To be argued by
DAVID L. GOODWIN
(20 minutes)

Court of Appeals

STATE OF NEW YORK,

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against –

LANCE RODRIGUEZ,

Defendant- Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This brief is submitted in reply to certain arguments made in Respondent's brief. Appellant's time to reply has been extended to June 24, 2022.

As to those arguments not requiring rejoinder, appellant rests on his opening brief.

ARGUMENT

NEITHER THE "MIXED QUESTION" DOCTRINE NOR THE SUPPOSED DIFFERENCES BETWEEN CARS AND BICYCLES IDENTIFIED BY THE PEOPLE UNDERMINE THE CONCLUSION THAT THE POLICE STOP IN THIS CASE WAS AN ILLEGAL SEIZURE, BECAUSE BICYCLE STOPS ARE CONSTITUTIONALLY ANALOGOUS TO CAR STOPS AND THE RECORD OTHERWISE COMPELS THE FINDING THAT THIS BICYCLE STOP WAS A SEIZURE.

Because being pulled over by the police is an intrusive, coercive, and stressful encounter that demands submission to authority while restricting freedom of movement, police stops of moving vehicles are constitutional *seizures* under state and federal law. *See People v. Hinshaw*, 35 N.Y.3d 427, 430 (2020); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Evaluated under *De Bour* Level 3, seizures are lawful only if police possess at least reasonable suspicion of criminal activity. *See People v. De Bour*, 40 N.Y.2d 210, 223 (1976); *Prouse*, 440 U.S. at 657.

At the center of this appeal is an undisputed fact: the police pulled over defendant-appellant Lance Rodriguez on a public street one night in Queens. Had he been driving a car, there could be no dispute that he was seized. But instead, Mr. Rodriguez was a bicyclist—a distinction which, the lower courts believed, rendered him a *pedestrian*, and the stop not a seizure, under state and federal constitutional law.

This was incorrect. As Mr. Rodriguez argued in his main brief, the vehicle-stop doctrine, which reaches cars, motorcycles, scooters, and

other vehicles, applies with equal force to stops of moving bicycles. Bicycle stops feature the same elements that make vehicle stops *per se* seizures: a moving vehicle, a show of police authority, enforced submission to that authority, and restraint on freedom of movement. *See Prouse*, 440 U.S. at 657; *People v. Ingle*, 36 N.Y.2d 413, 418 (1975). By extension, stops of bicycles should receive the same constitutional treatment as stops of other vehicles—constitutional parity that has been recognized by other jurisdictions, is bolstered by laws that grant bicyclists and drivers the same rights and responsibilities on the road, and reflects sound public policy. A rule treating bicyclists as pedestrians, by contrast, would relegate bicyclists to second-class citizenship on public roadways, endangering the constitutional rights of those New Yorkers who rely on bicycles as a primary mode of transportation—a burden that would fall especially hard on New Yorkers from low-income and marginalized communities.

For these reasons, Mr. Rodriguez urged this Court to recognize that bicycle stops are *De Bour* Level 3 constitutional seizures and to reject the contrary rule embraced by the Appellate Division and the People (Appellant's Br. at 28–42). He also argued, in the alternative, that even if the stop were evaluated under the totality-of-the-circumstances test used outside of vehicle-stop cases, the record compels the conclusion that what happened here was a constitutional seizure (Appellant's Br. at 42–49). And as a seizure, the stop was illegal, because the police

did not possess the articulable reasonable suspicion of criminality needed to pull Mr. Rodriguez over (Appellant's Br. at 49–58); indeed, the People never claimed otherwise (Appellant's Br. at 49).

The People now respond by arguing that this stop was not a seizure, focusing chiefly on the differences between cars and bicycles. In particular, the People contend that bicyclists are exposed to the public, and so have a diminished expectation of privacy and less protection against suspicionless stops. The People also assert that bicycles, being slower than cars, require less effort to pull over. In the alternative, the People maintain that the stop was not a seizure under a totality-of-the-circumstances analysis. They argue, too, that the Court's review of these issues is circumscribed by the "mixed question of law and fact" doctrine.

As explained below, the Court should reject the People's arguments and hold, upon *de novo* review, that the stop of Mr. Rodriguez was a *De Bour* Level 3 constitutional seizure requiring reasonable suspicion. And because the People failed to preserve the argument that the stop was supported by reasonable suspicion at Level 3, and now affirmatively disclaim "that the police possessed reasonable suspicion sufficient to effect a seizure" of Mr. Rodriguez (People's Br. at 34), the Court should grant the motion to suppress and dismiss the indictment.

A. *De novo* review is appropriate because the legal standard governing a police encounter is not a mixed question of law and fact.

The People claim that the issues on appeal are "beyond . . . further review," because whether this bicycle stop was a *De Bour* Level 3 or Level 2 encounter is a "mixed question of law and fact" (People's Br. at 7, 18, 20–21). The People are wrong about the scope of this Court's review.

The "mixed question" doctrine limits this Court's review to deciding if "there is legally sufficient record support for the determinations of the courts below." *People v. Stroud*, ___ N.Y.3d ____, 2022 N.Y. Slip Op. 03862, at *1 (June 14, 2022). However, it is triggered only when the legal standard to be applied by this Court is the same standard deployed below. *See People v. Garcia*, 20 N.Y.3d 317, 324 (2012) (adopting mixed question standard of review where Appellate Division had applied the *De Bour* standard that, this Court determined, *correctly* governed the police encounter). For instance, mixed-question deference applies when an appeal asks if police conduct "conform[ed]" to a particular *De Bour* level. *People v. Barksdale*, 26 N.Y.3d 139, 143 (2015).

The People implicitly concede that if the lower courts fail to use "the appropriate legal standard" (People's Br. at 7), as Mr. Rodriguez argues here, mixed-question review does not apply. When this happens, there is no prior "determination" to which this Court owes deference, and the application of the incorrect standard instead presents a re-

viewable "issue of law" addressed *de novo*. *See People v. Borges*, 69 N.Y.2d 1031, 1033 (1987); *People v. Morales*, 65 N.Y.2d 997, 998 (1985) (lower court "determination [that] rests upon an erroneous legal standard . . . present[s] a question of law within this court's power of review"). This Court thus frequently decides where specific police conduct falls under the four-step *De Bour* test—as, of course, the Court did in *De Bour* itself. *See, e.g.*, *People v. Hill*, 33 N.Y.3d 990, 992 (2019) (encounter rose to *De Bour* Level 2 or 3 from *De Bour* Level 1); *People v. Moore*, 6 N.Y.3d 496, 498–99 (2006) (stop was *De Bour* Level 3, not Level 2); *People v. Spencer*, 84 N.Y.2d 749, 751 (1995) (same); *De Bour*, 40 N.Y.2d at 223.

Here, the lower courts' "determination" of *De Bour* was based on the incorrect conclusion that a moving bicyclist was constitutionally identical to a pedestrian. The Appellate Division both erroneously ruled that "police encounters with bicyclists [use] the *De Bour* analysis applicable to pedestrians" rather than the reasonable suspicion required for car stops and then omitted from its "totality" analysis that Mr. Rodriguez was stopped while riding a moving bicycle (A4). There is thus no lower-court "determination" to which this Court must defer.

Mixed-question review also is not triggered because the parties agree on the facts to which the correct legal standard must be applied. *People v. Oden*, 36 N.Y.2d 382, 384 (1975) (no mixed question issue when "the facts and circumstances are undisputed"). While the People

partially misread one part of the record (*see* note 6 in subsection C, below), there is no debate that the officer's credited testimony presents the framework for evaluating a constitutional seizure.

Neither of the cases upon which the People rely—*People v Perez*, 31 N.Y.3d 964 (2018), and *People v. Francois*, 14 N.Y.3d 732 (2010) (People's Br. at 7, 21)—holds otherwise, because the lower courts in each had "applied the appropriate legal standard" (People's Br. at 7). *Perez* involved the Appellate Division's determination that police conduct "conformed to" the "applicable" *De Bour* "level of intrusion"—not a legal question about which level governed the encounter, as here. *Perez*, 31 N.Y.3d at 966. *Francois*, meanwhile, is a one-sentence memorandum decision that addressed only whether certain conduct by an officer "elevate[d]" an encounter from one level to the next—not whether an encounter was a certain level from its inception. *Francois*, 14 N.Y.3d at 733.

In sum, this appeal concerns whether the lower courts failed to apply the correct legal standard under *De Bour*. It therefore presents this Court with a reviewable question of law that does not implicate the mixed-question doctrine.

B. Constitutional doctrine, case law, state laws and regulations, and public policy all support treating bicycle stops like car stops.

While the People agree that car stops are treated as presumptive constitutional seizures (People's Br. at 36–37), the People's chief contention is that bicycles simply are not like cars. As "courts have refused to adopt per se rules" outside of "automobile stops," the People argue, this Court should "reject[]" the "bright-line rule" that a bicycle stop requires reasonable suspicion (People's Br. at 37–38).[1] The People also dispute that case law, the Vehicle and Traffic Law, and public policy all support treating bicycles like cars for constitutional purposes (People's Br. at 35–55).

The People's constitutional argument rests on two main grounds. Neither is persuasive.

First, the People assert that, unlike cars with "enclosed passenger compartment[s]," bicycles "expose" their riders "to public view" (People's Br. at 9, 19). So like pedestrians, bicyclists have "virtually no expecta-

[1] Echoing the Appellate Division's holding that police-bicyclist "encounters" are assessed at Level 2 of *De Bour* (A4), the People assert that treating bicycle stops like car stops would mean equating a "police-bicyclist *encounter*" with "a police stop of moving vehicles" (People's Br. at 35) (emphasis added). But as the People acknowledge, plenty of police encounters with motorists, such as an inquiry of someone seated in a parked car, are not constitutional stops requiring reasonable suspicion (People's Br. at 44 n.8). In the same vein, applying the car-stop rule to bicyclists would not affect police-bicyclist encounters that fall short of being stops.

tion of privacy" (People's Br. at 40). To the People, this diminished privacy interest alters the Fourth Amendment calculus—which balances the individual expectation of privacy against "the governmental interest in investigating and preventing crime"—and favors equating bicyclists with pedestrians (People's Br. at 8; *see also* People's Br. at 39 ("[T]he greater the intrusion of individual privacy rights, the greater justification required by the police.")).

This focus on the privacy of an enclosed passenger compartment does not stand up to scrutiny, as a reasonable expectation of privacy generally governs standing to contest *searches*, not *seizures*—and this case involves an unlawful seizure. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It is well established, for instance, that a passenger in a car can challenge an illegal police stop even without an expectation of privacy in the car itself. *See Brendlin v. California*, 551 U.S. 249, 263 (2007); *People v. Millan*, 69 N.Y.2d 514, 520 n.6 (1987) ("The People's arguments that defendant had no standing to challenge the search of the [taxi] cab have no bearing on defendant's right to contest the stop."); *People v. Gittens*, 110 A.D.2d 908, 908 (2d Dept. 1985) (although "a thief driving a stolen car lacks standing to challenge a search of the vehicle," the thief can nevertheless "challenge a search of the car as the fruit of an illegal arrest"). And if passengers can challenge unlawful stops despite "no reasonable expectation of privacy in the interior of the vehicle in which they are riding," *United States v.*

Mosley, 454 F.3d 249, 252–53 (3d Cir. 2006), a bicyclist's protection against unlawful stops cannot depend on a lack of privacy from an enclosed passenger compartment, as the People incorrectly contend.

Further refuting the People's enclosed-compartment argument is the fact that courts treat stops of "exposed" motor vehicles the same as any other vehicle stop. Convertibles, motorcycles, and scooters all enjoy the same constitutional protections as "traditional" motor vehicles, despite exposing their drivers to public scrutiny. *See, e.g.*, *United States v. Hensley*, 469 U.S. 221, 223–24, 226 (1985) (applying vehicle-stop doctrine to a "white Cadillac convertible"); *People v. Lewis*, 195 A.D.2d 523, 523 (2d Dept. 1993) (a "1989 white BMW, with its top down"); *People v. Herrar*, 120 A.D.2d 614, 614 (2d Dept. 1986) (motorcycle); *United States v. Gunnell*, 775 F.3d 1079, 1082 (8th Cir. 2015) (equating cars and motorcycles); *Weekly v. State*, 105 N.E.3d 1133, 1137 (Ind. Ct. App. 2018) (motorized scooter). This would not be so if passenger-compartment privacy were the basis of the car-stop rule.

Instead, as explained in Mr. Rodriguez's main brief (Appellant's Br. at 25–26), the cornerstone cases premise the vehicle-stop doctrine on interference with freedom of movement and the reality of the stress, anxiety, and intrusiveness of being diverted and detained pursuant to a show of authority—not on intrusion into the enclosed passenger compartment. *See Brendlin*, 551 U.S. at 257 (addressing police activity that "divert[s]" a car "from the stream of traffic to the side of the road");

Prouse, 440 U.S. at 657 (interference with freedom of movement, inconvenience, creation of substantial anxiety, and consumption of time)[2]; *Spencer*, 84 N.Y.2d at 752 (stopping progress); *Ingle*, 36 N.Y.2d at 418 (a stopped motorist is "accosted" and "restrained" by officers). Privacy in these cases meant the right to be left alone, not the literal privacy of not being observed.

In short, case law simply does not support the idea that an enclosed passenger compartment alters the appropriate constitutional test. Public exposure means only that police might have a better opportunity to gather the information needed for a lawful stop. It does not relieve officers of their responsibility to have reasonable suspicion of criminality, just as police must have reasonable suspicion to stop a motorcycle or any other vehicle that exposes its rider or driver to public scrutiny.

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[2] The People cite *Prouse*'s comment about the "greater sense of security" and privacy in an automobile over more-exposed pedestrian or "other modes of travel" (People's Br. at 40). In context, this language does not suggest that other, unidentified modes of travel deserve less Fourth Amendment protection, or that such privacy concerns are paramount in the applicability of car-stop principles. The Court was rejecting an argument that state regulation (*i.e.*, traffic laws) should permit suspicionless stops of vehicles for license and registration checks—the question actually posed in that appeal—while observing that much as "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks" as pedestrians, they are also not "shorn of those interests" when driving. *See Prouse*, 440 U.S. at 650, 662–63.

Second, the People maintain that because bicycles travel at a "much lower speed" than motor vehicles, bicycle stops are "less restrictive" of movement than equivalent car stops (People's Br. at 9, 39). The People also note that stops of cars "routinely carry much stronger indicia of a seizure, including flashing lights and sirens" (People's Br. at 19), which "few motorists" would ignore (People's Br. at 37).

While cars are faster than bicycles, the speed difference is not as great as the People think, with bicycle commuters in New York City achieving average speeds of 13.5 miles per hour. Agnes Mazur, "Here's what bike commuting looks like in 12 major cities," Vox, Oct. 8, 2015, https://www.vox.com/2015/10/8/9480951/bike-commute-data-strava; *see also* Diane C. Thompson et al., "Bike speed measurements in a recreational population: validity of self reported speed," 3 Injury Prevention 43, 43–44 (1997), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1067763/ (observing an average bicyclist speed of 10 miles per hour). More to the point, the average bicyclist is much faster than a comparable *pedestrian*. *See* Boyce Rensberger, "Pace of City Life Found 2.8 Feet per Second Faster," N.Y. Times, Feb. 29, 1976, *available at* https://www.nytimes.com/1976/02/29/archives/pace-of-city-life-found-28-feet-per-second-faster.html (observing a pedestrian walking speed of 5.5 feet per second at the high end, or about 3.75 miles per hour) (last visited June 22, 2022). If "stopping the progress of an automobile is more intrusive than the minimal intrusion involved in stopping a pedestrian,"

People v. John BB, 56 N.Y.2d 482, 487 (1982), then stopping a bicycle *also* takes more effort than stopping a pedestrian, and requires a greater interference with momentum and direction.[3]

And just as stops of vehicles open to public view still amount to seizures, so too do car stops without lights and sirens. For instance, *Whren v. United States*, 517 U.S. 806, 808–10 (1996), applied the vehicle-stop doctrine when a police car pulled up alongside a truck stopped behind other vehicles at a red light and an officer approached on foot to direct that the truck be put in park. This Court has otherwise suggested that lights and sirens are relevant to whether an officer's on-foot approach to a car stopped at a red light is a seizure, but not to whether an officer's "interference with a moving vehicle" is a seizure. *People v. Ocasio*, 85 N.Y.2d 982, 984 (1995); *see also People v. Smith*, 40 Misc. 3d 1224(A), 2013 N.Y. Slip Op. 51294(U), at *1 (Sup. Ct., Kings Co. 2013) (observing no authority "holding that some vehicle 'seizures' may be lawful and other 'seizures' unlawful depending on how the vehicle was brought to a stop"). So while lights and sirens are one kind of "possibly

[3] It is also unclear whether speed truly matters, as courts have evaluated stops of slow-moving cars under traditional car-stop principles. *See, e.g.*, *People v. Ahmad*, 193 A.D.3d 961, 961, 963 (2d Dept. 2021) (reasonable suspicion needed to stop vehicle "merely driving slowly down the road"); *State v. Donnell*, 239 N.W.2d 575, 576–78 (Iowa 1976) (same for a vehicle "cruising very slowly" through a residential area).

unsettling show of authority," *Prouse*, 440 U.S. at 657, they are not required to trigger constitutional protections.

Although Mr. Rodriguez cited decisions from other jurisdictions recognizing that bicycle stops are seizures just like car stops (Appellant's Br. at 34–37), the People dismiss this authority as not following *De Bour* or relating to traffic stops instead of investigative stops (People's Br. at 31, 51–52).[4] However, since the federal seizure standard is more stringent than New York's, and a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)) is identical to *De Bour* Level 3, constitutional seizures under the federal framework (or under state tests patterned after the federal framework) must also be seizures under New York law. Similarly, traffic stops require probable cause because, like investigative stops, they too are seizures. *Hinshaw*, 35 N.Y.3d at 430.[5] And as "[a] forcible stop of the occupants in a vehicle is equally intrusive whether done to enforce the laws against traffic infractions or the laws against crimes,"

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[4] It is worth noting that some of the out-of-jurisdiction cases in the People's response (People's Br. 46–47) are not about whether bicycle stops should be treated like car stops. *See, e.g.*, *State v. Tehero*, 147 P.3d 506, 507–08 (Utah Ct. App. 2006) (no seizure because officer never actually ordered the bicyclist to stop or pulled him over; instead, bicyclist stopped upon noticing the police).

[5] The People argue that a person stopped for violating the traffic laws is not free to leave until the officer permits it (People's Br. at 48), but do not explain why investigative stops are any different. *See Brendlin*, 551 U.S. at 257 ("[A] sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing.").

id. at 432, treating traffic stops of moving bicycles as seizures supports treating *investigatory* stops of bicycles as seizures as well.

The six New York cases relied on by the People, which were also cited by the Appellate Division, also do not uniformly treat bicyclists as pedestrians (People's Br. at 8 n.1, 44–45). Just two involve an actual police stop of a person on a moving bicycle, and only *In re Jamaal C.*, 19 A.D.3d 144, 145 (1st Dept. 2005), concluded that a stop arising out of a police command "did not constitute a seizure." Notably, in *Jamaal C.*, the defendant was "attempting to conceal" a heavy object in his waistband from public scrutiny, a fact—absent here—that the court relied upon to support "at least" a Level 2 inquiry. *Id.* The remaining decisions are not on point. *See People v. Ruffin*, 133 A.D.2d 425, 425–26 (2d Dept. 1987) (observing that the defendant initiated the police encounter); *People v. Day*, 8 A.D.3d 495, 495–96 (2d Dept. 2004) (reasonable suspicion existed prior to pursuit and detention); *People v. Feliciano*, 140 A.D.3d 1776 (4th Dept. 2016) (defendant did not actually stop); *McClelland v. Kirkpatrick*, 778 F. Supp. 2d 316, 319 (W.D.N.Y. 2011) (on *habeas* review of *People v. White*, 35 A.D.3d 1263 (4th Dept. 2006), observing that defendant was not actually on his bicycle at the time police interacted with him).

No more persuasive is the People's attempt to dismiss Mr. Rodriguez's point that the Vehicle and Traffic Law grants bicyclists "all of the rights" and subjects them to "all of the duties" that are "applicable to

the driver of a vehicle," V.T.L. § 1231 (Appellant's Br. at 31–34). Contrary to the People's claim, that § 1231 also reaches "in-line skates" does not mean that affording bicyclists the same constitutional rights as motorists would also "require" extending the same rights to individuals on roller skates (People's Br. at 50–51; *see also* People's Br. at 48 (suggesting that "every mode of transport" would be affected by treating bike stops like car stops)). Unlike roller skates, bicycles have a long history as on-road transportation. *See Hubbell v. City of Yonkers*, 104 N.Y. 434, 436–37 (1887) (addressing a 19th-century encounter between a horse and a bicycle on a public road); 1899 N.Y. Laws. 1400–03 (nineteenth-century law allowing municipalities to enact certain ordinances "regulating the use of bicycles" and "similar vehicles" on "the public highways, streets, avenues" and elsewhere). In fact, prior to 1995, § 1231 addressed only bicycles, not skates. *See* V.T.L. § 1231 (1994) ("Traffic laws apply to persons riding bicycles.").

Mr. Rodriguez also argued that bicyclists are directed into the flow of traffic, where they are more susceptible to the "lawful order" requirement of V.T.L. § 1102 (Appellant's Br. at 33–34). The People respond that § 1102 also applies to pedestrians (People's Br. at 51), but that misses the point. Pedestrians are *less likely* than bicycles to be within the flow of traffic on a public road—especially in New York City, where regulations expressly direct bicyclists onto the roadways. N.Y.C. Rules & Regs. § 4-07(c)(3)(i) (prohibiting biking on sidewalks unless

permitted by sign); N.Y.C. Administrative Code § 19-176 (prohibiting bicycling on the sidewalk). Bicycles are more likely to be the subject of lawful police orders related to traffic; the law regulates bicycles for precisely that reason.

Finally, the People make several unconvincing public policy arguments against affording bicyclists the same constitutional protections as motorists. They contend that *De Bour* Levels 2 and 1 provide adequate protection to bicyclists (People's Br. at 53) and suggest that treating bicycle stops like car stops would "place both the police and the public in danger during ensuing street encounters" (People's Br. at 54). The People also suggest that equating bicycle stops with car stops would "not further" the deterrent purpose "of the exclusionary rule" (People's Br. at 54).

The People fail to support these claims. If an officer's observations support a reasonable suspicion that a moving bicyclist is carrying a gun, and therefore poses a danger to the public, the officer could lawfully seize that person. Since bicyclists are exposed to public view, as the People argue, an officer would have a good vantage point to make that assessment. But if the officer's observations do not support reasonable suspicion, it is hard to imagine what "public safety" was actually being "threatened" by the bicyclist to justify a stop (People's Br. at 42). Finally, while the exclusionary rule is the "deterrent sanction" for violations of the constitutional right to be free from unreasonable searches

and seizure, the rule does not define the scope of the constitutional right itself. *See Kansas v. Ventris*, 556 U.S. 586, 590–91 (2009); *People v. Castillo*, 80 N.Y.2d 578, 583 (1992) (describing the exclusionary rule as a remedy); *see also* C.P.L. § 710.20 (codifying the suppression of unlawfully obtained evidence).

In these respects, the People's public policy rationale relies heavily on the false assumption that a police stop of a moving bicycle is only "minimally intrusive" (People's Br. at 42). To the contrary, as the above shows, bicycle stops have all the seizure-related hallmarks of car stops, and so should be treated the same. The People's public policy arguments also falter on this Court's recognition that both public policy and the enhanced protections provided by the New York Constitution prevent police-citizen interactions arising out of "the police officer's whim or caprice." *People v. Cantor*, 36 N.Y.2d 106, 112 (1975). Requiring less than reasonable suspicion to stop a moving bicyclist all but guarantees future stops based on otherwise unsupported hunches about potential criminal activity.

In sum, for the reasons set forth above and in the main brief, the well-established rule governing police stops of moving cars, motorcycles, scooters, and other vehicles applies with equal force to police stops of moving bicycles. They, too, are *De Bour* Level 3 seizures that must be supported by reasonable suspicion of criminal wrongdoing.

C. The totality of the circumstances compels a finding that this stop was a seizure, and the People's argument to the contrary runs afoul of *De Bour* and the well-established rule that submission to authority is a seizure.

Alternatively, the totality of the circumstances compels the conclusion that this particular bicycle stop—featuring shouted commands, police pursuit, a clear submission to police authority, and an intimidating show by three officers on a residential street late at night—more than met the threshold for a seizure under both the federal and more favorable New York standards (Appellant's Br. at 42–49). In particular, that Officer Schell admitted "command[ing]" Mr. Rodriguez to "stop [hi]s bicycle," and that Mr. Rodriguez stopped in response to the officer's "yelled" commands (A35, 58, 65), together demonstrate actual submission to a show of police authority—a classic seizure under state and federal law. *See Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021) ("[A] seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement.").

In their response, the People reverse the totality analysis, assuming a *De Bour* Level 2 encounter and then defending the police conduct within the contours of Level 2 in order to claim that there was no seizure under Mr. Rodriguez was restrained (People's Br. at 21–28). The People insist, for example, that Officer Schell "had a founded suspicion to conduct a common-law inquiry" upon seeing the bulge in Mr. Rodriguez's waistband (People's Br. at 24–25). It was also "good police work,"

they claim, for Officer Schell to take advantage of this "founded suspicion" by asking Mr. Rodriguez for an explanation (People's Br. at 41–42).

But an officer does not pick a *De Bour* level and then act. Rather, an officer's actions and the surrounding circumstances determine the intrusiveness of the encounter, the *De Bour* level and, by extension, the degree of suspicion needed to justify the officer's intrusion. Reasoning the other way, as the People repeatedly do (and as the Appellate Division did here after deciding that police/bicyclist "encounters" are generally Level 2), creates an incentive to fit the conduct to the chosen *De Bour* level instead of following the facts where they lead.

More problematically, despite claiming to assess the facts in their "totality" (People's Br. at 6, 28, 34), the People focus on each in isolation, ignoring that a seizure analysis requires looking at the entire picture. *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020). This is not a case where there was a mere "request" that a citizen "stop" unaccompanied by other conduct (People's Br. at 25–26, 30). *See People v. Bora*, 83 N.Y.2d 531, 535 (1994) ("verbal command" may constitute a seizure "when coupled with other behavior"). Instead, "the actions of the police" showed "an unambiguous intent to restrain," and Mr. Rodriguez's decision to stop was far from mere "passive acquiescence" to their commands. *Brendlin*, 551 U.S. at 255. By wrongly isolating each factor, the People disregard that Officer Schell's commands to stop *caused Mr.*

Rodriguez to stop—again, the clearest proof that Mr. Rodriguez was seized.

The record establishes that Officer Schell "yelled" at Mr. Rodriguez to "stop" or "hold up"—which Officer Schell admitted was a "command[]"—all while explicitly identifying himself and his fellow officers as "police officer[s]" (A35, 51, 53, 57–58, 65).[6] When Mr. Rodriguez did not immediately comply, Officer Schell continued to follow Mr. Rodriguez in his car and yelled out again "even louder" to "stop the bicycle, police," or "Hold up, police" (A35, 58, 65). Only then did Mr. Rodriguez actually bring his bike to a stop, after which Officer Schell asked if he had anything on him (A36).

The People suggest this "mere approach" did not "alone constitute a show of authority" to make out a seizure, and that what followed was simply a "couple of verbal requests to stop" (People's Br. at 28–29). But Officer Schell twice commanded Mr. Rodriguez to stop while continuing to follow alongside him, and Mr. Rodriguez finally stopped in clear deference to Officer Schell's explicit show of authority. *See Bora*, 83 N.Y.2d

[6] The People's response inconsistently recounts where the police were positioned when Officer Schell gave the first order to stop, sometimes asserting they were still behind Mr. Rodriguez (People's Br. at 11, 33) and at other times stating they were "alongside" him (People's Br. at 18). However, Officer Schell clarified on cross-examination that the police had "pulled up to Mr. Rodriguez" before Officer Schell issued the first order (A51), matching Officer Schell's earlier testimony to the grand jury that the police pulled up "alongside" the bicycle when he gave the first order (A60).

at 535. When a person commanded to stop "submits to the authority of the badge" and stops, that person has been seized under both state and federal law. *Id.* This is all the more true considering that, after stopping, Mr. Rodriguez did not attempt to evade the police, or otherwise signal that his affirmative submission to authority was anything other than complete. *Cf. United States v. Baldwin*, 496 F.3d 215, 218–19 (2d Cir. 2007) (no seizure when a defendant "halt[ed] temporarily" before speeding off).

Crucially, the Appellate Division, hearing court, and People all recognized below that Mr. Rodriguez "stopped in response to the commands" (A4, Appellate Division), that the "officer stopped the defendant" (A181, hearing court), and the "defendant stopped" after Officer Schell called out a second time (A162, the People). Mr. Rodriguez's decision to stop was plainly a submission to the police conduct, not "independent" of it. *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (no seizure when restriction on movement was independent of police conduct).

Thus, as explained above and in Mr. Rodriguez's main brief, the totality of the circumstances compels the conclusion that this stop was a seizure under *De Bour* Level 3.

Whether the Court rules that stops of moving bicycles are seizures just like car stops (subsection B) or that this stop was a seizure under the totality of the circumstances (subsection C), the People "justified the officers' interaction" with Mr. Rodriguez solely under *De Bour* Level 2

below, thereby "fail[ing] to preserve any argument that the encounter in this case was justified under . . . [Level] three of *De Bour*." *People v. Hill*, 33 N.Y.3d 990, 992 (2019). Accordingly, because the People "never claimed" (People's Br. at 34) that the police had either reasonable suspicion of criminal conduct (which they now *disclaim*, People's Br. at 34) or the probable cause needed for a traffic stop, a holding that this stop was a seizure requires reversing the hearing court's decision, suppressing the fruits of the stop, and dismissing the indictment. *Id.* at 992 (reversing the judgment, granting suppression, and dismissing the indictment where the People defended the officers' actions only under *De Bour* Level 1 and the Court concluded that the incident "rose beyond a level-one" encounter).

* * *

Lance Rodriguez, a 20-year-old Hispanic man, was biking late at night in residential Far Rockaway, Queens, when he was pulled over by three police officers from the NYPD's "anti-crime" unit (A46)—a unit which "played an outsize role in the searches of millions of young Black and Latino men across the height of the stop-and-frisk era," and did "little to actually lower crime levels" before being disbanded in 2020. Troy Closson, "Can Adams Rebuild, and Rein In, a Notorious N.Y.P.D. Unit?," N.Y. Times, Jan. 5, 2022, https://www.nytimes.com/2022/01/05/nyregion/eric-adams-nypd-anti-crime-unit.html (last visited June 22, 2022). Officer Schell testified that the stop was motivated by an "ob-

ject" Mr. Rodriguez was holding in his waistband, which Officer Schell claimed to see from 25 yards away (A35).

But Officer Schell candidly admitted that he could not tell what the object was, and did not claim that it looked like or resembled a weapon; "[a]ll I could tell [was] that it was a bulky object" (A35, A75). Officer Schell also cited Mr. Rodriguez's "reckless" biking (A34) as reason to make the stop, but this proved so anodyne that neither he nor the People have ever suggested that Mr. Rodriguez violated any traffic laws or regulations. And as the record makes plain, Officer Schell would not take "no" for an answer; when Mr. Rodriguez did not immediately stop after being commanded to do so by the police driving alongside him, Officer Schell *repeated* the command, at increasing volume, making clear that the orders were to be heeded (A35, 58, 65). Mr. Rodriguez submitted, stopping his bike at the side of the road, at which point the officers pulled their car up so close to him that the passenger door could not be opened to allow Officer Schell to leave the car (A36, 52–53, 58, 64, 66).

The People nevertheless argue that this was not a seizure because "no reasonable person, innocent of wrongdoing, would feel they were not free to leave" in these circumstances (People's Br. at 30). But common sense makes plain that this encounter was coercive, and that the realities of race, age, time of day, and location all factored into what a reasonable, innocent person would have perceived when ordered to pull over by police, as Mr. Rodriguez was. *See United States v. Mendenhall*,

446 U.S. 544, 558 (1980) (demographic factors such as race and age are not irrelevant to totality analysis); *State v. Sum*, ___ P.3d ___, 2022 WL 2071560, at *7 (Wash. June 9, 2022) (holding, as a matter of Washington law, that "race and ethnicity" are relevant factors in determining whether an encounter is a seizure). Moreover, the car-stop rule rests on the long-established truth that people pulled over by police on our nation's roadways do not feel "free to depart without police permission"—consistent with the lived experience of anyone who has ever been pulled over. *Brendlin*, 551 U.S. at 257. That this rule governs stops of moving bicycles, just as it applies already to analogous stops of motorcycles, convertibles, scooters, and other vehicles, simply acknowledges the reality of police/citizen interactions and the inherent intrusiveness of a stop of a moving vehicle. And because a bicycle may also frequently be a person's only means of nonpublic transportation, especially for young people and those for whom maintaining a private car presents too much of an expense (Appellant's Br. at 38–39), applying *different* rules to cars and bicycles arising out of the *same* kind of encounter on public roads would diminish the civil rights of those categories of citizens.

The People argue, however, that requiring anything more from the officers in this case would be an impossible burden. They insist that Officer Schell should not have been required to "simply shrug his . . . shoulders" after spotting the unknown bulky object (People's Br. at 41) and would have been "derelict to let defendant just ride away when

public safety was possibly threatened" (People's Br. at 42). To the People, it is "difficult to imagine how these officers could have investigated less intrusively than they did" (People's Br. at 42–43), even though the officers here followed Mr. Rodriguez for a mere 30 seconds before deciding to pull him over (A52).

But adherence to the Fourth Amendment and its analogue under the New York Constitution always requires balancing public safety and individual rights. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001) (the Fourth Amendment must "be construed . . . in a matter which will conserve public interests as well as the interests and rights of individual citizens") (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)); *People v. Abad*, 98 N.Y.2d 12, 16–17 (2002) (in suspicionless stop case, balancing the public interest against "the severity of interference with individual liberty").

Here, the People ask this Court to endorse a violation of Mr. Rodriguez's rights to be free from unlawful police intrusion. They urge that he be treated as a mere pedestrian whose decision to stop was somehow not a submission to police authority, instead of being seen for what he clearly was: a bicyclist in motion on a public roadway who, in response to repeated shouted commands to stop by police who persisted in following and pulling alongside him in their car, submitted to police authority and stopped his bicycle.

The Fourth Amendment balance favors Mr. Rodriguez, however. So rather than endorsing the fiction that moving bicyclists are the same as pedestrians, this Court should apply the same principles that have governed stops of all sorts of vehicles for over 40 years. The Court should hold that a police stop of a moving bicycle is a "seizure implicating constitutional limitations" that must be supported by "reasonable suspicion" that the bicyclist "ha[s] committed, [is] committing, or [is] about to commit a crime." *Spencer*, 84 N.Y.2d at 752–53.

For the reasons set forth above and in Mr. Rodriguez's main brief, the Court should reverse the Appellate Division decision affirming the denial of the suppression motion, grant the motion to suppress, and dismiss the indictment. *See* C.P.L. § 470.40(1); *People v. Balkman*, 35 N.Y.3d 556, 560 (2020); *Hill*, 33 N.Y.3d at 992.

CONCLUSION

FOR THE FOREGOING REASONS AND THE REASONS SET FORTH IN THE MAIN BRIEF, THE COURT SHOULD REVERSE THE APPELLATE DIVISION'S DECISION, GRANT THE MOTION TO SUPPRESS, AND DISMISS THE INDICTMENT.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 500.13(c)

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