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,
Free Speech Coalition, Free Speech Defense and Education Fund,
Gun Owners of America, Inc., Gun Owners Foundation,
Policy Analysis Center, and Restoring Liberty Action Committee
in Support of Defendant-Appellant's Petition for Rehearing En Banc

William J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070

Attorney for *Amici Curiae*

September 6, 2018

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Policy Analysis Center, and Restoring Liberty Action Committee, 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., Gun Owners Foundation, and Policy Analysis Center are non-stock, nonprofit corporations which have no parent companies, and no person or entity owns them or any part of them. Restoring Liberty Action Committee is an unincorporated educational organization with no parent company, and no person or entity owns it or any part of it.

/s/ William J. Olson
William J. Olson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, and Policy Analysis Center are nonprofit organizations, exempt from federal income taxation under Internal Revenue Code section 501(c)(3) or 501(c)(4). Restoring Liberty Action Committee is an educational organization. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

Some of these *amici* filed an *amicus* brief in this case, *United States v. Zodhiates*, No. 17-839, last year:

- Brief *Amicus Curiae* of Downsize DC Foundation, *et al.* in Support of Appellant (July 5, 2017).

Additionally, some of these *amici* filed *amicus* briefs in similar cases involving the Fourth Amendment's protection of cell site location information and other cell phone-related information, including the recent Supreme Court case

---

[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 not responded to a request for consent to this *amicus curiae* brief.

which was applied here by the panel decision, *Carpenter v. United States*, 138 S.Ct. 2206 (June 22, 2018):

- Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* in Support of Petition for Certiorari (Aug. 14, 2017).

Other related cases in which some of these *amici* participated are:

- *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).

Lastly, some of these *amici* filed two *amicus* briefs in the U.S. Supreme Court in *United States v. Antoine Jones*, 565 U.S. 400 (2012), prohibiting warrantless GPS monitoring of an individual's location:

- 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, Inc., *et al.* in Support of Respondent, On Writ of Certiorari (Oct. 3, 2011).

ARGUMENT

I. Without any Briefing or Argument, the Panel Misapplied the *Carpenter* Decision, Sanctioning the Government's Use of CSLI Even Though Admittedly Seized in Violation of the Fourth Amendment.

Motions to delay briefing and argument filed by counsel for Mr. Zodhiates made the panel below fully aware of the pendency of *Carpenter v. United States*, 138 S.Ct. 2206 (2018), in the U.S. Supreme Court — a case that was anticipated to, and did, resolve an issue which is almost on all fours with one of the issues on appeal involving the warrantless search and seizure of cell site location information ("CSLI") in *Zodhiates*. After the Second Circuit denied Mr. Zodhiates' motions to await the Supreme Court's decision, the Zodhiates case was briefed and argued well prior to the Supreme Court's decision. Even after *Carpenter* was decided, the panel never sought supplemental briefing from the parties, despite having received one Rule 28(j) letter from each counsel.

On the same day *Carpenter* was decided, June 22, 2018, counsel for Defendant-Appellant advised the panel of the significance of that case to the present one:

> *Carpenter* held that individuals have an expectation of privacy, and therefore a Fourth Amendment interest in cellular telephone location data. Accordingly, the Supreme Court held that absent exigent circumstances (which are not claimed in the Zodhiates case), such information can be obtained only after establishing probable cause to

> the satisfaction of a judicial officer. The Supreme Court further determined that the so-called **"third party doctrine" does not apply** as it cannot be said that individuals voluntarily agree that their location as determined by cell location data can be viewed. Mr. Zodhiates made these very same arguments in Point II of his brief, starting at page 32, and in Point II of his Reply Brief, starting at page 12. [Appellant's Rule 28(j) letter dated June 22, 2018 (emphasis added).]

On June 26, 2018, the government responded, contending that:

> **The *Carpenter* decision announced a new exception to the third-party doctrine**, but the Court noted that this exception was "narrow." Indeed, the Court explicitly stated that the new exception did not reach business records simply because the business records contain some location information. To the extent that the Court reaches the issue, it should find that the Fourth Amendment does not protect the bills in this case. In any event, *Carpenter* provides supports [sic] for the government's good faith argument. [Appellee's Rule 28(j) letter dated June 26, 2018 (emphasis added).]

On its face, the *Carpenter* decision directly applies to *Zodhiates*. But the government sought to limit the application of that decision by describing *Carpenter* not in terms of its primary holding protective of CSLI, but in narrow terms, as creating a new exception to the third-party doctrine. Counsel for Mr. Zodhiates had no opportunity to rebut this argument.

In *Zodhiates*, the Second Circuit assumed that the 2011 search of Mr. Zodhiates' CSLI using a subpoena under the Stored Communications Act (not a warrant), even though it violates the Fourth Amendment, was not subject to the

exclusionary rule because law enforcement acted in "good faith" in reliance on the third party doctrine line of cases. *Zodhiates* at *2, *12-*13. But, as the court made clear, neither the *Smith* nor the *Miller* case was controlling, as neither involved sensitive location privacy data.[2]

The panel erroneously assumed:

- that a simple application of *Smith* and *Miller* governed the decision here (*i.e.*, good faith reliance on controlling appellate authority allowing access to information in the hands of a third party without a warrant); and
- that earlier private individual location information cases were irrelevant here.

However, allowing use of CSLI obtained without a warrant in this case was not a simple application of *Smith* and *Miller*, as the Second Circuit has assumed. It was an extension of *Smith* and *Miller*. We can be sure of this because the Supreme Court stated: "The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information." *Carpenter* at 2219. "We decline to extend

---

[2] The Second Circuit dismissed reliance on *U.S. v. Jones* because the search in Zodhiates took place in 2011 before the decision in *Jones* (2012), and thus is "not relevant to our good faith analysis." *Zodhiates* at *13.

Smith and Miller to cover these novel circumstances." *Id*. at 2217. Thus, the Second Circuit misapplied *Smith* and *Miller*, considering them to be controlling when they were not. This is clear error. This alone should be enough for this Court to grant rehearing *en banc*. But there is more.

Rejecting the approach in *Carpenter*, the panel wholly ignored prior private individual location information cases. The *Carpenter* decision discusses the *U.S. v. Knotts*, 460 U.S. 276 (1983) decision at length — referencing that case no fewer than 20 times. *See Carpenter* at 2215-32. Had the Second Circuit considered privacy of movement, it could not rightly ignore *Knotts* where the monitoring was prohibited, even for a single trip. *Knotts* and *Jones* are in the same line of cases. Even if *Jones* did not apply retroactively, the limitations implicit in *Knotts* should have been considered. Failure to consider the case under *Knotts* (and perhaps other cases) was error. The consideration of the applicability of *Knotts* to this case requires re-briefing by the parties.

The panel's decision that the government's search and seizure of Zodhiates' CSLI was authorized as an "objectively reasonable reliance on appellate precedent" is insupportable. *Zodhiates* at *12. Rather, the panel sustained a search and seizure made in disregard of Zodhiates' Fourth Amendment rights as

demonstrated by the government's, and the panel's, disregard of prior private individual location information cases.

Indeed, the exclusionary rule especially applies to deter the government from presuming it had authority to search by relying on only one line of supposedly controlling cases (third party doctrine) while ignoring another line of cases that is much more factually and legally on point (private individual location information).

II. The Exclusionary Rule Applies to the Wrongful Seizure and Search of Zodhiates' Cell Site Location Information.

The panel described the recent U.S. Supreme Court decision in *Carpenter v. United States* as having established that "under the requirements of the Fourth Amendment, enforcement officers must **generally** obtain a warrant before obtaining" a suspect's cell phone location information. *United States v. Zodhiates*, 2018 U.S. App. LEXIS 23278, *11 (2018) (emphasis added).

By inserting "generally" into its summary of the Supreme Court's holding, this Court has understated the *Carpenter* holding, leaving the distinct impression that the Zodhiates subpoena may have been permissible as some exception to the general rule. However, the *Carpenter* Court had specifically held "that an individual maintains a legitimate expectation of privacy" not only of "the record of

his physical movements as captured through CSLI," but "in the whole of their physical movements" and that "[a]llowing government access to cell-site records contravenes that expectation." *Carpenter* at 2217. This language allows of no exceptions, and the panel decision allowing of exceptions reveals a fundamental misunderstanding of *Carpenter*.

Indeed, in *Carpenter*, Chief Justice Roberts attested that the reasonable expectation of privacy in one's physical movements was expansive, extending beyond the cell phones themselves, including their almost compulsively and ubiquitous use in the lives of everyone in the country — "near perfect surveillance." *Id.* at 2218. Justice Roberts explained further that given their universality, law enforcement officers are tempted to indulge themselves, giving "police access to a category of information otherwise unknowable" (*id.*):

> With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts [and] because local information is continually logged for all of the 400 million devices in the United States – not just those belonging to persons who might happen to come under investigation – this newfound tracking capacity runs against everyone. [*Id.*]

Everyone, that is, except apparently Zodhiates, who this Court says "is not entitled to have the records suppressed because, under the 'good faith' exception, when the

Government 'act[s] with an objectively reasonable good-faith belief that their conduct is lawful,' the exclusionary rule does not apply." *Zodhiates* at *12.

The purpose of the exclusionary rule is not to honor law enforcement's "good faith." Rather, the Supreme Court has "repeatedly held" that the rule's sole purpose "is to deter future Fourth Amendment violations." *See Davis v. United States*, 564 U.S. 229, 236-37 (2011). As Chief Justice Roberts observed in *Carpenter*, the proliferation of modern technological devices threatens the privacy of everyone, not just those reasonably suspected of criminal activity. Yet, despite "seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years" (*Carpenter* at 2219), the panel below would invoke the "good faith" exception to the exclusionary rule that rests upon the claim that the police acted on what they understood to be "objectively reasonable reliance on binding judicial precedent." *Davis* at 239.

One of the most dynamic areas of constitutional law is the applicability of the Fourth Amendment to new sources of digital data as law enforcement shows itself to be increasingly creative in its efforts to seize and search that data. At any point in time, court decisions analyzing the constitutionality of law enforcement techniques will lag behind what prosecutors and police are actually doing in the

field. For this reason, under an exclusionary rule which only applies to deter police practices which have been expressly prohibited by controlling appellate authority, the American people will not be properly protected in their "persons, houses, papers, and effects." Yet this is the very rule that the prosecution sought and the panel adopted. Additionally, the rule applied by the panel actually treats the constitutional text as not binding on law enforcement, because it allows the use of evidence unconstitutionally seized at trial — unless an appellate court has previously ruled that type of search of that type of data to be unconstitutional. Such a rule elevates judicial decisions over the constitutional text. The decision of the panel is in error and must be corrected.

CONCLUSION

The Petition for Rehearing *en banc* should be granted, and the case re-argued to determine the proper application of the Supreme Court's July 22, 2018 decision in *Carpenter v. United States*.

Respectfully submitted,

/s/ William J. Olson

*William J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorney for *Amici Curiae*

*Counsel of Record
September 6, 2018

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 Defendant-Appellant's Petition for Rehearing En Banc complies with the type-volume limitation of Rule 29(b)(4), Federal Rules of Appellate Procedure, because this brief contains 2,146 words, excluding the parts of the brief exempted by Rule 32(f).

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 W ordPerfect version 18.0.0.200 in 14-point Times New Roman.

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

Dated: September 6, 2018

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amici Curiae* of Downsize DC Foundation, *et al.* in Support of Defendant-Appellant's Petition for Rehearing En Banc was made, this 6th day of September 2018, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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