IN THE SUPREME COURT

STATE OF ARIZONA

ANTHONY LITO HERNANDEZ, Petitioner, v. STATE OF ARIZONA, Respondent.	Supreme Court No. CR-17-0325-PR Court of Appeals, Division Two No. 2 CA-CR 2015-0229 Cochise County Superior Court No. SO200CR2014529

SUPPLEMENTAL BRIEF OF AMICI CURIAE GOLDWATER INSTITUTE AND PROFESSOR ERIK LUNA IN SUPPORT OF PETITIONER ANTHONY LITO HERNANDEZ

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici Goldwater Institute and Prof. Erik Luna is set forth in the Goldwater Institute's amicus brief in support of the petition for review.

INTRODUCTION

Rules that allow police to search citizens essentially at their discretion invite arbitrary and discriminatory enforcement practices. As Justice Janice Brown warned in *People v. McKay*, 41 P.3d 59, 81, 27 Cal. 4th 601, 632–33 (2002) (Brown, J., concurring and dissenting), federal law today allows police "to arrest [people] for thousands of petty *malum prohibitum* 'crimes'—many too trivial even to be honestly labeled infractions..... Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the inevitable recrudescence of the general warrant." Worse still, the breadth of discretion allowed to officers tends to have a disproportionate effect on members of minority groups who may "look[] like [they] [do] not belong," *id*. at 642, and whom police can target for search by simply following around until they do something vaguely suspicious—including even perfectly legal driving. *See id.* at 633 n.4 (citing *United States v. Smith*, 799 F.2d 704, 706-07 (11th Cir. 1986)).

Research bears this prediction out, showing that black and Hispanic Arizonans are more likely to be stopped and searched than are whites, even though white drivers

are more likely to be carrying contraband. ACLU Arizona, *Driving While Black or Brown* 2 (2008).[1] The same pattern has been documented in other jurisdictions, including Ferguson, Missouri, subject of a recent Department of Justice Investigation, which found that black drivers were 67 percent more likely to have their cars searched after being stopped than whites were, even though officers were *more* likely to find contraband in stops of white drivers. *See* Jeffrey Fagan, *Race and the New Policing,* 2 REFORMING CRIMINAL JUSTICE: POLICING 95 (Erik Luna ed., 2017).[2]

In addition to violating important constitutional rights, and inflicting humiliation and frustration on Arizonans who often are unable to bring such grievances to court, these discriminatory consequences encourage minority communities to distrust police—which in the long run reduces officers' ability to protect these communities. *See Illinois v. Wardlow*, 528 U.S. 119, 133–34 (2000) (Stevens, J., concurring in part and dissenting in part) ("the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare.").

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[1] https://www.acluaz.org/sites/default/files/documents/DrivingWhileBlackorBrown.pdf

[2] http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_2.pdf

"For every inch given, a mile will be taken." *McKay*, 41 P.3d 59, 27 Cal.4th at 628 (Brown, J., concurring and dissenting). For the reasons adduced by the Petitioner and by Goldwater Institute's brief in support of the petition for review, this Court should reverse and hold that the search in this case did not qualify for the exigent circumstances exception to the warrant requirement. The Petitioner did not violate traffic laws, did not "flee," and stopped in the curtilage of a home. This Court should, at a minimum, enforce a clear and predictable standard *under the Arizona Constitution* to avoid empowering officers to search Arizonans practically at will: stopping seconds after officers activate their emergency lights is not "fleeing" and cannot justify a warrantless search.

ARGUMENT

I. THE DECISION BELOW RESULTS IN BAD POLICY THAT IS LIKELY TO HARM VULNERABLE COMMUNITIES MOST

The central problem with the decision below is that the courts' loose definition of "fleeing" expanded police discretion to the point that it threatens the privacy rights of all citizens, and encourages officers to enforce their own biases, sometimes even in unconscious ways. Greater discretion means more chances for discrimination. Plentiful research shows that members of racial minorities are more likely to be detained and searched than are whites in similar circumstances. *McKay*, 41 P.3d 59, 27 Cal.4th at 640 (Brown, J., concurring and dissenting) (citing studies). A 2008

report found that black Arizonans were 2.5 times more likely to be searched than white drivers, and Native Americans were 3.25 times more likely—even though white drivers were more likely to be carrying contraband. ACLU Arizona, *supra*, at 3.

These statistics are similar to the national statistics, which show that while white drivers are searched in 2 percent of traffic stops, black drivers are searched in 3.5 percent of them, and Hispanic drivers in 3.8 percent—a statistically significant difference not attributable to chance. Emma Pierson, *et al., A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* 6 (2017).[3] Another nationwide survey found that only 3.6 percent of white drivers were searched, while 8.8 percent of Hispanics were, and 9.5 percent of blacks—and that black drivers were twice as likely to be arrested as whites. BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 (Apr. 2007).[4]

The question is not whether the police have good motives. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *State v. Brown*, 104 Ariz. 510, 512 (1969) (citation omitted). Rather, the problem is that discretion without clear limits encourages

[3] https://5harad.com/papers/traffic-stops.pdf
[4] https://www.bjs.gov/content/pub/pdf/cpp05.pdf

subjective, and possibly arbitrary and discriminatory, enforcement of the law. "Since virtually everyone violates traffic laws at least occasionally, … police officers, if they are patient, can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over." David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (1997).

Given both the broad discretion that officers enjoy under current law, and the "qualified immunity" they enjoy even in cases where their actions are later ruled unconstitutional, victims of wrongful stops and searches typically have little recourse. As Fourth Circuit Judges Hamilton, Rovner, and Williams, noted only weeks ago, "[u]nless the target of such a seizure can offer evidence of racial motivation in the particular case, which is rarely available, such seizures are difficult to limit." *United States v. Johnson*, 874 F.3d 571, 575 (7th Cir. 2017) (Hamilton, J., dissenting).

Improper searches cause more than intrusion and humiliation; they can also lead to violent interactions with police. Expanding police authority to stop motorists increases the likelihood of tense, hostile, and even violent interactions between drivers and police officers. And because racial minorities are more likely to be stopped and searched that whites, black and Hispanic drivers are more likely to have

unpleasant and possibly violent interactions with law enforcement. *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 163 (2017) ("Fourth Amendment law is one of several variables that facilitate contact between African Americans and the police; and the facilitation of police contact is one of several dynamics that enables and legitimizes police violence.").

The point is echoed by Professor David Sklansky *supra*, 1997 SUP. CT. REV. 271. "Since virtually everyone violates traffic laws at least occasionally," writes Sklansky, "police officers, if they are patient, can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over…. [T]his is a discomforting state of affairs." *Id.* at 273.

Unjustified searches also undermine confidence in the police among those minority communities who often find themselves targeted. *See* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy,* 66 CASE W. RES. L. REV. 931, 933-35 (2016). Expanding exceptions to the warrant requirement so as to empower officers to search motorists who have not violated any laws and have not given rise to legitimate suspicion to justify a stop "sow[s] the seeds of distrust between police and minority communities," leading to an "erosion of police and criminal law legitimacy." *Id.* at 942. A confrontational attitude between police

and the minority community harms the ability of officers to police these communities, and harms the citizens in these communities, who consequently suffer from less effective policing. When a citizen comes to view the police as lacking legitimacy, as a consequence of biased policing, it "makes the citizen less likely to accept the outcome, less likely to obey the law, less likely to assist an officer when he or she needs help, and less likely to regard the police as a force for good and for safety." David A. Harris, *Racial Profiling,* 2 REFORMING CRIMINAL JUSTICE: POLICING 137 (Erik Luna ed., 2017).[5] Potential jurors who have been subjected to such stops themselves may answer during *voir dire* that they have had negative experiences with law enforcement, and consequently be disproportionately excluded from juries. *See* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement,* 92 NOTRE DAME L. REV. 691, 737 (2016); DAVID K. SHIPLER, THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES 86 (2011). Or they may be seated in a jury and treat officer testimony with undue skepticism. *See* Mark Cammack, *In Search of the Post-Positivist Jury,* 70 IND. L.J. 405, 481 (1995).

[5] http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_2.pdf

This is not speculation. The Department of Justice's recent report on conditions in Ferguson, Missouri,[6] illustrated these phenomena in real life. It cited many examples of officers stopping drivers who had violated no laws, or in cases where they had "no objective, articulable suspicion." U.S. DEP'T OF JUSTICE CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 18 (2015). Such conduct led to a "lack of trust between a significant portion of Ferguson's residents, especially its African-American residents" and the police. *Id.* at 79. The report cited scholarly research that showed that "this loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime." *Id.* at 80.

Other deleterious results follow from policing strategies that inflict unjustified searches on citizens. Traffic stops often lead to tickets and fines, and the inability to pay those fines—not to mention "processing fees" and other consequent bills—can ultimately result in arrest. Thus, policing strategies that rely heavily on pulling over drivers can result in a sort of tax that disproportionately harms minority members and members of the poor. Fagan, *supra* at 100-04.

[6] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

II. THIS COURT SHOULD FOLLOW THE FLORIDA SUPREME COURT'S *MARKUS* RULING AND CONSTRAIN THE "EXIGENT CIRCUMSTANCES" EXCEPTION

The only solution is to adopt clear and objective legal standards that limit the ability of police to stop and search people unless they are, in fact, violating the law, evading arrest—or if the officers obtain a warrant. The decision below dangerously undermines the protections of the law by expanding the definition of "fleeing" to encompass a driver who stopped rapidly after officers activated their lights, narrowing the definition of "curtilage" in an unprecedented manner, and embracing arguments that the state waived, in order to reweigh evidence at the appellate stage. That should not be allowed to stand. This Court should ensure that police power to search is limited to circumstances involving probable cause, or in which an exception such as exigent circumstances—specifically meaning the presence of a *significant* and *urgent* need of police officers involving criminal activity that includes "an element of *danger or grave emergency.*" *State v. Markus*, 211 So.3d 894, 907 (Fla. 2017) (emphasis in original).

In *Markus*, the Florida Supreme Court ruled that the "hot pursuit" version of exigent circumstances did not apply simply because the offense for which the officer stopped the suspect was jailable. Like this case, *Markus* involved intrusion into home or curtilage, but unlike this case, *Markus* involved actual observed lawbreaking (smoking marijuana). *Id.* at 909–10. The court refused to expand the

exigent circumstances rule, holding on the contrary that the police officers' failure to obtain a warrant increased the likelihood of a violent encounter with the police: "The suspicion of a minor, nonviolent misdemeanor coupled with the officers' failure to respect the restraints of the federal and state constitutions resulted in an extremely invasive search and seizure," the court declared. *Id.* at 912. The court refused to endorse the idea that "any jailable offense be subject to hot pursuit, regardless of how minor," because that "would unleash irrational and invasive results on the public," by allowing the police to enter the home without a warrant even for "minor code violations." *Id.* at 911. That was an "unacceptable consequence[]." *Id.*

This Court should do likewise. The officers observed no lawbreaking, but only an "'indicat[ion] that there had been an insurance cancellation' the previous month." *State v. Hernandez*, 242 Ariz. 568, 570 ¶ 2 (App. 2017). They then initiated a traffic stop, which Hernandez obeyed, by stopping his car within seconds. Officers then proceeded into the curtilage of a private home, without a warrant, without an emergency, and without evidence of a threat to the public. This case is thus even less appropriate for application of the "exigent circumstances" exception than was *Markus*.

CONCLUSION

The decision of the Court of Appeals should be *reversed*.

Respectfully submitted December 6, 2017 by:

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Pursuant to ARCAP 23(g)(2), I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and does not exceed 20 pages.

Respectfully submitted December 6, 2017 by:

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Pursuant to ARCAP 15, the undersigned hereby certifies that on the 6th day of December, 2017, she electronically filed this Brief of Amici Curiae Goldwater Institute and Professor Erik Luna in Support of Petitioner Anthony Lito Hernandez with the Arizona Supreme Court, and on the same date electronically served copies to:

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