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IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. WILLIAM MIXTON, Appellant.	No. CR-19-____-PR No. 2 CA-CR 2017-0217 Pima County Superior Court No. CR-20160238-001 **CROSS-PETITION FOR REVIEW TO ARIZONA SUPREME COURT**

Appellant requests this Court review the court of appeals' (COA) opinion dated July 29, 2019, denying his motion to suppress evidence found as a result of an illegal search of his IP address and Internet subscriber information. Review should be granted because the question of whether the Fourth Amendment protects internet privacy is novel in Arizona. Furthermore, the COA misapplied the good-faith exception under both the federal and state constitutions. These issues are of great statewide importance.

ISSUES PRESENTED

Law enforcement illegally used administrative subpoenas to obtain William Mixton's IP address from the provider of a messaging application he used, and, using his IP address, to obtain his name and home address from his Internet service provider (ISP). In a divided opinion, the COA held that the third-party doctrine precluded protection of that information under the Fourth Amendment, but that the third-party doctrine does not apply to that information under article 2, § 8 of the Arizona Constitution; however, the good-faith exception to the exclusionary rule applies, so suppression was not required.

1. In light of *Carpenter v. United States*, 138 S.Ct. 2206 (2018), and the unique privacy interests at stake in this case, does the Fourth Amendment protect such information without application of the third-party doctrine?

2. Did the COA misapply the good-faith exception to the exclusionary rule?

3. Should this Court establish a state constitutional exclusionary rule that adheres to the original constitutional basis for the rule?

FACTS[1]

In March 2016, an undercover detective investigating child exploitation placed an ad on a popular internet advertising forum targeting offenders interested in child pornography and incest, inviting those interested to contact him to join a group chat on a messaging application known for minimal verification of its users' identities. Several people responded to the ad, including one who provided his messaging application screen name "tabooin520" and asked to be added to the group chat. In the days after the detective added this user to the group, the user posted several images and videos depicting child pornography. When the detective sent a

[1] Mixton adopts the facts as stated in *Opinion* ¶¶ 2-6.

person-to-person message to the user thanking him for the pictures, the user responded by sending the detective additional images of child pornography in personal messages.

At the detective's request, federal agents participating in the investigation served a federal administrative subpoena on the messaging application provider to obtain the user's IP address. Once the provider furnished the IP address, the detective was able to determine the user's ISP by using publicly available information. Again, federal agents served a subpoena, and as a result, the ISP supplied the street address of the user to whom the IP address was assigned. Based on this information, the detective obtained a search warrant for that address.

Mixton lived in a room at that address. During execution of the search warrant, police seized from Mixton's room a cell phone, an external hard drive, a laptop computer, and a desktop computer, each of which contained numerous images and videos containing child pornography. In some of the folders containing these images and videos, police also found images of Mixton, and images the detective had sent to the user via the messaging application.

Mixton moved to suppress both the subscriber information obtained via the administrative subpoenas and all evidence collected as a result of that information, including the evidence obtained during the search of his home. He argued that both the Fourth Amendment and article 2, § 8 of the Arizona Constitution protected his

reasonable expectation of privacy in the subscriber information, prohibiting law enforcement from obtaining that information without a warrant. The trial court denied the motion, ruling that Mixton had no recognized privacy interest in the subscriber information.[2]

On appeal, all three judges wrote separately. Judge Eppich authored the opinion of the court, holding that the United States Supreme Court's third-party doctrine foreclosed finding a Fourth Amendment violation, but that the acquisition of this information by administrative subpoena violated the private affairs clause of article 2, section 8 of the Arizona Constitution. *Opinion* ¶¶ 10-33. Judge Eckerstrom agreed with the state constitutional analysis but opined that *Carpenter v. United States*, 138 S.Ct. 2206 (2018), shows that the Fourth Amendment also prohibits the police conduct here. *Opinion* ¶¶ 40-47. Judge Espinosa disagreed that subscriber information was entitled to protection under either constitution. *Opinion* ¶¶ 48-52. All three judges agreed that the good-faith exception to the exclusionary rule applied and thus suppression was unwarranted.

REASONS TO GRANT REVIEW

This case involves several novel issues of great statewide importance. First, it presents important issues related to the third-party doctrine; while Arizona courts may not infer that *Carpenter* implicitly overruled the third-party doctrine, *see*

[2] The trial court did not separately address Mixton's claim under article 2, § 8.

Agostini v. Felton, 521 U.S. 203, 237 (1997),[3] it may observe that ample U.S. Supreme Court precedent (including *Carpenter*) provides exceptions to the general rule. Second, all three judges' opinions reflect an erroneous application of the good-faith exception, in part due to misapprehension of this Court's recent opinion in *State v. Weakland*, 246 Ariz. 67, 70 ¶ 9 (2017). Finally, as a matter of first impression, this Court should address the argument that Arizona should, as a matter of state constitutional law, extend the protections of its exclusionary rule to all unlawful conduct by police, in conjunction with the founders' original intent.

A. *Carpenter* shows that the third-party doctrine does not apply in cases impacting digital privacy. Judge Eckerstrom's partial dissent correctly stated that Mixton's IP address and ISP subscriber information is protected under the Fourth Amendment.

In *Smith v. Maryland,* 442 U.S. 735 (1979), and *United States v. Miller,* 425 U.S. 435 (1976), the Supreme Court created the third-party doctrine under which people are not entitled to reasonable expectation of privacy from government snooping in information that is disclosed to a third party, such as bank records. The Court has never addressed the issue of whether subscriber information is protected under the Fourth Amendment, and thus those cases do not directly control. *OB*, ¶¶ 39-40. However, *Carpenter* shows that the "third party" doctrine is not a hard and

[3] Mixton preserves an argument that the third-party doctrine is inconsistent with the Fourth Amendment, while recognizing that the U.S. Supreme Court is the ultimate arbiter of that question. *Michigan v. Long*, 463 U.S. 1032 (1983).

fast rule that applies in every case, but, instead, can be departed from under appropriate circumstances.

Carpenter was not the first case to carve out exceptions to the third-party doctrine. In *Bond v. United States*, 529 U.S. 334, 338-39 (2000), the Court held that police could not physically manipulate bus passengers' luggage:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court held that a state-operated hospital could not fight the scourge of pregnant women abusing drugs by collecting urine samples for the purpose of sharing evidence with police. The Court stated. "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id*. at 78. And, as shown in *Stoner v. California*, the fact that a hotel patron "gives 'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter his room 'in the performance of their duties' does not mean that police may enter without a warrant. 376 U.S. 483, 489-90 (1963) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951), and citing *Johnson v. United States*, 333 U.S. 10 (1948)).

Judge Eppich's opinion correctly recognized that "[i]n the internet era," information previously stored in the home is now stored on phones or in the "cloud," and "the framers of our state constitution [did not intend] the government to have such power to snoop in our private affairs without obtaining a search warrant." *Opinion* ¶ 27. It was also "especially troubled that the third-party doctrine grants the government unfettered ability to learn the identity behind anonymous speech, even without any showing or even suspicion of unlawful activity," as "the government's ability to identify anonymous speakers, if not meaningfully limited, intrudes on the speaker's desire to remain anonymous and may discourage valuable speech. At worst, the power may be wielded to silence dissent." *Opinion* ¶ 29. Where that opinion goes wrong is assuming that the Supreme Court would agree with the federal circuit courts that held *Smith* would allow such government snooping, even while acknowledging that Arizona courts have no duty to follow such circuit court opinions. *Opinion* ¶¶ 11-12.

Post-*Carpenter* federal case law continues to uniformly reject protection of IP address and subscriber information under the Fourth Amendment. *See, e.g., United States v. Kidd*, 2019 WL 3251356, *4-*6 (S.D.N.Y. July 3, 2019) (surveying cases). In those cases, however, the defendants only argued that IP address information was comparable to *Carpenter*'s cell-site location information, thus requiring an exception to the third-party doctrine. They did not argue, as Mixton argues and Judge

Eppich agreed, that this information impacts First Amendment interests in anonymous speech and freedom of association. Those cases are, therefore, inapplicable to the questions presented here. This Court should join the minority position because "[courts] must guard against the slow whittling away of constitutional rights, particularly as we apply constitutional rights adopted in an analog era to the new challenges of the digital age." *United States v. Bosyk*, -- F.3d --, 2019 WL 3483181, *11 (4th Cir. Aug. 1, 2019) (Wynn, J., dissenting).

As Judge Eckerstrom pointed out, the Supreme Court's "reasoning [in *Carpenter*] demonstrated that it would reject the third-party doctrine (1) when the societally recognized privacy interest is acute and (2) when the privacy domain cannot be accessed without the incidental disclosure of some private information to a third party." *Opinion* ¶ 42 (citing *Carpenter*, 138 S.Ct. at 2216-21). He persuasively stated:

> In fact, our expectation of privacy in internet use is arguably greater than any similar expectation we hold for our physical movements in public. A visit to an internet site is presumptively anonymous unless we choose to make it otherwise; our movements on public streets are presumptively visible to all we encounter. For this reason, the Court has required a warrant for the locational tracking of criminal suspects only when that tracking is sufficiently protracted to reveal private features of their lives. By contrast, each discrete internet visit may expose an acutely private thought process and may do so in a context where the visitor has taken every precaution to retain his anonymity. Surely, if the government is required to obtain a warrant to track, through technology, a suspect's public physical movements, it should likewise need a warrant to expose a suspect's private digital behavior.

Id. ¶ 44 (internal citations omitted). For these reasons, the majority opinion erred in holding that *Smith* and *Miller* dictated the result as to the Fourth Amendment's application to this case.

B. The good-faith exception does not apply here.

Where an illegal search has occurred, courts ordinarily apply the exclusionary rule, unless the State can prove that an exception to that rule applies. In *Davis v. United States*, the Supreme Court explained the good-faith exception for reliance on previous law:

> when *binding appellate precedent* specifically authorizes a *particular* police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than ac[t] as a reasonable officer would and should act under the circumstances.

564 U.S. 229, 241 (2011) (internal quotations omitted, emphasis added). This Court has recently clarified *Davis*'s application in *Weakland*, but that context involved binding appellate precedent that specifically authorized a particular police practice, and which had not been formally overruled until this Court decided *State v. Valenzuela*, 239 Ariz. 299 (2016). Rather than decide the case narrowly and determine solely whether *State v. Butler*, 232 Ariz. 84 (2013), had unsettled precedent, however, this Court espoused a different standard: "the good-faith exception applies if the search was 'conducted in objectively reasonable reliance on ... binding appellate precedent ....'" *Weakland*, 246 Ariz. at 70 ¶ 9 (quoting *State v.*

Jean, 243 Ariz. 331, 343 ¶ 47 (2018)). It concluded that the good-faith exception "applies with equal force where binding appellate precedent otherwise supports the practice," and adopted a "reasonableness approach." *Id*.

Weakland generates more confusion than clarification, however, because a "reasonableness approach" is essentially standardless. The U.S. Supreme Court's language in *Davis* does not permit such broad license to officers in the field to make such interpretations. But even if it did, *Weakland* still requires there to be binding appellate precedent that authorizes the practice. In Mixton's case, no such precedent existed. The COA found good faith based on the belief that the officers acted "reasonably," even in the absence of any binding appellate precedent.

C. This Court should create a state constitutional exclusionary rule.

1. General principles of state constitutional interpretation

"[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution." William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). "[A] state is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Although not required to do so, Arizona courts often read our state constitution in lockstep with the United States Supreme Court's reading of the federal constitution and eschew any independent

reading of the state constitution. *State v. Noble*, 171 Ariz. 171, 173 (1992); *but see Pool v. Superior Court*, 139 Ariz. 98, 108 (1984) (while giving great weight to United States Supreme Court decisions, "we cannot and should not follow federal precedent blindly").

More recent scholarship—including from two Arizona Supreme Court justices—have called upon practitioners and judges to look independently to the Arizona Constitution as the source of individual rights. *See* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 267 (2003) (labeling the three standard approaches as "lockstep," "primacy," and "interstitial / criteria"); Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 509 (2012) ("Far better is the 'primacy' approach—that is, interpreting state constitutional provisions separately from their federal constitutional counterparts, focusing on their language, intent, and history. Such an approach contributes to consistency in the law, it honors the intent of the framers to provide an independent and primary organic law, and it ensures that the rights of Arizonans will not erode even when federal constitutional rights do."); Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723 (2019). Accordingly, this court should accept the invitation, and the responsibility, to interpret the protections of the Arizona Constitution separate from those of the federal constitution.

Giving a state constitutional interpretation to the exclusionary rule "also could provide greater certainty and predictability to defendants and law-enforcement alike than hitching our jurisprudence to often amorphous and constantly evolving U.S. Supreme Court decisions." *Jean*, 243 Ariz. at 354 ¶ 94 (Bolick, J., dissenting in part). Such was the impetus for the separate interpretation of the state constitution in the context of home searches. *See State v. Bolt*, 142 Ariz. 260, 264 (1984) (expressing concern that *Segura v. United States*, 468 U.S. 796 (1984), could undermine sanctity of the home). Mixton asks this Court to unhitch its exclusionary-rule jurisprudence from the Fourth Amendment's slippery slope.

When crafting the Arizona Constitution in 1910, Arizona's declaration of rights was taken in large part from Washington, with many provisions copied verbatim. Among those verbatim provisions are the right to privacy, from article 1, section 7 of the Washington Constitution to article 2, section 8 of the Arizona Constitution, and the right that "[n]o person shall be compelled in any criminal case to give evidence against himself," which appears in article 1, section 9 of the Washington Constitution as well as article 2, section 10 of the Arizona Constitution. These provisions were adopted with no debate at all. Supreme Court of Arizona, *The Records of the Arizona Constitutional Convention of 1910,* John S. Goff ed., at 659, 1232-33 (showing no objection to adoption). For this reason, this Court looks to the Washington Supreme Court for guidance in interpreting corresponding provisions.

The Washington Supreme Court first recognized the exclusionary rule in *State v. Gibbons*, 203 P. 390 (Wash. 1922), a case involving an illegal seizure of a vehicle which turned out to be transporting liquor. The court first recognized that because the arrest of the accused was unlawful, so was the seizure of his vehicle, which contained the liquor. *Id*. at 394. As did the United States Supreme Court, it found the source of the exclusionary rule not only in the text of the Fourth Amendment and its state analog but also of the Fifth Amendment's prohibition on compelled self-incrimination and the state analog's extension of that prohibition to giving not just *testimony* but also *evidence* against oneself. *Id*. at 395. It relied not only on the recent wave of U.S. Supreme Court cases but also on the reasoning of *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); and, like *Weeks*, it reasoned that a rule that prohibits future unconstitutional action could not possibly forgive past unconstitutional action. *Id*. at 396.

After *Mapp*, states did not need to interpret their state constitutional provisions when they could rely on the Fourth Amendment. As a result, states like Washington which had modeled their exclusionary rules on the *Weeks* rule had no need to use its state constitution to protect the integrity of the judicial system. But over the course of the next twenty years, in response to the U.S. Supreme Court eroding these protections and recasting the exclusionary rule as one focused on deterring police misconduct, the Washington Supreme Court raised its state

constitutional exclusionary rule from its slumber. In *State v. White*, 640 P.2d 1061, 1066-67 (Wash. 1982), it noted that the U.S. Supreme Court had recently held that an unconstitutional stop-and-identify statute did not require suppression of evidence because police could not anticipate that the statute would be struck down, and it rejected the high court's rationale at its core. The court noted that it was the high court that had altered longstanding exclusionary rule jurisprudence, and given Washington's equally longstanding history of reading its corresponding state constitutional provision differently, it was necessary to give broader protection and in so doing strike out on its own. *Id*. at 1070-71. It concluded: "[t]he important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." *Id*. at 1071.

This Court has explicitly disclaimed a broader interpretation of the exclusionary rule. *Bolt*, 142 Ariz. at 268-69; *State v. Hummons*, 227 Ariz. 78, 82 ¶ 16 (2011). For the first time, the COA majority in Mixton's case correctly acknowledged that the "private affairs" clause provides different protections. It is time to recognize that our exclusionary rule has different roots as well and thus must be read differently, and follow Washington's example as our state's founders intended.

2. History of the exclusionary rule in federal and state courts

In recent years, there has been suggestion that the exclusionary rule has no basis in the Fourth Amendment. *See Collins v. Virginia*, 138 S. Ct. 1663, 1676-77 (2018) (Thomas, J., concurring). The Supreme Court has held since *United States v. Calandra*, 414 U.S. 338 (1974), that the purpose of the exclusionary rule is to deter police misconduct. In *Davis*, the Court explained that it recognized the errors of past "expansive dicta," 564 U.S. at 237 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). It "abandoned the 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id*. at 238 (citing *Arizona v. Evans*, 514 U.S. 1, 13 (1995)). In making these statements, the Supreme Court is rewriting history based on individual disagreement with the fundamentals of the exclusionary rule.

While it is true that the text of the Fourth Amendment does not literally spell out the exclusionary rule,[4] the principle underlying the exclusionary rule is undeniably rooted in originalism. In *Weeks v. United States*, following a recitation of the principles and history underlying the Fourth Amendment, the Court explained:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal

[4] The lack of specific text securing a remedy for the violation of a constitutional right provides no barrier in other contexts. For example, the Sixth Amendment's promise of trial by jury is unaccompanied by text suggesting that violation of that right is structural error, yet jurists and commentators agree that the remedy is automatic reversal of convictions and a new trial.

> Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. 383, 392 (1914). It then said:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393. The Court deduced that allowing illegally obtained evidence in court "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id*. at 394. Thus, the exclusionary rule is rooted in the need to protect the integrity of the judiciary so it does not become complicit in illegal action. The Court recognized that English common law remedy for unlawful seizure of evidence was returning the evidence to the person upon whose rights the government agent trespassed:

> The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in *Wise v. Henkel*, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc. § 210; *Rex v. Barnett*, 3 Car. & P. 600; *Rex v. Kinsey*, 7 Car. & P. 447; *United States v. Mills*, 185 Fed. 318; *United States v. McHie*, 194 Fed. 894, 898.

Id. at 398.

It is self-evident that a remedy that involves returning the property or papers to the accused necessarily means that such items cannot be used in evidence by the government. Thus, discounting the constitutional roots of the exclusionary rule merely because the Supreme Court took until 1914 to call it such is no divination of the Founders' original intent, just as it would be fallacious to reject the Fourth Amendment itself merely because the Court did not squarely interpret it until *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd*, citing the illustrious history both in England and the American colonies that culminated in the Fourth Amendment, was asked to invalidate a demand for forfeiture of property—in other words, a future seizure. Were it the case in *Boyd* that the government agents had already seized the property, as in *Weeks*, no doubt Justice Bradley would have articulated the exclusionary rule in similar language in *Boyd*.

In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court considered the question whether the federal exclusionary rule applied to the states through the Due Process Clause of the Fourteenth Amendment, and it rejected that proposition. In categorizing the positions of the several states, the Court considered Arizona to be among the "states which passed on the *Weeks* doctrine for the first time after the *Weeks* decision and in so doing rejected it," *id*. at 35 (Table E), but the case it cited for authority, said no such thing. In *Argetakis v. State*, 24 Ariz. 599, 610-11 (1923), this Court found the facts of the case before it akin to those in *Adams v. New York*,

192 U.S. 585 (1904), in that no illegal search or seizure had in fact occurred. Because an illegal search or seizure is a condition precedent to invoking the *Weeks* doctrine, there was no reason for this Court to bring it up. Thus, the Court's classification of Arizona in "States that reject *Weeks*" was erroneous. *Wolf*, 338 U.S. at 38.

Only twelve years later, the Court reversed course in *Mapp v. Ohio*, 367 U.S. 643 (1961), and applied the federal exclusionary rule to the states through the Due Process Clause. As part of the march toward incorporation to the states of most of the protections of the Bill of Rights,[5] the Court recognized that "[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society,'" *id*. at 656 (quoting *Wolf*, 338 U.S. at 27), unless the exclusionary rule was enforced against federal and state governments alike. "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional

[5] *Compare Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' … I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights"), *with Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring) (while maintaining belief in full incorporation of Bill of Rights, "I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government.").

evidence." *Id*. at 657. The Court explained the importance of the exclusionary rule as more than just a deterrent:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "(t)he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity." 364 U.S. at page 222, 80 S.Ct. at page 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Id. at 659.[6] Thus, the rule's deterrent value is secondary to its true purpose of protecting the integrity of the judicial system.

Justice Black's concurring opinion in *Mapp* provides a classic textualist argument for a constitutional exclusionary rule, as opposed to a judicial construct. Justice Black, the only justice to vote in the majority in both *Wolf* and *Mapp*, explained his switch had nothing to do with his view on incorporation, but rather his view on the exclusionary rule itself:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any

[6] Another commentator's retort to the Cardozo aphorism was, "the criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered." Arnold H. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 Geo. Wash. L. Rev. 1218, 1236 (1969).

> provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

Id. at 661-62 (Black, J., concurring). Justice Black then explained that the *Wolf* dissent, which he criticized at the time, persuaded him over time:

> In the final analysis, it seems to me that the *Boyd* doctrine, ***though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint***, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case.

Id. at 662-63 (Black, J., concurring) (emphasis added).

3. <u>The U.S. Supreme Court's current exclusionary-rule jurisprudence has its source in a misinterpretation of 1960s-era cases, not originalism.</u>

Although *Mapp*, at its core, is about the Due Process Clause and not the exclusionary rule, it was the exclusionary rule's imposition on the states that inspired negative reaction and the rewriting of history. Beginning with *Calandra*, 414 U.S. at 348, the Court began referring to the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Over the generations, the U.S. Supreme Court stopped reciting the full history of the rule and, in the process of assuming its validity, merely cited *Boyd*, *Weeks*, and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), as established precedent. *Walder v. United States*, 347 U.S. 62, 65 (1954), was one such case; after citing these cases, the Court added a sentence without any citation to authority: "All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." As a result of that statement, the following year, the Supreme Court of California cited this statement as proof positive that "the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law." *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). In *Elkins v. United States*, 364 U.S. 206, 217 (1960), the Court added a few more phrases: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*'s authority for this point was a single case of the New Jersey Supreme Court decided two years earlier, *Eleuteri v. Richman*, 141 A.2d 46, 50 (N.J. 1958). That case conducted no historical analysis and instead chose to reject the exclusionary rule under New Jersey law.

Elkins was partially incorrect. *Weeks* shows that deterrence is not the rule's purpose, but rather its effect, because at common law, the constable was deterred

from violating a person's Fourth Amendment rights by the threat of civil action for trespass. 232 U.S. at 390. Yet, this misstatement in *Elkins* is now manifested as the new purpose of the exclusionary rule for the post-Warren Court era.

Not until 1984 did the Court create a "good-faith exception" in *United States v. Leon*, 468 U.S. 897 (1984). Application of that exception to reliance on binding precedent first appeared only eight years ago in *Davis*. Furthermore, the Court now rejects applications of the rule on the ground that trespasses can be brought as civil rights claims under 42 U.S.C. §1983. *See Hudson*, 547 U.S. at 597. This, despite the fact that it has greatly expanded the judicial construct of "qualified immunity" for government officials, as explained below.

The U.S. Supreme Court's current interpretation controls federal law. But the above analysis shows that the original intent was for a broader exclusionary rule that prohibited use of illegally obtained evidence, and the current rule, often described as a "return to originalism," is the opposite of originalism. This Court should adhere to the original meaning of our state constitution, which necessarily means establishing a state exclusionary rule.

4. <u>The federal exclusionary rule insufficiently guards against unconstitutional action by government, and thus the state constitutional exclusionary rule should afford greater protection.</u>

The deterrence theory for the exclusionary rule is no longer viable when police officers are immunized for actions that are so obviously egregious. In the last decade,

the U.S. Supreme Court has intervened on behalf of local government officials in two Arizona cases to undermine "clearly established" rights. In *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009), the Court found school officials entitled to qualified immunity for strip-searching a thirteen-year-old girl suspected of possessing Tylenol. Last year, in *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), it held that an officer was entitled to qualified immunity for shooting a Tucson woman holding a knife but not threatening anyone. Justice Sotomayor criticized the majority's summary disposition of the case:

> The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.
>
> If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.

Id. at 1155 (Sotomayor, J., dissenting) (cites omitted). See also David French, "End Qualified Immunity," *National Review*, Sept. 1, 2018, available at https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ (last visited August 22, 2019) (excoriating courts for creating and expanding doctrine of qualified immunity, in contradiction of Congress's plain language in 42 U.S.C. §1983). French cited a "blistering attack" on qualified immunity by Judge Willett; that concurring opinion began:

> The court is right about Dr. Zadeh's rights: They were violated.
>
> But owing to a legal deus ex machina—the "clearly established law" prong of qualified-immunity analysis—the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal.

Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring).[7] Judge Willett interpreted *Kisela* as standing for the rule that "[m]erely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer." *Id*. (citing *Kisela*, 138 S.Ct. at 1153). Recognizing that the Supreme Court

[7] The Fifth Circuit granted rehearing and amended its opinion, and Judge Willett amended his concurrence, this time using even stronger language. *Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring).

has been inconsistent on just how similar precedent must be before it is "clearly established," Judge Willett noted that "like facts in like cases is unlikely. And this leaves the 'clearly established' standard neither clear nor established among our Nation's lower courts." *Id.* He is not alone: just last month, a divided panel of the Eleventh Circuit found an officer was entitled to qualified immunity for shooting a child when aiming for a nonthreatening house pet. *Corbitt v. Vickers*, 929 F.3d 1304, 1325 (11th Cir. 2019) (Wilson, J., dissenting).

For all of these reasons, this Court should abandon the "lock-step" method of applying the Arizona Declaration of Rights and breathe life into the state constitutional exclusionary rule.

CONCLUSION

This Court should grant review to decide these important questions of first impression related to the third-party doctrine and the good-faith exception.

DATED: August 28, 2019.

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