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

SUPPLEMENTAL BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of the Institute for Justice pursuant to this Court's Order of November 19, 2019.[1] Both issues presented on review in this case implicate the government's ability to acquire, without a warrant, information about any Arizonan who uses the internet, email, a bank, or other real-world services where third parties have access to private information. This case therefore implicates the interests of every Arizonan. IJ has represented innocent property owners harmed by applications of the federal "third-party" 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 legal perspectives will provide this Court with valuable insights regarding the need to protect private information from government overreach by enforcing the original meaning of the Arizona and federal constitutions.

ARGUMENT

The third-party search doctrine is dangerous. Judicially invented in 1976—nearly 200 years after ratification of the Fourth Amendment and more than 60

[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.

years after adoption of the Arizona Constitution—the doctrine is both unmoored from traditional understandings of the limits of government power and disconnected from realities of the modern information age. As explained below, the doctrine has permitted the abuse of innocent people and has been repeatedly criticized by state courts and legal scholars. The 2018 decision in *Carpenter v. United States* has begun to unravel the doctrine, but has left it in disarray at present, inviting courts to "guess" as to its continued application. Regardless of the doctrine's continued application by the federal courts, this Court should not adopt the federal third-party doctrine under the "private affairs" clause of the Arizona Constitution because doing so would be inconsistent with the proper approach to state constitutional interpretation and contrary to the plain language and original understanding of the clause. Rather, this Court should adopt the "positive law floor" model in interpreting the private affairs clause to better protect the rights guaranteed by our independent constitution.

I. The Federal Third-Party Doctrine Permits Abusive Government Overreach.

The Fourth Amendment generally requires a warrant supported by probable cause before government may intrude into the "private sphere." *Carpenter*, 138 S. Ct. at 2213. In *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court recognized that the Fourth Amendment extends to expectations of privacy that society is "prepared to recognize as reasonable." But the Court subsequently held

in *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), that an individual has no reasonable expectation of privacy in private information held by third parties. This "third-party doctrine" created a "categorical" exception to the protections guaranteed by the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).[2] This exemption from constitutional protections permitted government abuse of innocent people and has been roundly criticized by state courts and legal experts.

A. The third-party doctrine.

The U.S. Supreme Court first announced its third-party doctrine in *United States v. Miller* in 1976. In *Miller*, government agents subpoenaed the defendant's banks to acquire cancelled checks, deposit slips, and statements. The Court rejected a Fourth Amendment challenge to the seizure, holding that the documents were the banks' "business records" rather than private documents. *Id.* at 440-42. Additionally, the Court reasoned that the defendant took a risk that his documents would be disclosed to the government by "revealing his affairs to another." *Id.* at 443. According to the Court, therefore, individuals lack a reasonable expectation of privacy in records held by their banks.

[2] Though the third-party exception was often deemed a "categorical" rule, the Court has, in fact, protected some personal information even when in the hands of third parties. *See* Br. Amicus Curiae, ACLU of Ariz., ACLU, and Electronic Frontier Foundation at 8-9.

The Court extended the *Miller* rationale in *Smith*. In *Smith*, a telephone company installed a pen register on the defendant's telephone at the request of police without a warrant. The pen register recorded numbers dialed from the defendant's home, providing police with the probable cause necessary to procure a warrant. The Court rejected the defendant's claim that police were required to obtain a warrant prior to installing the pen register, noting that phone companies use dialed numbers "for a variety of legitimate business purposes." *Smith*, 442 U.S. at 743. The Court concluded that people categorically lack a reasonable expectation of privacy "in the numbers they dial." *Id.* at 742. Furthermore, repeating its *Miller* rationale, the Court held that the defendant "assumed the risk" that the numbers he dialed "would be divulged to police." *Id.* at 745.

The third-party doctrine thus paved the way for abusive government overreach by allowing government entities to acquire people's private information without the constitutional check of the warrant requirement.

B. The third-party doctrine lead to the abuse of innocent people.

The third-party doctrine, combined with the financial incentives created by civil forfeiture, often resulted in abusive government overreach. Civil forfeiture is a "highly profitable" venture for government entities. *Leonard v. Texas*, S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). In 1986, the inaugural year of its asset forfeiture fund, the Department of Justice collected

$93.7 million—in 2014, it collected $4.5 *billion*. Institute for Justice, D. Carpenter, L. Knepper, A. Erickson, J. McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. Nov. 2015), at 10, https://ij.org/report/policing-for-profit/. Civil forfeiture leads to "egregious and well-chronicled abuses," *Leonard*, 137 S. Ct. at 848, and armed with the third-party doctrine, government entities are empowered to abuse a far larger number of innocent people in novel ways.

The interaction between banking records, civil forfeiture, and the third-party doctrine illustrates how government entities abuse relaxed Fourth Amendment protections. Under the Bank Secrecy Act, banks are required to file currency transaction reports whenever individuals deposit more than $10,000 in cash. In 1986, Congress passed a "structuring" law, making it illegal to purposefully deposit less than $10,000 in increments to sidestep banks' reporting obligations. *See United States v. MacPherson*, 424 F.3d 183, 188-89 (2d Cir. 2005) (describing the structuring laws). The government was empowered to seize the bank accounts of individuals *suspected* of structuring violations and it did so aggressively. Between 2005 and 2012, the IRS seized more than $242 million in more than 2,500 cases for suspected structuring violations. Institute for Justice, D. Carpenter & L. Salzman, *Seize First, Question Later: The IRS and Civil Forfeiture* (Feb. 2015), at 10, http://ij.org/wp-content/uploads/2015/03/seize-first-question-

later.pdf. And 86% of those seizures led to civil—not criminal—forfeiture actions. *Id.* at 14.

IJ clients Carole Hinders and Randy and Karen Sowers were victimized by this unjust system when the IRS seized every penny in their businesses' bank accounts. Carole's restaurant accepted only checks and cash, requiring her to frequently deposit cash. She began depositing less than $10,000 after her mother explained that larger deposits required extra paperwork. Similarly, Randy and Karen's creamery—which sold milk, eggs, and other produce at farmers' markets—often had significant amounts of cash. When a bank teller told Karen that deposits over $10,000 required extra paperwork and that smaller deposits could save bank employees time, she began depositing smaller amounts.

Although neither Carole, nor Randy and Karen, ever knew about the federal structuring law, the IRS seized all the money in their bank accounts without notice. In both cases, a government agent monitored the accounts and collected information without a warrant. That information was then used to obtain a seizure warrant for the bank accounts. In both cases, the government pursued civil forfeiture action against the money, without determining whether the business owners intended to violate the structuring laws or if the sources of the seized funds were legal or not. Only after national media outrage at the treatment of Carole, Randy and Karen, and other innocent business owners prompted Congressional

hearings—which in turn led to the Clyde-Hirsch-Sowers RESPECT Act, which restricted structuring forfeitures—did the IRS change its enforcement policies or return any money. Press Release, Institute for Justice, Trump Signs Bill to Protect Small-Business Owners from IRS Seizures (July 2, 2019), https://ij.org/press-release/trump-signs-bill-to-protects-small-business-owners-from-irs-seizures/.

C. The third-party doctrine is widely criticized.

The abuses permitted by the third-party doctrine have led to widespread criticism by the courts and legal scholars. As noted by the majority opinion below and IJ's brief in support of the petition for review in this case, courts in at least ten different states have sharply criticized the federal third-party doctrine and rejected it under their own state constitutions. Br. Amicus Curiae Institute for Justice in Support of Pets. For Review 6-7. These criticisms are echoed by legal scholars who have examined the origins of the doctrine. These criticisms essentially fall into three overarching categories.

The first overarching criticism is that *Miller* and *Smith* are rooted in the fiction that individuals cannot reasonably expect any amount of privacy in information provided to third parties. *People v. Chapman*, 679 P.2d 62, 67 & n.6 (Cal. 1984). To the contrary, people would likely protest if the government, without a warrant, sought to obtain records listing "every [website] they had visited in the last week, month, or year." *State v. Walton*, 324 P.3d 876, 906 (Haw. 2014)

(quoting *United States v. Jones*, 565 U.S. 400, 418 (2012) (Sotomayor, J., concurring)). Experience shows that individuals may reasonably expect that information disclosed to third parties for one purpose will not be disclosed to the government "for other purposes." *State v. Reid*, 945 A.2d 26, 33 (N.J. 2008). *Miller* and *Smith* are thus "dead wrong" to assert that a bank depositor—as in *Miller*—expects less privacy than one using a public telephone booth—as in *Katz*. Wayne R. LaFave, 1 Search & Seizure Section 2.7(c) (5th ed. 2018).

The second overarching criticism is that the third-party doctrine's "risk assumption" rationale is unjustified. In *Smith*, Justice Marshall's dissenting opinion took aim at this rationale by noting that individuals cannot be deemed to "assume the risk" of using "what for many has become a personal and professional necessity." *Smith*, 442 U.S. 735, 750-51 (1979) (Marshall, J., dissenting). Several state courts, including the Court of Appeals below, have relied on Justice Marshall's criticisms to reject the third-party doctrine under their own state constitutions. *State v. Mixton*, 247 Ariz. 212, __ ¶ 23, 447 P.3d 829, 840 (App. 2019); *Walton*, 324 P.3d at 906; *State v. Thompson*, 760 P.2d 1162, 1166 (Idaho 1988); *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983). Ultimately, the 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).

Finally, the third-party doctrine is incompatible with a world where third parties are routinely entrusted with information that, if disclosed, would provide the government with a "virtual current biography." *Chapman*, 679 P.2d at 68. Two examples drive this point home. "Direct-to-consumer" genetic testing now allows people 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). Similarly, people commonly store large amounts of data on third-party servers instead of local computers thanks to cloud computing. *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."). Again, a strict application of *Miller* and *Smith* suggests that users of cloud computing services assume the risk of disclosure of all emails, personal papers, and other private information to law enforcement; a proposition at odds with user expectations under the Arizona ethics rules. *See* Ariz. State Bar Ethics Op. 09-04

(Dec. 2009) (allowing attorneys to use cloud computing services if they "take reasonable precautions to protect the security and confidentiality of client documents and information").

* * *

Since its invention, the third-party doctrine has permitted government abuse of innocent Americans. The growth of modern communication, computing, and other technologies has exacerbated the doctrine's threat today. The Supreme Court's recent decision in *Carpenter v. United States* recognizes the growing disconnect between the doctrine's theory and actual practice and history. And although *Carpenter* undermines the judicial assumptions supporting the doctrine's continued application, the *Carpenter* majority itself refused to wrestle with the implications of its "minimalist" ruling, leaving the doctrine in disarray.

II. *Carpenter v. United States* Recognized the Federal Third-Party Doctrine's Many Faults and Left the Doctrine in Disarray.

The United States Supreme Court's recent decision in *Carpenter v. United States* implicitly recognized—but did nothing to resolve—the third-party doctrine's numerous problems. But *Carpenter*'s "minimalist" approach—which purported to keep the doctrine, even while discarding its empirical assumptions and creating an unexplained exception to its "categorical" application—in fact undermines the doctrine and exacerbates the difficulties that courts will face under the third-party doctrine going forward.

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. Although CSLI is maintained and possessed by a third-party, prior cases indicated that particularly invasive forms of tracking were invalid without a warrant. *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 Jones*, 565 U.S. 400 (holding that government's remote 28-day GPS monitoring of defendant's vehicle violated the Fourth Amendment). The collision of these legal doctrines tested the integrity of *Miller* and *Smith*'s categorical rule.

The *Carpenter* majority blinked when faced with third-party doctrine's full ramifications. Rather than apply the third-party doctrine, the Court 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. Chief Justice Roberts described the majority holding as a "narrow one," leaving the third-party doctrine otherwise undisturbed. *Carpenter*, 138 S. Ct. at 2220. This, even though members of the *Carpenter* majority had previously called for the wholesale revisiting of the third-party doctrine. *See, 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.").

It is unclear whether *Carpenter* enfeebled the third-party doctrine or preserved it notwithstanding CSLI as a unique exception. The Court held that *Miller* and *Smith* remain applicable 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 justify why CSLI falls within a separate constitutional category:

> [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. Additionally, Justice Gorsuch recognized that, under an original understanding of the Fourth Amendment, "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)).

Carpenter thus simultaneously abandoned the third-party doctrine's categorical approach and failed to provide a standard to guide future applications. One thing, however, is certain: the third-party doctrine's most recent iteration in *Carpenter* will "'keep defendants and judges guessing for years to come.'" *Id.* at 2234-45 (Alito, J., dissenting) (quoting *Riley*, 573 U.S. at 401).

This Court is now being asked to guess as to the third-party doctrine's continued application. Clearly, the third-party doctrine *is not* a categorical rule; *Carpenter* recognizes that. And if the ubiquity of cellphones, the pervasive data captured by CSLI, and the potential for governmental overreach means that the third-party doctrine does not apply to CSLI, then the internet's ubiquity, the pervasive data captured by ISPs, and the potential for governmental overreach should mean that personal information held by ISPs is similarly not subject to the

third-party doctrine. *See* Appellant's Supp. Br. at 4-8. And this is particularly true where, as here, the "police could have easily obtained a search warrant" for the identifying information they sought. *Mixton*, 247 Ariz. at __ ¶ 32, 447 P.3d at 843.

Many state courts have refused to guess about the application of the third-party doctrine and have instead rejected it under their own state constitutions to protect their citizens' rights with greater certainty. This Court should join them by refusing to adopt the federal third-party doctrine—whatever that doctrine might be currently—under the "private affairs" clause of the Arizona Constitution.

III. This Court Should Interpret the Arizona Private Affairs Clause Independently of the Fourth Amendment.

This Court has repeatedly acknowledged that the Arizona Constitution should—and must—be interpreted independently from the federal constitution. Nevertheless, the State's Petition for Review in this case urged this Court to grant review to incorporate, in lockstep with federal jurisprudence, the third-party doctrine into the Arizona Constitution. State Pet. 12. Aside from being generally inconsistent with the approach this Court follows, the lockstep approach is particularly inappropriate where, as here, the text and history of the Arizona Constitution's relevant provision contrasts sharply with its federal analog.

When interpreting the Arizona Constitution, this Court is not simply to parrot federal law, but rather must ensure that the plain text and original understanding of the Arizona Constitution is enforced. "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). This Court has consistently recognized, since statehood, that the plain text and original understanding of the Arizona Constitution must be enforced. *See* Paul Avelar and Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 359-60 (2017) (collecting cases from 1912 to present).

In recent years, however, this Court has also applied, inconsistently and without explanation, various other "interpretive methodologies"—including a "'lockstep' approach"—to construe state constitutional provisions that have a federal analog. Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 267, 270-71 (2003). But no evidence suggests that the people who framed and approved the Arizona Constitution understood its provisions to adopt, in lockstep, the meaning given by courts to a different, inapplicable, constitution. Avelar & Diggs, *supra* at 361-63. Lockstep interpretation is "[a] grave threat to independent state constitutions" because it ignores the unique values captured in each state's constitutional provisions. Jeffrey S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law 174 (Oxford Univ. 2018). State constitutions are not "'balloons to be blown up or deflated every time, and precisely in accord with the

interpretation of the U.S. Supreme Court, following some tortious trail.'" *State v. Ingram*, 914 N.W.2d 794, 797 (Iowa 2018) (quoting *Penick v. State*, 440 So. 2d 547, 552 (Miss. 1983)).

The lockstep approach is particularly inappropriate when the language of a state constitutional provision is distinct from its federal counterpart. *See Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 928-29 (Ariz. 2019) (Bolick, J., concurring). Such is the case here. The private affairs clause in Article II, Section 8 of the Arizona Constitution explicitly protects citizens' "private affairs," while the text of the Fourth Amendment omits any reference to privacy, *see Carpenter*, 138 S. Ct. at 2239 (Thomas, J., dissenting). And this contrast is no mistake; the private affairs clause was animated by privacy concerns different from those motivating the Fourth Amendment. *See generally* Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723 (2019).

IV. This Court Should Follow the Positive Law Floor Model in Interpreting the Private Affairs Clause.

Rather than adopt the third-party doctrine in lockstep with whatever the U.S. Supreme Court says it is, this Court should apply the positive law floor model to Arizona's private affairs clause. The positive law floor model is rooted in a common-sense observation that, "if it's objectionable for a private party to encroach on privacy or security in a certain way, then it's at least as objectionable – and probably much more objectionable – for the government to do the same."

Re, *The Positive Law Floor*, 129 Harv. L. Rev. F. at 333. When a governmental actor does something to invade privacy that would be unlawful for a "similarly situated nongovernment actor" to do, courts should presume that the government has disturbed private affairs. Baude & Stern, *The Positive Law Model*, 129 Harv. L. Rev. at 1831 (emphasis removed). The rationale is simple: when society creates positive law that protects against intrusion by other individuals, courts should presume that this area is a "private affair." *See also Carpenter*, 138 S. Ct. at 2262-63 (Gorsuch, J., dissenting) (recognizing that the third-party doctrine is, in fact, contrary to every realistic understanding of privacy, citing Baude & Stern, *The Positive Law Model*, 129 Harv. L. Rev. at 1872).

The positive law floor model has two practical advantages. First, it anchors the private affairs clause analysis to tangible, identifiable law. Courts can take a first cut at determining whether an interest is a "private affair" by asking whether a statute or ordinance prohibits private individuals from invading that interest. Second, the existence of positive law is sufficient, but not necessary, to identify privacy interests. Positive law may not capture privacy interests for several reasons: positive law may lag behind a recently implicated privacy interest; norms or community expectations may have formerly protected a now-threatened privacy interest; or, more cynically, democratic majorities may purposefully exclude privacy interests from positive law to facilitate selective law enforcement. The

positive law floor model provides courts with a useful starting point to identify privacy interests articulated in law, without unduly constraining courts from acknowledging the existence of privacy interests not captured in the positive law. And this analysis is nothing new to courts.

Though not by name, state courts already invoke the positive law floor model's rationale to identify protected interests and to reject the federal third-party doctrine. In *State v. Reid*, the New Jersey Supreme Court held that citizens have an expectation of privacy in the subscriber information they provide to ISPs, citing state wiretapping and electronic surveillance laws as support. 945 A.2d at 33-35. In *State v. Boland*, the Washington Supreme Court used positive law to determine that garbage placed out for pickup is protected by its own constitution's private affairs clause. 800 P.2d 1112, 1114-15 (Wash. 1990) (citations omitted). And the Washington Supreme Court returned to positive law in *State v. Miles*, when, in determining that bank records are "private affairs," it relied on state legislation designating such records as "confidential and privileged information." 156 P.3d 864, 869 (Wash. 2007).

The United States Supreme Court has similarly applied the positive law floor model's rationale. In *Florida v. Riley*, 488 U.S. 445 (1989), the Court rejected a Fourth Amendment challenge after police used a helicopter to observe marijuana growing in an individual's greenhouse. It was "of obvious importance" to the

plurality opinion "that the helicopter in this case was *not* violating the law." *Id.* at 451. After looking to positive law, the Court additionally "checked to see whether there was any other reason to be concerned with the reasonableness of the government's conduct." Re, *The Positive Law Floor*, at 335-36. Similarly, concurring in *Fernandez v. California*, Justice Scalia rejected a Fourth Amendment challenge but noted that it would be a "more difficult case" if property rights would suggest a different outcome. 571 U.S. 292, 308 (2014) (Scalia, J., concurring).[3] Positive law is thus an intuitive starting place when determining which affairs society deems private and worthy of protection.[4]

CONCLUSION

This Court is not bound to the federal third-party doctrine, which, in the wake of *Carpenter*, lacks standards to guide application. The third-party doctrine is a poorly reasoned and overbroad exception to the Fourth Amendment, a tool for abusive government overreach, and incompatible with Arizona's protection of

[3] This approach dovetails with Justice Scalia's theory that *Katz*'s "reasonable expectation of privacy" test supplements the Fourth Amendment's prohibition on property rights violations under the "trespass theory." *See Florida v. Jardines*, 569 U.S. 1, 11 (2013) ("The *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment." (quoting *Jones*, 565 U.S. at 409). The positive law floor model adds to this approach by suggesting that, in addition to property law, courts look to "other laws relating to personal privacy." Re, *The Positive Law Floor*, at 335-36.

[4] For a comprehensive examination of the Supreme Court's flirtations with a positive law-influenced theory, *see generally* Baude & Stern, *The Positive Law Model*, 129 Harv. L. Rev. at 1834-36.

private affairs. Additionally, this Court should reject the State's invitation to interpret the Arizona Constitution as if it merely parrots the federal constitution. Lockstep interpretation is particularly inappropriate because the language of Arizona's private affairs clause differs drastically from the Fourth Amendment. This Court should use the positive law floor model as a tool for interpreting Arizona's private affairs clause and thereby reaffirm that the unique protections enshrined in state constitutions are not to be dispensed with for the sake of "uniformity."

Respectfully submitted this 30th day of December, 2019, by:

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