Pima County Public Defender's Office
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800
E-Mail: abigail.jensen@pima.gov; david.euchner@pima.gov
ABIGAIL JENSEN, SB#018810; DAVID J. EUCHNER, SB#021768
Attorneys for William Mixton

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. WILLIAM MIXTON, Appellant.	No. CR-19-0276-PR No. 2 CA-CR 2017-0217 Pima County Superior Court No. CR-20160238-001 **OPPOSITION TO PETITION FOR REVIEW**

Appellant William Mixton opposes the State's petition for review of the Court of Appeals' (COA) opinion that obtaining his IP address and subscriber information without a judicially-issued warrant violated his rights under article 2, §8 of the Arizona Constitution. *State v. Mixton*, 247 Ariz. 212, 220-27 ¶¶ 14-33 (App. 2019). The COA was correct on the merits and should be affirmed on that issue, and thus this Court should deny the State's petition and grant Mixton's cross-petition for review filed on August 27, 2019.

ISSUE 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. Did the COA correctly rule that, under article 2, §8 of the Arizona Constitution, an Internet user has a legitimate expectation of privacy in their IP address and subscriber information supplied to third parties in order to utilize the Internet, such that, to acquire such information from the operator of an internet messaging application and the user's ISP, law enforcement must first obtain a judicially-issued search warrant based on probable cause?

FACTS

Mixton adopts the facts as stated in *Opinion* ¶¶2-6 and in his Cross-Petition for Review.

REASONS TO DENY REVIEW OF THE STATE'S PETITION

The State argues that the COA majority's state constitutional ruling is wrong for three reasons: (1) neither the text of article 2, §8, nor case law supports that result; (2) Arizona has historically relied on federal law to interpret article 2, §8, and "uniformity with federal law is highly desirable," thus rejection of the third-party doctrine was error; and (3) the lower court's claim to be part of "growing trend among states" is incorrect because no other state has held that a warrant is required to obtain a person's IP address and subscriber information. Petition at 6. The State

also echoes Judge Espinosa's argument that "only basic identifying information is at issue here," and that such information is not entitled to protection. *Id*. at 5-6. The State's criticisms of the majority's holding are unfounded.

A. The "private affairs" clause of article 2, § 8 grants broader protection than the Fourth Amendment. The COA correctly followed this Court's precedent interpreting article 2, § 8 as providing broader protection than the Fourth Amendment in the case of home searches.

Although the State repeatedly asserts that there is no "textual reason to construe the Arizona Constitution more broadly" than the Fourth Amendment, Petition at 15, at no point does it apply the rules of statutory construction to the actual text of article 2, § 8 to support its argument, or argue why the deliberate choice of different language than in the Fourth Amendment should not be given effect.[1] In fact, the State's argument would render the "private affairs" language of our constitution superfluous, something which courts cannot do. *Mejak v. Granville*, 212 Ariz. 555, 557 ¶9 (2006) ("We must interpret the statute so that no provision is rendered meaningless, insignificant, or void."); *see also Opinion*, ¶40 (Eckerstrom, J., (concurring)) ("Were we to find no violation of article II, §8 under these facts, we would render the specific guarantee of the Arizona Constitution—that '[n]o person

[1] The State does, however, acknowledge that the rules of statutory construction apply here. Petition at 7-8, quoting *Kotterman v. Killian*, 193 Ariz. 273, 284 ¶33 (1999).

shall be disturbed in his private affairs ... without authority of law'—an empty promise.").

Justice Bolick has plainly laid out why the "private affairs" language must be interpreted as granting broader protection than the Fourth Amendment:

> The language of Arizona Constitution article 2, section 8 is starkly different from the language of the Fourth Amendment…. It is axiomatic, as a matter of constitutional or statutory interpretation, that where different language is used in different provisions, we must infer that a different meaning was intended. *Rochlin v. State*, 112 Ariz. 171, 176 (1975) (comparing sections of the Arizona Constitution with other state constitutions, the Court concluded that any "difference in language must be respected. If the authors of the constitution had intended the sections to mean the same thing they could have used the same or similar language. The fact that they did not, requires the conclusion that the sections were meant to be different."); *see also* [*State v. Ault*, 150 Ariz. 459, 466 (1986)] ("While our constitutional provisions were generally intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy." (citation omitted)). As a former chief justice of this Court has aptly observed, our Constitution's "framers had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona's needs." Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012). "Had the framers merely intended to mirror the guarantees found in the Federal Bill of Rights, they could have simply adopted the first eight amendments of the U.S. Constitution." *Id.* at 469.
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> The Court correctly observes that it has interpreted article 2, section 8's second provision, pertaining to sanctity of the home, significantly more broadly than the United States Supreme Court has interpreted the Fourth Amendment. *Supra* ¶ 23; *see, e.g., Ault*, 150 Ariz. at 466 (deciding "on independent state grounds" not to apply the federal inevitable discovery doctrine, because "exceptions to the warrant

> requirement are narrow and we choose not to expand them"); [*State v. Bolt*, 142 Ariz. 260, 265 (1984)] (holding that police entries into a home to secure them pending warrant "are 'per se unlawful' under our state constitution," a holding "based upon ... its specific wording, and our own cases, independent of federal authority"). It is also true, as the Court observes, that the Court has not extended article 2, section 8 beyond the Fourth Amendment outside of the context of the home. *Supra* ¶ 23. But the Court has never expressly held, based on considered analysis, that article 2, section 8's first provision, protecting a person's "private affairs" against warrantless government intrusion, is coextensive with the United States Supreme Court's interpretation of Fourth Amendment protections. Given that we have recognized that the second provision provides greater protection than the Fourth Amendment, it would be odd to construe the first provision more narrowly, in lockstep with the Supreme Court's ever-evolving Fourth Amendment jurisprudence.

State v. Hernandez, 244 Ariz. 1, 7-8 ¶¶29-30 (Bolick, J., concurring). Ironically, the State cites *Hernandez* in support of its argument that, historically, courts have interpreted article 2, §8 in lockstep with the Fourth Amendment. Petition at 8. It ignores, however, this Court's qualification that, "under the circumstances of [that] case," a departure from that approach was not justified, thus signaling that under other circumstances, such as those in this case, such a departure may be well justified. *Hernandez*, 244 Ariz. at 6 ¶23. In fact, where this Court has departed from the lockstep approach, it has done so based specifically on the broader language of our constitution. In *State v. Ault*, this Court declined to apply the federal inevitable discovery doctrine to violations of article 2, §8, noting that

> The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.

> * * *
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> Our decision not to extend the inevitable discovery doctrine into defendant's home in this case is based on a violation of art. 2 § 8 of the Arizona Constitution regardless of the position the United States Supreme Court would take on this issue. While our constitutional provisions were generally intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy.

150 Ariz. 459, 463, 466 (1986) (citation omitted). Similarly, in *State v. Bolt*, 142 Ariz. 260 (1984), this Court declined to follow the U.S. Supreme Court's holding that the Fourth Amendment allows warrantless entry into a home to "secure" it while law enforcement seeks a search warrant. In reaching that result, this Court specifically rejected the State's argument that the need for uniformity with federal law should take precedence over the broader language of our constitution.

> While we are cognizant of the need for uniformity in interpretation, we are also aware of our people's fundamental belief in the sanctity and privacy of the home and the consequent prohibition against warrantless entry. We believe that it was these considerations that caused the framers of our constitution to settle upon the specific wording in Article 2, § 8. While Arizona's constitutional provisions generally were intended to incorporate the federal protections, *Malmin v. State,* 30 Ariz. 258, 261, 246 P. 548, 549 (1926), they are specific in preserving the sanctity of homes and in creating a right of privacy.

Id. at 264-65.[2] *See also State v. Juarez,* 203 Ariz. 441, 444 ¶3 (App. 2002) (noting that this Court's broader interpretation of article 2, §8 in *Ault* and *Bolt* was based on "the specific wording" of that provision).

[2] After strenuously arguing that the Arizona Constitution should be interpreted identically to the Fourth Amendment despite the difference in language between the

The State's reliance on *State v. Adair*, 241 Ariz. 58, 64 ¶24 (2016), is similarly unavailing. Petition at 8. The State ignores (1) that searches without a warrant are presumptively unreasonable,[3] and (2) that this Court's application of the "totality of the circumstances" test in that case was based on its holding that the warrantless search of Adair's home was not done "without authority of law" because it was authorized by his conditions of probation. *Adair*, 241 Ariz. at 62-63 ¶¶18-21. There is no suggestion in *Adair*, nor does the State cite any authority for the proposition, that that standard applies in this context.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This much-quoted principle serves to remind states that they need not limit themselves to the protections mandated by the federal government; rather, they can, within the boundaries of the Constitution, strike out to explore and recognize new frontiers in

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two provisions, the State reverses itself and urges this Court to ignore the cases from other states cited by the majority because the wording of their constitutions is different. Petition at 18 ("Ultimately, decisions from other jurisdictions interpreting their own constitutions that contain different wording than article II, § 8 'are of little value' in interpreting the Arizona Constitution.").

[3] *State v. Wilson*, 237 Ariz. 296, 298 ¶7 (2015) (search of a home without a warrant is presumptively unreasonable under both the Fourth Amendment and art. 2, §8).

running a free and just society. The COA expertly applied that principle in this case; this Court should let that part of the opinion stand.

B. Even "basic identifying information," such as a person's IP address and internet subscriber information, is entitled to protection, because, in the hands of law enforcement, it can allow police to determine the most intimate details of a person's life.

Relying on Judge Espinosa's dissent, the State asserts that there was no constitutional violation here because the State only sought and obtained "basic identifying information" about Mixton, which they argue is not entitled to protection under article 2, §8. Petition at 5, 11, 14. The majority below, however, correctly held that law enforcement collection of even "basic identifying information" violates the state constitution if obtained without a warrant. *Opinion* ¶¶27-30.[4]

[4] The State misunderstands the nature of IP addresses when it claims, in a footnote, that "[a]n IP address is 'a string of numbers associated with a device that had, at one time, accessed a wireless network'; it 'does not itself convey any location information.'" Petition at 2 n.2 (quoting *United States v. Hood*, 920 F.3d 87, 92 (1st Cir. 2019)). By burying this in a footnote, the State implies that this statement is a fact that is judicially noticed and well-accepted, when in fact it is not true, and *Hood* cited no authority for its assertion. Even federal cases relied upon by the State for the proposition that IP addresses are not entitled to Fourth Amendment protection acknowledge that the reason is that "the third-party doctrine continues to apply to business records that might incidentally reveal location information" and an IP address reveals only an address. *See United States v. Contreras*, 905 F.3d 853, 857 (5th Cir. 2018) (internal quotations omitted).

Ultimately, what is at stake here is one's right to be anonymous, to the extent one chooses, in one's life online. In this day and age of near universal surveillance,[5] the government may well have vast amounts of information about any one of us. However, without the ability to connect that information with one's personal identity, that information is of little value and has only minimal impact on one's ability to conduct one's "private affairs" online without governmental interference. But once the government can connect that information to one's identity, "[o]ur privacy, our right to anonymity in public and our right to free speech are in danger." Clare Garvie, *You're in a Police Lineup, Right Now*, New York Times, October 15, 2019;[6] *see Opinion* ¶28 ("[T]he identity behind anonymous communications[] is part and parcel of a person's private affairs; access to it affords the government significant insight into a person's private activities and beliefs.").

The California Supreme Court has recognized why one's name and address must be protected. *People v. Chapman*, 679 P.2d 62 (Cal. 1984) (police violated California constitution's search-and-seizure provision by obtaining the name and address of an unlisted telephone subscriber without a warrant), *disapproved on other*

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[5] *See, e.g.*, Aaron Mackey and Andrew Crocker, "Secret Court Rules That the FBI's 'Backdoor Searches' of Americans Violated the Fourth Amendment," Oct. 11, 2019, https://www.eff.org/deeplinks/2019/10/secret-court-rules-fbis-backdoor-searches-americans-violated-fourth-amendment (last visited 10/15/19).

[6] https://www.nytimes.com/2019/10/15/opinion/facial-recognition-police.html (last visited 10/15/19).

grounds, People v. Palmer, 15 P.3d 234 (Cal. 2001). Relying on its previous ruling rejecting the idea "that because information is turned over to a bank, it is no longer private," the court held that telephone subscribers who obtain an unlisted telephone number have a reasonable expectation of privacy in their name and address. *Id.* at 66-67 (citing *Burrows v. Superior Court*, 529 P.2d 590, 594 (Cal. 1974)). The court rejected the People's arguments against a warrant requirement for obtaining a telephone subscriber's name and address, since "disclosure of the subscriber's name and address may well add the missing link to make up a 'virtual current biography.'" *Id*. at 68-69. In support of its conclusion, the court pointed out that, under the attorney-client privilege, a client's identity is normally not protected; however, "if the government already *has* evidence of the substance of a communication between attorney and client but seeks the identity of the client to link him with some incriminating evidence, the client's identity is protected by the privilege." *Id*. at 69 (emphasis in original). Under those circumstances, "the client's name itself has an independent significance." *Id*.

> Here, it is the constitutional right to privacy rather than a privilege that is being invoked. However, the attorney-client privilege cases are analogous in that in both situations the government is seeking the name and address of a person about whom it already has a great deal of information. In many cases, it is seeking the name and address of a person in order to provide an essential link to establish a "virtual current biography." Thus, protection of the individual's name and address is the only way to protect the "virtual current biography."

Id.[7] The court also noted that "[c]ases dealing with the First Amendment… demonstrate the fallacy in the conclusion that there can be no privacy interest in one's name and address." *Id.* (citing *Talley v. California*, 362 U.S. 60 (1960)) (holding that person could not be compelled to identify himself as the author of a political leaflet, since it would restrict the freedom of expression). Thus, even when the defendant was not engaged in constitutionally protected speech, he still has a legitimate expectation in the privacy of his name and address. *Id.* at 70. Consequently, "[w]here the police seek to overcome this anonymity in the belief that criminal activity is afoot, they must first obtain a judicial determination that they are entitled to do so." *Id.*; *see Opinion* ¶¶29-30 (expressing similar concerns about the

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[7] The Colorado Supreme Court applied similar reasoning in deciding that the Colorado Constitution requires a warrant for law enforcement to obtain a record of phone numbers dialed from the defendant's phone.

> [A] pen register record holds out the prospect of an even greater intrusion in privacy when the record itself is acquired by the government, which has a technological capacity to convert basic data into a virtual mosaic of a person's life.
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> * * *
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> Simply stated, merely because the telephone subscriber has surrendered some degree of privacy for a limited purpose to those with whom she is doing business does not render the subscriber fair game for unrestrained police scrutiny by virtue of that fact.

People v. Sporleder, 666 P.2d 135, 142 (Colo. 1983) (citation and internal quotation marks omitted).

impact on the freedom of speech and association if law enforcement can pierce one's anonymity without a warrant).

Finally, in *Chapman* the People argued that the defendant had no expectation of privacy in her name and address because unlisted telephone subscribers had been informed by the Public Utilities Commission that unpublished information "would be released to law enforcement agencies." 679 P.2d at 71. The court found that notice had not been sent to the subscriber before police obtained her unlisted information. *Id*. But it also held that, even if she had received that notice in advance, "there is a more fundamental reason why that fact would not change the result here." *Id*.

> Since respondents' privacy claim is a reasonable one, it cannot be wiped out by the simple and expedient device of its universal violation. Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, the state cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations.

Id. (citations, internal quotation marks and ellipsis omitted).

The State cites *Oliver v. United States*, 466 U.S. 170 (1984), for the proposition that efforts to maintain privacy, such as locking gates and posting "No Trespassing" signs, are not relevant to determining whether a defendant's subjective expectation of privacy is reasonable. Petition at 8-9. According to *Oliver*, the test is "not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." 466 U.S. at 182-83. Since article 2, §8

gives express protection to "private affairs," however, Arizona's founders valued privacy, not just "persons, houses, papers, and effects." *See* U.S. Const. amend. IV. Thus, as stated above, the different language of the two provisions necessitate assigning different meanings. Furthermore, as in *Chapman*, the lower court properly relied on Mixton's efforts to maintain his anonymity on the internet in determining that his privacy interest was legitimate in the eyes of society, as well as subjectively reasonable. *Opinion* ¶¶12, 19, 26, 28-31. Finally, comparing *Oliver*, a case involving open fields, to this case, where Mixton's conduct was with his own devices in his own home, invokes the apples-and-oranges idiom. In order for *Oliver* to apply to internet use, Mixton would have to be using public spaces and devices, such as if he accessed the internet from the public library.

The State quotes the Washington Supreme Court's interpretation of the identical "private affairs" language in its constitution as meaning that, to determine "whether a certain interest is a private affair deserving article I, section 7 protection, a central consideration is the *nature* of the information sought—that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life." Petition at 9-10 (quoting *State v. Jorden*, 156 P.3d 893, 896 ¶8 (Wash. 2007) (emphasis in original)). It ignores, however, that the court applied that standard to hold that the defendant's location at a motel, gleaned from a warrantless inspection of the motel's registration book, was a protected "private

affair" requiring reversal of his convictions. *Jorden*, 156 P.3d at 898 ¶15. Mixton's IP address and subscriber information is similarly protected under article 2, §8 because of the intimate details of his life it could reveal. *Opinion* ¶¶27-30.

For the first time in this Court, the State argues that article 2, §8 does not apply here because the subpoenas were issued by federal agents, rather than state or local law enforcement personnel. Petition at 18 n.5 (citing *State v. Mollica*, 554 A.2d 1315, (N.J. 1989)). As the New Jersey Supreme Court recognized, however, a state constitution's search-and-seizure provision does apply to federal agents unless "their conduct is pursuant to federal authority and consistent with applicable federal law, and provided further they have acted independently and without the cooperation or assistance of our own state officers with respect to the seizure of such evidence." *Mollica*, 554 A.2d at 1330. The determination of whether the federal officers were instead "acting under the 'color of state law," and thus subject to the state constitution, "requires an examination of the entire relationship between the two sets of government actors…." *Id*. at 1329.

> Differing relationships and interactions may suffice to establish agency. Thus, antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.

Id. The State admits that the federal agents and Tucson Police Department Detective Barry involved in this case were engaged in "a joint investigation." Petition at 1. In addition, since Barry had primary contact with Mixton in the Kik chatroom, it seems likely that he informed the HSI agents of what he had learned and, either explicitly or impliedly, asked for their help to determine Mixton's identity. Under these circumstances, and under the very case on which the State relies, the federal agents were acting under "color of state law" in issuing the subpoenas; thus, article 2, §8 applies to their actions.

C. The State makes unfounded criticisms of the majority opinion and has even admitted to violating that opinion in pleadings before this Court.

The State asserts that the majority incorrectly said it was joining a growing trend of states, pointing out that no other state has held that its constitution requires a search warrant for a suspect's IP address and/or subscriber information. Petition at 16. The State, however, is mixing apples and oranges. The majority actually said that it was joining a growing trend of states rejecting the third-party doctrine under their state constitutions. That rejection then led those states to hold that, unlike the Fourth Amendment, their state constitutions required warrants for information that, under *United States v. Miller,* 425 U.S. 435, 443 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), is not protected by the Fourth Amendment, such as the phone numbers a suspect dials and banking records. It was the COA's rejection of the third-party doctrine under our state constitution that led to its finding that Mixton had a

reasonable expectation of privacy in his IP address and subscriber information; therefore, law enforcement's acquisition of that information without a warrant violated article 2, § 8.

Far worse is the State's disregard for the majority opinion, which it demonstrated by attaching to its Motion to Expedite Consideration of the State's Petition for Review a recently filed motion filed by the Attorney General's Office in Cochise County Superior Court. In that motion, the State[8] sought an order to show cause against WhatsApp because WhatsApp, rather than comply with an unlawful subpoena, cited the *Mixton* opinion as legal authority for its refusal.[9] The pleading acknowledges that the application for an *ex parte* order in superior court was made on August 12, 2019—more than two weeks after *Mixton* was decided.

The State also asserts in its Cochise County motion that Arizona statutes separately authorize the conduct that is at issue in *Mixton*. This is incorrect. "Any … judge … may issue an ex parte order for the interception of wire, electronic or oral communications if there is probable cause.…" A.R.S. § 13-3010(A). Such an

[8] Based on the procedural history in that motion for order to show cause, it appears the Attorney General's Office was not initially involved in the unlawful request, but it involved itself once law enforcement brought WhatsApp's response to its attention. Exhibit 1, p.3.

[9] The State also complained that WhatsApp had no standing to assert its customers' privacy rights, Exhibit 1, p.3, ignoring that standing is a prudential doctrine related to bringing a claim in court. *Dobson v. State*, 233 Ariz. 119, 122 ¶ 9 (2013).

application must be in writing. § 13-3010(B). When "an application for wiretap [fails to] satisfy the literal requirements of A.R.S. § 13-3010," suppression is required. *State v. Salazar*, 231 Ariz. 535, 536 ¶ 1 (App. 2013). Even use of "a pen register or a trap and trace device" requires a court order. A.R.S. § 13-3017(A). In those cases where a true exigency exists, the Attorney General or any county attorney (or their designee) may authorize an emergency interception of "wire, electronic or oral communications," so long as that prosecuting attorney applies for (and receives) a court order "authorizing the interception … as soon as practicable, and in no event later than forty-eight hours after commencement of the emergency interception." A.R.S. § 13-3015(A)-(B). *See State v. Hausner,* 230 Ariz. 60, 70-74 ¶¶ 21-42 (2012) (where exigency exists, and officers have probable cause for a wiretap but not to arrest a suspect, and there has been substantial compliance with federal and state statutory requirements, there is no constitutional violation either under Fourth Amendment or article 2, section 8).

To the extent that sections 13-3016 & 13-3018 permit law enforcement to avoid the warrant requirement completely, those statutes are arguably unconstitutional. Because the illegal searches in this case were conducted by federal law enforcement officers purportedly following federal law,[10] this case did not give

[10] The federal statute under which the subpoenas in this case were issued gives the United States Customs Service authority to issue administrative subpoenas in investigations for the purpose of "insuring compliance with the laws of the United

the COA occasion to address that question.[11] To date, the only published case interpreting either statute involved an investigation where police obtained a search warrant and the issue was whether notice must be given to the subscriber when a warrant is obtained under section 13-3016(B)(1). *State v. Reyes*, 238 Ariz. 304, 306 ¶ 2 (App. 2015). In any event, A.R.S. § 13-3016(B)(2)-(3) require that the subscriber receive notice when law enforcement seeks to use a subpoena. That did not happen here, so these statutes would not save law enforcement's illegal conduct in this or any similar case. The State is either unable or unwilling to recognize that the effect

States administered by" the Customs Service. 19 U.S.C. § 1509(a). Subpoenas may be issued for records "regarding which there is probable cause to believe that they pertain to merchandise the importation of which into the United States is prohibited." § 1509(d)(1)(A)(ii). In support of its claim that the subpoenas were properly issued, the State cites *United States v. Cray*, 673 F.Supp.2d 1368 (S.D. Ga. 2009). Petition at 2 n.1; *see also id*. at 12. Unlike *Cray*, 673 F.Supp.2d at 1376-77, in this case, there was no evidence that Mixton or anyone else was involved in the importation of child pornography. In fact, the State's recitation of the relevant facts below indicates that the investigation that lead to Mixton's arrest was focused solely on Tucson-area child pornography offenses.

[11] This case similarly provides no opportunity to address directly the constitutionality of A.R.S. § 13-2315, which provides that "[a] custodian of records at a financial institution … shall … produce for inspection or copying the records in the custody of such financial institution when requested to be inspected by the attorney general or a county attorney authorized by the attorney general, provided such person requesting such information signs and submits a sworn statement to the custodian that the request is made in order to investigate racketeering.…" Since the U.S. Supreme Court has held in *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015), that a city ordinance requiring a motel to produce its guest register to police on demand is facially unconstitutional, there is a compelling argument that § 13-2315 suffers the same constitutional infirmity.

of *Mixton* is to require a search warrant, supported by probable cause, for any order to a third-party internet service provider to install a pen register or trap-and-trace or otherwise disclose information about its subscribers, and that any statute that purports to authorize less contravenes article 2, section 8 of the Arizona Constitution.

The State complains that "[s]tate constitutional rights should not emerge 'out of the blue,'" especially in cases "like this one where courts are confronted with questions involving technology, electronic information, and privacy rights." Petition at 18-19, quoting *Opinion* ¶52 (Espinosa, J., dissenting.). It is unclear what the State thinks Arizona courts should do when confronted with issues of first impression "involving technology, electronic information, and privacy rights"; given Mixton's constitutional right to an appeal,[12] the COA was required to resolve these questions regardless of their novelty or complexity.

The State apparently shares the dissenting judge's belief that privacy is an anachronism in the internet age and that law enforcement needs are paramount. *See Opinion* ¶¶ 48, 52 (Espinosa, J., concurring in part and dissenting in part). The Private Affairs Clause of the Arizona Constitution says otherwise. The State seeks to maintain a status quo where constitutional rights are "judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v.*

[12] Ariz. Const. art. 2, §24.

United States, 333 U.S. 10, 14 (1948). The dissent, like the State, fails to recognize that "[a]lthough in many instances this will merely impose inconvenience on the authorities, the warrant requirement marks the dividing line between the rule of law and tyranny." *State v. Jean*, 243 Ariz. 331, 353 ¶ 90 (Bolick, J., concurring in part and dissenting in part). "We do not share the view…that rights secured by the constitution are mere 'technicalities' which should be swept aside in the interests of expediency even to accomplish the most desired social goal." *Bolt*, 142 Ariz. at 267. For these reasons, the COA's rejection of the third-party doctrine was sound and should be upheld.

CONCLUSION

This Court should deny the State's petition for review and affirm the Court of Appeals' ruling that law enforcement violated the Arizona Constitution by obtaining Mixton's IP address and subscriber information without a warrant.

DATED: October 15, 2019.

By /s/ David J. Euchner
Abigail Jensen & David J. Euchner
Attorneys for William Mixton