ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. WILLIAM MIXTON, Appellant.	CR–19–0276–PR Court of Appeals No. 2 CA–CR 2017–0217 Pima County Superior Court No. CR–2016–2038–001

THE STATE OF ARIZONA'S RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

The State of Arizona respectfully submits this brief in response to the briefs of *amici curiae* filed by: (1) American Civil Liberties Union of Arizona, American Civil Liberties Union, and Electronic Frontier Foundation ("ACLU/EFF"); (2) Institute for Justice ("IJ"); and (3) Goldwater Institute.[1]

ARGUMENT

I. The ACLU/EFF's Suggestion To Interpret "Without Authority Of Law" As "Without A Warrant" Violates The Settled Principle That Courts Do Not Rewrite Laws

The Arizona Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8. As discussed in the State's Supplemental Brief (at 9–10), this Court should employ a two-step test to evaluate challenges raised under the "private affairs" clause of article II, § 8, consistent with the Constitution's text.[2] First, courts should ask whether a person was "disturbed" in his or her

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[1] The Goldwater Institute and Institute for Justice each filed amicus briefs in October and November 2019, respectively, supporting both parties' petitions for review. Because this Court has since granted review, the State responds only to amici's merits briefs filed in December 2019.

[2] As the State previously noted (Supp. Br. at 8), Mixton has never argued that "his home [was] invaded" by state or federal agents under article II, § 8. Nor could he make such an argument because the detectives searched Mixton's home pursuant to a search warrant. (R.O.A. 41.)

"private affairs." Only if this first step is satisfied should courts evaluate whether the disturbance was "without authority of law." Applying that test to the facts of this case, Mixton's claim fails.[3]

The ACLU/EFF appears to suggest that the "without authority of law" clause of article II, § 8 imposes a warrant requirement. (See ACLU/EFF Brief at 19 ["Not every type of information request issued to a third party will constitute an invasion of a person's private affairs. Those that do will simply require a warrant."].) But the Constitution's text does not require a warrant. *See* ARIZ. CONST. art. II, § 8.

Substituting "without authority of law" for "without a warrant" would be overstepping the clear boundaries between legislative and judicial power. *See* ARIZ. CONST. art. III ("[T]he government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial … such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the

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[3] The Goldwater Institute argues (at 13) that a "faithful interpretation" of article II, § 8 "requires a consultation of Washington State jurisprudence—the state from which [the private affairs] Clause was borrowed." As the State noted in its Supplemental Brief (at n.4), Washington courts start with the same two-part test described above. *See State v. Athan*, 158 P.3d 27, 33, ¶ 14 (Wash. 2007) (courts apply "a two step analysis: was there a disturbance of one's private affairs and, if so, was the disturbance authorized by law").

others."). It is well-established that courts do not rewrite laws, let alone provisions of our state Constitution. *See Coleman v. Johnsen*, 235 Ariz. 195, 197, ¶ 12 (2014) (rejecting an interpretation of the Arizona Constitution that "effectively would rewrite the [C]onstitution"); *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 413, ¶ 39 (2005) ("The decision below effectively amended the [Arizona] constitution … [a]s judges, we are not free to rewrite our fundamental document in this fashion.").

The lack of a warrant requirement in article II, § 8 is a critical distinction between our state Constitution and the Fourth Amendment. As the Institute for Justice and the Goldwater Institute emphasize (see IJ Brief at 16; Goldwater Brief at 6) the language of the Fourth Amendment is different; it provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Accordingly, "[t]he text of the [Fourth] Amendment" (unlike article II, §8) "expressly imposes two requirements." *Kentucky v. King*, 563 U.S. 452, 459 (2011). "First, all searches and seizures must be reasonable. Second, a

warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Id*.

This Court has correctly declined in previous cases to add a warrant requirement to article II, § 8. For example, this Court "has long recognized" in an analogous setting "that a search incident to a lawful arrest does not require any warrant" under article II, § 8. *See State v. Navarro*, 241 Ariz. 19, 21, ¶ 4 (App. 2016) (citing *Argetakis v. State*, 24 Ariz. 599, 606, 608–09 (1923)). More recently, this Court emphasized that the constitutional proscription against intrusions into a home "applies to intrusions undertaken 'without authority of law'" and held that a reasonable search of a probationer's residence "pursuant to a valid probation condition is not 'without authority of law.'" *State v. Adair*, 241 Ariz. 58, 64–66, ¶¶ 24–32 (2016). Thus, the search in *Adair* was constitutional under article II, § 8 even though the probation officers did not have a search warrant. *Id*.

The ACLU/EFF's arguments echo the court of appeals' majority's conclusion that "police could have easily obtained a search warrant in this case." *See* Opinion ¶ 32. But although the detectives had probable cause here, this will not always be the case. More importantly, as Judge Espinosa noted, statements like this are simply irrelevant to determine whether a warrant is constitutionally *required* under article II, § 8. *See id.* n.21 ("My colleagues

posit that 'police could have easily obtained a search warrant in this case.' But that sidesteps the question of whether law enforcement should have to resort to such formal and burdensome means in the first place, particularly during the preliminary stages of an investigation.") (Espinosa, J. dissenting). Because the private affairs clause of article II, § 8 does not contain a warrant requirement, the ACLU/EFF's invitation to rewrite the words "without authority of law" to "without a search warrant" must be rejected.

II. Although This Court Should Not Blindly Follow Federal Precedent, It Should Not Disregard Federal Precedent Either

Amici also suggest that this Court should abandon Fourth Amendment standards while interpreting article II, § 8. (See IJ Brief at 14–16 [arguing this Court should interpret article II, § 8 "[i]ndependently of the Fourth Amendment"]; Goldwater Brief at 5–13.) The Goldwater Institute further contends that "whatever interpretive method one uses, the Arizona Constitution rejects the [State's] 'uniformity' arguments[.]" (Goldwater Brief at 11.)

As a preliminary matter, contrary to the Goldwater Institute's assertion (*id*. at 5), the State has not "urge[d] this Court to interpret" the article II, § 8 "as identical with the Fourth Amendment." Nor has the State asked this Court to "disregard the textual differences between the state and federal constitutions" for "uniformity" reasons. (*Id*. at 11.) In fact, the State *agrees* with the

Goldwater Institute that resolution of Mixton's claim should be grounded in the text of article II, § 8. (See Pet. for Rev. at 7–12; State's Supp. Brief at 8–14.)

The Institute for Justice argues (at 14–16) that article II, § 8 should not be interpreted in "lockstep" with the Fourth Amendment because the language of article II, § 8 "is distinct from its federal counterpart." Some courts have applied some variation of a "lockstep" analysis when the state and federal provisions are identically worded. *See, e.g., State v. Johnson*, 259 P.3d 719, 722 (Kan. 2011) ("Section 15 of the Kansas Constitution Bill of Rights provides lockstep protection to the Fourth Amendment."); *see also People v. Caballes*, 851 N.E.2d 26, 31 (Ill. 2006) (describing the "lockstep doctrine," the "interstitial approach," and "the primacy approach").

Arizona courts, however, have not applied a lockstep approach to interpret article II, § 8. In fact, "this Court has recognized more expansive protections under the Arizona Constitution concerning officers' warrantless physical entry into a home." *State v. Hernandez*, 244 Ariz. 1, 6, ¶ 23 (2018) (citing *State v. Ault*, 150 Ariz. 459, 463 (1986), and *State v. Bolt*, 142 Ariz. 260, 264–65 (1984)). Yet in *Ault* and *Bolt* (both criminal cases), this Court still consulted federal precedent and strived for outcomes that would align with United States Supreme Court precedent. (See State's Supp. Br. at 17–18.) And although article II, § 8 "has been invoked most often in a Fourth

Amendment context," *Rasmussen v. Fleming*, 154 Ariz. 207, 215 (1987), the "private affairs" clause has already encompassed other constitutional rights beyond the search and seizure context. *See, e.g., id.* ("We hold that [article II, § 8] also provides for a right to refuse medical treatment.").

Here, the State has not asked for a "lockstep" approach; instead, the Court should apply the two-step analysis above, which is anchored in the text of article II, § 8 *and* is consistent with this Court's precedent. *See, e.g., State v. Caraher*, 653 P.2d 942, 946–48 (Or. 1982) (abandoning lockstep approach in favor of independent constitutional analysis, i.e., "to formulate an independent rule *consistent with our past decisions* than by hypothesizing how the U.S. Supreme Court would consider this case in light of its past decisions and then deciding whether to adopt that rule") (internal footnote omitted; emphasis added). The State's proposal is in line with this Court's precedent in search-and-seizure cases, which is more akin to "either an interstitial or perhaps a limited lockstep approach," similar to the approach undertaken by Illinois courts. *See Caballes*, 851 N.E.2d at 42–43 (adopting a "limited lockstep approach" that "look[s] first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent"). This is essentially the approach that this

Court followed in *Bolt*. *See* 142 Ariz. at 269 (turning to the private affairs clause only after concluding that federal law was not clear on the question presented).

In this case, Mixton asserts a privacy interest in an IP address and his internet subscriber information—*i.e.*, non-content information that police acquired for the sole purpose of learning Mixton's identity after he electronically transmitted child pornography. But Mixton cannot cite to any historical evidence suggesting that Arizona's founders intended that article II, §8 should impose greater restrictions on law enforcement in this context than the Fourth Amendment. Indeed, just 14 years after Arizona achieved statehood, this Court noted that although the private affairs clause is "different in its language, [it] is of the same general effect and purpose as the Fourth Amendment, and, for that reason, decisions on the right of search under the latter are well in point on section 8[.]" *Malmin v. State*, 30 Ariz. 258, 261 (1926). Thus, Arizona's history reflects that our state courts have applied federal search-and-seizure standards to evaluate claims under article II, § 8 in criminal cases. *See State v. Peoples*, 240 Ariz. 244, 247, ¶ 8 (2016) (stating the rights under the Fourth Amendment and article II, § 8 "are personal and can be invoked only by a defendant with a 'legitimate expectation of privacy in the invaded place'") (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)); *State v.*

Juarez, 203 Ariz. 441, 445, ¶ 16 (App. 2002) (noting that "Arizona courts have consistently applied the Fourth Amendment's 'legitimate expectation of privacy' requirement when determining unlawful search or seizure claims made pursuant to Article 2, Section 8") (collecting cases). There is no textual or historical reason to construe the Arizona Constitution more broadly than the Fourth Amendment on the facts of this case.

The Goldwater Institute argues (at 2) that "[r]eliance on federal Fourth Amendment precedent is arbitrary and unprincipled" in light of the difference in wording between the Fourth Amendment and article II, § 8. The Institute for Justice contends (at 16) that "the private affairs clause was animated by privacy concerns different from those motivating the Fourth Amendment." And the ACLU/EFF urges this Court (at 11–12) to consult the state of Washington's case law to interpret article II, § 8 instead of "applying a reasonable-expectation of privacy framework" to determine if a defendant's "private affairs" have been disturbed. But amici have not explained why this Court should essentially start from scratch and abandon its own longstanding precedent in search-and-seizure cases. *See Malmin*, 30 Ariz. at 261 (although article II, § 8 is "different in its language, [it] is of the same general effect and purpose as the Fourth Amendment, and, for that reason, decisions on the right of search under the latter are well in point on section 8[.]"); *cf. Coolidge v. New*

Hampshire, 403 U.S. 443, 483 (1971) (refusing to accept "the facile consistency obtained by wholesale overruling of recently decided cases" while acknowledging that "Fourth Amendment law [does not reflect] complete order and harmony").

In sum, this Court should adopt the two-part test above to interpret article II, § 8, thereby "formulat[ing] an independent rule consistent with [this Court's] past decisions," *see Caraher*, 653 P.2d at 947, which have, in turn, incorporated federal search-and-seizure standards. *See State v. Casey*, 205 Ariz. 359, 362, ¶ 11 (2003) ("Although this Court, when interpreting a state constitutional provision, is not bound by the Supreme Court's interpretation of a federal constitutional clause, those interpretations have 'great weight' in accomplishing the desired uniformity between the clauses."); *cf. Coolidge*, 403 U.S. at 484 (reasoning, "[w]e are convinced that the result reached in this case is correct" and "the principle it reflects … can be easily understood[,] applied by courts and law enforcement officers alike[, and] should work to protect the citizen without overburdening the police").

III. This Court Should Reject The "Positive Law Floor" Model Advocated By The Institute For Justice

The Institute for Justice (at 16–17) urges this Court to "apply the positive law floor model to Arizona's private affairs clause," explaining that this model stands for the proposition that "[w]hen 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." The "positive law floor" model derives from a recent law review article authored by a UCLA law professor, Richard Re. *See* Richard M. Re, *The Positive Law Floor*, 129 Harv. L. Rev. F. 313 (2016). In his article, Re states that the "positive law floor would view laws applicable to private parties as a practical tool for understanding when police have engaged in an 'unreasonable' search or seizure[.]" *Id*. at 333.

The Institute argues (at 17) that the positive law floor model has "two practical advantages": (1) "it anchors the private affairs clause to tangible, identifiable law"; and (2) "the existence of positive law is sufficient, but not necessary, to identify privacy interests." But this model is no panacea. The positive law floor would establish the following rule: "police searches that would violate privacy-protecting laws if performed by a private party are presumptively 'unreasonable' under the Fourth Amendment, with the presumption being overcome, for instance, if the police have an appropriate degree of individualized suspicion." *See* Re, *The Positive Law Floor* at 333. Application of rebuttable presumptions to decide whether a criminal defendant's "private affairs" were disturbed "without authority of law" under article II, § 8 would be problematic because this type of search-and-seizure

issue is highly fact-intensive. *See, e.g., Adair*, 241 Ariz. at 64–66, ¶¶ 25–32 (applying numerous "non-exhaustive" factors to determine whether a search was reasonable under the totality of circumstances under the "without authority of law" clause); *cf. Missouri v. McNeely*, 569 U.S. 141, 158 (2013) ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake"); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (explaining that reasonableness "is measured in objective terms by examining the totality of the circumstances … eschew[ing] bright-line rules [and] instead emphasizing the fact-specific nature of the reasonableness inquiry"). Adding additional inquiries under the positive law floor model—deciding whether a "presumption" exists and whether it has been "overcome" on any given set of facts—would lead to an unduly complex analysis.

This is not to say, however, that federal or state statutes do not factor into the analysis under article II, § 8 at all. Relevant laws should be encompassed within the factors to consider while assessing reasonableness under the totality of circumstances of each case, *see Adair*, 241 Ariz. at 64–66, ¶¶ 25–32, or to determine whether a particular defendant's expectation of privacy is "legitimate," i.e., objectively reasonable, *cf. State v. Jean*, 243 Ariz.

331, 337–38, ¶ 24 (2018) (noting that the case "involves a commercial truck, and commercial trucking is a closely regulated industry," but declining to "address whether the regulated status of a commercial truck may affect the legality of investigatory GPS monitoring by law enforcement" under the Fourth Amendment upon concluding the State did not "argue[] that this fact is significant"). *See also Jean*, 243 Ariz. at 347–49, ¶¶ 67–72 & n.2 (concluding the defendant lacked a reasonable expectation of privacy while citing federal laws governing commercial vehicles, "which are subject to far more regulations than private vehicles") (Pelander, J., dissenting in part).

Indeed, "positive law" is already necessarily part of search and seizure jurisprudence, which is based, in large part, on property rights. *See Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2213 (2018) ("For much of our history, Fourth Amendment search doctrine was tied to common-law trespass and focused on whether the Government obtains information by physically intruding on a constitutionally protected area.") (internal quotation marks omitted). Courts should continue to evaluate the totality of circumstances—including the existence of positive law—when determining whether an impermissible search has occurred under the Fourth Amendment or article II, § 8 of the Arizona Constitution. But it is unnecessary and undesirable for the reasons discussed above to adopt a rigid, formulistic model

that one law professor espoused during a critique of a model suggested by other law professors. *See* Re, *The Positive Law Floor*, at 314–37 (critiquing *The Positive Law Model of the Fourth Amendment* by Professors Will Baude and James Stern).

Here, relevant federal and state statutes bolster a conclusion that: (1) Mixton's asserted privacy interest is not legitimate; and (2) the detectives' acquisition of information from internet service providers ("ISPs") that identified Mixton was entirely reasonable. Specifically, federal laws establish that ISPs have a statutory obligation to report "identifying information"—including an IP address and "geographic location information"—when a provider obtains actual knowledge of apparent or imminent violations of federal law "that involves child pornography." 18 U.S.C. § 2258A. Similarly, Arizona law provides that "[a]ny communication service provider … who discovers suspected visual depictions of sexual exploitation of a minor on a computer, computer system or network or in any other storage medium may report that discovery to a law enforcement officer." A.R.S. § 13–3559(A). Given this "positive law," in conjunction with other relevant facts (i.e., that the detectives' subpoena was narrow in scope), Mixton's "private affairs" claim fails. The detectives' use of federal subpoenas under 19 U.S.C. § 1509 to acquire an IP address and Mixton's subscriber information while investigating

a child pornography crime was reasonable, and therefore, constitutional. *See Adair*, 241 Ariz. at 64, ¶ 24 (a search does not violate article II, § 8 "as long as [it] is reasonable under the totality of circumstances").

IV. The Third-Party Doctrine Simply Bolsters A Conclusion That Mixton's Assertion Of Privacy Is Unreasonable

Finally, the Institute for Justice argues that the federal third party doctrine has resulted in the abuse of innocent people, is widely criticized, and was left "in disarray" by the Supreme Court in *Carpenter v. United States*, 138 S. Ct. at 2214. (IJ Brief at 1–14.) The ACLU/EFF assert (at 13–17) that eleven other states have interpreted their state constitutions "to reject the federal third-party doctrine with respect to at least some categories of information," including: bank and phone records; telephone numbers dialed; garbage left for collection; tax documents; business records; cell site location information held by phone companies; and text messages.

Whatever merit these arguments may have, they should be reserved for another case. *Cf. Jean*, 243 Ariz. at 349, ¶ 76 ("Circumstances certainly may arise where the government's surveillance of a person or a vehicle—even on public thoroughfares—is so pervasive that it violates the Fourth Amendment. But this is not such a case.") (Pelander, J., dissenting in part) (internal citation omitted). This case does not involve any of the categories of information above, let alone application of the third-party doctrine to those types of records

and documents. Such questions, which may arise in future cases, are likely to be complex and difficult, particularly if the information at issue involves the *content* of electronic communications. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 750 (2010) (declining to decide whether an employee had a reasonable expectation of privacy in the content of his text messages, noting the case "touches issues of far-reaching significance", and emphasizing, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear").

In contrast, the issue in this case is easy and straightforward: whether police can obtain non-content, subscriber information for the sole purpose of learning the identity behind content that is not constitutionally protected. As Judge Espinosa correctly noted in his dissent, the court of appeals' majority erroneously considered theoretical scenarios, facts, and constitutional rights that are not implicated in this case. *See* Opinion n.20. This Court should not opine on theoretical scenarios that may arise in future cases that may "present additional privacy concerns not present here." *Maryland v. King*, 569 U.S. 435, 464 (2013) (holding police's processing of DNA sample's 13 loci for "the sole purpose of generating a unique identifying number" does not "intrude on respondent's privacy in a way that would make his DNA identification

unconstitutional"); *see also* Opinion ¶ 51 (reasoning that "governmental prying might well warrant constitutional protection" if disclosure of an internet user's identity revealed intimate "details of a person's life") (Espinosa, J., dissenting).

The amicus brief for the Arizona Prosecuting Attorneys Advisory Council ("APAAC") notes that New Jersey is the *only state* that has given heightened protection to the type of non-content, internet-user subscriber information that is at issue in this case. (APAAC Amicus Brief, at 4–12.) And even in New Jersey, the government is permitted to obtain this information using a grand jury subpoena without probable cause. (*Id*. at 12; see also Pet. for Rev. at 17–18.) *See State v. Simmons*, 27 A.3d 1065, 1070 n.5 (Vt. 2011) ("[D]espite the privacy retained in internet user identification, the *Reid* court opined that such information was still obtainable by police through properly issued subpoenas, rather than warrants based on probable cause.").

Of course, this Court need not adopt the third-party doctrine to resolve Mixton's claim under article II, § 8. *See, e.g., State v. Mello*, 27 A.3d 771, 776–77 (N.H. 2011) (holding state constitution does not provide greater privacy protection in subscriber information than Fourth Amendment and declining to follow New Jersey, while recognizing that individuals "may have a reasonable expectation of privacy in the contents of their communications, i.e., the content of e-mails and the specific content viewed over the Internet"); *State*

v. Delp, 178 P.3d 259, 265 (Or. App. 2008) (holding state constitution does not afford an "interest in keeping private the noncontent information that is held by a third party regarding his Internet usage"). This Court's precedent, which applies the text of article II, § 8 in conjunction with search-and-seizure standards, demonstrates that Mixton's claim is meritless. *See also State v. Welch*, 236 Ariz. 308, 317 n.1 (App. 2014) (observing that ISPs assign IP addresses to their customers "in order to identify them and verify their status as paying customers" and concluding that "any expectation of privacy [from an ISP] would be unreasonable").

Setting aside the third party doctrine, the fact remains that—as a matter of federal law—individuals like Mixton do not have a reasonable expectation of privacy in identifying information that the government acquires from ISPs without a warrant. (See Response to Cross-Petition for Review at 6–13.) This is true, even post-*Carpenter*, despite Mixton's arguments to the contrary. *See United States v. Hood*, 920 F.3d 87, 92 (1st Cir. 2019) (reasoning that "the government's warrantless acquisition from Kik of the IP address data at issue here in no way gives rise to the unusual concern that the Supreme Court identified in *Carpenter*…Accordingly, we conclude that [the defendant] did not have a reasonable expectation of privacy in the information that the government acquired from Kik without a warrant."). The weight of this federal

law should not be lightly brushed aside simply because—in other contexts and factual scenarios—other courts have decided that federal law does not comport with their state constitutions' privacy protections. Simply put, the scope of article II, § 8's protections does not "exceed[] the Fourth Amendment's reach under the circumstances of this case." *See Hernandez*, 244 Ariz. at 6, ¶ 23.

CONCLUSION

The State respectfully requests that this Court affirm paragraphs 10–13 of the court of appeals' decision, vacate the remainder, and issue an opinion holding that the detectives did not violate article II, § 8 of the Arizona Constitution.

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