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

BRIEF OF AMICI CURIAE GOLDWATER INSTITUTE AND PROFESSOR ERIK LUNA IN SUPPORT OF PETITIONER ANTHONY LITO HERNANDEZ FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF AMICI CURIAE

The Goldwater Institute is a nonpartisan public policy foundation that advances the principles of limited government and individual liberty through litigation, research, and policy briefings. Its Scharf-Norton Center for Constitutional Litigation represents parties and participates as amicus curiae in this and other courts in cases involving those values. *See, e.g.*, *Sedona Grand, LLC, v. City of Sedona,* No. CV-12-0080-PR; *Aspen 528, LLC, v. City of Flagstaff,* No. CV-12-0422-PR. Prof. Erik Luna is Lewis Professor of Constitutional & Criminal Law at the Sandra Day O'Connor College of Law at Arizona State University, recipient of two Fulbright awards and an internationally respected scholar on criminal procedure. Together amici seek to enforce the protections of our state and federal constitutions to secure individual rights, including the right to be free from warrantless, suspicionless searches.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1761, James Otis denounced general warrants as "'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,'" because they placed "'the liberty of every man in the hands of every petty officer.'" *Stanford v. State of Tex.*, 379 U.S. 476, 481 (1965). The federal and state warrant requirements stand today as bulwarks against such arbitrary power.

But fifteen years ago, California Supreme Court Justice Janice Brown warned of what she called the "recrudescence of the general warrant." *People v. McKay*, 41 P.3d 59, 81 (2002) (Brown, J., concurring and dissenting). Recent decisions that allow police to arrest citizens for *any* infraction, and to search incident to arrest, added to expansive exceptions to the warrant requirement, now present a real threat of swallowing up those constitutional guarantees.[1] The decision below presents an egregious example of this trend. This Court should grant the petition and reverse the judgment below, for at least three reasons:

First, the dissent is correct that the majority's expansion of "felony flight" to include someone who did not try to hide from or escape the police, but simply failed to stop the instant police activated their lights—risks implicating innocent drivers.

Second, the distinction the majority created between curtilage and the home itself has no legal basis, is unmanageable, and will undermine the most critical aspect of the warrant requirement: "that the sanctity of the home should be protected against warrantless entry." *Juarez*, 203 Ariz. at 444 ¶ 13.

Third, the court asserted authority, contrary to *State v. Brita*, 158 Ariz. 121, 124–25 (1988), to decide fact-specific questions on appeal, despite those questions being waived below. This upends the deference appellate courts must accord trial

[1] Arizona's Constitution protects homes against warrantless searches more broadly than the Federal Constitution. *State v. Juarez*, 203 Ariz. 441, 444 ¶ 13 (2002).

courts and subjects search warrant jurisprudence to retroactive rewriting—essentially a form of rational basis review.

As Justice Brown warned, excessive discretion for searches invites abusive and discriminatory enforcement—which has a disparate impact on the poor and members of racial minorities. *See* *McKay*, 41 P.3d at 85–86 (Brown, J., concurring and dissenting). Whatever really happened on September 11, 2014—and the majority opinion's facts are self-contradictory in places—the bottom line is clear: this decision weakens the constitutional guarantees that safeguard Arizonans.

REASONS TO GRANT PETITION

I. THE RE-DEFINITION OF "FELONY FLIGHT" IS CONTRARY TO LAW AND DANGEROUSLY BROAD

A. Hernandez Did Not Commit Flight Because He Did Not Flee

"Flight" means to try to avoid apprehension—to attempt to evade arrest or detention, or conceal oneself from a pursuing officer. *State v. Loyd*, 126 Ariz. 364, 367 (1980); *State v. Salazar*, 112 Ariz. 355, 357 (1975).

None of that occurred here. Hernandez stopped his car seconds after officers activated their lights and made no effort to hide or to run from them or to avoid detention. Yet the court below found that he engaged in "flight." *State v. Hernandez*, 242 Ariz. 568, 399 P.3d 115, 120–21 ¶ 17 (2017); *see also id.* at 125 ¶¶ 36–37 (Staring, P.J., dissenting).

State v. Wilson, 185 Ariz. 254 (App. 1995), held that "merely leaving [a] crime scene is not tantamount to flight," and that the accused had not fled despite "[leaving] the scene of the incident," because he did not do so "in haste," there was no pursuit, and "no evidence that he concealed or attempted to conceal himself." *Id.* at 257. That is closer to what happened here.

The court justified this redefinition of "flight," because Hernandez "'knowingly fail[ed] or refuse[d] to bring [his]…motor vehicle to a stop'" after being signaled by the officers, and "'willfully fle[d] or attempt[ed] to elude'" them. *Hernandez*, 399 P.3d at 120 ¶ 16 (quoting A.R.S. §§28-1595(A), 28-622.01). That is not true: there is no evidence he *knowingly* or *willfully* failed to yield—and, in fact, he did not fail to stop the car: he *did* stop the car, within seconds. Nor is there evidence that it would have been reasonable for the officers to conclude that he was fleeing—the evidence is consistent with the conclusion that he did not see the officers' lights at all and simply proceeded to his destination in the few seconds between when the officers turned on their lights and he turned into the driveway where he stopped.

Section 28-1595(A) does not require a driver to stop *instantaneously*, just "after" an officer activates his lights. Hernandez did that. Requiring drivers to stop *instantly* would be dangerous, if not impossible, given the shortcomings of human reaction time. *Hernandez*, 399 P.3d at ¶ 38 n.16. It could also pose a risk to other

drivers in busy traffic. And while the majority also noted that Hernandez "did not stop on the wide shoulder of the road," *Hernandez*, 399 P.3d at 120 ¶ 17, drivers are also not required to stop on the shoulder. In fact, they often pull into driveways when stopped—for example, into gas stations or parking lots.

The American Automobile Association even recommends that drivers *not* "pull over suddenly," and urges them to stop in "a safe location"—such as "a side street or…parking lot." William Van Tassel, *Getting Pulled Over! The Driving Instructor's Guide to Interacting with Law Enforcement at the Roadside* 7 (AAA March 27, 2017).[2] Drivers often prefer to pull over in gas stations, driveways, or parking lots out of fear of police impersonators, who sometimes rob drivers. After one recent incident, the Tucson Police recommended that drivers stop at "a gas station or busy parking lot" instead of by the side of the road. April Morganroth, *Police Impersonator Pulls Over, Handcuffs Driver in Tucson*, ARIZONA REPUBLIC, May 15, 2017.[3]

The dissent was correct that the majority opinion threatens with arrest and search drivers who fail to "stop[] almost instantaneously…or [who], concerned

[2] https://drivertraining.aaa.biz/download/getting-pulled-over/.
[3] http://www.azcentral.com/story/news/local/arizona-breaking/2017/05/15/police-impersonator-pulls-over-handcuffs-driver-tucson/322607001/

about…personal safety, drive to well-lit, public places before pulling over." *Hernandez*, 399 P.3d at 126 ¶ 40 (emphasis added).

The majority's only answer was to claim that it was "not hold[ing] that a driver who stops as soon as is reasonably practicable will generate reasonable suspicion," but only that "under the totality of the circumstances," the officers could have thought Hernandez was fleeing. *Id.* at 121 ¶ 17 n.8. That is no reassurance. First, there are grounds other than "reasonable practicality" why drivers might not pull over immediately—for example, they might prefer a well-lit parking lot even though it would be "reasonably practicable" to stop sooner. Second, courts will only apply the "totality of the circumstances" test long after the incident, and only if a defendant obtains counsel and challenges the search. As a consequence, "[w]e don't know how often [police] get it wrong. Unless a victim dies or chooses to sue the police—rare events—fruitless search[es]…remain as invisible as the frisks and car searches that turn up nothing." DAVID K. SHIPLER, THE RIGHTS OF THE PEOPLE 131–32 (2011). Third, the "totality of the circumstances" here were commonplace: "a left turn, followed by a right turn and then another left." *Hernandez*, 399 P.3d at 126 ¶ 40 n.18. If this sort of driving can justify arrest and search after a less-than-instantaneous stop, all drivers have engaged in felony flight.

B. Only Serious Offenses Trigger the "Hot Pursuit" Exception

Because there was no flight, there was also no "hot pursuit." This is significant because this case involves a residence, and "the existence of probable cause, without more, does not validate a warrantless entrance into a *residence*." *United States v. Suarez*, 902 F.2d 1466, 1467 (9th Cir. 1990) (citation omitted). There must also be some additional justification for not obtaining a warrant.

The majority found that hot pursuit supplied that justification. But (under *federal* law) hot pursuit involves the "immediate or continuous pursuit" of a suspect "from the scene of [the] crime," *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984), and there was no crime here, and no genuine "pursuit," since Hernandez did not flee.[4]

The gravity of the alleged offense, and other factors, must count when determining whether the hot pursuit exception applies. *Id.* The facts of *Welsh* are instructive. There, a car was seen driving erratically (unlike in this case). When it was in an accident, the driver got out, and a private citizen called the police before taking action to prevent the car from driving away because he believed the driver was under the influence. *Id.* at 742. The driver walked away. *Id.* When the police

[4] The purported "flight," of course, cannot *itself* serve as the offense. *Cf. United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012) ("unprovoked flight…can not elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest…absent some other indicia of involvement in criminal activity.").

arrived and ran the plates, they learned the driver lived nearby, and went to his house. They entered, and arrested him. *Id.* at 743–44. The Court held this unconstitutional, and found no exception to the warrant requirement applied. There was no continuous pursuit from the scene of a crime, no grave crime involved, and no emergency or public risk. *Id.* at 753.

The Court warned state courts that "the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense…has been committed." *Id.* While courts had "permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time," they could not expand this rule to encompass minor crimes, because that would make it "difficult to conceive of a warrantless home arrest that would not be unreasonable"—meaning that there would be little left of the warrant requirement. *Id.* at 752–53. Both the gravity of the offense *and* some "emergency" that makes it impracticable to obtain a warrant, must be considered. *Id.* at 753.

Neither of those factors exists here. There was no threat to public safety, and no dangerous driving. There was no basis for concluding that an emergency, such as evidence-destruction, justified departing from the warrant requirement.

The majority adopted its hot pursuit theory on the grounds that even cases involving minor crimes can generate a hot pursuit exception. *Hernandez*, 399 P.3d

at 121 ¶ 20 (citing *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam), and cases cited therein). But *People v. Lloyd*, 265 Cal. Rptr. 422 (Cal. App. 1989), and *In re Lavoyne M.*, 270 Cal. Rptr. 394 (Cal. App. 1990), involved officers witnessing lawbreaking that threatened public safety: running a red light and stop signs. Hernandez violated no traffic laws.[5] And, given that the Arizona Constitution provides *more* protection against warrantless searches than its federal counterpart, *Juarez*, 203 Ariz. at 444 ¶ 13, the "hot pursuit" theory adopted below finds even less justification.

C. A Better Approach: the Florida Supreme Court

State v. Markus, 211 So.3d 894 (Fla. 2017), offers a better analysis. There, officers went to a home on a noise complaint. When they arrived, the noise had ceased, but they saw people in the driveway drinking and smoking. When they approached the people, they smelled marijuana, and ordered one person to halt. Instead, he raised his hands and backed into the home. Officers followed him, and a confrontation ensued. *Id.* at 897–98.

The court found the entry unlawful. A warrant is required except where "exigent circumstances" exist, which means "a '*grave emergency*' that 'makes a

[5] *Stanton* was not a Fourth Amendment case, but a qualified immunity case. 134 S. Ct. at 7. It did not purport to determine whether the officers were within the Fourth Amendment, but only whether the law on that matter was clearly established.

warrantless search imperative to the safety of the police and of the community.'" *Id*. at 906–07 (cleaned up). There are three such exigencies: the emergency aid exception, the need to prevent evidence-destruction, and hot pursuit.

Police argued hot pursuit, but "a key ingredient of hot pursuit is an element of *danger*," and the suspect "did not pose a danger…to anyone." *Id*. at 907–09. He did not run away, but "walked backwards with his hands up," which was "not hot pursuit" but "slow pursuit at best." *Id*. at 910. Also, the officers increased the risk by invading the home without a warrant: "The potential danger that accompanies an officer's entry into the private dwelling…is not to be taken lightly. We cannot endorse a standard that would encourage such needless entries, and thus increase the potential for officer injuries or fatalities." *Id*.

More importantly, the court could not endorse warrantless entries where "the only apparent reason for failing to obtain a search warrant is mere inconvenience." *Id*.

> [T]he outcome petitioned for by the State—that any jailable offense be subject to hot pursuit, regardless of how minor—would unleash irrational and invasive results on the public. For example, there are a number of potentially jailable…violations that would render the enforcement of such a holding absurd…[including] jaywalking and littering …. Under the State's logic, police suspicion of such minor code violations would allow an officer to invade a citizen's home without a warrant…. [T]hese are unacceptable consequences…[and] would…trample[] over the Fourth Amendment rights of our citizens and the age-old doctrine of separation of powers.

Id. at 911.

Markus is a harder case than this, because the officers may have witnessed serious illegality, and there may have been a risk of evidence-destruction, neither of which exists here. In any event, *Markus*'s hot pursuit analysis was correct. In fact, there was not even a showing that obtaining a warrant in this case would have inconvenienced the officers. *Missouri v. McNeely*, 569 U.S. 141, __, 133 S. Ct. 1552, 1562 and n.4 (2013) ("Well over a majority of States allow police … to apply for search warrants remotely through…electronic communication such as e-mail, and video conferencing.") (citing A.R.S. § 13-3914(C)).

To expand the warrant exceptions to encompass flight-without-fleeing, and arrest-without-a-crime, undermines important protections against warrantless searches.

II. THE DISTINCTION BETWEEN CURTILAGE AND THE "REAL" HOME LACKS LEGAL FOUNDATION AND RISKS DILUTING THE MOST IMPORTANT ASPECT OF SEARCH JURISPRUDENCE

Equally troubling is the unprecedented definition of "curtilage" in the opinion, which threatens to narrow this important legal concept until it no longer protects as it should.

Curtilage defines the "home" for purposes of the warrant requirement. Even *with* probable cause, officers must obtain a warrant before invading the home unless exigent circumstances apply. Although the majority purported to agree that

Hernandez was within the curtilage, *Hernandez*, 399 P.3d at 119 ¶ 12, it simultaneously declared that the driveway is "'only a semiprivate area.'" *Id.* (citation omitted).

The attempted distinction between curtilage that is private and curtilage that is semi-private, lacks legal foundation. The common law and constitutional law regard curtilage as part of the home, period. *Oliver v. United States*, 466 U.S. 170, 179–80 (1984).

The cases the majority cited do not hold otherwise. *State v. Cobb*, 115 Ariz. 484 (1977) (In Banc), was a plain-view case, not a curtilage case. It held that an officer who "was on appellant's property with appellant's consent and, therefore…had the right to be in the position to view" the contraband, did not violate the warrant requirement when he saw it. *Id.* at 489. That case involved "'a non-intrusive viewing of items in [the] driveway.'" *Id.* (citation omitted). And *State v. Blakley*, 226 Ariz. 25 (App. 2010), found it *unlawful* for an officer to walk down a driveway, "into an area ordinarily not used by visitors," without a warrant. *Id.* at 30 ¶ 17.

A driveway is semi-public, in that the public—and consequently, an officer—can walk down it *to knock on the door*, *id.* at 29 ¶ 14, but when an officer "exceed[s] [those] boundaries…for the purpose of conducting an investigation," he intrudes into

the same "reasonable expectation of privacy" that protects the home, and must therefore have a warrant or an exception. *Id*. at 30 ¶ 17.

The warrant requirement protects against intrusion not merely against a privileged building, but against privacy. *See* *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors…that constitutes the essence of the offense; but…the invasion of his indefeasible right of personal security, personal liberty. and private property."). And the law recognizes the concept of curtilage to ensure that those protections are not whittled down until they only apply within the house's four walls, or perhaps a single room. Curtilage must not be so narrowly defined as to undermine the purpose of the concept.

III. THE COURT OF APPEALS IMPROPERLY DECIDED THE CASE ON FACTUAL GROUNDS THE STATE WAIVED

The decision below erred by addressing issues the state waived by not raising at trial. *Brita*, 158 Ariz. 121, held that "sound principles of judicial policy" forbid appellate courts from doing this if "the issue[s] [are]…fact-intensive," which search-and-seizure law particularly is. *Id.* at 124.

The majority relied on *State v. Boteo-Flores*, 230 Ariz. 551 (App. 2012), to hold that it could consider issues the state waived by not raising at trial. *See* *Hernandez*, 399 P.3d at 120 ¶ 15 n.5. But that is a superficial reading of *Boteo-Flores*. That case involved a remand from the Arizona Supreme Court. It was about

whether the defendant's statement after he was detained by police was admissible. The court first addressed whether he had been arrested when he made the statement; the supreme court then held he had been, and remanded. 230 Ariz. at 553 ¶ 5. The Court of Appeals *then* proceeded to the *logically secondary question* of whether the statement was nevertheless admissible for *other* reasons, *id.* ¶ 8, which the appellate court considered appropriate to do even though the state had not argued that before. *Id.* Since the state had initially prevailed on the question of whether the defendant was arrested, it was allowed to make the logically secondary argument the second time around. *Id.* ¶ 6.

This case, by contrast, involves just *one* question, and there is no remand. The state *was* required to make the argument as to the lawfulness of the stop, because that factual determination was critical to determining what the officers reasonably believed, and that, in turn, is the basis of any exigent circumstances analysis. Search jurisprudence "depends upon the resolution of questions which are peculiarly factual," *Brita*, 158 Ariz. at 124; it focuses on "what the officer[s] knew or believed at the time of the search and what action [they] took in response." *State v. Littlebrave*, 776 N.W.2d 85, 89 ¶ 10 (S.D. 2009); *accord*, *People v. Sanders*, 73 P.3d 496, 505 (2003). Allowing appellate courts to revise the factual record in this *post hoc* fashion invites rationalization and reinterpretation of the record in derogation of the warrant requirement. Appellate courts do not allow criminal defendants to offer

new versions of events that they waived at trial—and the rules should be the same for both sides.

Courts of Appeals should not be allowed to disregard the *actual* record, and conclude that police officers *might* have believed something other than what they *actually* believed, and that if they *had*, their actions would have passed constitutional scrutiny. That approach would enshrine something like rational-basis scrutiny—the least-protective form of judicial review—in the law of search and seizure.

CONCLUSION

Growing exceptions to the warrant requirement, combined with increasing arrest powers, now mean citizens are liable to search almost at will:

> In the pervasively regulatory state, police are authorized to arrest for thousands of petty *malum prohibitum* "crimes"—many too trivial even to be honestly labeled infractions. They are nevertheless public offenses for which a violator may be arrested. 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.

McKay, 41 P.3d at 81 (Brown, J., concurring and dissenting). That should not be allowed.

The petition should be granted, and the decision reversed.

Respectfully submitted September 11, 2017 by:

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