IN THE SUPREME COURT

STATE OF ARIZONA

WILLIAM MIXTON, Petitioner, v. STATE OF ARIZONA, Appellee.	Supreme Court No. CR-19-0276-PR Court of Appeals Case No. 2 CA-CR 2017-0217 Pima County Superior Court Case No. CR2016038001

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government and promoting the faithful enforcement of *state* constitutional protections. Institute scholars have published important research on the history and interpretation of the Private Affairs Clause. *See* Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723 (2019). Through its Scharf-Norton Center for Constitutional Litigation, the Institute frequently appears as *Amicus Curiae* in this Court, *see, e.g.*, *Leach v. Reagan*, 245 Ariz. 430 (2018); *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, 245 Ariz. 397 (2018); *Molera v. Reagan*, 245 Ariz. 291 (2018), and it recently filed *amicus* briefs in *State v. Hernandez*, 244 Ariz. 1 (2018), and *State v. McNeill*, No. 1 CA-CR 18-0911, 2019 WL 4793121 (Ariz. App. Oct. 1, 2019), to address issues arising under the Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona courts have long claimed that the state Constitution protects individual rights more than the federal Constitution does. Indeed, this Court has explained that state courts have a *duty* to "*first* consult our constitution … whenever a right that the Arizona Constitution guarantees is in question." *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 356 (1989) (emphasis added); *see also See State v. Jean*, 243 Ariz. 331, 353 ¶ 92, *cert. denied*,

138 S. Ct. 2626 (2018) ("[W]e frequently may find that our [state] constitution provides greater protections of individual liberty and constraints on government power … because we more strictly construe such protections that exist in both constitutions.") (Bolick, J., concurring in part, dissenting in part).

Nowhere is there a stronger basis for doing so than the Private Affairs Clause, Arizona Constitution, Article II, Section 8. It differs from the Fourth Amendment in *every* significant respect. *See* Sandefur, *supra*, at 723-47. Its text is entirely different from that Amendment. It was written a century and a half after that Amendment. Its authors had different concerns in mind. There is simply no justification for following federal Fourth Amendment jurisprudence when applying the Private Affairs Clause.

In fact, because the Clause was copied from the Washington Constitution, *id*. at 723, Arizona courts should consult *that* state's interpretations of the Clause. They already consult Washington jurisprudence to interpret other provisions of the Arizona Constitution that were modeled on Washington's. *See, e.g., Bailey v. Myers*, 206 Ariz. 224, 229–30 ¶ 22 (App. 2003) (eminent domain); *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 200 ¶ 17, n.9 (2001) (state immunity); *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 355 (free speech). Yet they have not done so with regard to the Private Affairs Clause—and have never explained why. They

have instead virtually always followed federal jurisprudence[1]—which is arbitrary, because, among other things, that jurisprudence interprets wholly different language, such as "unreasonable," a word that does not appear in the Private Affairs Clause.

Washington courts, by contrast, have fashioned a robust and effective Private Affairs jurisprudence, and decided cases that address issues presented here: the Third Party Doctrine and the Good Faith Exception. *See, e.g.*, *State v. Hinton*, 319 P.3d 9, 15 ¶ 17 (Wash. 2014) (Third Party), *State v. Afana*, 233 P.3d 879, 884–85 ¶ 16 (Wash. 2010) (Good Faith). Washington precedent is superior because it is based on the actual language of the Private Affairs Clause, and lacks the subjectivity and mutability of Fourth Amendment doctrine. *See State v. Myrick*, 688 P.2d 151, 154 (Wash. 1984) (Private Affairs jurisprudence "is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.").

[1] In its recent decision in *State v. McNeill*, No. 1 CA-CR 18-0911, 2019 WL 4793121, at *2 n.2 (Ariz. App. Oct. 1, 2019), for example, the Court of Appeals chose not to address the Arizona constitutional claims the defendant raised, because it resolved the case on federal grounds. This is directly contrary to this Court's instruction that lower courts should "*first* consult our constitution." *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 356 (emphasis added).

Amicus urges the Court to review this case to place Arizona Private Affairs jurisprudence on the right track. The court below was right to independently interpret the Clause. But it erred in not following Washington jurisprudence. While Washington precedent obviously is not binding, it is more applicable than federal jurisprudence, and, without being unduly burdensome on law enforcement, better protects citizens against warrantless searches.

REASONS TO GRANT PETITION

I. Lower courts need guidance regarding the Private Affairs Clause.

The disarray in the decision below illustrates the need for this Court's guidance. Out three judges, two filed partial dissents—an unusual circumstance that reveals the necessity of Supreme Court review. Moreover, such review is warranted because Arizona courts have failed to develop a rational Private Affairs Clause jurisprudence. The court below was correct that there is increasing need to address the scope of that Clause "in the internet era," *State v. Mixton*, No. 2 CA-CR 2017-0217, 2019 WL 3406661, at *9 ¶ 27 (Ariz. App. July 29, 2019), and particularly to review the Third Party Doctrine and Good Faith Exception under that Clause.

The Third Party Doctrine, fashioned in the days of rotary telephones (*Smith v. Maryland*, 442 U.S. 735 (1979)) and hand-written bank orders (*United States v. Miller*, 425 U.S. 435 (1976)), is out of step with an era in which "almost all

communications … including messages over such sites as Facebook [or] Gmail … are stored for various lengths of time on third party servers or Internet service providers." Monu Bedi, *Facebook and Interpersonal Privacy*, 54 B.C. L. Rev. 1, 2 (2013). As the court below observed, federal Third Party Doctrine appears to give government "unfettered" power to obtain such information. 2019 WL 3406661 at *10 ¶ 29.

But there is a broader issue. Although this Court has acknowledged that the Private Affairs Clause provides greater protections than the Fourth Amendment, *see, e.g., State v. Ault*, 150 Ariz. 459, 463 (1986), it has not given effect to that promise. Instead, it has largely copied federal Fourth Amendment jurisprudence. *See, e.g., State v. Peoples*, 240 Ariz. 244, 247–48 ¶ 9 (2016). This is profoundly wrong. The Arizona Constitution uses entirely different language than the Fourth Amendment, was written during a different era, and was drafted with the intention of *not* simply echoing that Amendment, but instead applying stronger, state-based protections. Sandefur, *supra*, at 724–36. It was copied from the Washington Constitution, *id.* at 724, and was designed to combine then-existing Fourth Amendment guarantees with additional, new protections for "private affairs"—a term that largely referred to records of business transactions between private

parties. *Id.* at 729-36.[2] The Clause makes no reference to reasonableness, but focuses solely on the *lawfulness* of the government's actions.[3]

Obviously, when the wording of two constitutions is different, that is both necessary and sufficient for interpreting them differently. *State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986); *People v. Caballes*, 851 N.E.2d 26, 31 (Ill. 2006). An independent Arizona jurisprudence of Private Affairs is also mandated by this Court's duty to effectuate the *Arizona* Constitution. *Mountain States Tel. & Tel.*, 160 Ariz. at 356.

Most importantly, the Private Affairs Clause does not include the word "unreasonable." The U.S. Constitution does, and, consequently, "reasonableness" is the touchstone of Fourth Amendment jurisprudence. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). But the Arizona Constitution forbids *any* search that lacks lawful authority, regardless of whether it is reasonable. *Jean*, 243 Ariz. at 354 ¶ 94 (Bolick, J., concurring).

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[2] For this reason, Arizona courts are wrong to say that the Clause's stronger protections only apply to home searches. *See, e.g., State v. Johnson*, 220 Ariz. 551, 557 ¶ 13 (App. 2009). On the contrary, the Clause expressly applies *both* to the home *and* to private affairs.

[3] For the same reason, the term "lawful authority" in the Clause must be interpreted in light of the concept of "lawfulness" that prevailed when the Arizona Constitution was ratified. At that time, the concept of "lawfulness" was widely understood to include the protections today referred to as "substantive" as well as "procedural" due process. *See generally Hurtado v. People of State of Cal.*, 110 U.S. 516, 520–37 (1884); *McLean v. Territory*, 8 Ariz. 195, 201 (1903).

Yet Arizona courts have illogically and arbitrarily failed to respect these principles. In *Malmin v. State*, 30 Ariz. 258, 261 (1926), this Court admitted that the state and federal constitutions use "different … language," yet it followed Fourth Amendment precedent anyway, because the two have "the same general effect and purpose." That is simply not adequate justification for disregarding the textual differences. To interpret different language as though it were identical, just because they have the same "general" purpose, would be like interpreting the Arizona Constitution's protections for free speech as though they were identical to the First Amendment, or its eminent domain provisions as though they were identical to the Fifth Amendment. Yet Arizona courts do not do that. Both of those provisions, like the Private Affairs Clause, were copied from the Washington Constitution—and Arizona courts rightly consult Washington precedent when interpreting those clauses. *See, e.g.*, *Bailey*, 206 Ariz. at 229–30 ¶ 22; *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 355. There is no justification for failing to do likewise with regard to the Private Affairs Clause.

Obviously, Washington precedent is not binding, but it is persuasive, and the fact that the text of Washington's Private Affairs Clause is identical and Arizona's text was specifically based on Washington's, is reason enough to consult Washington precedent. True, if there were reason to believe that the authors and ratifiers of Arizona's Clause did *not* mean for it to be interpreted like

Washington's, then ignoring Washington precedent would be reasonable. In *Desert Waters v. Super. Ct.*, 91 Ariz. 163, 168-69 (1962), this Court engaged in that analysis. But the Court has never performed that analysis with regard to the Private Affairs Clause, or given *any* reason for failing to follow Washington precedent. And the rationale it has given for following federal jurisprudence—that the Fourth Amendment and the Private Affairs Clause have "the same general effect and purpose," *Malmin*, 30 Ariz. at 261—is inadequate. The wording is different; the interpretation should be different.

Arizona's founders "must have intended the Arizona declaration of rights to be the main formulation of rights and privileges," because "Arizona enacted its declaration of rights before the United States Supreme Court adopted the doctrine of incorporation." *Mountain States Tel. & Tel.*, 160 Ariz. at 356. What's more, copying-and-pasting federal precedent means outsourcing state law to federal judges who are not accountable to Arizonans and who do not realize that by interpreting the Fourth Amendment, they are, in effect, fashioning Arizona law. The consequence of the present approach is to "allow the words of our [Arizona] Constitution to be 'balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court.'" *State v. Ingram*, 914 N.W.2d 794, 797 (Iowa 2018) (citation omitted).

Failure to interpret the Clause independently results in arbitrariness. Arizona courts today employ federal doctrines that interpret entirely different language (such as "unreasonable"), instead of considering what the authors and ratifiers of *Arizona's* Constitution had in mind. Arizona courts have also failed to consult the body of well-considered Washington precedent interpreting language that is *identical*, the way they do with regard to other clauses copied from the Washington Constitution. That is not the right path.

II. Washington Private Affairs Clause precedent should guide Arizona courts.

Washington Courts have fashioned a body of precedent that is superior to federal precedent here, and which this Court should adopt.

A. Washington's superior objective approach

Because the Fourth Amendment bars "unreasonable" searches, federal precedent deals largely with *reasonableness*—both of subjective expectations of privacy and of official actions. One problem with this is that privacy expectations gradually become *unreasonable* as government surveillance techniques become more pervasive. Every time a new monitoring technique comes into use, a citizen's expectation of privacy diminishes—which allows still another new monitoring technique to come into use. The Private Affairs Clause, by contrast, "is not confined to the subjective privacy expectations of modern citizens who, due to

well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." *Myrick*, 688 P.2d at 154.

Rather than evaluating the reasonableness of subjective expectations of privacy, Washington courts "focus[] on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* That involves two questions: (1) what has state law historically protected, and (2) what dangers are presented by the search or surveillance technique in question? *See State v. Miles*, 156 P.3d 864, 868 ¶ 12 (Wash. 2007). In *Miles*, for instance, the Court found that the Clause covers bank records , because they have been historically considered private, *id*. at 868–69 ¶ 15, and because they can "reveal[] sensitive personal information," such as "what political, recreational, and religious organizations a citizen supports," as well as "where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Id*. at 869 ¶ 17. *Accord*, *Hinton*, 319 P.3d at 13 ¶ 11.

Washington courts have used this objective approach to address the questions presented in this case: the Third Party Doctrine and the Good Faith Exception. That superior jurisprudence should guide Arizona courts in applying the Private Affairs Clause.

B. Third Party Doctrine in Washington law

Gunwall, *supra*, refused to adopt the Third Party Doctrine created by federal courts in *Smith* and *Miller*, because those cases were focused on the "reasonableness" of a person's privacy expectations. *Smith* and *Miller* involved information that suspects conveyed to third parties, and the Court concluded that nobody "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy'" in that information. *Smith*, 442 U.S. at 740. But such reasoning is inapplicable under the Private Affairs Clause, because that Clause is not concerned with "reasonableness."

Gunwall rejected *Smith* particularly because telephone users *do* expect the telephone numbers they dial to be "'free from governmental intrusion,'" and this is not changed by the fact that the numbers are transmitted to the phone company. 720 P.2d at 815 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)). A caller's "disclosure" of a phone number to the telephone company is "'necessitated [by] the nature of the instrumentality,'" but it is "'for a limited business purpose and not for release to other persons for other reasons.'" *Id.* at 816 (citation omitted). The dialing of a phone number cannot, therefore, constitute a waiver of privacy expectations.

Hinton, *supra*, was even clearer. It held that officers violated the Private Affairs Clause by reading text messages one person sent another. "Given the

realities of modern life," *Hinton* said, "the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of [the Private Affairs Clause]'s protection." 319 P.3d at 15 ¶ 17. "[P]ersonal and sensitive" information does not cease to be a "private affair" simply because it is disclosed to a third party. *Id.*

Washington courts appear not to have addressed the precise issue of obtaining ISP information without a warrant, because it appears that in Washington, officers regularly get warrants before seeking this information—which is "not[]…onerous" on law enforcement. *See State v. Reeder*, 365 P.3d 1243, 1261 ¶ 76 (Wash. 2015) (McCloud, J., dissenting). Yet *Gunwall* and *Hinton* provide helpful starting points for resolving the questions presented here.

In this case, the court of appeals, notwithstanding its refusal to employ Washington precedent, and its incorrect invocation of the subjective, federal "reasonable expectations" test, 2019 WL 3406661 at *5 ¶ 18, still followed the correct approach in substance. It found that the information internet users share with internet service providers is essentially like a "personal desk drawer," and that letting the government "peek at this information" without a warrant is akin to letting it take "a trip through a home" without lawful authority. *Id.* at *9 ¶ 27. The fact that a user "voluntarily" shares this information with the service provider

changes nothing, because the information is shared "for the limited purpose of obtaining service," not so that the provider can "reveal[ ] the user's identity to authorities." *Id*. at *9 ¶ 28. That conclusion is consistent with the Private Affairs Clause approach developed in *Gunwall*, 720 P.2d at 816, and *Hinton*, 319 P.3d at 15 ¶ 17.

The court also addressed the dangers of permitting the warrantless acquisition of this information, particularly for those engaged in anonymous speech. 2019 WL 3406661 at *10 ¶¶ 29, 30. This, too, is compatible with the Washington approach, which addresses both the historical protection afforded to private affairs, and "the nature and extent of the information which may be obtained as a result of the governmental conduct." *Miles*, 156 P.3d at 868 ¶ 12. The court of appeals therefore reached the right conclusion on this issue, despite incorrectly citing federal precedent.

C. The Good Faith Exception in Washington law

The court of appeals reached the incorrect conclusion, however, with regard to the Good Faith Exception.

That exception is a creature of federal law, adopted by federal courts in 1984. It is based, like so much else in Fourth Amendment jurisprudence, on reasonableness considerations. *See United States v. Leon*, 468 U.S. 897, 919 (1984), *Mass. v. Sheppard*, 468 U.S. 981, 987–88 (1984). But the Private Affairs

Clause is not concerned with reasonableness; it forbids *unlawful* intrusions into private affairs, even if reasonable. Therefore, the Good Faith exception cannot apply. *State v. Nall*, 72 P.3d 200, 202 (Wash. App. 2003). As the Washington Supreme Court has explained, "if a police officer has disturbed a person's 'private affairs,' we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite 'authority of law.'" *Afana*, 233 P.3d at 884 ¶ 15.

The federal Good Faith Exception was also based on the U.S. Supreme Court's cost-benefit analysis—an analysis partly justified by that Court's concern with preserving state autonomy as much as possible. But such considerations can have no weight under the *state* Private Affairs Clause, the "paramount purpose" of which is "the vindication of the defendant's rights." Sanford Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule*, 61 Wash. L. Rev. 459, 512 (1986). That makes "an empirical measurement … both inappropriate and impossible." *Id.* Indeed, the purported cost-benefit analysis underlying the Good Faith Exception is illusory, because it fails to include "the benefit derived from protecting the defendant's rights," meaning that it is "merely a stylish way to write an opinion once a judgment has already been reached on the basis of individual, subjective values." *Id.* at 492 n.176.

Washington's refusal to employ the Good Faith Exception is, again, more objective than the ever-evolving federal "reasonableness" approach. The federal rule's primary flaw is that it is "speculative and does not disregard illegally obtained evidence.'" *Afana*, 233 P.3d at 885 (citation omitted)). Washington's rule, by contrast, avoids speculation, and asks a single, objective question: was the evidence obtained lawfully? This is more protective of citizens and more faithful to the text of the state Constitution. It is also more helpful to police and prosecutors, who are given the benefit of clear and unambiguous rules to guide them when conducing searches or introducing evidence in court.

The federal Good Faith Exception has been criticized, rightly, for its subjectivity and for hollowing out the Fourth Amendment's guarantees. Federal Good Faith analysis frequently results in "bypass[ing] entirely" the "threshold issue of whether the individual's fourth amendment rights have been violated." Joan Greenberg Levenson, *The Good Faith Exception*, 52 Brook. L. Rev. 799, 801 (1986). The exception is so broad that it encourages courts to "evade fourth amendment issues and proceed directly to a good faith analysis." *Id*. at 815. *See also State v. White*, 640 P.2d 1061, 1069 (Wash. App. 1982) (good faith rule "allow[s] the [government] to make an 'end run' around the Fourth Amendment."). Even federal judges have objected that the federal "reasonableness" theory it is too subjective and invites courts—in Justice Thomas's words—to "make judgments

about policy, not law." *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting); *see also id.* at 2264 (Gorsuch, J., dissenting) (reasonableness analysis depends on "abstract 'expectation[s] of privacy' whose contours are left to the judicial imagination").

The Private Affairs Clause has the advantage that, properly interpreted, it contains no such subjective considerations, but turns instead on an objective analysis of whether a person's private affairs have been invaded, and whether there is lawful authority for that invasion. That objectivity prevents policy-focused applications of the law, and is therefore *less* prone to "judicial activism." *See* Sandefur, *supra* at 746 n.126. It is also less prone to fluctuation with shifting social attitudes.

CONCLUSION

Private Affairs jurisprudence in Arizona presents a true anomaly: although the Constitution does *not* use the wording of the Fourth Amendment, and *does* use the wording of Washington's Constitution—on which it was expressly based—Arizona courts employ federal doctrines instead of Washington precedent. This is contrary to the text, history, and purpose of the Clause, and clashes with this Court's willingness to consult Washington precedent with regard to *other* constitutional provisions borrowed from that state's Constitution.

The constitutional concerns about obtaining ISP location information from third parties without a warrant are matters of increasing importance in the internet age. The fractured decisions in both *Carpenter* and this case are proof enough of the need to resolve these questions under an independent state jurisprudence rather than copying-and-pasting inapposite federal precedent. *See* 138 S. Ct. at 2270 (Gorsuch, J., dissenting) (suggesting that the problem would be better resolved at the state level).

The Court should grant the petition to set Arizona Private Affairs law on the right track—by interpreting the Clause independently, and consulting Washington precedent to inform the Court's analysis.

Respectfully submitted this 15th day of October, 2019 by:

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