(b)(2)(F) to require CSOSA's director to "[d]evelop and operate intermediate sanctions *and incentives* programs for sentenced offenders[.]" (added language emphasized). In so doing, Congress recognized that CSOSA had "specific statutory authority to punish sentenced offenders." S. Rep. No. 114-110, at 2 (2015).

2. This Court's GPS Cases

During the nearly 20 years that CSOSA employed GPS monitoring as an administrative sanction, this Court repeatedly addressed that practice without questioning its legality, and upheld CSOSA's use of GPS monitoring against constitutional attack on numerous occasions.

In *Hunt v. United States*, this Court addressed a defendant's conviction under a statute that made it "a crime for a person to 'intentionally remove' a GPS device that he or she is 'required to wear . . . as a condition of . . . parole.'" 109 A.3d 620, 621 (D.C. 2014) (quoting D.C. Code § 22-1211(a)(1)(A) (2012)). The Court reversed the conviction

for insufficient evidence because the statute criminalized only the intentional removal of a GPS monitoring device by "persons required to wear a device as a condition . . . of parole," and did not apply "to persons required to wear a device as a sanction who, in removing the device, violate a different condition requiring compliance with CSO-imposed sanctions." *Id.* at 623-24 (quotation marks omitted). The Court distinguished parole conditions, which may be imposed only by the Superior Court or the Parole Commission, from CSOSA's administrative-sanctions regime. *Id.* at 623. It explained that CSOSA monitors a released defendant's compliance with the conditions of release, *id.*, and, as part of that duty, may impose "'intermediate sanctions' to encourage compliance with release conditions." *Id.* at 621 (quoting D.C. Code § 24-133(b)(2)(F)). "[B]y issuing sanctions," the Court noted, "CSOSA 'introduce[s] an accountability structure into the supervision process' without commencing revocation proceedings or seeking a hearing for a change in release conditions." *Id.* at 622 (quoting 68 Fed. Reg. at 19738). The Court specifically acknowledged that one intermediate sanction available to CSOSA was "'[e]lectronic monitoring for a specified period of time.'" *Id.* (quoting 28 C.F.R. § 810.3(b)).

Subsequently, in *United States v. Jackson*, this Court rejected a defendant's argument "that CSOSA violated his Fourth Amendment rights by placing him on GPS monitoring . . . without judicial authorization[.]" 214 A.3d 464, 467 (D.C. 2019). The Court again discussed CSOSA's "intermediate sanctions" regime, which allowed the defendant's CSO to impose "'[e]lectronic monitoring for a specified period of time.' This is the provision under which CSOSA utilizes GPS tracking technology." *Id.* at 476 (quoting 28 C.F.R. § 810.3(b)(6)).

The Court explained that GPS monitoring "directly serves the primary purposes of probation supervision." *Jackson*, 214 A.3d at 476. "GPS tracking," the Court found, "is a uniquely valuable and effective tool for detecting whether a high-risk offender is committing crimes, going to prohibited places, or violating curfew[.]" *Id.* at 480. And "CSOSA's ability to employ such focused GPS monitoring as an intermediate sanction without judicial approval promotes legitimate governmental interests in responsive, effective, and commensurate supervision of high-risk offenders on probation." *Id.* The Court recognized the "advantages" provided by CSOSA's administrative-sanctions regime: it "'enable[s] CSOSA to provide swift, certain, and consistent responses

to noncompliant behavior,'" which, because the sanction occurs "'quickly and consistently[,] may prevent escalation of the offender's non-compliant behavior.'" *Id.* at 476 (quoting *Hunt*, 109 A.3d at 621-22) (other quotation marks omitted).

Although a trial court could "make compliance with GPS monitoring an express condition of probation at the time the court imposes sentence," this Court found that "such an express condition is not a constitutional prerequisite for the probationer to be subjected to a monitoring requirement[.]" *Jackson*, 214 A.3d at 476. Given the "government's legitimate and important interests in the effective supervision of a high-risk probationer," the Court held "that CSOSA's placement of [the defendant] on GPS monitoring pursuant to its regulations governing probationers was a reasonable search within the meaning of the Fourth Amendment." *Id.* at 480-81.

This Court later extended *Jackson*'s holding to supervised releasees. In *Atchison v. United States*, the Court rejected the defendants' attempt to distinguish probationers from supervised releasees, explaining that "the entire premise of supervised release is that the individual remains at risk of re-offending and is in need of supervision to

deter recidivism and encourage rehabilitation." 257 A.3d 524, 531 (D.C. 2021). Although one defendant was a supervised releasee subject to GPS monitoring, the Court held that, "as in *Jackson*, the fact that CSOSA rather than the court required that the monitoring devices be worn did not render the 'search' unlawful." *Id.* Even more recently, this Court concluded "that CSOSA was permitted to place [the defendant] on GPS monitoring" as a sanction for violating the conditions of his supervision: "CSOSA 'probationers . . . are on notice and agree that they will be subject to intensive and intrusive supervision, specifically including GPS monitoring, if there is reason to believe they are . . . otherwise violating the conditions of their release.'" *Young v. United States*, 305 A.3d 402, 432 (D.C. 2023) (quoting *Jackson*, 214 A.3d at 478).

3. The Court's Opinion in *Davis*

This Court's opinion in *Davis* dramatically changed this well-established legal landscape. In an opinion issued December 21, 2023, a divided panel held—for the first time in the nearly 20 years that CSOSA had been employing GPS monitoring as an intermediate sanction—that CSOSA's regulation authorizing the imposition of GPS monitoring as a

sanction "is unlawful to the extent it is applied to supervised releasees." *Davis*, 306 A.3d at 93.[3]

The panel majority determined that, when Congress created CSOSA in 1997, it provided the Parole Commission with "the sole authority to impose or modify conditions of supervised release," while giving CSOSA "only administrative and supervisory authority . . . such as informing releasees of their release conditions, staying informed about releasees' compliance, and recording and reporting on that compliance to the court as appropriate." *Davis*, 306 A.3d at 101-02. Although Congress had ordered CSOSA "[d]evelop and operate intermediate sanctions," Revitalization Act § 11233(b)(2)(F), the majority interpreted that command to mean that CSOSA was supposed to "'develop and operate' these intermediate sentencing options for the courts. It did not confer power . . . to unilaterally impose administrative penalties on a supervised releasee upon a perceived violation of their conditions of release." *Davis*, 306 A.3d at 103.

[3] The government has petitioned for rehearing or rehearing en banc in *Davis*; that petition remains pending as of the filing of this brief.

The majority recognized that this understanding of "intermediate sanctions" was "muddied somewhat by the fact that Congress amended D.C. Code § 24-133(b)(2)(F) in 2016 to include reference to 'incentives' alongside 'intermediate sanctions.'" *Davis*, 306 A.3d at 103 (quoting Pub. L. 114-118, § 3(a)). The majority "assume[d] for purposes of [its] opinion" that, with this change, Congress provided CSOSA with "some authority under its regulations to *administratively* sanction—or incentivize—supervised releasees." *Id.* at 104. The majority ultimately concluded, however, "that (1) as the sole adjudicatory authority in the supervised release system, only the Parole Commission may impose or modify conditions of release, and (2) whatever CSOSA's administrative sanctions authority is, it must not transgress on the Parole Commission's adjudicatory role." *Id.*

Explaining that GPS monitoring is a warrantless search, the majority noted that "the Parole Commission assumes exclusive authority to impose search conditions, as with any other conditions of release." *Davis*, 306 A.3d at 107. The majority thus held that the "regulatory scheme allowing CSOSA to unilaterally order GPS searches is unlawful under the statutory scheme which entrusts the Parole Commission with

the equivalent power of a federal trial court to impose conditions of release . . . and is unreasonable under the Fourth Amendment." *Id.* at 109. Only the Parole Commission could order "GPS monitoring as a search"; "whatever powers CSOSA has to administratively sanction supervised releasees, they do not include unilaterally subjecting releasees to GPS monitoring because such a power would arrogate to CSOSA what has been reserved to the Commission[.]" *Id.* at 110. And although the Parole Commission's regulations required supervised releasees to comply with CSOSA's administrative-sanctions program, the Commission "could not delegate" to CSOSA the decision to require an offender to comply with GPS monitoring. *Id.* at 109-10.

Senior Judge Thompson dissented. She believed that "the plain language of CSOSA's authorizing statute, its legislative history, and CSOSA's interpretation of its statutory mandate as made known to Congress all confirm CSOSA's statutory authority to operate its sanctions program." *Davis*, 306 A.3d at 112. By 2016, when it reenacted the statutory provision requiring CSOSA to "develop and operate intermediate sanctions," Congress "had been made well aware, in the specific CSOSA oversight context, of how CSOSA interpreted its

intermediate sanctions responsibility[.]" *Id.* at 116. CSOSA thus had properly interpreted its statutory mandate from the outset: "'Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *Id.* (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982)).

Furthermore, because Congress reenacted the relevant statutory provision "with an express understanding that this mandate included 'specific statutory authority to punish sentenced offenders,'" *Davis*, 306 A.3d at 114 (quoting S. Rep. No. 114-110, at 2), Congress adopted that interpretation: "'When a Congress that re-enacts a statute voices its approval of an . . . interpretation thereof, Congress is treated as having adopted that interpretation, and [courts are] bound thereby.'" *Id.* (quoting *United States v. Bd. of Comm'rs*, 435 U.S. 110, 134 (1978)). Thus, "the legislative history of section 24-133(b)(2)(F) show[ed] that Congress intended to authorize and did authorize CSOSA to operate a program of sanctions (such as the requirement to wear a GPS monitor) for a

supervised releasee's failure to comply with conditions of supervised release." *Id.* at 116.

Judge Thompson also concluded that the Parole Commission had lawfully "adopted CSOSA's schedule of graduated sanctions as a Parole Commission requirement" by requiring supervised releasees to "'comply with the sanction(s) imposed by the supervision officer and as established by an approved schedule of graduated sanctions.'" *Davis*, 306 A.3d at 116 (quoting 28 C.F.R. § 2.204(a)(6)(vi)). This was not "an unlawful delegation by the Parole Commission of statutory responsibility with respect to D.C. offenders on supervised release." *Id.* at 119. Rather, "both [Parole Commission] regulations and CSOSA regulations acknowledge that CSOSA's sanctions decisions remain subject to the Commission's override or modification." *Id.* The Parole Commission thus "retains oversight of any decision by a CSOSA CSO to refer a release for GPS monitoring for a specified period of time." *Id.* at 120.

B. Applicable Legal Principles and Standard of Review

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a

criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). However, exclusion is "'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *(Willie Gene) Davis*, 564 U.S. at 236 (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Rather, the exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Id.* at 236-37.

The exclusionary rule thus applies "only where it 'result[s] in appreciable deterrence.'" *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 909) (other quotation marks omitted). The deterrence benefit of exclusion "varies with the culpability of the law enforcement conduct." *Id.* at 143. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it[.]" *Id.* at 144. The rule thus applies to "deliberate, reckless, or grossly negligent conduct, or in some circumstances [to] recurring or systemic negligence." *Id.*

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." *(Willie Gene) Davis*, 564 U.S. at 237 (quoting *Hudson*, 547 U.S. at 596). The "benefits of deterrence must outweigh the

costs." *Herring*, 555 U.S. at 141. There are "'substantial social costs' generated by the rule." *(Willie Gene) Davis*, 564 U.S. at 227 (quoting *Leon*, 468 U.S. at 907). Application of the rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id.* As a result, "[t]he principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 908). The exclusionary rule's "'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364-65 (1998) (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)). "[S]ociety must swallow this bitter pill when necessary, but only as a 'last resort.'" *(Willie Gene) Davis*, 564 U.S. at 227 (quoting *Hudson*, 547 U.S. at 591).

In sum, "[w]hen 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." *(Willie Gene) Davis*, 564 U.S. at 238 (quotation marks omitted). "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.* (cleaned up). The exclusionary rule thus does not apply to "evidence obtained by an officer acting in objectively reasonable reliance on a statute," *Krull*, 480 U.S. at 349, or "when the police conduct a search in objectively reasonable reliance on binding judicial precedent," *(Willie Gene) Davis*, 564 U.S. at 239. "'Penalizing the officer for the [legislature's or the court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.'" *Krull*, 480 U.S. at 350 (quoting *Leon*, 468 U.S. at 921).

This Court reviews de novo "whether exclusion was required[.]" *United States v. Bumphus*, 227 A.3d 559, 564 (D.C. 2020).

C. Argument

The trial court erred when it excluded the evidence in this case. Application of the exclusionary rule is inappropriate here, where both Wells's CSO and CSOSA acted in good faith, the deterrence value of exclusion is minimal to nonexistent, and where exclusion would come at a particularly high cost.

When Wells's CSO required him to wear a GPS monitor as a sanction for Wells's violation of the conditions of his supervised release, she did so in objectively reasonable reliance on existing CSOSA regulations and policy. She imposed that monitoring in early June 2023 (R.43 at Exhs. 5-6), before this Court's opinion in *Davis*. At the time, Parole Commission regulations required supervised releasees to "comply with the sanction(s) imposed by the supervision officer and as established by an approved schedule of graduated sanctions." 28 C.F.R. § 2.204(a)(6)(vi). CSOSA's sanctions schedule permitted CSOs to impose "[e]lectronic monitoring for a specified period of time," 28 C.F.R. § 810.3(b)(6), and formal CSOSA policy allowed "use of a specific form of electronic monitoring, GPS tracking, as a sanctioning condition." Policy Statement 4008 at 1. And this Court had repeatedly rejected Fourth Amendment challenges to CSOSA's use of GPS monitoring as an administrative sanction. *See Young*, 305 A.3d at 431; *Atchison*, 257 A.3d at 530; *Jackson*, 214 A.3d at 480-81. As the Supreme Court explained in *(Willie Gene) Davis*, "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will *and*

should use that tool to fulfill their crime-detection and public-safety responsibilities." 564 U.S. at 241 (some emphasis added).

The CSO's reliance on CSOSA's formal policy and subsequently invalidated regulation—which was promulgated in 2003 and went unchallenged until *Davis*—is no different than a police officer's "reliance upon a statute authorizing warrantless administrative searches . . . where the statute is ultimately found to violate the Fourth Amendment." *Krull*, 480 U.S. at 342. In both scenarios, application of the exclusionary rule is unwarranted because it "would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Id.* at 349. Just as a police officer "cannot be expected to question the judgment of the legislature that passed the law," *id.* at 350, an individual CSO cannot be expected to question the judgment of the organization that promulgated the regulations. "If the [regulation] is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the [regulation] as written." *Id.* In each situation, "[p]enalizing the officer for

the [enacting body's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* (quotation marks omitted).

Consistent with that conclusion, the Supreme Court has held that exclusion is not warranted where officers acted "in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval[.]" *United States v. Peltier*, 422 U.S. 531, 541 (1975). And numerous lower courts have found that "the exclusionary rule should not apply where a government official acts in good-faith reliance on an agency-promulgated regulation." *United States v. Kolokouris*, No. 12-CR-6015G, 2015 WL 4910636, at *25 (W.D.N.Y. Aug. 14, 2015); *see also, e.g.*, *United States v. France*, No. 1:19-cr-0103-TCB-AJB-02, 2020 WL 5229040, at *5 (N.D. Ga. May 4, 2020) ("Even if the warrantless search in this case is found to violate the Fourth Amendment, the Court concludes that suppression is not mandated under the good-faith exception to the exclusionary rule. The officers acted on the basis of a regulation that permitted the warrantless opening of priority mail[.]"); *United States v. Osgood*, No. 2:07-cr-00260-JHH-JEO, 2007 WL 9757448, at *11 (N.D. Ala. Sept. 11, 2007) ("A reasonable officer

. . . would have no reason to question his authority under the Federal and Alabama regulatory scheme to conduct the inspection. Accordingly, even if the regulatory provisions were found to be unconstitutional, the court would conclude that [the officer] acted in good faith barring application of the exclusionary rule."). That is because "[d]eterrence, the exclusionary rule's prime purpose, is not furthered when a governmental agent acts in objectively reasonable reliance on a . . . regulation." *United States v. Ortiz*, 714 F. Supp. 1569, 1578 (C.D. Cal. 1989). Wells's CSO engaged in precisely the kind of "nonculpable, innocent . . . conduct" to which the Supreme Court has "'never applied' the exclusionary rule[.]" *(Willie Gene) Davis*, 564 U.S. at 241 (quoting *Herring*, 555 U.S. at 144).

CSOSA as an agency likewise did not act with the requisite level of "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *(Willie Gene) Davis*, 564 U.S. at 238 (quotation marks omitted), necessary to justify application of the exclusionary rule. *See generally Krull*, 480 U.S. at 350 (evaluating "the effect of the exclusion of evidence on legislators" who enacted a statute later declared unconstitutional). CSOSA's policy of using GPS monitoring as an administrative sanction was based on regulations it had promulgated

pursuant to formal, notice-and-comment rulemaking, that allowed its CSOs to use electronic monitoring as a sanction. *See* 28 C.F.R. § 810.3(b)(6). CSOSA promulgated those regulations after Congress had ordered it to "develop and operate intermediate sanctions programs for sentenced offenders[,]" Revitalization Act § 11233(b)(2)(F), and after the Parole Commission had promulgated regulations requiring each supervised releasee in the District of Columbia to "submit to the sanctions imposed by his Community Supervision Officer," which could include "curfew with electronic monitoring[.]" 65 Fed. Reg. at 70469. Indeed, in promulgating its administrative sanctions regulations, CSOSA noted that "[r]egulations issued by the [Parole Commission] . . . authorize[d] CSOSA's community supervision officers to impose graduated sanctions[.]"68 Fed. Reg. at 19738.

CSOSA never hid the fact that it used GPS monitoring as a sanction that its CSOs could impose without prior court or Parole Commission approval. It made clear when it promulgated its regulations that administrative sanctions could be "applied short of court or [Parole Commission] approval," which would "reduce the number of violation reports sent to the releasing authority (for example, the sentencing court

or the United States Parole Commission)[.]" 68 Fed. Reg. at 19738. CSOSA worked closely with the Parole Commission, "report[ing] regularly to the Commission on each offender it supervises for the Commission[.]" *The Local Role of the U.S. Parole Commission*, 111th Cong. 10 (statement of Isaac Fulwood, Jr., Chairman, U.S. Parole Commission). And it repeatedly informed Congress that it used GPS monitoring as an administrative sanction without express Commission or court approval. *See Davis*, 306 A.3d at 114-15 (Thompson, J., dissenting) (identifying examples).

During the nearly 20 years that CSOSA used GPS monitoring as an administrative sanction without express court or Parole Commission direction, nobody—not the Parole Commission, not Congress, not this Court—suggested that practice was illegal. To the contrary, this Court repeatedly rejected constitutional challenges to CSOSA's use of GPS monitoring. *See Young*, 305 A.3d at 431; *Atchison*, 257 A.3d at 530; *Jackson*, 214 A.3d at 480-81. And it repeatedly emphasized the benefits of CSOSA's use of GPS monitoring as a sanction imposed without court or Parole Commission approval. *See Jackson*, 214 A.3d at 480 ("CSOSA's ability to employ such focused GPS monitoring as an intermediate

sanction without judicial approval promotes legitimate governmental interests in responsive, effective, and commensurate supervision of high-risk offenders on probation."); *Hunt*, 109 A.3d at 622 ("By issuing sanctions, CSOSA introduce[s] an accountability structure into the supervision process without commencing revocation proceedings or seeking a hearing for a change in release conditions.") (quotations marks omitted).

Congress, too, embraced CSOSA's use of GPS monitoring as an administrative sanction. The District's sole Representative, Eleanor Holmes Norton, declared herself "fascinated" by the practice and asked numerous questions about its efficacy. *The Local Role of the U.S. Parole Commission*, 111th Cong. 90, 102. More significantly, Congress as a whole recognized that, in the Revitalization Act, it had given CSOSA "specific statutory authority to punish sentenced offenders." S. Rep. No. 114-110, at 2. Congress then expanded that authority when it required CSOSA to offer incentives in addition to imposing sanctions. *See* Pub. L. 114-118, § 3(a).

As this history amply demonstrates, CSOSA did not act with anything approaching the culpability required for the exclusionary rule

to apply. Although a divided panel of this Court recently held that the Parole Commission could not delegate authority to CSOSA to impose GPS monitoring, and that CSOSA lacked statutory authority to do so itself, *see Davis*, 306 A.3d at 109-11, that disagreement with CSOSA's (and the Parole Commission's) interpretation of its legal authority hardly establishes that CSOSA acted with "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *(Willie Gene) Davis*, 564 U.S. at 237 (quotation marks omitted). To the contrary, this Court's numerous decisions approving of CSOSA's use of GPS monitoring as an administrative sanction and upholding it against constitutional attack, and Congress's expansion of CSOSA's authority after being fully informed of CSOSA's GPS program, preclude any such finding. *Cf. Abney v. United States*, 273 A.3d 852, 864 (D.C. 2022) (applying the good-faith exception "[g]iven the state of the case law in 2018," when officers applied for the warrant at issue). CSOSA's actions were neither "clearly unconstitutional," *Krull*, 480 U.S. 349, nor clearly unlawful. At worst, CSOSA misinterpreted its legal authority, but "reasonable men make mistakes of law, too." *Heien v. North Carolina*, 574 U.S. 54, 61 (2014).

"Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case." *(Willie Gene) Davis*, 564 U.S. at 240.

In his trial court briefing, Wells did not argue that his CSO acted culpably when she required him to wear a GPS monitor as an administrative sanction for Wells's violation of his release conditions, or that exclusion was necessary to deter CSOs from committing future Fourth Amendment violations. Instead, Wells focused on CSOSA as an agency, arguing that "[t]he core purpose of the exclusionary rule—to deter law enforcement misconduct—is fully applicable here, where evidence was unlawfully obtained pursuant to policies and regulations of the law enforcement agency itself" (R.52 at 1). According to Wells, this conclusion flows from the fact that: (1) CSOSA is a law enforcement agency; (2) CSOSA "has repeatedly demonstrated a worrisome disregard for Fourth Amendment rights and other liberty interests"; and (3) "excluding evidence obtained pursuant to CSOSA's regulations and policies will have a significant deterrent effect on CSOSA" (*id.* at 7-8). These arguments both ignore the complete absence of deliberate, reckless, or grossly negligent misconduct here and are meritless on their own terms.

As an initial matter, nowhere in his pleadings below did Wells assert that, when it promulgated its administrative-sanction regulations and its policy allowing GPS monitoring as a sanction pursuant to those regulations, CSOSA acted with the level of culpability necessary to justify application of the exclusionary rule. Regardless of Wells's other arguments, this "absence of . . . culpability" means that his reliance on the exclusionary rule is "doom[ed.]" *(Willie Gene) Davis*, 564 U.S. at 240. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Id.* (quoting *Herring*, 555 U.S. at 144). Indeed, the Supreme Court has "'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.* (quoting *Herring*, 555 U.S. at 144). Here, CSOSA as an agency acted with an "objectively reasonable good-faith belief that [its] conduct [wa]s lawful," and thus "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 238 (cleaned up).

As for the arguments that Wells did make, the fact that "CSOSA is a law enforcement agency within the executive branch of the Federal

Government," *In re W.M.*, 851 A.2d 431, 455 (D.C. 2004), is only the beginning of the Court's analysis, not the end. If CSOSA were not a law enforcement agency in some respects, application of the exclusionary rule would necessarily have no meaningful deterrent value. *See, e.g.*, *Krull*, 480 U.S. at 352 ("[I]t is logical to assume that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes."); *Leon*, 468 U.S. at 917 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them."); *Blair v. United States*, 114 A.3d 960, 975 (D.C. 2015) ("we find it difficult to believe that application of the exclusionary rule would have any significant deterrent effect on . . . BOP officials"). "The deterrent purpose of the exclusionary rule necessarily assumes that *the police* have engaged in . . . conduct which has deprived the defendant of some right." *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

The fact that CSOSA is a law enforcement agency, however, does not end the analysis: the Supreme Court has repeatedly declined to

require exclusion even when traditional law enforcement personnel committed a constitutional violation. *See, e.g.*, *(Willie Gene) Davis*, 564 U.S. at 249-50; *Herring*, 555 at 147-48; *Hudson*, 547 U.S. at 598-99; *Peltier*, 422 U.S at 542. And contrary to Wells's suggestion below, it has not found that "executive law enforcement agencies . . . are, by nature, 'inclined to ignore or subvert the Fourth Amendment'" (R.52 at 7 (quoting *Leon*, 468 U.S. at 916)). In the quote from *Leon* that Wells took out of context, the Supreme Court simply asserted that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." 468 U.S. at 916. And the Court has more recently found that the "increasing professionalism of police forces," "internal discipline" and "various forms of citizen review" can all "have a deterrent effect" that "[is] substantial" and renders "the massive remedy of suppressing evidence of guilt . . . unjustified." *Hudson*, 547 U.S. at 598-99. Regardless of CSOSA's status as a law enforcement agency, the relevant question remains whether "the deterrence benefits of suppression . . . outweigh its heavy costs." *(Willie Gene) Davis*, 564 U.S. at 237.

Wells likewise incorrectly asserted below that there would be meaningful deterrence benefits from suppression here because CSOSA "has repeatedly demonstrated a worrisome disregard for Fourth Amendment rights and other liberty interests" (R.52 at 7). The only evidence Wells cited in support of this proposition was the very same regulation, 28 C.F.R. § 810.3(b), that the majority in *Davis* found to exceed CSOSA's statutory authority. *See* 306 A.3d at 93 ("CSOSA's regulation authorizing its officers to discretionarily and unilaterally impose such monitoring, 28 C.F.R. § 810.3(b)(6), is unlawful to the extent it is applied to supervised releasees"). Even assuming that CSOSA misinterpreted its statutory mandate when it promulgated that regulation, this single error hardly demonstrates a "repeated[] . . . disregard for Fourth Amendment rights" (R.52 at 7). Moreover, even the majority in *Davis* declined to find that CSOSA's regulation was unlawful in the ways Wells urged below. *Compare* R.52 at 7-8 (asserting that administrative sanctions of "increased drug testing" and "placement in a residential treatment facility" "likely exceed[] CSOSA's statutory authority"), *with Davis*, 306 A.3d at 104, 107 n.15 (assuming that CSOSA has "some authority under its regulations to administratively sanction—

or incentivize—supervised releasees," and declining to decide the validity of the drug testing and residential treatment sanctions). There is simply "no evidence suggesting that [CSOSA] has[s] enacted a significant number of" unlawful regulations, and thus "no basis for believing that [CSOSA is] inclined to subvert . . . the Fourth Amendment" or that its "lawlessness . . . requires application of the extreme sanction of exclusion." *Krull*, 480 U.S. at 351 (quoting *Leon*, 468 U.S. at 916).

Perhaps most importantly, it is incorrect that "excluding evidence obtained pursuant to CSOSA's regulations and policies will have a significant deterrent effect on CSOSA" (R.52 at 8). CSOSA, as an agency, has "no stake in the outcome of particular criminal prosecution." *Leon*, 468 U.S. at 917. CSOSA promulgates its regulations and policies for "broad, programmatic purposes" that are not focused on "procuring evidence in particular criminal investigations." *Krull*, 480 U.S. at 352. Rather, those regulations and policies further CSOSA's "distinctive probation mission to reform convicted offenders and deter them from committing new crimes." *Jackson*, 214 A.3d at 473. "[T]he entire premise of supervised release is that the individual remains at risk of re-offending and is in need of supervision to deter recidivism and encourage

rehabilitation." *Atchison*, 257 A.3d at 531. As the Supreme Court has recognized, "[p]arole agents, in contrast to police officers, are not 'engaged in the often competitive enterprise of ferreting out crime'; instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial." *Scott*, 524 U.S. at 368 (quoting *Leon*, 468 U.S. at 914). For that reason, "[e]ven when the officer performing the search is a parole officer, the deterrence benefits of the exclusionary rule remain limited." *Id.*

There is thus no reason to believe that "applying the exclusionary rule to evidence [obtained] pursuant to [CSOSA's regulation] prior to the declaration of its invalidity will act as a significant, additional deterrent." *Krull*, 480 U.S. at 353. Rather, "it is logical to assume that the greatest deterrent . . . is the power of the courts to invalidate [CSOSA's regulations.]" *Id.* at 352. Consistent with that conclusion, courts have found that exclusion "would only have a minimal deterrent effect on the [agency]" that issued a regulation pursuant to which its employees conducted a search later deemed unconstitutional. *Ortiz*, 714 F. Supp. at 1580. Even when "part of [an] agency's function is to ferret out violations

of the law," another part "is to enact rules in a deliberative, drawn-out process that is similar to the statute-making process of a legislative body." *United States v. Kolokouris*, No. 12-CR-6015G, 2015 WL 7176364, at *12 (W.D.N.Y. Nov. 13, 2015). When it enacted its administrative-sanction regulations, CSOSA "was acting much more like a legislature than it was acting like a crime-fighting law enforcement officer." *Id.* "[J]ust like a legislature, it is hard to believe that [CSOSA], as a rulemaking body, would be significantly deterred by suppression of evidence in individual criminal prosecutions." *Id.*

Even if suppression of the evidence in this case could theoretically contribute to deterring CSOSA as an agency from committing future Fourth Amendment violations, that is not enough to support application of the exclusionary rule: the exclusionary rule applies "only where it 'result[s] in appreciable deterrence.'" *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 909) (other quotation marks omitted); *see also Blair*, 114 A.3d at 976 n.30 ("To decline to apply the exclusionary rule, a court need not find that it would have *no* deterrent effect whatsoever"). And while "[r]eal deterrent value is a 'necessary condition for exclusion,' . . . it is not 'a sufficient' one." *(Willie Gene) Davis*, 564 U.S. at 237 (quoting

Hudson, 547 U.S. at 596). The "benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141. Here, any minimal deterrence obtained by suppression of the evidence "would come at a high cost to both the truth and the public safety[.]" *(Willie Gene) Davis*, 564 U.S. at 231. Unlike the typical case, exclusion here would affect not only this case, but the many pending cases where the government's investigation relied upon GPS data obtained as a result of motoring imposed by CSOSA over the past two decades. *See, e.g.*, *Davis*, 306 A.3d at 94; *Young*, 305 A.3d at 431; *Atchison*, 257 A.3d at 530; *Walker v. United States*, 253 A.3d 146, 152 (D.C. 2021); *Jackson*, 214 A.3d at 469-70. This "heavy toll on both the judicial system and society at large," *(Willie Gene) Davis*, 564 U.S. at 237, cannot be justified by whatever theoretical deterrent value suppression might have in preventing future Fourth Amendment violations by CSOSA as an agency.

Declining to apply the exclusionary rule here would not incentivize Fourth Amendment violations by ensuring, as Wells asserted below, that "a law enforcement agency could use illegally obtained evidence at trial any time the agency itself enacts a policy directing its officers to conduct illegal searches" (R.52 at 10). Rather, the exclusionary rule issue

presented by this case is much more limited. There are good reasons to believe that application of the exclusionary rule in a criminal case is not necessary to deter CSOSA as an agency from future Fourth Amendment violations. CSOSA serves different purposes and is motivated by different interests than traditional policing entities, and Congressional oversight and notice-and-comment rulemaking provide "extant deterrences" that are "substantial." *Hudson*, 547 U.S. at 599. But even if "application of the exclusionary rule could provide some incremental deterrent" to CSOSA under some circumstances, *Krull*, 480 U.S. at 352, CSOSA's agency-level actions in this case do not demonstrate the requisite culpability for "the deterrence benefits of suppression . . . [to] outweigh its heavy costs." *(Willie Gene) Davis*, 564 U.S. at 237. As an agency, CSOSA acted "with an objectively reasonable good-faith belief that [its] conduct [wa]s lawful," and thus "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* (cleaned up).

CONCLUSION

WHEREFORE, the government respectfully submits that the trial court's suppression order should be reversed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
JOHN P. MANNARINO
D. WILLIAM LAWRENCE
MEGAN E. MCFADDEN
Assistant United States Attorneys

/s/
DANIEL J. LENERZ
DC Bar #888283905
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Daniel.Lenerz@usdoj.gov
(202) 252-6829

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial Here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/	24-CO-162
Signature	Case Number(s)
Daniel J. Lenerz	4/2/2024
Name	Date

Daniel.Lenerz@usdoj.gov
Email Address

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellee, Samia Fam, Esq., Public Defender Service, sfam@pdsdc.org, on this 2nd day of April, 2024.

/s/
DANIEL J. LENERZ
Assistant United States Attorney