No. 17-839

In the United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP ZODHIATES,
Defendant-Appellant.

On Appeal from the
U.S. District Court
for the Western District of New York

Brief *Amicus Curiae* of
Downsize DC Foundation, DownsizeDC.org,
Gun Owners of America, Inc., and Gun Owners Foundation
in Support of Appellant

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DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Downsize DC Foundation, DownsizeDC.org, Gun Owners of America, Inc., and Gun Owners Foundation, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. Downsize DC Foundation, DownsizeDC.org, Gun Owners of America, Inc., and Gun Owners Foundation are non-stock, nonprofit corporations, which have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson

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INTEREST OF *AMICI CURIAE*[1]

Downsize DC Foundation and Gun Owners Foundation are exempt from federal income taxation under Internal Revenue Code ("IRC) section 501(c)(3). *Amici* DownsizeDC.org. and Gun Owners of America, Inc. are nonprofit organizations, exempt from federal income taxation under IRC section 501(c)(4). Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici* filed *amicus curiae* briefs in three other cases involving the Fourth Amendment's protection of cell site location information and other cell phone information, including:

- United States v. Wurie, 134 S.Ct. 2473 (2014), U.S. Supreme Court, Brief *Amicus Curiae* of Downsize DC Foundation, *et al.* (Apr. 9, 2014). Note: Wurie was the companion case to Riley v. California, 134 S.Ct. 2473 (2014);

- United States v. Graham, U.S. Court of Appeals for the Fourth Circuit Docket No. 12-4659, Brief *Amicus Curiae* of DownsizeDC.org, *et al.* in Support of Defendants-Appellants on Rehearing *En Banc* (Jan. 22, 2016); and

- Graham v. United States, U.S. Supreme Court, Docket No. 16-6308, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* in Support of Petition for Certiorari (Nov. 3, 2016). Note: this Petition for

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. Counsel for Mr. Zodhiates has consented, and Counsel for the United States has stated the Government does not object to the filing of this *amicus curiae* brief

Certiorari is currently pending the decision in Carpenter v. U.S. (No. 16-402).

Additionally, these *amici* filed two *amicus* briefs in the United States Supreme Court in United States v. Antoine Jones, 132 S.Ct. 945 (2012), at both the petition stage and the merits stage:

- Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* in Support of Neither Party, On Petition for Writ of Certiorari (May 16, 2011); and

- Brief *Amicus Curiae* of Gun Owners of America, *et al.*, in support of Respondent, On Writ of Certiorari (Oct. 3, 2011).

STATEMENT OF THE CASE

Appellant Philip Zodhiates was convicted of conspiracy to remove, and aiding and abetting the removal of, Isabella Miller-Jenkins, a minor from the United States, while in the custody of her mother, Lisa Miller, with intent to obstruct the lawful exercise of parental rights. This appeal raises two issues of law. First, it questions whether the Government demonstrated that Appellant acted with the requisite intent, an issue not addressed here. Appellant's Br. ("Aplt. Br.") at 1.

Second, this appeal questions whether the Government violated the Fourth Amendment when, during its investigation, it issued two grand jury subpoenas to Appellant's cell phone provider for "[a]ll subscriber information" for a 28-month

period for two cell phones associated with Appellant. The Government used the cell phone location information obtained from these grand jury subpoenas at trial to establish Mr. Zodhiates' whereabouts at various dates and times. Aplt. Br. at 16. These *amici curiae* address this second issue.

ARGUMENT

I. AT TRIAL, THE GOVERNMENT RELIED ON CELL PHONE LOCATION INFORMATION SEIZED AND SEARCHED IN VIOLATION OF THE FOURTH AMENDMENT.

Appellant asserts that the district court below "erred by denying [his] motion to suppress" information obtained in response to two grand jury subpoenas for "[a]ll subscriber information for a 28-month period for two cellular phones associated with Mr. Zodhiates." Aplt. Br. at 16. With respect to his cell phone location information obtained pursuant to those subpoenas, Appellant contends the Government "[s]hould have applied for a warrant for this information and violated the Fourth Amendment by instead obtaining it by grand jury subpoena." *Id*. Appellant Zodhiates asserts that a Fourth Amendment violation would be found "under both [i] the reasonable expectation of privacy analysis set forth in *Katz* and [ii] the traditional property principles set forth in *Jones*." *Id.*

A. The Government Violated the Fourth Amendment Based on the Katz Privacy Analysis.

Appellant's Brief places principal reliance on the Katz v. United States, 389 U.S. 347 (1967), privacy analysis, largely based on the clarity and strength of the view expressed by concurring justices in Jones v. United States, 132 S.Ct. 945, 955 (2012) that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* at 964. Should this Court adopt that clearly expressed view, Mr. Zodhiates' conviction should be vacated and the case remanded. But Appellant also argued that the Government "violated the Fourth Amendment under a traditional property based analysis by commanding the production of information contained on a tangible object — his cellular provider's hard drive — without a warrant." Aplt. Br. at 17, 44. However, the Supreme Court has made clear that in evaluating claimed Fourth Amendment violations, reviewing courts should first consider the traditional property rights analysis re-asserted in Jones, **before** arguments based on reasonable expectation of privacy. *See* Section I.B, *infra*. Should this Court follow Jones and begin with the property analysis, it should also vacate the conviction — but for less subjective and more principled reasons — based on the text and history of the Fourth Amendment.

B. The District Court Completely Ignored the Supreme Court's Decisions in Jones and Jardines Establishing the Primacy of Property Rights in Fourth Amendment Challenges.

Jones constituted a watershed in the development of Fourth Amendment law.[2] Although that case had been litigated below largely based on a Katz privacy analysis, the majority decision in the Supreme Court was grounded in property principles embodied in common law trespass. In his decision for the Court, Justice Scalia explained that the Fourth Amendment's primary protection of property rights was clearly revealed by the language of the Amendment:

> The **text** of the Fourth Amendment reflects its close connection to **property**, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [Jones at 949 (emphasis added).[3]]

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[2] *See generally* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

[3] By contrast, the word "privacy" no where appears in the text of the U.S. Constitution. Its origin is in a law review article written more than 100 years after the ratification of the Fourth Amendment which nowhere even discussed the U.S. Constitution. Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," HARVARD L.REV. vol. IV, no. 5 (Dec. 15, 1890). Applied to Fourth Amendment law, it has become a dangerous judicial construct which diverts judges from applying the Amendment's text. Devoid of historic meaning, the reasonable expectation of privacy test allows a judge to reach whatever decision they may personally prefer, elevating the felt "needs" of law enforcement over the Constitutional text, without regard for the original textual meaning subscribed to by the Framers of the Fourth Amendment.

The central holding of Jones was reiterated by the Court the next year in Florida v. Jardines, 133 S.Ct. 1409 (2013). There, Justice Scalia explained where a court's analysis of such a case must begin:

> The [Fourth] Amendment establishes a simple **baseline**, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by **physically intruding**" on "persons, houses, papers, or effects," a 'search' within the original meaning of the Fourth Amendment has "undoubtedly occurred." [Jardines at 1414 (emphasis added).]

Justice Scalia then explained the interaction between the Jones property principles and the Katz privacy construct when he stated that:

> though *Katz* may **add** to the baseline, it does **not subtract** anything from the Amendment's protections when the Government does engage in [a] **physical intrusion** of a constitutionally protected area.... [*Id*. (citations omitted) (bold added).]

The district court decided Appellant's motion to suppress as though Jones and Jardines had never been decided. It ignored Jones and Jardines' elevation of property rights to a position front and center in Fourth Amendment challenges, relegating privacy rights to a secondary position. The district court adopted the Government's position that no Fourth Amendment "search" occurred when the Government obtained the cell phone location information that was used at trial. District Court Decision and Order (Jan. 20, 2016) (hereinafter "Decision and Order") at 11. To reach its decision, it made a Katz privacy assessment: whether

Zodhiates had "a subjective desire to keep his ... effects private" and whether "his subject expectation of privacy is 'one that society accepts as reasonable.'" *Id*. (citations omitted). To answer those questions, the court relied on the "third-party doctrine" as established by the Supreme Court in United States v. Miller, 425 U.S. 435 (1976)[4] and Smith v. Maryland, 442 U.S. 735 (1979).[5] However, both of these "third party" cases were decided well before United States v. Jones in 2012, and those opinions reveal that the Court gave no thought whatsoever to the Fourth Amendment's protection of property rights, since both decisions were based exclusively on a Katz privacy analysis. Here, the district court reasoned: (i) that Mr. Zodhiates could not possibly believe that his "location is somehow kept secret[6] from the telecommunication carriers and other third parties;" (ii) that there

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[4] The district court below explained that in Miller, the Supreme Court ruled that "the defendant had 'no legitimate expectation of privacy' in the contents of his checks and deposit slips because those documents 'contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.'" Decision and Order at 12.

[5] The district court below explained that in Smith, the Supreme Court ruled that "the defendant did not have a 'legitimate expectation of privacy'" in phone numbers he conveyed to a third party, such as the phone company. Decision and Order at 13.

[6] Here, the district court poses the wrong question and gets the wrong answer. The question is not whether Mr. Zodhiates believed that his "location information is somehow kept secret **from** telecommunication carriers..." but rather whether his location information is kept secret **by** his telecommunication carrier

was "no reasonable expectation of privacy in the cell phone location information at issue in this case; and therefore (iii) there was "[n]o Fourth Amendment 'search.'" Decision and Order at 15.[7]

When the district court finally addressed Jones, it concluded: "**Justice Scalia's trespass theory** ... did not address the continuing validity of the **third-party doctrine**." Decision and Order at 17 (emphasis added). However, what the district court completely missed is that the third-party doctrine has no relevance whatsoever to what it termed "Justice Scalia's trespass theory."[8] As demonstrated by the district court's own analysis of Smith and Miller, the "third-party doctrine"

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from all third parties, including the Government.

[7] It should be noted that the Government has not taken the position that the seizure and search of Mr. Zodhiates' cell phone location information was authorized by a subscription agreement between Mr. Zodhiates and his cell phone provider. The only authority for the seizure and search in this case is the Stored Communications Act.

[8] In Jones, the discussion of the need to reconsider the third party doctrine was set out in not in Justice Scalia's opinion for the Court, but in Justice Sotomayor's concurring opinion. *See* Jones, at 957 (Sotomayor, J. concurring) ("[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 [citing Smith and Miller]. 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.... I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.").

is a creature of the Katz privacy rule which was in no way applied in Justice Scalia's opinion for the court in Jones which rested exclusively on a traditional Fourth Amendment property rights analysis.

C. Applying Jones and Jardines Textual Property Principles to Zodhiates' Cell Phone Location Information Reveals a Constitutional Violation.

Beginning where Justice Scalia's opinion for the court in Jones began, the Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." Properly analyzed, the district court should have considered whether Mr. Zodhiates had a Fourth Amendment protected property right in his cell phone location information created by his cell phone but housed on computers located at the offices of his cell phone provider.

In Jones, the defendant's car was considered to be a protected "effect." In the present case, the cell phone location information seized and searched is the modern digital equivalent of protected "papers"[9] that were in the possession of a third party.[10] (As to the Fourth Amendment's long standing protection of papers,

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[9] *See* Gouled v. United States, 255 U.S. 298 (1921).

[10] This doctrine is one of the matters that the Supreme Court will be addressing this fall in Carpenter v. United States; *see* Section II, *infra*.

particularly against general warrants and writs of assistance, *see* Boyd v. United States, 116 U.S. 616 (1886) and its discussion of how the Framers designed the Fourth Amendment to prevent abusive searches suffered by the Colonists at the hands of the British.)

1. Third Party Possession of Property. Does the fact that physical possession of the cell phone location information was in the hands of a third party cell phone provider void all property rights in that item of personal property? The law knows no such principle. There are many types of situations where personal property is left in the possession of a third party without the owner losing ownership rights to control that information. Consider that in every bailment, possession is entrusted to another party, but the bailee has a duty to protect the bailor's property against demands by all other third parties. J. Story, Commentaries on the Law of Bailments, sec. 620, Little & Brown, 1840. In the present case, in terms of a property analysis, the Government is no more than a third party, with no greater rights to that property than a thief — in the absence of a warrant based on probable cause.

In the Stored Communication Act ("SCA"), which was enacted as part of the Electronic Communications Privacy Act of 1986 ("ECPA"), 100 STAT. 1848, codified at 18 U.S.C. §§ 2701-2712, Congress implicitly recognized that the data

in the hands of a cell phone provider is the personal property of the cell phone owner. The uses of that data by the cell phone provider is strictly controlled under the SCA — including instances where the cell phone provider wants to make a voluntary disclosure (18 U.S.C. § 2702) or where the Government compels him to make a required disclosure (18 U.S.C. § 2703). If the cell phone provider owned all of the bundle of rights in that data, there would be no need for the Government to do any more than make a demand for the information from a regulated company — over which the Government can exercise enormous power.[11] Indeed, in certain circumstances, it gives a cell phone "subscriber" the right to file a civil action to obtain damages, attorney's fees, and equitable relief from the person who violates the Act. 18 U.S.C. § 2707.[12] However imperfect those protections may be, the

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[11] The Government has often demonstrated that it has no respect for the sanctity of private communications and other forms of data, asserting whatever power that it needs to assert to access them. It has demonstrated its willingness to use its regulatory powers to coerce compliance, or threaten service providers with severe sanctions, thus making those providers complicit in Fourth Amendment violations. The encrypted email provider Lavabit was forced to shut down rather than violate the rights of its customers when its founder Ladar Levison refused to install Government surveillance equipment on his company's network and surrender encryption keys the Government demanded. *See* L. Levison, "Secrets, lies and Snowden's email: Why I was forced to shut down Lavabit," The Guardian (May 20, 2014).

[12] Although this section of the Stored Communication Act exempts the Government from civil liability for violation of the law, it contains no exemption from criminal sanctions. It appears, however, that to date no federal prosecutor

Stored Communications Act recognizes and protects each users' property rights in his own data.

What position the Government may take on Mr. Zodhiates assertion of property rights over his cell phone location information is unknown, as it appears that thus far the Government has been content to make broad assertions that no Fourth Amendment search occurred because of the permissive Katz third-party privacy doctrine. But in order to avoid the application of the property principles in Jones and Jardines, the Government would need to assert that a party loses all control over personal property when possession is vested in a third party — an absurd notion. If a businessman entrusts his car to a parking attendant to park, does the parking attendant have the right to search the entire car without a warrant — or allow the Government to do so?

2. Digital Information Stored on a Hard Drive. Does the fact that the cell phone location data sought by grand jury subpoena in this case was in digital form, "stored on a computer hard drive, a tangible object" (Aplt. Br. at 44) cause it to lose its status as protected private property? Certainly not. If that were so, data on a computer hard drive could be stolen but the thief could not be

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has brought criminal charges against anyone in law enforcement for violation of the SCA.

prosecuted. It would make no sense to protect as property data on paper and leave unprotected the digital version of that paper. Just like the Freedom of the Press is not limited to the pamphlet, and the Second Amendment is not limited to the musket, the Fourth Amendment is not limited to physical "papers." *See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

For example, in the case of Riley v. California, 134 S.Ct. 2473 (2014),[13] the U.S. Supreme Court discussed how to apply Fourth Amendment principles to stored data, and determined that the search of an arrestee's cell phone was not justified under the "search incident to arrest" doctrine. One of the factors that led the Court to bar a warrantless search of a cell phone is that:

> Data on a cell phone can also reveal where a person has been. **Historic location information** is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute.... See *United States* v. *Jones* [citation omitted]. [Riley at 2490.]

Moreover, Chief Justice Robert's opinion for a unanimous court in Riley explained that it was not just access to data on the cell phone in Mr. Riley's possession that had to be protected, but also detailed information about Mr. Riley

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[13] Appellant's brief pointed out that in Riley the Supreme Court identified two remarkable statistics about cell phone usage, and cell phone location: "more than 90% of American adults own a cell phone and according 'to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time." Aplt. Br. at 39.

that is located in "**cloud computing**" — "stored on **remote servers** rather than on the device itself." *Id*. (emphasis added). Therefore, it did not appear to matter to the Court where the cell phone location information was being kept — on a cell phone, in the cloud, or, in this case, at a computer owned by a cell phone provider. Here, the data accessed by Government was "stored on remote servers." It would make no sense whatsoever for the Supreme Court to rule in Riley that law enforcement was completely barred from accessing his cell phone location information through that cell phone without a warrant, while allowing it to be accessed without a warrant directly from the remote hard drive — the "cloud" — where that data is stored on behalf of the customer.[14]

D. Exclusive Possession Is Not Necessary to Have Enforceable Fourth Amendment Property Projection.

Even the U.S. Department of Justice training materials on the Stored Communications Act describes that law as "a system of statutory privacy rights for customers and subscribers of computer network service providers."[15] However,

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[14] Fully 127 years ago, future Justice Brandeis observed that "the term 'property' has grown to comprise every form of possession — intangible, as well as tangible." S.D. Warren & L. D. Brandeis, "The Right to Privacy."

[15] H.M. Jarrett & M.W. Bailie, Office of Legal Education, Executive Office for U.S. Attorneys, "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations" at 115.

should the Government take the position that Mr. Zodhiates had no property interest in his own cell phone location information — data created by signals sent from his own cell phone — a basic reexamination of property principles would be necessary.

Government lawyers seem to ignore the lessons of law school, where it has been taught for decades that property rights are like a bundle of sticks. *See generally* Jane B. Baron, "Rescuing the Bundle-of-Rights Metaphor in Property Law, U. CIN. L. REV. vol. 82, is. 1 (2014). It is not necessary that all of the sticks in that metaphorical bundle be in the exclusive control of the owner of property for the owner to retain protected rights. Personal data on a third-party computer would not be considered property only if "what we mean by property is *in rem* exclusion rights consolidated in a single owner and good against the world." *Id*. at 99. Professor Baron explains that two new types of "information based assets" — electronic health records and commercial databases — "fit awkwardly into existing legal categories such as property, privacy, and intellectual property [and] will look more like bundled rights than like exclusionary powers over things." *Id*. However, as to these assets, she asserts "[t]he bundle-of-rights metaphor is helpful ... precisely because it heightens attention to the possibility of divided, but shared rights." *Id*. Thinking of property rights as "a bundle of rights ... can be helpful ...

forcing specification of interconnected rights, powers, privileges and liabilities, highlighting the choices implicit in any given configuration of property rights...." *Id*. at 100. A historic "bundle of rights" helps the court see through the confusion caused by the Government's Katz privacy analysis, under which once data is in the hands of a third party, its owner loses all control over it with respect to Government demands. Even if that were true with respect to privacy considerations under *Katz*, it has no application to the Jones and Jardines property rights analysis.

An individual does not lose the right to control Government access to his car when he allows a parking attendant to park it. He does not lose the right to control Government access to his wallet when it is secured in a locker at a gym. He does not lose that right when he posts a First-Class letter with the U.S. Postal Service.[16] Likewise, he certainly should not lose the right to prevent Government access to detailed information about his daily comings and goings just because that location data is being held by his cell phone provider.

Indeed, when serving on the Tenth Circuit, Justice Gorsuch applied the Jones property analysis to the search of a email attachment on a third party's

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[16] *See* Ex Parte Jackson, 96 U.S. 727, 735 (1877) ([Postal] regulations ... cannot be enforced in a way which would require or permit an examination into letters ... without warrant, issued upon oath or affirmation.).

computer system, concluding that the "(presumptively) private correspondence ... seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment." United States v. Ackerman, 831 F.3d 1292, 1307 (2016). He also noted that "many courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications. *See, e.g.*, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1063, 1069-70 (N.D. Cal. 2000); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp 1015, 1019, 1027 (S.D. Ohio 1997); Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1565-67, 54 Cal. Rptr. 2d 468 (1996)." *Id*. at 1308. The same rule should apply here.

II. THE COURT SHOULD STAY THIS APPEAL PENDING THE UNITED STATES SUPREME COURT'S DETERMINATION OF CARPENTER V. UNITED STATES.

On May 31, 2017, Appellant filed a motion to stay the briefing in this case based on the filing of a Petition for Certiorari in the U.S. Supreme Court in a remarkably similar case — Carpenter v. United States, No. 16-402. (On June 5, 2017, the Petition for Certiorari[17] in Carpenter was granted.[18]) On June 12, 2017,

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[17] http://www.scotusblog.com/wp-content/uploads/2016/10/16-402-cert-petition.pdf.

[18] In Carpenter, Petitioner's brief on the merits and joint appendix is due on August 7, 2017. Carpenter v. United States, No. 16-402, U.S. Supreme Court

the Government filed a response opposing Appellant's motion for a stay of this appeal. Appellant then filed a reply on June 14, 2017, only eight minutes after which the motion for stay was denied — with the order stating that it was based on the motion for stay and the opposition, but with no mention made of the reply. On June 23, 2017, Appellant filed a motion for reconsideration which remains pending with this Court. The arguments made in that earlier reply and the motion for reconsideration have not yet been considered. For the reasons stated by Appellant in those filings, as well as the reasons set forth below, it is urged that this Court stay proceedings in this appeal until the Supreme Court issues its decision in Carpenter, which can be expected to resolve the second issue presented in this appeal.

A. The Legal Issues in this Case Are Identical to Carpenter v. United States and the Facts Are Substantially Similar.

In Carpenter, the Court issued a writ of certiorari to address the following question:

> Whether the **warrantless** seizure and search of historical cell phone records revealing the **location** and movements of a **cell phone user**

Docket Sheets, https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/16-402.htm.

> over the course of 127 days is permitted by the Fourth Amendment. [Emphasis added.[19]]

Here the second issue raised by appellant in the Zodhiates case is:

> Whether the government violated the Fourth Amendment by obtaining **cellular telephone location data** [for a 28-month period] by grand jury subpoena **instead** of seeking a **warrant**. [Appl. Br. at 1 (emphasis added).]

Clearly, the issue which the Supreme Court is now addressing in Carpenter is identical to the issue raised by Appellant Zodhiates on appeal. And, even more than the identity of the legal issue, the facts in the two cases are remarkably similar.

1. The Stored Communication Act Is Involved in Both Cases. In both Carpenter and the present case, the Government sought and obtained access to each defendant's cell phone location information pursuant to the Stored Communication Act. That statute imposes a duty (described as "required disclosure") on "a provider of electronic communication service" to "disclose a record or other information pertaining to a subscriber to or customer of such service" whenever a governmental entity, *inter alia*, (i) obtains a warrant,

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[19] *See* Carpenter v. United States, Petition for Certiorari (Sept. 26, 2016) at I.

(ii) obtains a court order, or (iii) has consent of the customer.[20] In neither case was a warrant on probable cause, or the consent of the customer, obtained. Instead, pursuant to 18 U.S.C. § 2703(c)(1)(B), the Government in both cases sought cell phone location information based not on probable cause, as required by the Fourth Amendment, but only on:

> specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. [18 U.S.C. § 2703(d).]

2. The Time Period for Location Information Is Even Longer Here. The time period for the data requested in Carpenter covered 152 days of data (about five months), and the cell service providers in that case provided 127 days of data. *Id*. at 4-5. As to Appellant Zodhiates, the jury subpoena obtained data for period more than five times longer — May 1, 2009 through August 25, 2011 — constituting 28 months. Aplt. Br. at 38.

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[20] Cell phone location information is not set out in the list of items of information that a provider "shall disclose to a government entity" without need for a warrant: (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service and types of service utilized; (E) telephone or instrument number; and (F) means and source of payment. 18 U.S.C. § 2703(c)(2). *See* Aplt. Br. at 32.

3. The Non-Warrant Request Is Similar. In Carpenter, the applications were submitted to Article I magistrate judges under the standard for "Court Orders" set out above — not warrants based on "Oath or affirmation" issued on a finding of "probable cause." *See id*. In the case of Appellant Zodhiates, the cell phone location information was provided to the Government in response to a grand jury subpoena pursuant to 18 U.S.C. § 2703(c)(2). *See* Decision and Order at 9-10. Like the magistrate's order in Carpenter, the grand jury subpoena used here was not a judicially issued warrant and was not based on oath or affirmation, nor on probable cause.

4. The Information Sought Is the Same Kind. The information sought by the orders in Carpenter was "'[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones from December 1, 2010 to present[,]' as well as 'cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls[.]'" Carpenter Petition for Certiorari at 3-4. In this case, the grand jury subpoenas sought "All subscriber information, including but not limited to" account number, subscriber name, other account identifying information, means and source of payments, length of service, detail records of phone calls made and received, numeric detail

records of text messages, multimedia, and other data transmissions made and received. *See* Decision and Order at 7. The cell phone location information obtained was used at trial in both cases. Aplt. Br. at 13; Carpenter Petition for Certiorari at 8.

5. The Third-Party Doctrine Is at Issue in Both Cases. Finally, in upholding the SCA orders in Carpenter, the Sixth Circuit relied on the third-party doctrine in ruling that there was no reasonable expectation of privacy in one's cell phone location information. *See* Carpenter Petition for Certiorari at 21. Likewise, in this case, as discussed in Section I.B., *supra*, the district court applied the third-party doctrine of Miller and Smith to hold that "there is no reasonable expectation of privacy in the cell phone location information at issue in this case." Decision and Order at 12-15.

B. The Same Issue Is Currently Being Raised in Numerous Courts, Generating a Volley of Opinions.

The Carpenter case is not the only case presently to be grappling with this issue. The Carpenter Petition for Certiorari identified "five courts of appeals to consider the Fourth Amendment status of historical [Cell Phone Location Information that] have generated 18 separate majority, concurring, and dissenting opinions, highlighting the need for [the Supreme] Court to act." Carpenter

Petition for Certiorari at 13.[21] Presumably the Court's decision in Carpenter will bring substantial uniformity to a hotly contested question.

C. Economy of Judicial Resources and Justice Would be Served by a Stay.

The Supreme Court and this Court have recognized "'the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 76 (2nd Cir. 1997) (quoting Landis v. North American Co., 299 U.S. 248, 254 (1936)). The Ninth Circuit *sua sponte* has stayed a case "pending the final decision of the Supreme Court in *Carpenter v. United States*, No. 16-402." United States v. Gilton, No. 16-10109, Doc. No. 90. The Ninth Circuit prudently decided to allow time for the Supreme Court to rule in Carpenter, and it is urged that this Court adopt that same approach, as it would be a waste of the resources of this Court, as well as counsel for the parties and the

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[21] In denying Appellant's motion to suppress, the district court below referenced other similar cases including United States v. Graham, 796 F.3d 332 (4th Cir. 2015), noting that the Zodhiates case involves "similar (if not identical) issues" to those in Graham. *See* January 20, 2016 Order denying motion to suppress at 20 n.11, and 14 n.9. Subsequent to the district court's order, the Fourth Circuit reheard the panel opinion *en banc*, issued an opinion (834 F.3d 421 (May 31, 2016)), and a Petition for Certiorari was filed in the U.S. Supreme Court, which was distributed for conference eight times, and remains pending. As stated in the Interest of the *Amici Curiae*, *supra*, these *amici* filed an *amicus curiae* brief in Graham in the Fourth Circuit, and in the U.S. Supreme Court support of the Petition for Certiorari.

parties themselves, not to hold this case in abeyance pending the Supreme Court's ultimate decision in Carpenter. And, it would avoid the thorny problem of addressing whether and how a decision in Carpenter upholding the position adopted by Appellant Zodhiates should be applied retroactively. Finally, it would be an injustice for Appellant to serve any sentence if the conviction is based on unconstitutionally seized evidence.

CONCLUSION

The third-party doctrine as applied by the district court is (i) wholly based on pre-Jones expectations of privacy, (ii) completely unreasonable even when the case is considered under privacy principles, and (iii) flatly inconsistent with the property principles established in Jones. The conviction should be vacated and the case remanded to the district court for further proceedings.

Respectfully submitted,

/s/ William J. Olson

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July 5, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amici Curiae* Downsize DC Foundation, *et al.* in Support of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,725 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ William J. Olson
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Attorney for *Amici Curiae*
Downsize DC Foundation, *et al.*

Dated: July 5, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amici Curiae* of Downsize DC Foundation, *et al.* in Support of Appellant was made, this 5th day of July 2017, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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