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CASE NAME: **STATE OF ARIZONA v EMILIO JEAN**	CASE NUMBER: CR-16-0283

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ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. EMILIO JEAN, Appellant.	CR-16-0283-PR No. 1 CA-CR 14-0444 Coconino County Superior Court No. CR-2012-00246

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF APPELLANT

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INTRODUCTION

Our smart phones contain continuously working GPS tracking systems which can be commandeered to track us the same way the GPS unit did on the vehicle that Emilio Jean was riding in. *See, e.g.*, *Tracey v. State*, 152 So. 3d 504, 507, 525-26 (Fla. 2014) (so noting, and holding collection of such smart phone GPS data, "even on public roads," violated the Fourth Amendment). But police are not free to GPS-track people for no reason. If a pedestrian has a smart phone, police need a warrant to get the GPS data from the phone. *See id.* And if police arrest that pedestrian, they cannot get the GPS data in a search incident to the arrest; they need a further warrant for the GPS data. *Riley v. California*, 134 S.Ct. 2473, 2493 (2014).

There is an anomaly under the Court of Appeals' opinion and the State's argument here. If that same pedestrian with a smart phone got into a friend's car, under the Court of Appeals' opinion and the State's argument, the police may permissibly and limitlessly collect the same previously prohibited GPS data without a warrant, through the simple expedient of attaching a tracker to the friend's car. According to the State, the passenger would not even have standing to complain.

The American Civil Liberties Union of Arizona ("ACLU of Arizona") agrees with Appellant Jean that the data collection in this case violates the Fourth Amendment and that Jean has standing to challenge it. But the ACLU of Arizona writes separately to explain why the Court need not reach those issues. Instead, this Court has instructed that when an issue implicates both the Arizona and U.S. Constitutions, the issue should be analyzed first under the Arizona Constitution. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 355-56 (1989). Doing so here will avoid the need for a Fourth Amendment analysis, because of the broader right to privacy that is specifically enumerated among the fundamental rights in Article II of Arizona's Constitution. *See* Ariz. Const. Art. II, §§ 1, 8; *State v. Bolt*, 142 Ariz. 260, 264-65 (1984) ("While Arizona's constitutional provisions were generally intended to incorporate the federal protections . . . they are specific in . . . creating a right of privacy."). GPS tracking of the sort here both imperils and violates that right. *Com. v. Rousseau*, 990 N.E.2d 543, 553 (Mass. 2013) (finding state analog of the Fourth Amendment violated by GPS tracking of car in challenge brought by "a 'mere passenger' having no possessory interest in [the driver's] pickup truck" because "a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government").

INTERESTS OF *AMICUS CURIAE*

The ACLU of Arizona is the Arizona state affiliate of the national American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU is committed to defending individual rights in Arizona through litigation, legislation, and public education and regularly advocates to expand privacy rights and to increase fairness in the criminal-justice process, both of which are implicated in this case.

The ACLU of Arizona offers this brief in support of Jean because the issue presented implicates the right of Arizona citizens to remain free from government scrutiny in the private affairs of their daily lives unless there is a good, individualized, and articulable reason for the government to surveil them. As noted above, the drafters of the Arizona Constitution were so keen to protect individual liberties that they went beyond the Fourth Amendment to the United States Constitution to include an express right of privacy in Article II, § 8. The ACLU of Arizona writes separately to urge the Court to consider the issues the petition poses first under the Arizona Constitution, to ensure that Arizonans' state constitutional rights are considered and honored.

ARGUMENT

I. The Court Should Address the Arizona Constitutional Right of Privacy in This Case.

Jean has been careful to separately state that he is claiming a violation of his rights under Article II, § 8 of the Arizona Constitution in addition to his Fourth Amendment rights. (Appellant's Op. Br. in Ct. App. at 9, 19 n.4; Pet. at 3, 7-8, 13.) This was sufficient to preserve the argument. *State v. DeWitt*, 184 Ariz. 464, 470-71 (1996) (argument under Arizona Constitution Article II, § 8 was preserved when motion to suppress and briefing in Court of Appeals and this Court all mentioned state constitutional provision);[1] *but see State v. Dean*, 206 Ariz. 158, 161, ¶ 8 n.1 (2003) (argument regarding Article II, § 8 waived where no separate argument made about it). The Court should exercise its discretion to consider the Arizona constitutional issue, however, even if it has doubts about its preservation. *State v. Smith*, 203 Ariz. 75, 79 ¶ 12 (2002) ("Although Smith arguably waived the arguments on which he now relies" in part by specifically disclaiming them "we exercise our discretion and address the merits of the motion.").

[1] *See State v. Holden*, 54 A.3d 1123, 1128 (Del. Super. 2010) (finding claim preserved; "Defendant properly asserted his constitutional claim because he argues that the use of GPS tracking . . . unlawfully violates Article 1, § 6 of the Delaware Constitution.").

"[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Thus, this Court has the obligation to ensure "the full realization of our liberties" under the Arizona Constitution. *Id.*; *see Bristor v. Cheatham*, 75 Ariz. 227, 234 (1953) ("It is the court's duty to protect constitutional rights."). The State is correct that, with respect to the Fourth Amendment, "[i]t is for the United States Supreme Court to determine whether its own precedents merit revision in light of changing technology and societal norms." (Appellee's Supp. Br. at 15.) But this Court has the final word on the Arizona Constitution and may interpret it to be more protective of privacy interests than the Fourth Amendment. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards.").

Moreover, there are "human, real-world benefits of vigorously and independently enforcing state constitutional provisions." Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 509 (2012). For instance, the Court can avoid the possible anomalies noted in the introduction, and also the debate about the trespass theory versus the privacy theory under the Fourth Amendment, by simply looking to the language of Article II, § 8 of the

Arizona Constitution: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

II. GPS Tracking Is Different Than Merely Following Someone.

The State's argument is a syllogism: the police could follow someone on a public road without a warrant, and GPS tracks someone who was on public roads, so the State must be able to use GPS without a warrant, too. *See* Resp. to Pet. at 12 ("Defendant's privacy was no more intruded upon than had officers followed him to California and back"); *accord* State's Supp. Br. at 12-13. If that were true, law enforcement would not go to the trouble of buying GPS devices; they would use the officers they already have to follow someone. Perhaps that is why multiple state supreme courts – and the United States Supreme Court – have rejected this argument. GPS is qualitatively different, as a steady stream of cases have recognized.

In *People v. Weaver*, 909 N.E.2d 1195, 1202 (2009), the Court of Appeals of New York (its highest Court) held that warrantless GPS tracking violated that state's constitution. The Court first acknowledged what the State relies upon here: the lessened expectation of privacy held by someone on public roads. *Id.* at 1198-99. But it reasoned that GPS was different; it was "not a mere enhancement of human sensory capacity" as it "facilitate[d] a new technological perception of the world in which . . . any object may be followed and exhaustively recorded over . . .

a practically unlimited period." *Id.* at 1199. Contrary to the State's argument that police officers following a car could accomplish the same thing, the *Weaver* Court noted that "a similar capture of information . . . by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp." *Id.* The Court was equally troubled by what this level of surveillance would reveal, namely "[t]he whole of a person's progress through the world, into both public and private spatial spheres" including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Id.* Notably, the Court expressed these concerns eight years ago. That court presciently observed that "with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are with and not with, [and] when we are and are not with them . . . ." *Id.* at 1200. The Court concluded that while "the expectation of privacy has been deemed diminished in a car upon a public thoroughfare," it is going too far "to suppose that when we drive ***or ride*** in a vehicle our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal." *Id.* (emphasis added).

It was this language from *Weaver* that Justice Sotomayor quoted in her concurrence in *United States v. Jones*, 132 S.Ct. 945, 955-56 (2012), where the Supreme Court held that a warrant was required for GPS tracking. *Id.* at 954. Justice Sotomayor explained that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955 (citing and quoting *Weaver*, 909 N.E.2d at 1199). Justice Sotomayor noted that "[t]he Government can store such records and efficiently mine them for information years into the future." *Id.* at 956. And, she wrote, "because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Jones*, 565 U.S. at 956 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).[2]

Justice Sotomayor's concerns formed the basis of the majority's opinion in *Riley v. California*, 134 S.Ct. 2473, 2490, 2493 (2014), where the Court held that police cannot access cell phone data in a search incident to an arrest; they need a

[2] Notably, here the State lauds "the avoidance of detection by the suspect" as a "benefit of GPS," though the State disagrees with Justice Sotomayor's position, asserting that this "benefit" is "not relevant to the privacy test." *See* State's Supp. Br. at 17.

warrant. The *Riley* Court noted the intimate details of one's life that could be found on a phone, including location information. *Id.* at 2490. "Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Id.* at 2490.[3] "Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone." *Riley*, 134 S.Ct. at 2492. The *Riley* Court was careful to note that it was not holding "that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search." *Id.* at 2493.

In *Commonwealth v. Rousseau*, 990 N.E.2d 543, 547, 550 (Mass. 2013), the Massachusetts Supreme Judicial Court considered whether a passenger had standing to challenge a warrant used to attach a GPS device to a vehicle he was riding in, since he was a "'mere passenger' having no possessory interest in [the driver's] pickup truck." *Id.* at 553. To resolve the issue, the court had to determine whether, even absent a protectable property interest, "the government's contemporaneous electronic monitoring of one's comings and goings in public places invades one's reasonable expectation of privacy." *Id.* The court held it did;

[3] *Accord Holden*, 54 A.3d at 1133 (warrantless GPS tracking violated the Delaware constitution; expressing concern that "[a]n Orwellian state is now technologically feasible. Without adequate judicial preservation of privacy, there is nothing to protect our citizens from being tracked 24/7.").

that under article XIV of the Massachusetts Declaration of Rights—which does *not* specifically mention a right to privacy—"a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government . . . without judicial oversight and a showing of probable cause." *Id.* (citing Justice Sotomayor's concurrence in *Jones*; and *Weaver*).

III. The Arizona Constitution Is Different Than the U.S. Constitution, and That Difference Should Be Given Effect Here.

This Court's cases regarding the correlation between Arizona Constitution Article II, § 8 and the Fourth Amendment to the U.S. Constitution are not uniform. Some cases have held that the exclusionary rule under the Arizona Constitution is co-extensive with that under the Fourth Amendment. *See, e.g.*, *State v. Hummons*, 227 Ariz. 78, 82 ¶ 16 (2011) ("the exclusionary rule is applied no more broadly under our state constitution than it is under the federal constitution outside the home-search context"). But in other instances, the Court has recognized that Article II, § 8 may go beyond the Fourth Amendment's protections. *Bolt*, 142 Ariz. at 264-65 (Arizona's Constitution is "specific in preserving the sanctity of homes *and in creating a right of privacy*" (emphasis added)); *see also State v. Ault*, 150 Ariz. 459, 463 (1986) ("The Arizona Constitution is even more explicit than

its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.").[4]

While the Court's interpretations of the privacy protections in the Arizona Constitution have thus far hewn rather closely to Fourth Amendment analysis, they have done so only because the Court has not yet had the need or opportunity to consider the import of the Arizona provisions, as it may here. Looking first to the Arizona Constitution in order to avoid the need for an analysis of the U.S. Constitution would be consistent with the approach of the Washington Supreme Court.

Our Constitution was taken from Washington, and our Article II, § 8 is identical to Article I, § 7 of the Washington Constitution. *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 277 (App. 1997) (noting Arizona adopted the Washington provision). Consequently, decisions of the Washington Supreme Court are persuasive when considering Article II, § 8 of our Constitution. *Schultz v. City of Phoenix*, 18 Ariz. 35, 42 (1916) (When clauses in the Washington Constitution are "very much like the same provisions" in our Constitution, "we think the law

[4] *See also Moulé ex rel. Moulé v. Paradise Valley Unified Sch. Dist. No. 69*, 863 F. Supp. 1098, 1102 (D. Ariz. 1994) (citing Arizona state law for the proposition that our courts have interpreted Article II, § 8 as affording broader protection than the Fourth Amendment), *rev'd on other grounds*, 66 F.3d 335 (9th Cir. 1995).

announced by [the Washington Supreme Court] is very persuasive.").[5] Washington has recognized that its analog to Article II, § 8 is broader than the Fourth Amendment, and it has utilized the difference to decide search and seizure issues under state law to avoid having to decide issues under the Fourth Amendment, especially where the United States Supreme Court has not given clear guidance. *See, e.g.*, *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003) (holding, prior to the U.S. Supreme Court's decisions in *Jones* and *Riley*, that warrantless GPS tracking of cars violated Washington's analog to Art. II, § 8).

This Court should take that same approach. "Arizona's protection of privacy is . . . substantially different in wording from the counterpart federal fourth amendment to the U.S. Constitution." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 82 (1988). Rather than adopt the Fourth Amendment, the citizens of Arizona made a decision to adopt Washington's constitutional privacy provision verbatim. *Hart*, 190 Ariz. at 277. As noted, Article II, § 8 is "specific in . . . *in creating a right to privacy*." *Bolt*, 142 Ariz. at 264-65 (emphasis added). That specific right to privacy does not exist in the Fourth

[5] *But see State v. Juarez*, 203 Ariz. 441, 446-47 ¶ 22 (App. 2002) (noting Arizona has not uniformly followed Washington law on the right to privacy, and citing examples); *State v. Murphy*, 117 Ariz. 57 (1977) (noting the existence of "Arizona's constitutional right to privacy" but declining to find that it encompasses the right to personal marijuana use in the home, diverging from Alaska's analysis of its substantially similar state constitutional provision).

Amendment. The framers' inclusion of those words in our Constitution should be given effect. *Ariz. E. R. Co. v. State*, 19 Ariz. 409, 411 (1918) ("If it can be prevented, no clause, sentence, or word in the Constitution shall be superfluous, void, or insignificant").

In doing so, the Court should adopt the framework utilized in Washington. In evaluating whether there is an interest to be protected under the Washington analog to Article II, § 8, their courts consider "both the nature and extent of the information which may be obtained as a result of the governmental conduct and the historical protection afforded to the interest asserted." *State v. Samalia*, 375 P.3d 1082, 1086 ¶ 12 (Wash. 2016) (quotations omitted). The Washington courts also "consider laws supporting the interest asserted, including statutes and analogous case law," and they "look to the reasonableness of the interest asserted." *Id.* ¶ 12 n.1 (noting "voluntary exposure to the public can negate an asserted privacy interest"). In *Samalia*, the Washington Supreme Court applied this test to determine that cell phone data should be considered "private," relying in part on the description in *Riley* of the information a cell phone could reveal. *Samalia*, 375 P.3d at 1086 ¶ 13. The *Samalia* Court specifically noted that "[c]ell phones track GPS" and that in *Jackson* it had held that "a warrant [wa]s required under article I, section 7 before the police may attach a GPS device to a citizen's vehicle." *Id.* at 1087 ¶ 16.

Here, the information to be gathered is "[t]he whole of a person's progress through the world . . . ." *Weaver*, 909 N.E.2d at 1199. Can it be said that Arizonans, who are specifically afforded an express constitutional right to privacy, have lesser expectations of privacy in this information than citizens of New York (*Weaver*), Delaware (*Holden*), Oregon (*Campbell*), or Massachusetts (*Rousseau*), where the constitutions do not specifically afford such a right?[6] *Holden*, 54 A.3d at 1133 ("Delawareans reasonably expect to be free from prolonged 24-hours a day surveillance. Use of GPS technology without adequate judicial supervision infringes upon the reasonable expectation of privacy . . . ."); *see also Tracey*, 152 So.3d at 525-26 ("we conclude that such a subjective expectation of privacy of location as signaled by one's cell phone—even on public roads—is an expectation

[6] The State dismisses Jean's reliance on *State v. Campbell*, 759 P.2d 1040 (Or. 1988), because *Campell* was decided on state law grounds. *See* State's Supp. Br. at 19 ("the [C]ourt's reliance on the Oregon Constitution undermines whatever persuasive force the decision might have."). To the contrary, the Oregon Supreme Court found that aerial tracking using a plane and beeper offended the privacy interest afforded by Article 1, § 9 of the Oregon Constitution. *Campbell*, 759 P.2d at 1044, 1048-49. That provision of the Oregon Constitution does not textually reference a right to privacy. Thus, the fact that *Campbell* found the tracking offended the facially-less-protective Oregon Constitution is not a reason to *disregard* the case – it is all the more reason why our Constitution, which specifically grants a right to privacy – should be read to give more protection than the Fourth Amendment to the United States Constitution. The same is true of the decisions in *Weaver*, *Holden*, and *Rousseau*, all of which came from jurisdictions where the constitutions do not specifically mention privacy – yet each of which were interpreted more expansively than the Fourth Amendment.

of privacy that society is now prepared to recognize as objectively reasonable under the *Katz* 'reasonable expectation of privacy' test."). Surely Arizonans expect at least this much protection, particularly in light of the protections afforded by the identical language in the Washington Constitution.[7] Indeed, while the State notes the surveillance was "just 2 days" (Supp. Br. at 18), the Arizona Legislature has declared that far shorter periods of GPS tracking are offensive. *See* A.R.S. § 13-2923(D)(1)(a)(ii) (defining a "course of conduct" that is prohibited by the stalking statute as encompassing the "[u]se [of] any electronic, digital or *global positioning system* device to surveil a specific person . . . continuously *for twelve hours or more* on two or more occasions over a period of time, however short, without authorization." (emphasis added)).

As Justice Sotomayor warned in her concurrence, "[a]wareness that the Government may be watching chills associational and expressive freedoms." *Jones*, 565 U.S. at 416. Further, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *Id.* Thus, "GPS monitoring . . . may alter the relationship between citizen and government in a way that is inimical to democratic society." *Id.* (quotations

[7] Or, perhaps, only Arizonans wealthy enough to own their own cars expect this privacy while driving because they are protected by *Jones*; while under the State's argument those Arizonans who cannot afford to own or drive their own cars would supposedly have no such protectable privacy interest.

omitted); *accord Tracey*, 152 So.3d at 522 ("the ease with which the government, armed with current and ever-expanding technology, can now monitor and track our cell phones, and thus ourselves, with minimal expenditure of funds and manpower, is just the type of 'gradual and silent encroachment' into the very details of our lives that we as a society must be vigilant to prevent." (quoting James Madison)).

CONCLUSION

The framers of the Arizona Constitution cautioned that a "frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." *See* Arizona Constitution Art. II, § 1. One of the fundamental rights is the right to privacy, as to which the drafters commanded that "***[n]o person shall be disturbed in his private affairs***, or his home invaded, without authority of law." *See* Arizona Constitution Art. II, § 8 (emphasis added). The Court should guard and give effect to that right here. It should do so by applying the holdings of *Riley* and *Tracey* to hold that *any* GPS monitoring requires a warrant due to Article II, § 8. To do otherwise would be to allow law enforcement to end-run the protections those cases announced, with the end-run being impermissibly based on protection of a place (another's car) rather than protection of a person. *See Katz v. U.S.*, 389 U.S. 347, 351 (1967) ("the Fourth Amendment protects people, not places"); *State v. Andrews*, 134 A.3d 324, 326 (Md. 2016) ("We conclude that

people have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement, and—recognizing that the Fourth Amendment protects people and not simply areas—that people have an objectively reasonable expectation of privacy in real-time cell phone location information.").

RESPECTFULLY SUBMITTED this 13th day of April, 2017.

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