IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CASSANDRA RENEE STEVENS, Defendant-Appellant, Petitioner on Review.	Douglas County Circuit Court Case Nos. 12CR1676FE and 12CR1963FE CA A156431 (Control) and A156432 SC S065140

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER

On Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the Circuit Court for Douglas County
Honorable Ann Marie Simmons, Judge

Court of Appeals Opinion Filed: June 21, 2017
Author of Opinion: Ortega, P.J.
Before: Ortega, P.J., Lagesen, J., and Garrett, J.

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OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them." OJRC, *About Us*, http://ojrc.info/about-us/ (last visited Jan 12, 2018). The OJRC *Amicus* Committee is comprised of Oregon attorneys from multiple disciplines.

Amicus wishes to be heard by this court because OJRC agrees with defendant that this court should adopt a rule that passengers in motor vehicles stopped by law enforcement are seized under Article I, section 9, of the Oregon Constitution, as the United States Supreme Court has held under the Fourth Amendment to the United State Constitution. *Amicus* supports defendant's contention that her encounter with law enforcement was inherently coercive.

SUMMARY OF ARGUMENT

OJRC, as *Amicus*, urges the court to reverse the Court of Appeals and adopt a bright-line rule that passengers in motor vehicles are seized for

purposes of Article I, Section 9. OJRC urges this court to adopt that rule based on current social science that concludes that citizen-police interactions are inherently coercive in certain situations, including traffic stops.

ARGUMENT

I. This court should adopt a bright-line rule that passengers of vehicles stopped by law enforcement are seized under Article I, section 9.

Whether an individual is "seized" under both the Fourth Amendment to the United States Constitution and Article I, section 9, of the Oregon Constitution turns on a nearly identical standard. The essential question is whether a reasonable person would feel free to terminate the encounter. Yet, despite this similar standard, the Oregon Supreme Court and the United States Supreme Court have come to opposite conclusions regarding whether passengers of motor vehicles stopped by law enforcement are "seized" for purposes of those constitutional provisions.

Article I, section 9, guarantees individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." A person is seized by law enforcement when the person is "stopped" or "arrested" through "the imposition, either by physical force or through some 'show of authority,' of some restraint on the individual's liberty." *State v. Ashbaugh*, 349 Or 297, 309, 244 P3d 360 (2010) (citing *State v.*

Rodgers/Kirkeby, 347 Or 610, 621–22, 227 P3d 695 (2010)). To determine whether law enforcement has seized an individual, Oregon courts employ an objective test: "Would a reasonable person believe that a law enforcement officer intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement." *State v. Backstrand*, 354 Or 392, 399, 313 P3d 1084 (2013).

The Fourth Amendment similarly guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Federal courts have generally interpreted this guarantee the same way Oregon's courts have interpreted Article I, section 9, holding that a law enforcement officer seizes an individual under the Fourth Amendment when the officer "by means of physical force or show of authority" terminates or restrains an individual's freedom of movement. *Brendlin v. California*, 551 US 249, 254, 127 S Ct 2400, 168 L Ed 2d 132 (2007). Also like the Oregon courts, federal courts employ an objective test to determine whether law enforcement has seized a person: "[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id*. at 255.

Despite the very similar guarantees against unreasonable seizures found in both the United States and Oregon constitutions, and despite the nearly

identical objective tests to determine whether a person has been seized under those constitutional provisions, the Oregon Supreme Court and the United States Supreme Court have come to opposite conclusions regarding whether law enforcement has seized a passenger in an automobile. Current Oregon precedent holds that, pursuant to Article I, section 9, passengers are not seized by virtue of being in an automobile that is stopped by law enforcement. *State v. Thompkin*, 341 Or 368, 375–76, 143 P3d 530 (2006). In contrast, federal courts and most other state courts have determined, based on the same standard of whether a reasonable person would feel free to terminate the encounter, that passengers of stopped vehicles are seized for constitutional purposes. *See Brendlin*, 551 US at 258–59 (observing that its holding "comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question" and collecting cases).

Those non-Oregon decisions rely primarily on the premise that a reasonable passenger in a stopped vehicle does not feel free to leave and terminate the encounter. Indeed, in *Brendlin*, the Court concluded that "any reasonable passenger would have understood the police officers [conducting the traffic stop] to be exercising control to the point that no one in the car was free to depart without police permission" in part because "[a] traffic stop necessarily curtails the travel of a passenger has chosen just as much as it halts the driver[.]" *Brendlin*, 551 US at 257. That is, not only did the Supreme Court

conclude that a passenger in a stopped vehicle would not feel free to leave, it concluded that *any* reasonable person would believe that the officers significantly and intentionally restricted the passenger's freedom of movement. The Court further observed that "even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id*. The Court recognized the "societal expectation of unquestioned police command [is] at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission." *Id*. at 258 (internal quotation omitted). The Court also pointed out that objective test itself leads to "the intuitive conclusion that all the occupants [of the vehicle] were subject to like control by the successful display of authority" by law enforcement, and were thereby "seized." *Id*. at 260.

In addition to noting that its conclusion is intuitive, the Court determined that establishing a bright-line standard that all passengers are seized during a traffic stop was necessary to guide law enforcement and protect individuals' rights:

> "Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against

> any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment rights."

Id. at 263 (footnote omitted).

Likewise, state courts have determined that establishing a bright-line rule that passengers are seized is necessary to guide law enforcement and the courts. *See, e.g.*, *State v. Harris*, 206 Wis 2d 243, 256–57, 557 NW2d 245 (1996) (noting that a bright-line rule is necessary to avoid inconsistent application). Without a bright-line rule, individual judges, with their individual worldviews, are expected to decide the point at which a reasonable passenger would no longer feel free to leave. Given the "infinite variety of encounters between law enforcement officers and citizens," a bright-line rule is necessary to ensure consistent administration of justice. *State v. Fair*, 353 Or 588, 593, 302 P3d 417 (2013).

No principled distinction can justify the different conclusions under the Fourth Amendment to the United States Constitution and Article I, section 9, of the Oregon Constitution. That the Fourth Amendment protects rights through its deterrence effect, while Article I, section 9, protects an individual right does not demand inconsistent outcomes. Rather, the different outcomes boil down simply to this court's supposition that a reasonable passenger in an automobile that has been stopped by the police would feel free to walk away from the vehicle. *Amicus* respectfully sides with the majority of courts, which have more

realistically determined that a reasonable person would not feel free to terminate the encounter in such situations. *Amicus* further posits that, while judges and lawyers who may better understand their rights might feel free to terminate such an encounter, people of color, the poor, and those who have had previous encounters with law enforcement, will feel far less free to walk away.

In order to provide clear guidance to law enforcement and lower courts, and to discourage abuses, this court should reverse the Court of Appeals's decision and hold that, as a matter of law, law enforcement seize the passengers of motor vehicles that they stop.

II. Social science research demonstrates that individuals, particularly those in minority communities, find police encounters inherently coercive.

Social science research on the psychology of obedience and on the effect of social context on meaning support the conclusion that a passenger in a stopped vehicle would feel that he or she had been effectively deprived "of his or her liberty or freedom of movement." *Backstrand*, 354 Or at 400. Several studies demonstrate that interaction with authority figures such as police officers is inherently coercive. Other studies go further to show that this may particularly be the case when police interact with members of minority communities. Those studies, coupled with data showing an increased likelihood for police to stop vehicles driven by minorities, suggest that a rule

depriving passengers of standing to suppress evidence obtained during a vehicle stop would disproportionately impact people of color.

A. Individuals' tendency to obey authority figures in restrictive situations demonstrates that police encounters are highly coercive.

Studies on the psychology of obedience demonstrate that "momentary situational pressures and norms (*e.g.*, rules of deference to an authority) can exert a surprising degree of influence on people's behavior." Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J Personality & Soc Psychol 398, 409 (1991). In Stanley Milgram's frequently cited study, test subjects responded with overwhelming deference to study administrators when instructed to deliver what they believed to be increasingly severe electric shocks to other people. Stanley Milgram, *Behavioral Study of Obedience*, 67 J Abnormal & Soc Psychol 371, 371–78 (1963). Eighty-seven percent of the subjects in the study were not deterred even by the sound of their supposed "victims" pounding on the wall of the room in which they were bound; 65 percent even continued administering increasingly intense shocks after the "victims" had become non-responsive, beyond the shock level labeled "Danger: Severe Shock." *Id.* Similar studies in the decades since Milgram's have shown comparable rates of obedience. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Know Now About Obedience to Authority*, 29 J of

Applied Soc Psychol 955, 969 (1999). In one study, when the pounding was replaced by screamed protests or complaints about a heart condition that would place the "victim" at great risk, subjects were comparably obedient to test administrators' instructions to continue with the experiment. Blass, 60 J Personality & Soc Psychol at 402.

One analysis of the Milgram study and its progeny attributed the high rates of compliance to the fact that the test subjects, believing the shocks to be authentic, effectively had only two options after having the experimental situation imposed upon them: "increase the voltage or quit the experiment." *Id.* This, in part, was due to the incremental elements of the study: the gradual increase of both voltage and response from the "victims" served as "binding factors—psychological inhibiting mechanisms [that] keep subjects in the situation even if they want to leave it." *Id.* The Milgram study was a "dramatic demonstration that people are much more prone to obey the orders of a legitimate authority than one might have expected"—an obedience which "comes about through the person's acceptance of the authority's definition of reality." *Id.* at 409. In other words, if a person finds himself in an incrementally intensifying situation in which he believes he has limited options, his overwhelming tendency is to obey an authority figure.

Viewing a traffic stop through the lens of this research on situational obedience to authority is revealing. In the case of a traffic stop, passengers

cannot be thought of as being "free to leave" due to psychological inhibiting mechanisms that keep them in a situation even if they want to leave it. Traffic stops involve imposed scenarios incrementally unfolding—*i.e.*, an officer stops the passengers' mode of transportation, then questions the passengers, then "runs" the passengers information, and then completes questioning of the passengers. Research suggests that an officer's control over a traffic stop would leave the "subject" with no meaningful choice but to obey. Put simply, a passenger in a vehicle stopped by law enforcement would not feel free to leave.

B. Police officers' status as uniformed authority figures leads citizens to interpret their statements as commands and increases citizens' tendency to obey those commands.

Additional research into the effect of situational factors on the psychology of obedience demonstrates that compliance rates increase when the authority figure in the experiment is uniformed. In one study, the administrator (dressed variously as a civilian, a milkman, and an unarmed security guard) directed individuals to perform a simple task. Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind LJ 773, 808 (2005) (*citing* Leonard Bickman, *The Social Power of a Uniform*, 4 J Applied Soc Psychol 47 (1974)). Individuals were overwhelmingly more likely to obey the security guard than the civilian: when directed to give a dime to a stranger, only 33 percent of the subjects did so when ordered by the civilian, while 89 percent obeyed the uniformed

security guard. *Id.* Another study, which examined compliance with someone dressed as a blue-collar worker as compared to compliance with someone dressed as a firefighter, found a similar tendency to obey a person in uniform. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J Crim L & Criminol 51, 63 (2009) (citing Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Conformity*, 14 J Applied Soc Psychol 501, 502–06 (1984)).

Other studies analyzing interactions between persons of differing social statuses and levels of authority demonstrate that the social context of a statement may greatly impact the way an indirect request is interpreted, such as the likelihood that it will be obeyed as a directive. "Higher status people frequently direct the actions of others, and hence others expect the remarks of higher status speakers (in the appropriate contexts) to act as directives." Thomas Holtgraves, *Communication in Context: Effects of Speaker Status on the Comprehension of Indirect Requests*, 20 J of Experimental Psychol: Learning, Memory, & Cognition 1205, 1214–15 (1994). For example, one study that compared listeners' comprehension of indirect requests by people of different social statuses found that listeners readily understood a negative observation (*e.g.*, that the room was cold) by a person of higher status as a directive to act. *Id.* at 1214. In another study, subjects perceived a peer's statement, "don't be late again," as more coercive than the statement, "try not to

be late again"; but when an authority figure (such as the subject's boss) made the same statements, both were perceived as being equally coercive. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup Ct Rev 153, 189 (2002) (citing Jennifer L. Vollbrecht, Michael E. Roloff & Gaylen D. Paulson, *Coercive Potential and Face Threatening Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 Intl J Conflict Mgmt 235, 236 (1997)). Put another way, "power relationships dictate that when the police make a 'request' and they could apparently compel the suspect to carry out the request, the suspect will view the request as a command." Peter Tiersma, *The Judge as Linguist*, 27 Loy LA L Rev 269, 282 (1993).

The studies indicate that interactions with uniformed authority figures are inherently coercive. The fact that test subjects interacted in this manner with strangers in non-police security and firefighter uniforms (*i.e.*, strangers who lacked authority to deprive the subjects of their liberty) suggests that police would wield even more coercive power than the studies show. Indeed, other research demonstrates such results.

C. Studies and surveys on police-citizen encounters demonstrate that people rarely view noncompliance with officer requests as an option.

More direct examinations of the *reasons* that people tend to submit to authority figures illustrate that a reasonable person may rarely feel free to leave an encounter with police. A study of stop data from Maryland and Ohio

revealed that, out of over 9,000 motorists whom police asked for consent to search their vehicles, 89.3 percent granted it. Steven Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 Tenn L Rev 399, 452 (2004) (citing Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police Citizen Encounter* 199 (1999) (unpublished Ph.D. dissertation, Rutgers University)). In a survey of 49 of the Ohio and Maryland motorists who consented, "all but two said that they were afraid of what would happen to them if they did not consent." Nadler, 2002 Sup Ct Rev at 202 (citing Lichtenberg, *Voluntary Consent* at 251, 268). Their fears included "property damage to their car * * * being arrested, being beaten, or being killed." *Id*. All but one of the 49 believed that the police would have searched their vehicles even if they had denied consent. *Id.* at 203 (citing Lichtenberg, *Voluntary Consent* at 271–72).

A separate survey asked 406 respondents whether they would feel free to leave or to deny a police officer's request during a hypothetical encounter on a sidewalk or on a bus. Kessler, 99 J Crim L & Criminol at 69. Asked to indicate on a scale from one to five how free they felt—with one being "not free" and five being "completely free"—the average response was "below even the mid-point of the free-to-leave scale in the survey, meaning respondents did not even feel 'somewhat free to leave.'" *Id.* at 75. About half of the respondents

selected a one or two on the scale, and almost 80 percent selected three or less. *Id.*

A third study—in which experimenters dressed as university security officers and made requests of passersby—further confirmed a tendency to obey authority figures, and for similar reasons. Alisa M. Smith, Erik Dolgoff & Dana Stewart Speer, *Testing Judicial Assumptions of the Consensual Encounter: An Experimental Study*, 14 Fla Coastal L Rev 285, 300 (2013). The security officers asked the test subjects to, "Please come here, I'd like to speak with you," then asked for their names and identification, and then asked why they were on campus. *Id.* at 301. Although the methodology was such that the officer would only proceed to the second question if the subject had complied with the first, and so on, every one of the 83 subjects complied completely with every request. *Id.* at 303. Sixty percent of the subjects indicated that they had done so because of the inherent authority of the officers, and another 11 percent said they did so to avoid trouble. *Id.* at 320. Thus, the authors of the study concluded, "Even without physical restraint, force, or commands, reasonable people are constrained to comply with authority." *Id.*

Considering these surveys in concert with research on the psychology of obedience and perceptions of authority, it is clear that an officer's uniform and status would greatly impact a person's tendency to interpret requests as directives, to obey those perceived directives, and to remain for the duration of

the encounter despite a physical or legal "freedom to leave." In the specific context of a vehicle stop, the passengers inside that vehicle would likely be highly compliant and would be highly unlikely to feel free to exit the vehicle and leave the encounter.

D. Police wield even more coercive power in encounters with members of minority communities.

Although there is no allegation of racial impacts in this case, it is worth noting that any legal decision impacting police power tends to disproportionately impact minority communities. Ample data show that minorities, particularly African-Americans, are routinely targeted by law enforcement. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val U L Rev 243 (1991) (compiling data). Oregon's largest city is no exception to this trend: while only approximately 5.7 percent of the population of Portland is African-American, 13.2 percent of drivers stopped in 2015 by Portland Police Bureau Traffic and Patrol Divisions were African-American. Michele Tong, Dr. Loretta Capeheart & Greg Stewart, Portland Police Bureau, *Stops Data Collection: 2015 Annual Report*, at 8, 32 (2016), https://www.portlandoregon.gov/police/article/585269 (last accessed Jan 12, 2018).

In response to the assertion that an individual is free to disregard a police officer's requests, one author has noted:

> "This is what the law is supposed to be; black men, however, know that a different 'law' exists on the street. Black men know they are liable to be stopped at any time, and that when they question the authority of the police, the response from the cops is often swift and violent."

Maclin, 26 Val U L Rev at 253. The regular and increasingly-wide publicized news of police shootings and killings of unarmed, African-American people, reaffirm the reality that members of that community feel increased pressure to comply with officers' requests for fear of severe and potentially violent reprisal. *See id.* at 255 ("Black males learn at an early age that confrontations with the police should be avoided; black teenagers are advised never to challenge a police officer, *even when the officer is wrong*." (Emphasis added.)).

Research suggests that no citizen of any race would be unimpressed by the status of a law enforcement officer in situations such as roadside vehicle stops, where the officer is requesting the vehicle and its passengers to stop their transportation. It is important for this court to consider the coercive forces at play when police interact with vehicle passengers, and whether or not a person, seated within an automobile stopped by a police officer, could truly feel free to leave the encounter, refusing the officer's request to stop. But the court should also be mindful when crafting a legal rule that minority communities face even greater pressures in such police-citizen encounters. Thus, a rule aligning

Oregon's jurisprudence surrounding seizures of passengers with the federal rule would benefit those already subject to the disproportionate racial impacts of policing.

CONCLUSION

For the foregoing reasons, this court should find that, under Article I, section 9, of the Oregon Constitution, passengers of vehicles subject to police stops are seized as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,847 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 17, 2018, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on January 17, 2018, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system or via conventional e-mail service:

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