COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. TIMOTHY ALEXANDER McNEILL, Appellee.	No. 1 CA-CR 18-0911 Maricopa County Superior Court No. CR2017-002133-001

BRIEF OF *AMICUS CURIAE* THE GOLDWATER INSTITUTE IN SUPPORT OF DEFENDANT/APPELLEE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute is a nonprofit, 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., Ariz. Pub. Integrity Alliance v. Maricopa Cnty. Special Health Care Dist.,* No. CV-15-0336-PR (Ariz. 2015); *Sedona Grand, LLC, v. City of Sedona,* No. CV12-0080PR (Ariz. 2012); *Aspen 528, LLC, v. City of Flagstaff,* No. CV-12-0422-PR (Ariz. 2012). The Institute seeks in particular to bolster the protections promised by the Arizona Constitution, including the protections of the Private Affairs Clause. It recently appeared as *amicus curiae* in *State v. Hernandez*, 244 Ariz. 1 (2018), addressing the Clause, and is publishing important research on the history and interpretation of the Clause. *See* Timothy Sandefur, *The Arizona "Private Affairs" Clause,* 51 Ariz. St. L.J. 723 (2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona courts, including this Court, have recognized that the state Constitution provides greater protections for individual rights than does the federal Constitution. Nowhere is there a stronger basis for that assertion than in the Private Affairs Clause, Ariz. Const. art. II § 8. That Clause was written a century and a half after the Fourth Amendment, uses entirely different terminology, and was based on a significantly different history. *See generally* Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723, 724-36, 743-54 (2019). There is no justification for following in lockstep with federal Fourth Amendment jurisprudence in applying Arizona's Private Affairs Clause. It is well past time for Arizona courts to fulfill the promise of greater protections for "private affairs."

Doing so does not require the Court to strike out on its own in fashioning jurisprudence out of whole cloth. The fact that the Clause is identical to the Washington Constitution's Private Affairs Clause, and was expressly based on that Clause, is sufficient justification for following the lead of that state's Supreme Court, which has formulated a conscientious, intellectually rigorous, and effective jurisprudence of "private affairs." In particular, Washington's judiciary has set forth a rational and principled inventory-search jurisprudence. *See State v. White*, 958 P.2d 982 (Wash. 1998).

Most notably, Washington courts do not apply the subjective federal "reasonable expectations" analysis, but instead employ an objective analysis to determine whether citizens have historically enjoyed legal protection for the asserted privacy interest and whether citizens should be entitled to hold that interest as secure from government intrusion absent a warrant. *State v. Hinton,* 319 P.3d 9, 12 ¶ 9 (Wash. 2014). Washington courts have also refused to adopt many of the exceptions to the warrant requirement that the U.S. Supreme Court created in the twentieth century—exceptions which *postdate* the adoption of the Private Affairs Clause and which are largely based on the concept of "reasonableness"—a concept that is inapplicable under the Private Affairs Clause since that Clause does not contain the word "reasonable." *State v. Wisdom*, 349 P.3d 953, 960 ¶ 26 (Wash. App. 2015).

This Court should do the same. Inventory searches "are not conducted to discover evidence of crime." *Id*. at 963 ¶ 43. Rather, they are permitted solely to secure against loss of property belonging to a detainee, to protect officers from liability that might arise from a dishonest claim of theft, and to ensure nothing dangerous is in the car. *Id.* ¶ 44. Such searches must not be pretexts for investigation, and must be limited to those areas necessary to fulfill the purpose of inventory and loss-prevention. *Id.* Reading a notebook found inside of a bag inside of a car does not fulfill those purposes—even if, on leafing through that

notebook, the officer finds that the owner has written in colorful ink or used highlighters or large letters. On the contrary, reading the contents of a private notebook is an investigatory step. Given the fact that personal financial records were among the core interests motivating adoption of the Private Affairs Clause and the fact that the search here exceeds the boundaries of a true inventory search, a warrant was required. The decision below should therefore be affirmed.

ARGUMENT

I. The Private Affairs Clause is more protective than the federal Fourth Amendment.

A. The history of the Private Affairs Clause demonstrates why it should apply to this case.

The Private Affairs Clause uses entirely different wording than the Fourth Amendment. The Fourth Amendment prohibits "unreasonable" searches. The Private Affairs Clause makes no reference to reasonableness. The Fourth Amendment does not refer to "private affairs," while the Arizona Constitution does. The Fourth Amendment protects "persons, houses, papers, and effects," while the state Clause protects both homes *and also* "private affairs." And while the federal Constitution prohibits searches and seizures, the state Constitution prohibits "disturb[ances]" and "inva[sions]." Because the wording of the two provisions is completely different, a separate interpretation is called for.

The most significant difference between the two provisions' text is the presence of the word "unreasonable" in the Fourth Amendment and the absence of that term in the Private Affairs Clause. "Reasonableness" has become the touchstone of Fourth Amendment jurisprudence. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). And it is that reasonableness consideration that underlies most of the exceptions that the federal courts have created during the twentieth century. *Id.* Yet the Private Affairs Clause does *not* forbid only unreasonable searches. It creates "a categorical bar" against *any* disturbance of private affairs or *any* invasion of the home, without lawful authority, even where that intrusion might be reasonable. *State v. Jean*, 243 Ariz. 331, 354 ¶ 94 (2018) (Bolick, J., concurring), *cert. denied*, 138 S. Ct. 2626 (2018). This and other textual differences are alone sufficient reason for interpreting the Clause differently from the Fourth Amendment. *See State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986) (where state constitution's language differs entirely from federal, independent interpretation is necessary); *People v. Caballes*, 851 N.E.2d 26, 31 (Ill. 2006) (same).

Not only is the language different, but the Private Affairs Clause's history is different, as well. The Arizona provision was copied from that of Washington State. *See* Sandefur, *supra*, at 724. The Washington State provision, in turn, was designed to address then-recent U.S. Supreme Court jurisprudence relating to

demands for information about private business transactions. *See* Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431 (2008). Specifically, the authors of the language were concerned with *Kilbourn v. Thompson*, 103 U.S. 168 (1880), and *Boyd v. United States*, 116 U.S. 616 (1886), cases that involved government inspections of invoices and account books. Although the U.S. Supreme Court held that the Fourth Amendment did apply to these matters, many in the legal community were unpersuaded by the opinions, leading to the worry that future courts would reverse them. The authors of the Washington Constitution therefore fashioned language that they hoped would encompass both the traditional Fourth Amendment protections, and also, these new, broader protections, and shield these protections from possible overruling in the future. *See* Johnson & Beetham, *supra*, at 442.

This occurred at a time when privacy concerns were on the rise nationwide. During the period between 1889 (when the Washington Constitution was written) and 1910 (when Arizona's was written), the famous article *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890), was published by Samuel D. Warren and Louis D. Brandeis. More significantly, an increase in government investigation into private business transactions—including headline-grabbing legislative inquiries into "trusts" and the advent of the income tax, with its detailed reporting

requirements—were raising concerns about government surveillance to a new height. *See* Sandefur, *supra*, at 730–34. A compromise was struck in the form of the Private Affairs Clause, which was intended to prevent intrusive government inspections of personal financial arrangements, while at the same time allowing government sufficient authority to regulate for the protection of the public. *See id.* at 734.

Of particular significance to this case is the fact that the primary (though not sole) concern driving adoption of the Washington and Arizona Private Affairs Clauses was the need to protect business transaction records. *Id.* at 725. Both *Kilbourn* and *Boyd*, which inspired the Washington framers to draft the Clauses, concerned examinations of notebooks containing records of financial transactions. *Id.* at 725–26. *Kilbourn* involved a subpoena issued by the House of Representatives for information relating to an allegedly illegal real estate transaction. The Court held that such an "inquiry into the private affairs of the citizen" must be done through proper judicial process. 103 U.S. at 190, 192–94. In *Boyd*, the Court found that a law allowing the government to compel businesses to permit inspection of "book[s], invoice[s], or paper[s]" was unconstitutional, because "compulsory production of a man's private papers" was just as much a search as "forcible entry into a man's house." 116 U.S. at 620, 622.

The delegates at the Arizona Constitutional Convention expressly intended the Private Affairs Clause to prevent government inspection of business records, among other things. For example, they chose to reject a proposal that would have allowed the Corporation Commission to exercise "general supervision of all private corporations" because this would have given the government too much power over private affairs. *See* Sandefur, *supra*, at 735. Instead, they chose to allow the Commission only to inspect the "books, papers, business, methods, and affairs" of *public service* corporations and *publicly held* corporations, *id.* at 736—and, in a separate provision, they gave the government "full visitorial and inquisitorial powers" to inspect the financial records of banks, "*notwithstanding the immunities and privileges secured in the declaration of rights*"—a phrase which alluded to the Private Affairs Clause. Ariz. Const. art. XIV § 16 (emphasis added). In other words, when the delegates chose to exempt something from the Private Affairs Clause, they did so expressly—and they understood that, absent such an express exception, the Clause would have forbidden the government from examining the financial records of banks. An *exclusio alterius* reading leads to the logical conclusion that the private financial records of individuals were understood as covered by the Private Affairs Clause.[1]

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[1] Obviously stolen credit card numbers and other such information is the *victim's* business information—but that cannot have been known to the officers at the time

In sum, the danger that government officers could read notebooks containing financial transaction information was among the *express* concerns of those who adopted the Private Affairs Clause.

B. This Court has an obligation to interpret the Private Affairs Clause independently of federal Fourth Amendment jurisprudence.

The fact that the Clause's text *and* history are so drastically different from those of the Fourth Amendment is alone sufficient justification for giving it a distinct and separate interpretation, rather than parroting Fourth Amendment precedent. *See* Sandefur, *supra* at 753–54. But there is still another reason that applying an independent state jurisprudence—rather than copying-and-pasting federal Fourth Amendment doctrine—is the rational approach. State constitutions are meant to be the *primary* protections for individual rights in the federalist system, and the federal Bill of Rights only *secondary*. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501–02 (1977). The federal Bill of Rights creates a "floor" of basic, minimal protections, below which state authorities may not fall—but states are free to provide, and have always been *expected* to provide, greater protections. *State v. Sieyes*, 225 P.3d 995, 1003 ¶ 28 (Wash. 2010). Federal judges have sometimes

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the search in this case was conducted. That fact cannot therefore exempt the notebooks from the coverage of the Private Affairs Clause.

even urged states to do so. *See, e.g.,* Brennan, *supra*; Jeffrey S. Sutton, *51 Imperfect* Solutions 178-82 (2018); *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting).

In fact, when federal courts interpret federal constitutional provisions, they often do so while expressly anticipating that states may create stronger and more precise rules on their own. Federal courts therefore often purposely seek interpretations that will leave states room to specify, innovate, or take different paths. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (supporting broad federal interpretation of "public use" in eminent domain by observing that states can craft more protective eminent domain law). For state courts to adopt federal jurisprudence wholesale, when that federal jurisprudence was consciously designed to maximize room for state courts to create their own rules, is self-contradictory and likely to result in a jurisprudence in which federal and state courts both defer to each other,[2] and in the process fail to secure individual rights. *See* Sandefur, *supra,* at 749-50.

The federal Constitution, after all, aims primarily to establish a government that deals with "external objects [such] as war, peace, negotiation, and foreign

[2] This phenomenon is similar to the "renvoi" problem in conflict of laws, in which two sovereigns defer to each other until the law resembles "a 'logical "cabinet of mirrors"' … [or] game of 'lawn tennis.'" Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979, 992 (1991) (citations omitted).

commerce"—whereas state constitutions are concerned with "all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State." *The Federalist* No. 45 at 313 (J. Cooke, ed., 1961) (James Madison). One major reason state constitutions—and state declarations of rights—are longer and more detailed than their federal counterparts is that state governments take primary responsibility for police matters. Protections against warrantless searches should, naturally enough, be stronger and more detailed at the state level. For *state* courts, interpreting a *state* constitution, to rely principally on *federal* jurisprudence—a jurisprudence designed by judges who are responsible for interpreting a *federal* document that is concerned with *federal* government charged with *national* responsibilities—is nonsensical.

But even if the Private Affairs Clause *had* been intended, when it was written in 1910, to go no further than the then-existing Fourth Amendment protections, there can be no justification for state courts to adopt post-1910 *alterations* to those protections. As an originalism matter, alterations and innovations to Fourth Amendment doctrine that were fashioned in, say, 1965 or 1985 cannot have been on the minds of the authors or the ratifiers of the 1910

Arizona Constitution.[3] *See State v. Lupo*, 984 So. 2d 395, 407–08 (Ala. 2007) (Parker, J., concurring) (emphasizing that federal jurisprudence postdating the state constitution should not be interpreted into the state constitution); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring) ("[E]ven if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision."). On the other hand, a non-originalist interpretation of the state Constitution would also require Arizona courts to determine *independently* whether a new rule or exception makes sense under the Private Affairs Clause—and, again, it would not be proper to copy federal Fourth Amendment precedent in answering that question.

Arizona courts have at times claimed that the Private Affairs Clause provides stronger protections *only* in the home. *See, e.g., State v. Peltz*, 242 Ariz. 23, 30 ¶ 24, n.3 (App. 2017). That is false, however, for two reasons.

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[3] For the same reason, the term "lawful authority" in the Private Affairs Clause must be interpreted in light of the concept of "lawfulness" that prevailed at the time when the Arizona Constitution was ratified. At that time, the concept of "lawfulness" was widely understood to include the protections today referred to as "substantive" as well as "procedural" due process. *See generally Hurtado v. People of State of Cal.*, 110 U.S. 516, 520–37 (1884); *McLean v. Territory*, 8 Ariz. 195, 201 (1903).

First, the text of the Clause itself expressly protects *both* homes *and* private affairs. It forbids (except where authorized by law) *either* "disturb[ances]" of private affairs, *or*, *separately*, "inva[sions]" of the "home." Ariz. Const. art. II § 8. The statement that the Clause's greater protections apply *only* within the home is therefore belied by the plain text. *See State v. Garcia*, 219 Ariz. 104, 106 ¶ 10 (App. 2008) ("[t]he word 'or' is a conjunction that is 'used to link alternatives.'"). Nor would it make much sense to limit the stronger protections promised by the Clause to just the home, where the Fourth Amendment's protections are already at their strongest.

Second, Arizona courts *have* applied greater protections outside the home. In *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 215 (1987), the state Supreme Court held that an individual's right to refuse medical treatment is protected by the Private Affairs Clause. "An individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile," the court said. *Id*.[4]

[4] *Fleming* was decided three years before the U.S. Supreme Court ruled that the right to refuse medical treatment is one of the liberties protected under the Due Process Clause of the Fourteenth Amendment. *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). That decision was not based on the Fourth Amendment, however, indicating yet again the significant differences between the Fourth Amendment and the Private Affairs Clause.

The bottom line is simple: the Private Affairs Clause contains language that is *entirely* different from the Fourth Amendment, it was written based on different considerations, it has a different historical background, and it serves a different purpose—namely, to provide Arizonans with greater protections than that afforded by the federal Constitution. There can be no justification for parroting federal search and seizure jurisprudence under this Clause. This Court should therefore resolve the Private Affairs Clause question independently, not by reliance on Fourth Amendment precedents.

II. Arizona's Private Affairs Clause should be interpreted in line with the Washington Private Affairs Clause.

A. The Washington Supreme Court interprets the Private Affairs Clause objectively and effectively.

Arizona courts are not without a compass when interpreting the Private Affairs Clause. An excellent model exists—Washington State's Constitution—which is roughly contemporaneous with our own, and which contains a Private Affairs Clause that not only contains language identical to Arizona's, but which was the *express model* for the Arizona provision. Moreover, Washington courts have applied an independent state jurisprudence to privacy matters involving law enforcement for almost a century, *see State v. Gibbons*, 203 P. 390 (Wash. 1922), and that jurisprudence is carefully considered, rationally consistent, and effective, without unduly constraining the police. In fact, that jurisprudence addresses the

question presented in this case quite well. This Court should therefore follow that court's lead.

The fact that the Private Affairs Clause was expressly copied from the Washington State Constitution, Sandefur, *supra* at 723, is alone sufficient reason to consult that state's judicial interpretations of the Clause when applying Arizona's version. Other provisions of the Arizona Constitution were also modeled on Washington's, including the eminent domain, free speech, and government immunity provisions—and Arizona courts have not hesitated to consult Washington interpretations of those provisions. *See, e.g., Bailey v. Myers*, 206 Ariz. 224, 229–30 ¶ 22 (App. 2003) (eminent domain); *Solana Land Co. v. Murphey*, 69 Ariz. 117, 124 (1949) (eminent domain); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 355 (1989) (free speech); *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 200 ¶ 17 (2001) (immunity). Yet Arizona courts have typically failed to do the same with regard to the Private Affairs Clause—and have never explained why. Instead, they have virtually always followed federal Fourth Amendment jurisprudence—a jurisprudence that interprets wholly different language in a wholly different document.

Perhaps the most significant difference between federal Fourth Amendment precedent and Washington Private Affairs precedent is that the former is largely concerned with a person's expectations of privacy, whereas Washington courts

interpreting the Private Affairs Clause have ruled that this approach is too subjective and unpredictable, and that it results in a jurisprudence that fluctuates too much with social trends. *See State v. Myrick*, 688 P.2d 151, 153–54 (Wash. 1984). For example, the reasonableness of an expectation of privacy necessarily changes any time the government begins to surveil in a new way, which then makes future expectations of privacy with regard to that realm unreasonable. Federal reasonableness analysis therefore creates a one-way ratchet that ultimately eliminates privacy expectations that once were reasonable. *See id.* at 154.

Washington courts instead take an objective approach. They "focus[] on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id*. This approach is objective because it is concerned with the meaning of the Private Affairs Clause independent of the mental states of any particular author or reader. *See* Michael S. Moore, *The Semantics of Judging,* 54 S. Cal. L. Rev. 151, 168 n.54 (1981). It assesses the privacy interests, as well as the offered justifications for intruding on those interests, in terms of the kinds of information at issue, its intimate nature, and the consequences of allowing the warrantless acquisition of that information—as opposed to asking whether any person or group *believes* the information to be private or the intrusion to be justified. In other words, this is not an inquiry into expectations or beliefs, but into rational justification. As another Washington court

explained, "*Myrick* requires us to look to the nature of the property [being searched], the expectation of privacy it reasonably supports, and the nature of the intrusion to answer the ultimate question: Whether the government's intrusion violated a privacy interest which citizens of this state have traditionally and justifiably held safe from governmental trespass absent a warrant." *State v. Thorson*, 990 P.2d 446, 449 (Wash. App. 1999).

Accordingly, Washington courts have been wary of creating new exceptions to the warrant requirement. They have refused to adopt the federal "good faith" or "inevitable discovery" exceptions, for example, in part because they are too subjective. *State v. Afana,* 233 P.3d 879, 884–85 ¶ 16 (Wash. 2010), *State v. Winterstein*, 220 P.3d 1226, 1232 ¶ 31 (Wash. 2009). Instead, Washington has fashioned its own, more balanced versions of those doctrines that are designed to avoid the subjectivity inherent in federal precedent. *See id.* ¶ 32 (explaining the greater objectivity of Washington search doctrine).

One good example of Washington's superior, objective approach is *Hinton,* 319 P.3d 9, which, like *State v. Peoples*, 240 Ariz. 244, 248 ¶ 10 (2016), held that a warrantless search of the contents of a smart phone violated the Private Affairs Clause. The *Hinton* court explained that "[t]o determine whether governmental conduct intrudes on a private affair, we look at the 'nature and extent of the information which may be obtained as a result of the government conduct' and at

the historical treatment of the interest asserted." 319 P.3d at 12 ¶ 10. Looking through a person's text messages obviously "exposes a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations,'" because text messages often contain the same "intimate" details that "phone calls, sealed letters, and other traditional forms of communication" do. *Id.* at 13 ¶ 11 (citation omitted). Washingtonians were therefore entitled to expect that government could not examine those messages without getting a warrant first.

Even closer to this case is *State v. Miles*, 156 P.3d 864 (Wash. 2007), which involved information about financial transactions. There, a state administrative agency exercised its statutory power to demand information from a bank relating to the defendant's bank records. The court found that the statute authorizing this violated the Private Affairs Clause, and rejected the federal "third party" doctrine, because bank transactions were private affairs which have long been shielded from warrantless government surveillance. *Id.* at 868–69 ¶ 15. And Washingtonians were objectively entitled to expect that information to remain private, absent a warrant because such records can "potentially reveal[] sensitive personal information," including information about "what the citizen buys, how often, and from whom," about "what political, recreational, and religious organizations a citizen supports," and about "where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Id*. at 869 ¶

17. Thus, the information at issue fell within the Clause and a warrant or its equivalent was required.

Given the parallel language and history of the Private Affairs Clause, it is simply common sense for Arizona courts to follow Washington's lead. In *State v. Mixton,* 2019 WL 3406661 (Ariz. App. July 29, 2019), however, the Second Division, while recognizing these parallels—and while exercising "our prerogative to independently interpret our constitution," *id.* at *4 ¶ 15, nevertheless stated that "we have not adopted Washington's interpretations of that [Private Affairs] provision." *Id.* at *5 ¶ 18, n.5. It gave no explanation for this anomaly however—of engaging in independent judicial interpretation while refusing to follow Washington courts. Instead, it merely cited to *State v. Juarez*, 203 Ariz. 441 (App. 2002), a case which merely stated the historical fact that Arizona courts have failed to follow Washington jurisprudence in the past, but gave no reason for this. In fact, Arizona courts appear never to have provided a rational justification for refusing to follow Washington interpretations of the Private Affairs Clause—despite the fact that they *do* pay attention to Washington courts' interpretations of *other* Arizona constitutional provisions that were modeled on the Washington Constitution. *See, e.g., Bailey,* 206 Ariz. at 229–30 ¶ 22. In any event, nothing in *Mixton* or any other case bars this Court from consulting Washington precedent—and it should.

B. Washington courts have developed a workable approach to inventory searches under the Private Affairs Clause, which this Court should follow.

Washington courts have applied their objective approach to inventory searches, and issued rulings that should apply here, as well. In *White*, 958 P.2d 982, the police pulled the defendant over for a traffic violation, as in this case, and, as in this case, the driver was using an expired license. *Id.* at 983. The defendant was arrested and the car was impounded. An inventory search was held during which the trunk was opened via a trunk release box in the main body of the car. In the trunk, the officers found drugs, cash, and drug paraphernalia. *Id.* at 984.

The court found the search invalid because the search of the trunk was not consistent with the purpose of an inventory search. The reason for inventory searches is *not* to facilitate investigations, but to prevent either theft of property from a car while the car is in police possession, or the risk of false accusations of theft. *Id.* at 986. Yet these considerations could not apply to the search in question because "'any need to protect property located in a locked trunk is outweighed by the countervailing privacy interests of the individual in the enclosed area of the trunk.'" *Id.* at 985 (quoting *State v. Houser*, 622 P.2d 1218, 1226 (Wash. 1980)).

Similarly, in *Wisdom*, 349 P.3d 953, officers stopped a pickup truck that had been reported stolen, and arrested the driver. *Id.* at 955 ¶ 2. The arresting officer then examined the truck, and found among other things a toiletry bag. *Id.* ¶ 3. The

officer photographed the truck, then removed the bag and opened it, finding drugs and cash inside. *Id.* ¶ 4. The court found that this was improper.

First, the toiletry kit was a "private affair," because such a kit, like a purse, "is intended to safeguard the privacy of personal effects," and it can and often does contain "items the owner wishes shielded from the public"—items that "may reveal much about a person's activities, associations, and beliefs." *Id.* at 961 ¶ 32.

Second, the opening of the bag was outside the scope of a permissible inventory search because it was done for purposes of investigation. *Id.* at 963 ¶ 44. An inventory search "must be restricted to effectuating the purposes that justify the exception," which is solely to secure property and protect officers, not to seek evidence of a possible crime. *Id.* at 964 ¶ 52. Nor could the scope of an inventory search be "enlarged on the basis of remote risks." *Id.* at 963 ¶ 44. Thus, the officers were required to obtain a warrant.

The court emphasized its constitutional duty to serve as a check on the executive branch. "Law enforcement is an honorable profession that deserves the highest respect from the citizenry and judicial system," it said, but the nature of law enforcement is such that checks-and-balances are required, including the constitutional warrant requirement and its provision for "[r]eview … by a neutral magistrate." *Id.* at 961 ¶ 29. "Ted Williams," said the court, "possessed exceptional eyesight. He could follow the trajectory and instantaneously pinpoint

the position of a fastball better than any umpire. He also was a fair and honest ball player. Nevertheless, American League rules did not allow Williams to call his own balls and strikes." *Id.* ¶ 30. For the same reason, "[f]airness demands that, except in emergency circumstances, a review by a neutral magistrate precede a search by a law enforcement officer of private possessions." *Id.*

The same analysis should apply here. First, a notebook of the sort at issue here is plainly a private affair covered by the Private Affairs Clause. A notebook containing financial information is prima facie a "private affair" such as was contemplated by the authors of the Clause. *See* Sandefur, *supra* at 725, 729–36. Unless officers have some independent reason to believe that the information contained in such a notebook is contraband or evidence of a crime, it therefore falls within the Clause's protections—and the search of a notebook being carried in a car (or in a backpack in the trunk of a car) is therefore plainly a search of private information.

Indeed, it has the potential of revealing highly personal, intimate information, because a notebook or receipt book, no less than a personal diary—which these notebooks might very well have been, for all the officers here knew—is a typical place for the writing of intimate personal matters. Arizona courts have recognized that diaries are private affairs, of course. *See State v. Davis*, 154 Ariz. 370, 375 (App. 1987). Reading such a book can easily "expose[] a 'wealth of

detail about [a person's] familial, political, professional, religious, and sexual associations,'" *Hinton*, 319 P.3d at 13 (citation omitted), and "sensitive personal information" about "where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition," and other things. *Miles*, 156 P.3d at 869 ¶ 17. As an objective matter, therefore, McNeill's notebooks were private affairs, and a warrant was required to read them.

The State's argument—that the writing on the pages qualified for the "plain view" exception due to the fact that it was highly colorful or highlighted, not only appears to be unsupported by evidence in the record, but should make no difference even if it were. It is a matter of common knowledge that people often write in diaries, receipt books, or other ledgers, in brightly colored ink, or in large letters, or use highlighters. Arizonans are entitled to write in large letters or in colorful ink in their diaries, address books, notebooks, or other materials, and to carry them around with them in their cars without thereby waiving their rights under the Private Affairs Clause. There are many written materials that contain highlighting or other attention-drawing effects, and which, if opened, might catch the eye. That cannot be the standard for overriding the warrant requirement.

Reading the notebooks plainly exceeded the scope of a legitimate inventory search. Even assuming that the opening of McNeill's trunk was justified under the circumstances—a dubious proposition, *see Houser*, 622 P.2d 1226 (opening a

locked trunk exceeded the scope of an inventory search and required a warrant)—a proper inventory search would still have ceased either at observing and making a record of the existence of the notebooks (and then getting a warrant), or of ensuring that there were no loose items between their pages. *Reading* their contents exceeded the scope of the warrantless search.

CONCLUSION

This Court should consult Washington State precedent to apply the Private Affairs Clause in this case. Washington cases—particularly *White* and *Wisdom*—provide the tools for resolving this case. The notebooks were "private affairs" covered by the Clause—precisely the sort of information at issue in *Kilbourn* and *Boyd*, and which the Arizona Constitution's authors had in mind when drafting the Private Affairs Clause. Reading the notebooks exceeded the legitimate scope of an inventory search because it was an investigative step, akin to reading a diary without a warrant. *Davis*, 154 Ariz. at 375. Because under the proper analysis the inventory search exception cannot apply, the Superior Court was right to suppress the evidence, and its decision should be *affirmed*.

Respectfully submitted August 12, 2019 by:

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