IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. ANTONIO MACIEL-FIGUEROA, Defendant-Appellant, Respondent on Review.	Polk County Circuit Court Case No. 11P3134 CA A148894 **S063651**

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

Review of the decision of the Court of Appeals on an appeal from a judgment of the Circuit Court for Polk County
Honorable Monte S. Campbell, Judge

Opinion Filed: August 26, 2015
Author of Opinion: Duncan, Presiding Judge
Concurring Judges: Haselton, Chief Judge, and Wollheim, Senior Judge
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INTRODUCTION

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School. A motion for OJRC to appear as *amicus curiae* is being submitted through a separate eFiling transaction this date.

Amicus curiae wishes to be heard by this court to ensure the preservation of the robust individual rights and liberties afforded by the Oregon Constitution. It is critically important to ensure the strength of those rights and liberties in the context of police stops. Stops are significant intrusions founded on the lowest legal standard of reasonable suspicion, and police disproportionately use them on racial and ethnic minorities. This court should reject the state's suggested expansion of the well-established reasonable suspicion standard.

ARGUMENT

In this case, the state argues that the Court of Appeals misapplied this court's Article I, section 9, jurisprudence regarding reasonable suspicion in a number of respects. For example, the state contends that the Court of Appeals required a greater degree of certainty than a simple "suspicion," and that it incorrectly excluded suspicion of crimes yet to occur. State's Opening Brief on the Merits (StBOM) at 22. Because these contentions involve a simple disagreement with the Court of Appeals' application of well-established law and read too much into the Court of Appeals' opinion, *amicus* does not address them. *Amicus* also does not address the state's argument, advanced for the first time in this court, that this court should create a general "witness-to-crime" exception to the warrant requirement. StBOM at 27-30.

Amicus writes only to address the state's repeated attempts to distinguish between reasonable suspicion of what it generically terms "criminal activity" as opposed to suspicion of "a specific criminal statute" or "a particular criminal offense." StBOM at 1-2, 11. In its first section, *amicus* explains that the simple standard applied by the United States Supreme Court and this court has always required reasonable suspicion of a particular crime. Laws must define crimes with sufficient specificity to give citizens fair notice of what conduct is prohibited and to guard against arbitrary enforcement. Accordingly, "criminal activity" can only mean conduct that the substantive criminal law prohibits. If

the "criminal activity" underlying the reasonable suspicion standard means something less concrete, then the reasonable suspicion standard would encompass generalized hunches of wrongdoing, inviting arbitrary enforcement and hindering judicial review. In its second section, *amicus* cautions against the creation of a broader, less defined reasonable suspicion standard for investigatory detentions, because doing so would exacerbate existing racial disparities in the use of police stops without a corresponding improvement in public safety.

I. Reasonable suspicion of "criminal activity" means suspicion of a crime or crimes.

In this federal system, the states have primary authority to define what constitutes a "crime" within their respective jurisdictions. *Bond v. United States*, __ US __, 134 S Ct 2077, 2083, 189 L Ed 2d 1 (2014) ("[O]ur constitutional structure leaves local criminal activity primarily to the States."). Whether defined by statute or common law, it is a "basic premise" of criminal law that "conduct is not criminal unless forbidden by law[.]" Wayne R. LaFave, 1 *Substantive Criminal Law* § 1.2 (2d ed).

This basic premise goes hand-in-hand with the void-for-vagueness doctrine, under which criminal statutes must be sufficiently specific to give citizens fair notice of what the statute prohibits and "to guard against the arbitrary deprivation of liberty interests." *Kolendar v. Lawson*, 461 US 352,

358, 103 S Ct 1855, 75 L Ed 2d 903 (1983). Criminal laws "must not permit policemen, prosecutors, and juries to conduct a standardless sweep to pursue their personal predilections." *City of Chicago v. Morales*, 527 US 41, 65, 119 S Ct 1849, 144 L Ed 2d 67 (1999) (O'Connor, J., concurring). In *Morales*, the Supreme Court struck down a city ordinance that required officers to order groups "loitering" with "no apparent purpose" with a criminal gang member to disperse and criminalized any failure to comply with the dispersal order. The Court held that the inherently subjective "no apparent purpose" standard did not give officers sufficient guidance in deciding whether to issue a dispersal order. *Id.* at 62.

Likewise, in *Kolendar*, the Supreme Court rejected a "stop and identify" statute that required stopped individuals to provide a "credible and reliable" form of identification. 461 US at 359. The Court found that the statute gave officers "virtually unrestrained power" because it did not establish any standards to determine whether the identification met the "credible and reliable" requirement. *Id.* at 360-61. The Court rejected the state's argument that the statute was necessary to strengthen law enforcement and curb crime: "As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.* at 361.

A related concern against arbitrary enforcement drives the Supreme Court's jurisprudence regarding Fourth Amendment reasonableness. The Court first approved investigatory detentions on a standard less than probable cause in 1968. *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). That case involved a plainclothes detective who had 30 years' experience patrolling downtown Cleveland for "shoplifters and pickpockets." *Id.* at 6. He became suspicious of two men "after observing their elaborately casual and oft-repeated reconnaissance of [a] store window" and suspected them of "'casing a job, a stick-up.'" *Id.* at 7.

The Court recognized that this type of on-the-street encounter involved "a sensitive area of police activity" that raised "difficult and troublesome issues" regarding the scope of permissible intrusion into the "inestimable right of personal security." *Id.* at 8-9. Referencing "police-community tensions" and racially-motivated policing, the Court acknowledged that an investigatory stop and frisk is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 12, 14, 17.

The Court set out general standards for assessing the reasonableness of investigatory stops under the Fourth Amendment, requiring an objective test undergirded by specific and articulable facts to allow for judicial review:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances * * *. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? * * * Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."

Id. at 22 (citations and footnotes omitted).

Following *Terry*, the Supreme Court repeatedly has emphasized that reasonable suspicion must be an objective standard that requires "something more than an inchoate and unparticularized suspicion or 'hunch.'" *See, e.g.*, *Navarette v. California*, ___ US ___, 134 S Ct 1683, 1687, 188 L Ed 2d 680 (2014); *United States v. Sokolow*, 490 US 1, 7, 109 S Ct 1581, 104 L Ed 2d 1 (1989) (articulable facts recognized by trained agent as being consistent with "drug courier profile" can be considered in support of reasonable suspicion). The Fourth Amendment standard of reasonableness cannot be met by the uncurbed "discretion of the official in the field." *Delaware v. Prouse*, 440 US 648, 661, 99 S Ct 1391, 59 L Ed 2d 660 (1979). The dissenting justice in *Sokolow* articulated the premise of reasonable suspicion as a limitation on biased policing:

> "By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race."

United States v. Sokolow, 490 US 1, 12, 109 S Ct 1581, 1588, 104 L Ed 2d 1 (1989) (Marshall, J., dissenting) (criticizing reliance on "profile" evidence).

The purpose of Article I, section 9, like the Fourth Amendment, is "to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013) (alterations omitted). Accordingly, this court has similarly judged investigative detentions against an objective standard and required the support of specific and articulable facts, eschewing stops based on instinct, inchoate suspicion, or hunches. *State v. Holdorf*, 355 Or 812, 822 n 4, 333 P3d 982 (2014) (citing *Terry* standard); *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993) (holding that statutory standard of reasonable suspicion requires "an objective test of observable facts"). In *State v. Valdez*, this court recognized that an objective standard is necessary to permit meaningful judicial review:

> "Such instinct and experience cannot, however, form the entire basis for 'reasonable suspicion,' because no practical control can be exercised over police by courts if, in the absence of any very remarkable activity, the officer's instinct and experience may be used as the sole reason to justify infringement upon the personal liberty sought to be protected by the statute."

277 Or 621, 628, 561 P2d 1006, 1010-11 (1977).

Even with its objective standard and requirement of specific and articulable facts, scholars have questioned whether the current reasonable suspicion standard is effective at curbing police abuse of discretion. *See, e.g.*, Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 Colum L Rev 1751, 1754 (1994) (arguing that, because of increasingly public lives, the reasonableness of police actions should be judged based on the extent to which the actions promote "reciprocal government-citizen trust"). The difficulty in distinguishing between subjective and objective factors leads to a corresponding risk that police will rely on stereotypes and prejudice. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind LJ 659 (1994) (discussing the racial disparity caused by "location plus evasion" cases where courts found that the combination of being in a high crime area and avoiding police constituted reasonable suspicion).

The state uses "particular criminal offense," "specific criminal statute," and similar phrases ten times in its effort to distinguish the allegedly higher standard of suspicion the Court of Appeals required from the more generic suspicion of "criminal activity" that the state views as the correct standard. StBOM at 1, 3, 4, 7, 11 19, 22, 30. Setting aside the unremarkable contentions that officers need not "confirm" that a crime has occurred to have reasonable

suspicion, and that "afoot" may include a temporal component reaching imminent crimes, the state's distinction is without merit. The state cites no case suggesting, much less holding, that "criminal activity" in the phrase "criminal activity is afoot" means something other than conduct that violates a particular criminal statute. *See Sokolow*, 490 US at 12 (Marshall, J., dissenting) ("It is not enough to suspect that an individual has committed crimes in the past, harbors unconsummated criminal designs, or has the propensity to commit crimes. On the contrary, before detaining an individual, law enforcement officers must reasonably suspect that he is engaged in, or poised to commit, a criminal act at that moment.").

This court's reasonable suspicion cases have invariably required reasonable suspicion of a particular crime or crimes. In *Holdorf*, the court held that the facts "gave rise to a reasonable inference that defendant committed the crime of possession of methamphetamine." 355 Or at 829. In *Ehly*, the court held that the officer had "an objectively reasonable suspicion that [the] defendant had committed the crime of felon in possession of a firearm." 317 Or at 81. In *State v. Jacobus*, 318 Or 234, 241, 864 P2d 861 (1993), the court held that the officer reasonably suspected the defendant of having conspired or attempted to commit robbery or theft. *See also State v. Watson*, 353 Or 768, 785, 353 Or 768 (2013) (finding reasonable suspicion of "criminal activity" after officer detected odor of marijuana in the defendant's car); *State v. Hall*,

339 Or 7, 17, 115 P3d 908 (2005) (accepting state's concession that police observations of the defendant did not "give rise to a reasonable suspicion that defendant was engaged in any criminal conduct"); *State v. Belt*, 325 Or 6, 13, 932 P2d 1177 (1997) (holding that officer had an objectively reasonably suspicion that the defendant committed the crime of soliciting prostitution).

Nor does the state propose an alternative definition of "criminal activity" other than the commission of the elements of a crime. Given the basic premise of criminal law that conduct is not a crime unless it is proscribed by a clearly defined law, "criminal activity" can have no other workable definition. To illustrate, suppose that an officer observes an individual breaking into a home at night. Under most circumstances, the officer would have reasonable suspicion that the individual was committing the crime of burglary. But that is because the officer would *reasonably suspect*, based on the circumstances of breaking in, that the individual is not the homeowner. Although innocent explanations might exist—that the putative burglar simply lost her keys, for example—the officer's suspicion of burglary would be reasonable, even without first investigating the home's ownership. By contrast, if the officer saw an individual walking through the unlocked front door of a home in daylight, it would be unreasonable to suspect a trespass or burglary on those facts alone, even though the person might not actually have license to enter. Lack of

suspicion that the defendant's conduct meets *all* of the element of a crime should defeat the reasonable suspicion.

The state's proposed standard offers none of the protections against arbitrary enforcement that this court and the Supreme Court deem critical to assessing reasonableness under the constitution. In the context of other warrant exceptions, this court has noted a preference for "bright line" rules that provide police with clear guidelines. *State v. Kurokawa-Lasiak*, 351 Or 179, 187, 189, 263 P3d 336 (2011). A standard for "criminal activity" that is not strictly tied to the substantive criminal law would make the reasonable suspicion standard wholly subjective. Each officer may reach a different conclusion about what type of "activity" is sufficiently related to a crime to qualify as "criminal." The state contends that "[p]eace officers should not be expected to be legal experts or to use a multifactor balancing test to assess whether reasonable suspicion exists to initiate an investigatory detention." StBOM at 14. But though they need not be "experts," police officers must nonetheless understand what conduct constitutes a crime if they are to effectively enforce the criminal laws. *Cf. Heien v. North Carolina*, ___ US ___, 135 S Ct 530, 536, 190 L Ed 2d 475 (2014) (investigatory stop can rest on a *reasonable* mistake of law).

Here, the Court of Appeals simply concluded that Officer Moffitt did not *reasonably suspect* that defendant committed the elements of any crime. That

conclusion was a straightforward application of the well-established reasonable suspicion standard.

II. Police authority to forcibly stop a suspect must be anchored to objective criteria to prevent its misuse.

Amicus urges this court to reject a reasonable suspicion standard that is not clearly bound to the substantive criminal law. Police already have broad authority to initiate investigatory detentions, and all available evidence indicates that police have used that authority disproportionately against minorities, exacerbating existing social and economic disadvantages. Although the state emphasizes that investigatory detentions are "essential to effective law enforcement," disparity in their use erodes public safety by damaging police-citizen relationships. Injecting ambiguity and subjectivity into the reasonable suspicion standard would aggravate the existing imbalance and multiply those negative results.

A. Police use investigatory stops disproportionately against minorities, exacerbating existing social and economic disadvantages.

Studies show that police use their authority to stop and detain individuals disproportionately against racial minorities. One of the most powerful examples is from New York City, where black and Latino residents made up only 52 percent of the city's population, but were almost 90 percent of the people stopped under the police "stop and frisk" policy between 2004 and 2012. *Floyd v. City of New York*, 959 F Supp 2d 540, 558-59 (SDNY 2013). By

contrast, whites made up more than a third of the population, but were involved in only 10 percent of the stops. *Id.* Racial disparities in police stops exist at home, too. Data for 2014 shows that black drivers and pedestrians made up 17 percent of the Portland Police Bureau's patrol stops for the year, although they represented under 6 percent of the city's population. *Id.* at 22, 28. Portland Police Bureau Strategic Services Division, *Stops Data Collection, 2014 Annual Report*, 3, 22, 28 (Nov. 10, 2015) ("*Stops Data 2014*").[1]

A 2007 British analysis likewise concluded that police stop authority disproportionately impacted black communities, even after controlling for certain variables: "[B]eing black increases the likelihood that a person will be stopped regardless of the demographic and lifestyle variables that make them 'available' to be stopped." Ben Bowling & Coretta Phillips, *Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search*, 70 Mod L Rev 936, 947-48 (2007). The authors noted that the stops were supposed to be "an investigative power used for the purposes of crime detection or prevention in relation to an individual suspected of a specific crime at a specific time," but that in practice, the power was used more broadly to "gain intelligence" on certain known groups and as a tool of "social control." *Id.* at 937. Thus, while the premise of reasonable suspicion accepts the risk that

[1] Available at http://www.portlandoregon.gov/police/article/552180.

police will necessarily stop innocent people, in practice, police stop more innocent minorities than innocent white people.

Moreover, reasonable suspicion stops provide police an opportunity to conduct additional intrusive actions, including requests for consent to search. *Jacobus*, 318 Or at 243-44 (approving of consent search following reasonable suspicion stop). As this court has recognized, some people "feel obliged to cooperate" with police officers, even without any show of authority or use of force. *State v. Backstrand*, 354 Or 392, 402, 313 P3d 1084 (2013) (quoting American Law Institute, *A Model Code of Pre–Arraignment Procedure* § 110.1, 258 (1975)); *State v. Bates*, 304 Or 519, 524, 747 P2d 992 (1987) (permitting search for officer safety during lawful detention). More than half of the searches conducted by the Portland Police Bureau are consent searches. Sgt. Greg Stewart & Emily Covelli M.S., *Stops Data Collection, The Portland Police Bureau's Response to the Criminal Justice Policy and Research Institute's Recommendations*, at 16 n 5 (Feb 13, 2014) ("*Stops Data, PPB Response*").

Unsurprisingly, the incidence of consent searches is not race-neutral. In 2014, black drivers stopped by patrol officers in Portland were twice as likely as white drivers to be to be subject to a consent search. *Stops Data 2014*, at 26. Cultural influences may lead black citizens to grant consent at a higher rate in order to avoid conflict. Tracey Maclin, *"Black and Blue Encounters" Some*

Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val U L Rev 243, 255 (1991) ("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.").

In *United States v. Washington*, the Ninth Circuit Court of Appeals considered "relations between police and the African-American community in Portland" in its determination that the defendant's consent search his car was involuntary. 490 F3d 765, 768-69 (9th Cir 2007). Specifically, the court noted two recent police shootings of black citizens by white Portland police officers during traffic stops. Following the shootings, the police distributed pamphlets advising the public to "follow the officer's directions" when stopped and to "comply with the procedures for a search." *Id.* Although the officers were not threatening, those facts contributed to the conclusion that consent was not voluntary: "Given that it was late at night on a dark street, that Washington had been led away from his car and seized by two police officers, and the tension between the African–American community and police officers in Portland in light of the prior shootings above-mentioned, we have no confidence that Washington's assent to the car search was voluntary under the total circumstances." *Id.* at 776.

Arrest rates are also higher for blacks. A recent Multnomah County report found that "[o]verall, [b]lacks are 4.2 times more likely to be referred to

the DA and they are less likely to receive a cite in lieu of arrest." Jennifer Ferguson, Ph.D., *Racial and Ethnic Disparities and the Relative Rate Index (RRI)*, 7 (2015) ("*RED Report*").[2] In 2014, USA Today reported that "[b]lacks are more likely than others to be arrested in almost every city for almost every type of crime. Nationwide, black people are arrested at higher rates for crimes as serious as murder and assault, and as minor as loitering and marijuana possession." Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'* (Nov. 19, 2014).[3] The disparity in drug arrests is stark: "In 2005, African Americans represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense." Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 Hum Rts 14 (2010); *see also* Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility* (Sep 30, 2014) (noting that whites were about 45 percent more likely than blacks to sell drugs in 1980 and about 32 percent more likely in 2012).[4]

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[2] Available at http://media.oregonlive.com/portland_impact/other/RRI%20Report%20Final-1.pdf

[3] Available at http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/

[4] Available at http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell

The racial imbalance in policing is one aspect of a system that creates a feedback loop of social disadvantage for minority communities: "The problem of racial disparity is one which builds at each stage of the criminal justice continuum from arrest through parole, rather than the result of the actions at any single stage." The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System, A Manual for Practitioners and Policymakers,* 2 (2008) ("*Reducing Racial Disparity*"). At the initial level, minority communities often live in low-income neighborhoods where citizens spend more time in public and are therefore more available for police intervention. *Id.* at 5. And because police stop minorities more often, they have a higher probability of being arrested, convicted, incarcerated, and having a criminal record. *See, e.g.*, US Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing,* at 134 (2004) (noting the "relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods," which places blacks at "a higher risk of conviction for a drug trafficking crime than * * * similar [w]hite drug traffickers").

The obstacles posed by having a criminal record and a history of incarceration, in turn, hardly need elaboration. Those individuals have fewer housing options and fewer economic opportunities, both for themselves and for their children, compounding the likelihood that racial minorities will continue

to live in disadvantaged neighborhoods where they have a risk of being stopped. And so the problem not only persists, but multiplies:

> "Once we have ensured that a higher proportion of people in certain areas of the county has a criminal history, we have helped to justify more intensive or even more aggressive policing of those areas. When a person by dint of being black is more likely to have a criminal history and more likely to associate with others with criminal records, we have naturally increased his or her risk score in reoffending prediction measures."

Lane Borg & Bobbin Singh, *The RED Report*, Multnomah Lawyer, 1 (April 2016); *see also* Bowling, 70 Mod L Rev at 953 (noting that these "structural disadvantage[s] point to the impact of stop and search as a force that is likely to compound and exacerbate disadvantage in other areas of social life").

It makes sense, then, that minorities are overrepresented in all aspects of the criminal justice system. *See* Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, Slate.com, Aug 9, 2015 (graphing national racial disparities in eight criminal justice categories, including rates of car searches, drug arrests, detention following arraignment, plea offers including prison, sentences, and probation revocation).[5] Likewise, Multnomah County's recent RED Report revealed local disparities at all levels. The comprehensive report found not only that blacks are four times more likely than

[5] Available at http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html.

whites to be arrested and have their cases prosecuted, but seven times more likely to be sentenced to prison. According to the report, a black person living in Multnomah County is:

- 320% more likely to be charged with a crime than a white person;
- 310% more likely to have his or her case accepted for prosecution;
- 29% less likely to have his or her case diverted;
- 500% more likely to serve time in jail;
- 600% more likely to be sentenced to prison; and
- 650% more likely to get a parole violation.

Similarly, an internal audit of Multnomah County jails found that employees used force disproportionately against black inmates.[6] Moreover, the county may not be on a trajectory for positive change. The current RED report shows even greater racial imbalance than existed in the late 1990s. Nick Budnick, *County Officials Say Jail Disparities Report Needs Action*, The Portland Tribune (Mar 8, 2016).[7]

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[6] The report was published by various news agencies and is available at https://s3.amazonaws.com/wapopartners.com/wweek-wp/wp-content/uploads/2016/02/19175117/jailuseofforce.pdf

[7] Available at http://portlandtribune.com/pt/9-news/296845-173421-county-officials-say-jail-disparities-report-needs-action.

The devastating impact of investigatory stops fully warrants this court's caution when considering any argument that the legal standard underlying those stops should be relaxed.

B. Unconscious racial bias plays a significant role in policing.

Racial disproportionality is a problem both insidious and difficult to solve because it derives not only from conscious prejudice, but also from implicit bias. *See, e.g.*, Jacinta M. Gau & Rod K. Brunson, *"One Question Before You Get Gone . . .": Consent Search Requests as a Threat to Perceived Stop Legitimacy*, 2 Race & Just 250, 254 (2012) ("[A]n officer can act in a biased manner without even being aware that she or he is stereotyping a citizen[.]"). Stereotypes are "cognitive shortcuts" that help human brains to unconsciously "disambiguate inherently ambiguous information, such as the behaviors and characteristics of other people to whom we have had limited exposure." Charles Crawford & Jack Glaser, *Drivers of Racial Disproportion in Police Stops and Searches* 9, 10 (Aug 10-11, 2011) ("*Drivers of Racial Disproportion*").[8]

Negative racial stereotypes linking black individuals to crime and violence are widespread, and even those who repudiate racism can be subject to

[8] Prepared for the UK-US Roundtable on Racial Disparities in Police-initiated Stops in the UK and US, available at http://www.jjay.cuny.edu/centers/race_crime_justice/1935.php

their influence. *Id*. at 11 ("One of the consistent findings is a strong, longstanding stereotype associating Blacks with crime and aggression."). "Merely thinking about [African-Americans] can lead people to evaluate ambiguous behavior as aggressive, to miscategorize harmless objects as weapons, or to shoot quickly, and, at times, inappropriately." Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J Personality & Soc Psychol 876, 876 (2004).

Social science research has proved the effects of this unconscious bias. One study found that children judged behavior by black perpetrators as more menacing and threatening than identical behavior by whites. Crawford & Glaser, *Drivers of Racial Disproportion* at 10. Another study demonstrated a link between viewing black faces and the speed with which an individual will conclude that an unclear image of an object is actually a weapon. In that study, participants were shown an unclear image of a weapon that became clearer over time. Eberhardt, et al., 87 J Personality & Soc Psychol at 879-80. After being "primed" by viewing faces of black individuals, participants concluded that the image was a weapon much more quickly than they did after viewing white faces, identifying the object as a weapon even while it remained very distorted. *Id.* at 879-80. Priming the participants with white faces actually had the opposite effect—in that circumstance, the participants waited significantly

longer to identify the image as a weapon—even longer than when they had not been "primed" at all. *Id.*[9]

Stereotypes play an important role in police work because officers must quickly interpret and act upon ambiguous information in a high-stress environment. Crawford & Glaser, *Drivers of Racial Disproportion* at 13. "When assessing the suspiciousness of a suspect, the belief that that person belongs to a group that is more likely to engage in crime is bound to influence that judgment." *Id.* Especially in the context of low-suspicion investigatory stops, racial stereotypes will undoubtedly impact an officer's perception of the citizen's dangerousness or suspiciousness, leading to more stops, more prevalent requests for consent to search, more patdowns, and escalating adversarial encounters. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 Basic & Applied Soc Psychol 193, 193-199 (2006); *see generally* Michelle Alexander, *The New Jim Crow: Mass Incarceration In the Age of Colorblindness* (2010).

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[9] The negative stereotypes have real-world implications beyond law enforcement: "Black applicants with no criminal record had about half the rate of success as White applicants with identical qualifications but comparable success on the job market to White applicants who did have a criminal record." Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 Geo Mason U Civ Rts LJ 1, 2 (2015).

The Portland Police Bureau has admitted that "racism can play an important role" in disparate use of detention authority, along with other factors such as the "differential exposure to law enforcement." *Stops Data*, *PPB Response*, at 4-5. Indeed, examples abound of everyday racial prejudice and stereotyping constituting an accepted part of even well-intentioned police and law enforcement work. A Washington County Assistant District Attorney recently opined that racial profiling in law enforcement is "common sense." Samantha Swindler, Editorial, *The Problem with Stereotypes and Facebook Posts*, The Oregonian, Mar 11, 2016. This off-the-cuff remark, by a well-respected and apparently evenhanded prosecuting attorney, provides a troubling echo of the state's argument that reasonable suspicion simply depends on "a common-sense conclusion about human behavior." StBOM at 10.[10]

C. Anchoring police investigations to well-defined, objective criteria will better serve public safety than a broad, subjective rule.

Police effectiveness is "largely dependent on the degree to which the public respects law enforcement." Nancy La Vigne et al., *Key Issues in the*

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[10] Of course, overt racism continues to play a role as well. *See*, *e.g.*, Catherine E. Sholchet and Artemis Moshtaghlan, *Oregon Officers Turn in Police Chief, Allege Racism*, CNN.com, Sep. 9, 2015 (reporting that Clatskanie's police chief retired after complaints that he "compared African-Americans to monkeys, made monkey sounds and sang 'Dixie' while being debriefed on the arrest of a woman who had said she was discriminated against"), available at http://www.cnn.com/2015/09/08/us/oregon-clatskanie-police-chief-racism-allegations/.

Police Use of Pedestrian Stops and Searches, Discussion Papers from an Urban Institute Roundtable 6 (Aug 2012). In turn, public respect for law enforcement is closely linked to procedural justice, the "fair, equitable, rational treatment of civilians by officers." Gau & Brunson, 2 Race & Just at 255. Empirical research demonstrates that people are more satisfied with police encounters—regardless of the outcome—when they perceive the police to exercise authority fairly. Stephen J. Schulhofer et al., *American Policing at A Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J Crim L & Criminology 335, 346 (2011). "Race-based inequality * * * compromises public trust in the police institution." *Id.* "Pervasive, ongoing suspicious inquiry sends the unmistakable message that the targets of this inquiry look like criminals: they are second-class citizens." Charles Epp & Steven Maynard-Moody, *Driving While Black*, Washington Monthly, Jan/ Feb 2014.[11]

The state's argument that reasonable suspicion stops are an essential tool for effective law enforcement ignores that stops must be used in professional and predictable—that is, race-neutral—manner to preserve the legitimacy necessary for effective policing. "[S]ince the police are the gatekeepers to the

[11] Available at http://www.washingtonmonthly.com/magazine/January_february_2014/ten_miles_square/driving_while_black048283.php?page=all

criminal justice system, fundamental mistrust and suspicion of police destroys the partnership between law enforcement and the community at the most direct contact point between the public and the system." *Reducing Racial Disparity* at 3. The state has not demonstrated that a broader standard for the already-low requirement of reasonable suspicion will improve public safety by thwarting crime to any measurable degree. Indeed, "intensive law enforcement and a readiness to arrest for low-level offenses is far more likely to arouse resentment, weaken police legitimacy, and undermine voluntary compliance with the law." Schulhofer et al., 101 J Crim L & Criminology at 351. By contrast, adhering to an objective standard that is defined by the criminal laws will increase the perceived legitimacy of police, engendering the public trust that is necessary for effective policing.

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CONCLUSION

For the foregoing reasons, the Oregon Justice Resource Center supports respondent and requests that the court affirm the decision of the Court of Appeals.

Respectfully submitted,

OREGON JUSTICE RESOURCE CENTER

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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 5,600 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).

/s Elizabeth G. Daily
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CERTIFICATE OF FILING AND SERVICE

I certify that on April 4, 2016, 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 April 4, 2016, 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:

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