IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. WILLIAM MIXTON, Appellant.	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 INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONS FOR REVIEW

INSTITUTE FOR JUSTICE
Paul V. Avelar (023078)
Timothy D. Keller (019844)
Keith E. Diggs (032692)
398 S. Mill Ave., Suite 301
Tempe, AZ 85281
P: (480) 557-8300
F: (480) 557-8305
E: pavelar@ij.org
tkeller@ij.org;
kdiggs@ij.org

Attorneys for Amicus Curiae Institute for Justice

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions **Pages**

Rules **Pages**

Ariz. Ethics Opinions **Pages**

Other Authorities **Pages**

INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of the Institute for Justice pursuant to Rule 31.12 of the Arizona Rules of Criminal Procedure.[1] Both petitions for review in this case implicate an important issue of Arizona law—the constitutionality of the so-called "third-party search doctrine" under Arizona's "private affairs" clause in Article II, Section 8—that no other Arizona decision squarely addresses. The resolution of this issue affects all Arizonans who use the internet, email, a bank, or a host of other virtual and real-world services. In short, the resolution of this issue affects all Arizonans. IJ has represented innocent property owners who have been harmed by the application of the federal precedents that the State urges this Court to adopt. *See* Brief of Institute for Justice et al. as Amici Curiae in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402). IJ therefore believes that its broader legal perspective will provide this Court with valuable insights regarding the need for this Court's review of the issue presented by the petitions.

ARGUMENT

Both petitions for review in this case implicate the "third-party search doctrine." As the Court of Appeals recognized, this Court is bound to that

[1] The parties have consented to the filing of this amicus brief. No person or entity other than the Institute for Justice has made a monetary contribution to the preparation or submission of this brief and no counsel for any party has written this brief in whole or in part.

doctrine—whatever the U.S. Supreme Court says that doctrine is—for purposes of Fourth Amendment law. But this Court is not bound to that doctrine under the independent provisions of the Arizona Constitution, in particular the "private affairs" clause in Article II, Section 8. The State here urges this Court to grant review to adopt, in lockstep with federal jurisprudence, the federal third-party doctrine into the Arizona Constitution. Because of the lack of Arizona precedents and the importance of this issue to all Arizonans, this Court should grant both petitions in this case to clarify that the "lockstep approach" is not the proper method of interpreting the Arizona Constitution generally, or the private affairs clause in particular.[2]

There are three reasons that this Court should grant the petitions for review to reject the lockstep adoption of the federal jurisprudence here. First, adopting a lockstep approach to the Arizona Constitution is contrary to the way this Court says it is to interpret the independent provisions of our fundamental law. Second, the federal jurisprudence at issue has been rejected by many state courts under their own constitutions and is widely criticized by commentators, especially given advancements in information technology. Third, as demonstrated by the U.S.

[2] Because of the lack of Arizona precedents and the importance of this issue to all Arizonans, this Court should also, pursuant to Ariz. R. Crim. P. 31.21(g), order supplemental briefs subject to the word limits of Ariz. R. Crim. P. 31.12(a) to ensure the parties and amici can adequately address the issues presented here.

Supreme Court's most recent decision in this area, the federal jurisprudence is currently in a state of upheaval, such that the lockstep approach would adopt unnecessary failings and uncertainty.

I. This Court Should Interpret the Arizona Constitution Independently Of, Not in Lockstep With, Federal Jurisprudence.

The State argues this Court should grant review to interpret Arizona's constitution in lockstep with federal Fourth Amendment jurisprudence because "uniformity is paramount." State Pet. 12. But this approach to interpreting the Arizona Constitution is contrary to the way that the Arizona Constitution, or any state constitution, should be interpreted. Rather, this Court should—and has recognized it must—interpret the Arizona Constitution independently from interpretations of the federal constitution. This is particularly true when the text and history of the relevant provision of the Arizona Constitution differs from its federal analog.

Interpreting the Arizona Constitution in lockstep with interpretations of the federal constitution is contrary to the way this Court has said it must interpret the Arizona Constitution. "The [Arizona] Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it." *Rumery v. Baier*, 231 Ariz. 275, 278 (2013) (internal quotation marks omitted). Since statehood, this Court has consistently recognized that it is not simply to parrot federal law, but rather must ensure that the plain text and

original understanding of the Arizona Constitution is enforced. *See* Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 359-60 (2017) (collecting cases). Granted, in recent years, this Court has applied—inconsistently and without explanation—various other "interpretive methodologies" when asked to construe a state constitutional provision that has a federal analog, including a "'lockstep' approach." Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 267, 270-71 (2003). But there is no reason to believe that the people who framed and approved the Arizona Constitution understood its provisions to adopt, wholesale, the later understanding of a different constitution which did not apply. Avelar & Diggs, *supra* at 361-63. Indeed, adopting a lockstep approach to interpreting Arizona's, or any state's, constitution is "[a] grave threat to independent state constitutions." Jeffrey S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law 174 (Oxford Univ. 2018)

The lockstep approach is particularly inappropriate when—as here—the text and history of the Arizona Constitution deviates from the analogous federal provision. *See Brush & Nib Studios, LC v. City of Phx.*, 448 P.3d 890, ___ ¶ 172, 2019 Ariz. LEXIS 280 at **103-04 ¶ 172 (Ariz. 2019) (Bolick, J., concurring). Here, the plain text of Arizona's "private affairs" provision in Article II, Section 8,

is clearly distinct from the search and seizure provision of the federal Fourth Amendment: The plain text of the Arizona Constitution protects a person's "private affairs" while the text of the Fourth Amendment does not mention privacy. *See Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting). And this clear textual difference is rooted in a particular understanding of the threats to privacy that were different than those that motivated the Fourth Amendment. *See generally* Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723 (2019).

For the foregoing reasons, this Court should grant review in this case to reaffirm that the lockstep approach to interpreting the Arizona Constitution is inappropriate generally, and particularly so when it comes to the "private affairs" clause. "The irreducible minimum is that state courts decide for themselves the meaning of their own constitutions, each with its own independent traditions and words." Sutton, *supra* at 189. On review, therefore, this Court should interpret Article II, Section 8 of the Arizona Constitution so that "each and every clause," including the textually and historically distinct private affairs clause, is given meaning "so that intent of the framers may be ascertained and carried out." *Davis v. Osborne*, 14 Ariz. 185, 204 (1912).

II. The Federal Third-Party Doctrine Has Many Failings This Court Need Not Adopt.

Refusing to adopt, in lockstep, the federal third-party doctrine will also prevent this Court from adopting that doctrine's many failings. These failings have led many state courts to reject the doctrine under their state constitutions and many commentators to strongly criticize the doctrine, especially given advances in information technology.

First, many state courts have rejected the third-party doctrine under their state constitutions, as Judge Eppich noted in his majority opinion below. *State v. Mixton*, 447 P.3d 829, 841-42 ¶¶ 25-26 (Ariz. App. 2019). Courts in California,[3] Colorado,[4] Florida,[5] Hawaii,[6] Idaho,[7] Illinois,[8] New Jersey,[9] Pennsylvania,[10]

[3] *People v. Chapman*, 679 P.2d 62 (Cal. 1984).
[4] *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *see also Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980).
[5] *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989).
[6] *State v. Walton*, 324 P.3d 876 (Haw. 2014).
[7] *State v. Thompson*, 760 P.2d 1162 (Idaho 1988).
[8] *People v. Jackson*, 452 N.E.2d 85 (Ill. App. 1983) (finding a constitutional right to privacy in bank records); *see also People v. DeLaire*, 610 N.E.2d 1277 (Ill. App. 1993) (finding a constitutional right to privacy in telephone records); *see also Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1097-98 (Ill. 1997) (citing *Jackson* and *DeLaire* to support a privacy interest in confidential medical communications).
[9] *State v. Reid*, 945 A.2d 26 (N.J. 2008) (acknowledging a privacy interest in subscriber information under state constitution).
[10] *Commonwealth v. DeJohn*, 403 A.2d 1283 (Pa. 1979).

Utah,[11] and Washington[12] have all sharply criticized the federal third-party doctrine and rejected it under their own state constitutions.

Legal scholars echo the state courts' criticisms. Experts have observed that the doctrine, as announced in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), is "dead wrong" in implying that a bank depositor expects less privacy than one using a public telephone booth. Wayne R. LaFave, 1 Search & Seizure § 2.7(c) (5th ed. 2012) (updated Oct. 2019). The doctrine's "risk assumption" rationale "made little sense when it appeared in the 1970s," and its absurdity is compounded by technology like cloud-based data which is necessarily "conveyed to and possessed by third parties." David. A. Harris, Riley v. California *and the Beginning of the End for the Third-Party Search Doctrine*, 18 U. Pa. J. Const. L. 895, 898-99 (2016); *see also* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment after* Lawrence, 57 UCLA L. Rev. 1, 40 (2009) (an individual's "choice" to use practical necessities like banks, phones, and the internet is "often illusory"). And the doctrine exempts information like bank records from Fourth Amendment protection, regardless of how egregiously—such as through government-sanctioned burglary—the government

[11] *State v. Thompson*, 810 P.2d 415 (Utah 1991).
[12] *State v. Miles*, 156 P.3d 864 (Wash. 2007) (holding that banking records are protected under the state constitution's private affairs clause); *see also State v. Boland*, 800 P.2d 1112 (Wash. 1990) (holding that garbage set out for collection is protected under the private affairs clause); *State v. Gunwall*, 720 P.2d 808 (Wash. 1986) (holding that long distance phone records are protected under the private affairs clause).

procures that information. LaFave, *supra* § 2.7(c) (discussing *United States v. Payner*, 447 U.S. 727 (1980), in which the IRS arranged to have an individual's bank records obtained through burglary).

The federal third-party doctrine's consequences are particularly staggering in light of modern technology. Take "direct-to-consumer" genetic testing as an example. These tests require purchasers to submit their DNA to a third party who subsequently stores and analyzes it. A strict application of *Miller* and *Smith* "suggest[s] that the [consumer] voluntarily assumes the risk of disclosure of his or her genetic information to law enforcement" by sending their DNA. Claire Abrahamson, *Guilt by Genetic Association: The Fourth Amendment and the Search of Private Genetic Databases by Law Enforcement*, 87 Fordham L. Rev. 2539, 2564 (2019).

Or, a bit closer to home, consider "cloud computing." Modern computing practices and the ubiquity of electronic and on-line storage means that people store large amounts of data with third-party service providers. *E.g.*, *Riley v. California*, 573 U.S. 373, 397 (2014) ("Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference."). For example, the State Bar of Arizona, created by this Court to administer the ethical rules, has recognized this reality and opined that lawyers may use online cloud computing in their practice so long as they "take

reasonable precautions to protect the security and confidentiality of client documents and information" stored in the cloud. Ariz. State Bar Ethics Op. 09-04 (Dec. 2009). But a strict application of *Miller* and *Smith* suggests that, no matter the precautions taken, lawyers voluntarily assume the risk of disclosing attorney-client records to law enforcement. This would be quite the news to Arizona's lawyers and their clients.

Finally, warnings that the government can use the third-party doctrine to vacuum up vast amounts of data about people it has no reason to suspect of illegal activities are, sadly, borne out by real-world experience. Not long after the Court of Appeals' decision here, it was accidentally disclosed—before the document was hidden from the public—that the U.S. government was demanding that Apple and Google "hand over names, phone numbers and other identifying data," including IP addresses, "of at least 10,000 users of a single gun scope app" without any particularized suspicion. Thomas Brewster, *Feds Demand Apple And Google Hand Over Names Of 10,000+ Users Of A Gun Scope App*, Forbes.com (Sept. 6, 2019) https://www.forbes.com/sites/thomasbrewster/2019/09/06/exclusive-feds-demand-apple-and-google-hand-over-names-of-10000-users-of-a-gun-scope-app/#4991f8a32423. The Department of Justice—in the absence of public charges—alleged that some gun scopes affiliated with the app (which allows users to live stream, take video and calibrate their gun scope through a mobile phone)

may have been illegally shipped out of the U.S. But DOJ's demand for user information was not limited to out-of-country users. Moreover, under the third-party doctrine, any such request is not limited in scope, given that at least one company has faced a government demand to "hand over the names and addresses of 58 million users of a single app." Thomas Brewster, '58 Million Names And Addresses, Please' - Tech Giants Reveal Wild Government Requests for Data, Forbes.com (March 26, 2019), https://www.forbes.com/sites/thomasbrewster/2019/03/26/58-million-names-and-addresses-pleasetech-giants-reveal-wild-government-requests-for-data/#2aeb49357c8a.

The federal third-party doctrine deserves its bad reputation and is fundamentally at odds with Arizona's constitutional protections for "private affairs." Increasingly Orwellian invasions of privacy are likely while third parties are the trustees of bank, phone, internet, DNA, and other records. The third-party doctrine thus puts individuals to the impossible choice between off-the-grid living and governmental intrusion into their most private affairs. Fortunately, like other state courts, this Court is not bound to the third-party doctrine's many shortcomings. Rather, under the Arizona Constitution's independent private affairs clause, this Court can and should refuse to adopt that doctrine in lockstep with federal jurisprudence.

III. *Carpenter v. U.S.* Maintained—Indeed, Exacerbated—The Third-Party Doctrine's Fundamental Problems.

The United States Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), implicitly recognizes the third-party doctrine's numerous problems but does nothing to resolve them. If anything, *Carpenter* exacerbates the difficulties the third-party doctrine will force the courts to face.

Carpenter addressed whether government agents must procure a warrant before obtaining cell-site-location information ("CSLI") from an individual's cell-service provider to track his movements. On one hand, the case implicated the third-party doctrine because cell-service providers possess and maintain CSLI. But on the other hand, the Court had previously set boundaries on how pervasively government may track an individual's movements. *Compare United States v. Knotts*, 460 U.S. 276 (1983) (upholding government's "limited" use of a beeper to track defendant's vehicle during an "automotive journey"), *with United States v. Jones*, 565 U.S. 400 (2012) (holding that government's remote 28-day GPS monitoring of defendant's vehicle violated the Fourth Amendment).

When faced with the full ramifications of the third-party doctrine, a majority of the *Carpenter* Court blinked. The *Carpenter* majority recognized the ubiquity of cellphones, the pervasive data captured by CSLI, and the potential for governmental overreach in holding that the government must obtain a warrant to procure CSLI records. But the majority holding was a "narrow one," leaving the

third-party doctrine otherwise undisturbed, *Carpenter*, 138 S. Ct. at 2220, even though members of the *Carpenter* majority had previously called for the wholesale revisiting of the third-party doctrine, *e.g.*, *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring) (the doctrine "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.").

Carpenter thus did not cure the third-party doctrine's underlying problems, but it certainly added confusion. Despite judges' and legal scholars' pervasive criticism of the third-party doctrine, *Carpenter* purported to preserve its application to "conventional surveillance techniques" and business records that "might incidentally reveal location information." *Carpenter*, 138 S. Ct. at 2220. But as Justice Alito's dissenting opinion noted, the majority did not adequately explain why CSLI falls within a separate constitutional category, and thus left the doctrine more confused than before:

> [T]he Court's holding is premised on cell-site records being a "distinct category of information" from other business records. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

Id. at 2234 (Alito, J., dissenting) (citations omitted).

Justice Gorsuch, also dissenting, went even further and, in doing so, likely framed the litigation that will be necessary in the coming years to make sense of the third-party doctrine. As he admitted:

> I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that.

Id. at 2272. Accordingly, Justice Gorsuch suggested fundamentally revisiting the third-party doctrine and anchoring it in the appropriate original understanding of the law under which "the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them." *Id.* at 2267-71 (citing, *inter alia,* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821 (2016) and Richard M. Re, *The Positive Law Floor*, 129 Harv. L. Rev. Forum 313 (2016)); *see also* Ariz. Const. art. II, § 1 ("A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.")

Thus, the most recent federal jurisprudence on the third-party doctrine is certain to "'keep defendants and judges guessing for years to come.'" *Id.* at 2234-45 (Alito, J., dissenting) (quoting *Riley*, 573 U.S. at 401). Refusing to read the tea leaves, many state courts have instead rejected the third-party doctrine under their

own state constitutions and protected their citizens' rights with greater certainty. This Court can, and should, do the same.

CONCLUSION

The petitions for review in this case implicate an important issue of Arizona constitutional law—the so-called "third-party search doctrine"—that no other Arizona decision squarely addresses. Because this case implicates the protection of "private affairs" and the use of the internet, email, a bank, or a host of other virtual or real-world services, it affects the rights of all Arizonans. The State's petition expressly asks this Court to follow in lockstep the federal jurisprudence on this issue. Doing so would be contrary to the way this Court is supposed to interpret the Arizona constitution; would threaten the privacy rights of all Arizonans; and would adopt widely criticized federal jurisprudence that is currently unsettled at best and likely to be subject to numerous challenges and major revisions in the coming years. None of this is appropriate just to forgive the State's failure to obtain a warrant when it so easily could have here. *See Mixton*, 447 P.3d at 843 ¶ 32. For these reasons, this Court should grant both petitions for review to make clear that the federal third-party doctrine has no place in the Arizona Constitution.

Respectfully submitted this 5th day of November, 2019, by:

INSTITUTE FOR JUSTICE
/s/ Paul V. Avelar
Paul V. Avelar (023078)
Timothy D. Keller (019844)
Keith E. Diggs (032692)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
Email: pavelar@ij.org;
tkeller@ij.org;
kdiggs@ij.org

Counsel for Amicus Curiae