IN THE SUPREME COURT

STATE OF ARIZONA

WILLIAM MIXTON, Appellant, v. STATE OF ARIZONA, Appellee.	Supreme Court No. CR-19-0276-PR Court of Appeals Case No. 2 CA-CR 2017-0217 Pima County Superior Court Case No. CR2016038001

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, and policy briefings. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and participates as *amicus curiae* in this and other courts in cases involving those values. *See, e.g.*, *State v. Hernandez,* 244 Ariz. 1 (2018); *State v. McNeill,* 2019 WL 4793121 (Ariz. App. Oct. 1, 2019). The Institute seeks to enforce the often-neglected protections promised by our state Constitution, including the right to be free from unauthorized (not just unreasonable) searches. Institute scholars have also published pathbreaking research on the Arizona Constitution, including on the "Private Affairs" Clause at issue here. *See* Timothy Sandefur, *The Arizona "Private Affairs" Clause,* 51 Ariz. St. L.J. 723 (2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly stressed that many parts of the state Constitution, including the Private Affairs Clause, protect individual rights more than the federal Constitution does. *State v. Stummer*, 219 Ariz. 137, 142–43 ¶¶ 14–17 (2008); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 353–54

(1989); *State v. Ault*, 150 Ariz. 459, 463 (1986); *State v. Bolt*, 142 Ariz. 260, 263 (1984).

Indeed, it has declared that Arizona courts have a duty to "*first* consult our constitution" "whenever a right that the Arizona Constitution guarantees is in question." *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 356 (emphasis added). And it has faulted litigants for failing to raise or to adequately develop state-law arguments. *See, e.g.*, *State v. Jean*, 243 Ariz. 331, 341–42 ¶ 39 (2018), *cert. denied*, 138 S. Ct. 2626 (2018).

Here, the argument is *fully* developed. The Court should therefore address the greater protections of the Private Affairs Clause, and do so *first*, before proceeding to any federal Fourth Amendment analysis.

In doing so, it should follow the path carved by *Mountain States Tel. & Tel. Co.* and *Strummer*: examining the text and history of the Arizona Constitution, instead of following federal jurisprudence in lockstep. Reliance on federal Fourth Amendment precedent is arbitrary and unprincipled, because (a) the wording of that Amendment is entirely different from the Private Affairs Clause—most significantly, the word "unreasonable" appears in the federal Constitution and does not appear in the state Constitution; (b) the federal precedent developing the Fourth Amendment largely postdates the Arizona Constitution; and (c) federal doctrines

have been developed with an eye to preserving the authority of *state courts*—authority which it would be irrational for this Court to disregard.

What this Court said of the Arizona Constitution's free speech guarantee in *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 356, and *Strummer*, 219 Ariz. at 137 ¶ 14 n.4, is also true of the Private Affairs Clause: its authors expressly chose *not* to echo the wording of the federal Constitution, but followed Washington's Constitution instead, specifically so that the Private Affairs Clause would provide citizens with stronger protections than federal law provides—and Arizonans adopted that expectation when they ratified the Constitution.

The Attorney General argues that this Court should disregard that choice beacuse "uniformity" between state and federal law is "desirable." Supplemental Brief of the Attorney General ("AG Supp.") at 3-5. That is not only unconvincing, but directly contrary to the language of the state Constitution. Arizona's framers chose to *reject* uniformity by employing language that has literally *nothing* in common with the Fourth Amendment, but which is copied word-for-word from the Washington Constitution. This Court—for reasons discussed in the Goldwater Institute's brief in support of the Petition (at 9-16)—should consult Washington, *not* federal, jurisprudence to interpret the Clause.

As for the merits, the history of the Private Affairs Clause shows that when it was adopted, "private affairs" referred to, among other things, a person's

business records—e.g., receipts, account books, and other documents relating to private transactions or contracts. *See* Sandefur, *supra* at 729–36. The Clause was written to provide a stronger basis for the principle, announced by the U.S. Supreme Court in some then-recent decisions, that government demands for records of business transactions were "searches" that required warrants. *Id.* at 730. Accordingly, the framers of Arizona's Constitution rejected the proposal to give the Corporation Commission power to examine the records of all corporations in the state because that would intrude into people's "private affairs." *Id.* at 735. And because IP location information is a record of a private business transaction, it is a private affair covered by the Clause. *Cf. State v. Hinton*, 319 P.3d 9, 14–15 ¶ 17 (Wash. 2014) (text messages protected by Private Affairs Clause); *State v. Gunwall*, 720 P.2d 808, 816 (Wash. 1986) (records of phone numbers called are protected by Private Affairs Clause).

The federal rule, set forth in *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), holds that such information is largely unprotected by the Fourth Amendment. That rule was fashioned more than 60 years after the Arizona Constitution was adopted, by federal courts that were interpreting the word "reasonable," which does not appear in the Private Affairs Clause. That doctrine, has consequently been rejected by Washington Courts

interpreting the *actual language* of the Private Affairs Clause. The Court below was right to reject it, too.

Washington precedent is also helpful here because it addresses another issue subsumed within the question presented: the degree to which federal officials are bound by state law when conducting investigations. *See, e.g., In re Teddington,* 808 P.2d 156, 162–63 (Wash. 1991). Washington courts have held that evidence obtained by federal officers is inadmissible if it would have been inadmissible if obtained by state officers—a proposition this Court has so far referred to only in dicta in *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 117 n.1 (1996). This Court should reject the Attorney General's policy-driven call for "uniformity," and enforce the Private Affairs Clause as written—by consulting its text and history, and those cases that actually interpret its wording.

ARGUMENT

I. This Court should apply the Private Affairs Clause, rather that copying-and-pasting Fourth Amendment jurisprudence.

A. Under any interpretive methodology, "uniformity" is not appropriate.

The Attorney General urges this Court to interpret the Private Affairs Clause as identical with the Fourth Amendment. The Court should reject that argument. This Court has already acknowledged that the Private Affairs Clause protects rights to a greater degree than does the federal Constitution, *see, e.g., Rasmussen by*

Mitchell v. Fleming, 154 Ariz. 207, 215 (1987), and while the Court has frequently followed federal legal doctrines when interpreting the Private Affairs Clause, that is misguided, under *any* interpretive methodology.

● *Textualism*: it is arbitrary and irrational to interpret two texts with completely different wording as if they were the same. While *minor* textual variations might not change meaning, entire differences obviously do. The fact that the language of the Private Affairs Clause differs *entirely* from that of the Fourth Amendment—does not contain the words "unreasonable," or "houses" or "effects"; includes the words "without authority of law," "disturbed," and "private affairs"—is both necessary and sufficient for applying an independent interpretation of the Private Affairs Clause. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern."). To do otherwise "makes no logical sense. If our text was written at a different time by different people with different concerns, then the protection it affords may be greater, lesser, or the same as that provided by a different provision in the United States Constitution." *Ex parte Tucci*, 859 S.W.2d 1, 32 n.34 (Tex. 1993) (Phillips, C.J., concurring). The first rule of legal interpretation is to give effect to the wording of the text under consideration—not the wording of some other text. Following Fourth Amendment doctrines here does the latter.

● *Originalism:* the original public understanding of the phrase "private affairs" in 1910-12 was that it referred to a *broader* range of matters than the Fourth Amendment covered. The Clause was written decades before incorporation of the Fourth Amendment, and could not therefore have been viewed as merely a reflection of the federal Constitution. The phrase "private affairs" was understood by the public at the time to include a person's business records, receipts, and information about commercial transactions. *See* Sandefur, *supra* at 725, 729–36. If IP location information is a private business record, then it must be covered by the Clause. The Constitution's authors and ratifiers in 1910 cannot have anticipated that Arizona courts would rely on federal legal theories fashioned in the 1970s when interpreting the Clause. *See Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992) ("'[O]ur Texas Forbears surely never contemplated that the fundamental state charter, crafted after years of rugged experience on the frontier and molded after reflection on the constitutions of other states, would itself veer in meaning each time the United States Supreme Court issued a new decision.'" (citation omitted)); Rebecca White Berch, et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation,* 44 Ariz. St. L.J. 461, 469 (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."). Nor can they have expected Arizona

courts to seek "uniformity" with federal law in direct contradiction to the constitutional text—and contrary to their intent when they chose to deviate from the federal Constitution's wording.

● *Purposivism*: The reason for having separate state and federal constitutions—the purpose of federalism—is to provide a basic "floor" of constitutional protections at the federal level, while allowing states to establish stronger protections when citizens consider it necessary. *Bond v. United States*, 572 U.S. 844, 854–55 (2014). The citizens of Arizona evidently did view it as necessary, since they—unlike the citizens of 48 other states—chose *not* to employ the wording of the Fourth Amendment. This was not a mistake; Arizona's framers expressly rejected the wording of the Fourth Amendment, and chose different wording instead. *Cf. Strummer*, 219 Ariz. at 142 ¶ 14, n.4. In other words, they rejected "uniformity," and although the Attorney General now argues in favor of "uniformity" on *policy* grounds, those policy arguments simply cannot trump the Constitution's language. *State v. Wilson*, 200 Ariz. 390, 396 ¶ 14 (App. 2001) ("'[W]e do not begin our statutory analysis by examining … public policy concerns … . We must begin by examining the actual language … [and] apply [it] as written.'" (citation omitted)).

The purpose of the Clause was to provide protections for private business records and transactions, as suggested in the then-recent cases, *Kilbourn v.*

Thompson, 103 U.S. 168 (1880), and *Boyd v. United States*, 116 U.S. 616 (1886), as well records that were subject to controversies at that time. Sandefur, *supra*, at 726-27. For example, many at the time were concerned that tax laws then being proposed would empower government "to look into a man's private affairs and to compel him to produce his private papers in order that his actual income may be ascertained." *Id*. at 733 (quoting William Howard Taft, Address at Denver, Colo., Sept. 21, 1909). Given that *Kilbourn* and *Boyd* did not apply to states prior to incorporation (and that many doubted that those decisions were correct readings of the Fourth Amendment), Arizona's framers chose not to protect "persons, houses, papers, and effects" against "unreasonable searches," as the Fourth Amendment does, but instead to provide stronger protections—against any "disturb[ance]" of his "private affairs" without "authority of law." *Id.* at 723. They considered and rejected the proposal to adopt the Fourth Amendment's wording verbatim.[1] Their purpose was *not* "uniformity." The Attorney General's policy-based argument for "uniformity" cannot trump the Constitution's language. *Wilson*, 200 Ariz. at 396 ¶ 14 ("'[W]e do not begin our statutory analysis by examining … public policy

[1] The 1910 Constitutional Convention considered a proposal to employ the language of the Fourth Amendment (as Proposition 116), and rejected that in favor of the wording of the Private Affairs Clause (Proposition 94). *See* John Goff, ed., *Records of the Arizona Constitutional Convention of 1910* at 507-08 (1991).

concerns … . We must begin by examining the actual language … [and] apply [it] as written.'" (citation omitted)).

● *Living Constitution*: If the Constitution is a "living" document whose meaning must be determined "'in the light of our whole experience and not merely in that of what was said a hundred years ago,'" Greg Stanton, *More Than Limestone*, Ariz. Att'y, Feb. 2013[2], at 52 (quoting *Missouri v. Holland*, 252 U.S. 416 (1920)), then the Clause should not be interpreted as mimicking federal jurisprudence, either. If constitutional doctrines should change to suit the needs of the present day, then it is this Court's obligation to take that step by determining what qualifies today as a "private affair," rather than to echo the doctrines of the federal courts.

Federalism protects liberty by ensuring that major decisions are made by those who are closer to the citizens "who seek a voice in shaping the destiny of their own times," as opposed to "rely[ing] solely upon the political processes that control a remote central power." *Bond,* 564 U.S. at 221. This serves democratic values by ensuring that law is developed by judges closer to the community. This is one reason federal courts often avoid resolving questions under the federal Constitution: to allow state courts to resolve them on state constitutional grounds. *See, e.g., City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 641 (1959)

[2] http://www.azattorneymag-digital.com/azattorneymag/201302/?pg=1#pg1

("when the state court's interpretation … [of] the state constitution may obviate any need to consider … the Federal Constitution, the federal court should hold its hand."). For state courts not to do this, and to copy federal doctrines instead, leads to "entrenched and still-growing federal domination in the dialogue of American constitutional law," which is contrary to our federalism. Jeffrey S. Sutton, *51 Imperfect Solutions* 188 (2018).

Thus, whatever interpretive method one uses, the Arizona Constitution rejects the "uniformity" arguments the Attorney General makes.

B. The "desirability" of "uniformity" cannot trump the Constitution's text.

The Attorney General argues that the Court should disregard the textual differences between the state and federal constitutions because "uniformity … is generally desirable." AG Supp. at 3. This is because uniformity makes the administration of criminal justice "predictabl[e]" and "consistent[]." *Id.* at 4. But as the U.S. Supreme Court has observed, while constitutional restrictions may seem inefficient to government officials, that very inefficiency protects individual rights: "one might fairly say of the Bill of Rights … that [it was] designed to protect the fragile values of a vulnerable citizenry from [an] overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). *See also Ex parte Melof*, 735 So. 2d 1172, 1190 (Ala. 1999) (Houston, J., concurring) (it is "'highly probable that inconveniences will result from following the

constitution as it is written,'" but that cannot justify disregarding the Constitution's wording because otherwise "'the people may well despair of ever being able to set a boundary to the powers of the government,'" and "'[w]ritten constitutions will be more than useless.'" (citation omitted))

Federalism was invented to protect individual freedom. *Bond*, 564 U.S. at 221. Striving for "uniformity" is contrary to that goal. That, at least, was what Arizona's founders decided when they rejected the wording of the Fourth Amendment. This Court's analysis in *Mountain States Tel. & Tel.* and *Stummer* is instructive. Those cases noted that the Free Speech Clause of the state Constitution was written before incorporation (meaning the framers did not anticipate that state courts would just copy federal doctrines), that the framers "declined to adopt the language of the First Amendment's free speech provision," *Strummer*, 219 Ariz. at 142 ¶ 14, n.4, and that although Arizona courts had sometimes "followed federal interpretations of the United States Constitution," that could not be the end of the story, because the Clause's "encompassing text" shows that it was broader than the federal provision. *Id.* at 142 ¶¶ 15, 16. The same is true of the Private Affairs Clause.

The Attorney General's "uniformity" arguments should be addressed to the people in the form of a proposal to amend the Constitution. But as it stands, the Constitution rejects uniformity. To adopt it anyway would be a form of

"activism"—rewriting the Constitution's text to serve policy preferences. And it would transform state courts into handmaidens of the federal judiciary—which is not how federalism works. *See Davenport*, 834 S.W.2d at 16; *State v. Ingram*, 914 N.W.2d 794, 797 (Iowa 2018).

On the contrary, faithful interpretation of the Arizona Private Affairs Clause requires a consultation of Washington State jurisprudence—the state from which the Clause was borrowed. *See* Sandefur, *supra*, at 723. Arizona courts already consult Washington precedent when interpreting other clauses that were borrowed from that state's constitution. *See, e.g., Bailey v. Myers*, 206 Ariz. 224, 229–30 ¶ 22 (App. 2003) (eminent domain); *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 355 (free speech); *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 200 ¶ 17 (2001) (sovereign immunity). To disregard Washington precedent *only* in the context of this one Clause—and to do so to achieve a "uniformity" that the Clause was written to reject—would be a policy-driven political choice, not principled legal reasoning.

II. "Private Affairs" refers to records of business transactions—including ISP location information.

Arizona's Constitution was written at a time when attorneys general, legislatures, and courts were becoming increasingly aggressive in their demands for financial information relating to individuals' and businesses' commercial transactions. Attorneys general and legislative committees investigating so-called

trusts were ordering businesses and individuals to hand over account books, disclose the terms of their contracts, and otherwise surrender information relating to purchases, sales, and financial dealings. Opponents of these efforts complained that these were "private affairs" into which the government had no lawful authority to inquire without a warrant. Sandefur, *supra* at 730–36.

For example, in 1912, the *Arizona Republican* editorialized against a proposal to force newspapers to disclose the names of their subscribers, on the grounds that it was "perniciously inquisitorial" to compel disclosure of "private business affairs and financial affairs." *Id.* at 731 n.47. The same year, it warned against Congressional investigations of alleged monopolies because "attacks upon corporate credit and private affairs … ought to be deprecated." *Id.* at 731. Indeed, by the time Arizona's Constitution was written, the phrase "private affairs" had become something of a term of art, referring, *inter alia*, to a person's or a business's financial records and documents relating to business transactions.

While many at the time favored these investigations, the authors of the Washington and Arizona Constitutions were concerned about protecting "private affairs" against governmental intrusion, and chose to adopt language that would provide protections exceeding those promised by the Fourth Amendment—and that would protect, among other things, the business records that were then considered private affairs.

Most notable about the wording they chose is that they did not employ the word "unreasonable."[3] As a consequence, the reasonableness of a person's privacy expectations, or of an officer's behavior, is not relevant. Instead, the Clause prohibits even *reasonable* searches that are "without authority of law." This alone renders reliance on cases such as *Miller* and *Smith* inappropriate. They involved questions of whether the defendant's privacy expectations were reasonable—which is simply not a factor under the Clause. *See Gunwall*, 720 P.2d at 815; *Hinton*, 319 P.3d at 15. Instead, the proper inquiry is whether IP location information is a "private affair."

The answer must be yes. IP location information is not normally held out to the public. The user of a computer or a messaging app does not typically participate in a system designed to be, or generally understood to be, public. Instead location information is disclosed to the internet service provider as part of the transaction between the consumer and provider, in the way a Social Security number or a credit card number (and the personal identifying information associated with it) is provided to the seller of a good or service by the buyer. This

[3] They also did not use the word "privacy," a word added to other state constitutions in the 1970s, in reference to "right to privacy" decisions by that era's courts. This textual difference is significant because it reinforces the conclusion that proper Private Affairs Clause analysis is (a) not confined to rights of sexual intimacy and (b) *objective*. The Clause focuses not on what a person believed or should have believed, but on whether or not the evidence in question qualifies as a private affair. *See State v. Myrick*, 688 P.2d 151, 154 (Wash. 1984).

information is provided due to "the nature of the instrumentality," and only "for a limited business purpose." *Gunwall*, 720 P.2d at 816. It is therefore a Private Affair.

In *State v. Peppin*, 347 P.3d 906 (Wash. App. 2015), the court found that the Private Affairs Clause was not violated when officers obtained files without a warrant from a computer user who participated in a file-sharing network, because in such a network, users "voluntarily" hold this data "out to the public," and "make these shared files available without restriction." *Id*. at 910 ¶ 24. That is not the case here. The messaging app in question was advertised as private, and the exchange of information was more like a text message than a file-sharing network. This case is therefore more like *Hinton, supra*, in which the court found that text messages between two smartphone users are "private affairs" protected by the Clause.

III. Washington precedent is also helpful in determining whether federal officials are bound by the Private Affairs Clause.

Because the search here violated the Arizona Constitution, the Court must determine the degree to which federal officers are bound by that Constitution. Arizona courts appear not to have addressed this question—and, again, Washington precedent is instructive.

Teddington, *supra*, addressed the interaction of federal and state constitutional standards with regard to searches. It concluded that federal officers

are not bound by the state Constitution when operating in federal territory, but, relying on *State v. Mollica*, 554 A.2d 1315 (N.J. 1989), observed that if a federal officer gave evidence to state officers "which if obtained by a state officer would have violated the state constitution," then the evidence must be suppressed. 808 P.2d at 162. In addition, if a federal officer is acting "as an agent for the state at the time the officer acquired the evidence," then the state Constitution is, again, binding. *Id.* at 163. In this case, federal officers were acting as agents of the state. The lower court found that the federal agents subpoenaed the information at the request of state officials. *State v. Mixton*, 447 P.3d 829, 834 ¶ 3 (Ariz. App. 2019). The Clause should therefore control, and the evidence be suppressed.

CONCLUSION

"In the American federalist system, state courts are essential to maintaining the rule of law and protecting rights enshrined in the state constitution." Mark Brnovich, *Judging the Justices: A Review of the Arizona Supreme Court, 2003-2004*, Goldwater Institute Policy Report No. 203, Apr. 8, 2005[4] at 3. Indeed, this Court is "the primary protector of constitutional rights in Arizona," *id*.—meaning specifically those rights listed in the state Constitution, which the framers considered "the first line of defense for individual liberty." *Id.*

[4] https://goldwaterinstitute.org/wp-content/uploads/2019/12/04-08-2005-Judging-the-Justices.pdf

This Court should therefore "aggressively protect constitutional rights and liberties" enshrined in the state Constitution, *id.*, by enforcing the Private Affairs Clause, rather than imposing an artificial uniformity that the Constitution's wording expressly rejects.

The decision below should be *affirmed.*

Respectfully submitted this 30th day of December 2019 by:

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