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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Appellant,
Respondent on Review

v.

CHARLES STEVEN MCCARTHY,

Defendant-Respondent
Petitioner on Review

Marion County Circuit Court
Case No. 16CR75546

CA A165026

S067608

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION AND OREGON JUSTICE RESOURCE CENTER

Review from the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Marion County
Honorable Lindsay R. Partridge, Judge

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BRIEF OF *AMICI CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION AND OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

Oregon Criminal Defense Lawyers Association (OCDLA) is non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators and related professionals dedicated to defending Oregonians who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, networking and legislative action. OCDLA is concerned with legal issues presenting a substantial statewide impact to criminal defendants.

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 September 26, 2020). The OJRC *Amicus* Committee is comprised of Oregon attorneys from multiple disciplines.

Amici agree with defendant that the automobile exception should be limited to searches in which, under the totality of the circumstances at the time

of the search, an actual exigency exists, and that the state has the burden of production and persuasion to show an the existence of an actual exigency.

SUMMARY OF ARGUMENT

Article I, section 9, of the Oregon Constitution protects Oregonians from unreasonable searches and seizures. It requires judicial preapproval by way of a warrant as a check on executive discretion when invading possessory and privacy interests. Certain exigent circumstances present a narrow exception to the warrant requirement when immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence. As it stands, the automobile exception is a subcategory of the exigency rule, which takes a one-size-fits-all approach: all mobile automobiles present exigent circumstances and may be searched by the police without judicial preapproval when probable cause supports the search.

A *per se* exigency rule is a double-edged sword. It is efficient in that it provides clear guidance regarding when officers can and cannot perform a search. However, a clear rule that bypasses judicial preauthorization also gives state agents unchecked discretion when conducting a warrantless search. Unchecked discretion allows police to strategically cut corners—that is, to exploit their authority in the hopes that the ends justify the means. In addition, such broad executive discretion impacts different Oregonians differently based

on the officer's and the law enforcement agency's policies and resources. Requiring an actual exigency also promotes transparency in police conduct, which may reduce existing racial disparities in policing.

Because of the negative impacts of a *per se* exigency rule, the automobile exception to the warrant requirement should be construed narrowly so that it permits unilateral executive action only when it is actually necessary to prevent removal or destruction of evidence and a warrant cannot feasibly be obtained. Such a rule also provides clear guidance to police officers, but it reduces the negative impact of the *per se* exigency rule because it bypasses the warrant requirement only in the narrow circumstances in which it is actually necessary to do so.

ARGUMENT

I. The automobile exception should be narrowly construed to its limited exigency purpose of preventing destruction or loss of evidence.

A. Article I, section 9, prevents executive officers from searching solely under their own discretion.

Article I, section 9, of the Oregon Constitution, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

This provision protects individuals against unreasonable search, or seizure, and protects both possessory and privacy rights in personal effects. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986).

The framers adopted Article I, section 9, specifically to prohibit general warrants, which provided their bearer "an unlimited authority to search and seize." *State v. Blackburn/Barber*, 266 Or 34, 34-35, 511 2d 381 (1973). *See State v. Mansor*, 363 Or 185, 222, 421 P3d 323 (2018)(same). General warrants commanded apprehension or arrest for an unstated cause or "the arrest, search, or seizure of unspecified persons, places, or objects." Jack L Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 866 n 6 (2008) (internal quotations omitted). In response to that broad executive authority, Article I, section 9, imposes a particularity requirement, which aims "to protect the citizen's interest in freedom from governmental intrusion through the invasion of his privacy." *Blackburn/Barber*, 266 at 34. The particularity requirement ensures that "the search be as precise as the circumstances allow and that undue rummaging be avoided." *State v. Massey,* 40 Or App 211, 214, 594 P2d 1274, *rev den,* 289 Or 409, 614 P2d 1148 (1979).

In addition, Article I, section 9, "subordinate[s] the power of executive officers over the people and their houses, papers, and effects to legal controls beyond the executive branch itself." *State v. Weist*, 302 Or 370, 376–77, 730

P2d 26 (1986). "One measure of control is found in a carefully limited judicial warrant[.]" *Id.* Without that control, "executive officers could define and exert their own authority to search and to seize however widely they thought necessary." *Id.* at 388. Thus, "the constitution requires a warrant so that a disinterested branch of government—the judicial branch—and not the branch that conducts the search—the executive branch—makes the decision as to whether there is probable cause to search." *State v. Kurokawa-Lasciak*, 351 Or 179, 186, 263 P3d 336 (2011).

General warrants allowed the police to engage in overbroad searches in order to obtain evidence. The framers adopted Article I, section 9, to prevent unreasonable invasions of privacy by imposing a particularity requirement and requiring judicial preauthorization in most circumstances.

B. The automobile exception justifies bypassing judicial preauthorization only in cases of actual exigency, and it should be construed narrowly to fulfill that purpose.

"[T]he contours and scope of a warrant exception are circumscribed by the justification for that exception." *State v. Fulmer*, 366 Or 244, 233-234, 460 P3d 486 (2020). Searches supported by probable cause and conducted in exigent circumstances often do not require a warrant. *State v. Mazzola*, 356 Or 804, 810-11, 345 P3d 424 (2015). Courts recognize exigent circumstances in "situations in which immediate action is necessary to prevent the disappearance,

dissipation, or destruction of evidence." *State v. Meharry,* 342 Or 173, 177, 149 P3d 1155 (2006). In other words, a warrantless search is allowed when a cognizable exigency at the time of the search makes it infeasible for the police to obtain a warrant. *State v. Bonilla*, 358 Or 475, 487, 366 P3d 331 (2015). In conducting warrantless searches due to exigency, the police act unilaterally and without judicial oversight. *Id*.

The automobile exception of Article 1, section 9, is "a subset of the exigent circumstances exception." *Meharry*, 342 Or at 177. The automobile exception requires "(1) that the automobile is mobile at the time it is stopped by police or other governmental authority, and (2) that probable cause exists for the search of the vehicle." *State v. Brown*, 301 Or 268, 274, 721 P2d 1357 (1986). The exigency is that a vehicle is mobile, and "[a] vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Meharry*, 342 Or at 177.

This court adopted the *per se* exigency rule in part because "[p]olice need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts regarding the time, location and manner of highway stops." *Brown*, 301 Or. at 277. In addition, the court in *Brown* expressly assumed that the *per se* mobility rule was necessary only until technology progressed to the point that it was feasible for officers to obtain warrants *before* conducting automobile searches.

Id. at 278 n 6. The *per se* exigency rule rests on a legal presumption that it would be infeasible to obtain a warrant in such circumstances. The *Brown* court's *per se* exigency rule is not a matter of necessity in service of the exigency principle but a matter of judicial preference for clear rules and a reflection of the state of technology at the time. !

At every stage of its history, the underlying purpose of the automobile exception has been exigency—that evidence may be lost in the time it takes to acquire a warrant. However, a *per se* exigency rule is an unnecessary departure from the warrant requirement and its goals. The automobile exception authorizes unilateral executive action and creates a risk of officer-created "exigencies" that are not truly exigent at all. In addition to offending the goals of Article 1, section 9, the lack of transparency in officer decision-making when searching pursuant to a *per se* rule reduces the public's trust in policing.

II. The automobile exception should be narrowly construed to ensure an effective judicial check on executive discretion because a one-size-fits-all rule for law enforcement is unnecessary and encourages disparate treatment of Oregonians.

As explained above, the automobile exception to the warrant requirement rests on the presumption that exigent circumstances exist when police encounter a mobile automobile. The rule assumes that it is generally infeasible for police to obtain a warrant when they encounter a mobile automobile for

which they have probable cause to search. In addition, the rule was designed to provide clarity to police and equal application.

Circumstances have changed since this court adopted the *per se* exigency rule over 30 years ago. As explained below, changing technology means that it is typically feasible to obtain judicial preapproval for an automobile search by means of a telephonic warrant. In addition, the rule encourages law enforcement to manipulate the circumstances to avoid judicial preapproval. In doing so, the rule leads to unequal application across the state, and it abdicates judicial oversight of a policing system that historically impacts different racial groups differently. In sum, it is time to modify the automobile exception so that its scope aligns with its narrow justification.

A. The *per se* exigency rule for automobiles has outlived its narrow justification because it is no longer presumptively infeasible for police to obtain a warrant when they encounter a mobile automobile.

Thirty years ago, this court predicted that changes in technology would quickly eliminate the exigency underlying the automobile exception. *Id.* at 278 n 6 (recognizing that "[i]n this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception."); *State v. Andersen*, 361 Or 187, 203, 390 P3d 992 (2017) (Walters, J., concurring) (describing the expectation in *Brown*). The *per se* exigency rule was designed

to expire as technology developed. For that reason, in *Andersen* this court expressly did not "foreclose a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception." *Id*. at 201.

As of February 2019, 96 percent of American adults owned cell phones and 81 percent of American adults owned smartphones. Pew Research Center, *Mobile Fact Sheet*, available at https://www.pewresearch.org/internet/fact-sheet/mobile/ (last visited Sept. 16, 2020). The court in *Anderson* recognized that, "evidence from other jurisdictions suggests that police officers should be able to obtain warrants in less than one hour." *Andersen*, 361 Or at 205.

Oregon law allows law enforcement to use electronic means to seek search warrants. Police may make oral statements under oath rather than written affidavits in search warrant applications. ORS 133.545(7). Warrant applications may be transmitted electronically to judges, and the judges may return the signed warrant in the same manner. ORS 133.545(8). The statutory authority to use widely available technology like mobile phones and email means that many, if not all, Oregon law enforcement agencies are equipped to seek warrants telephonically, regardless of whether they choose to do so.

The mobility of an automobile justifies unilateral executive action only when there exists an exigency that makes it infeasible to obtain a warrant before conducting the search. This court should construe the exception to *encourage*

the use of basic tools of communication, like mobile phones and email, and discourage officer-created exigencies that are intended to contravene the important goal of judicial oversight. To do so, this court must either eliminate the *per se* exigency rule or provide a meaningful opportunity for the defendant to rebut that presumption in a specific case. When, as in defendant's case, the state presents no evidence that a telephonic warrant could not feasibly have been obtained, an exigency does not exist to justify the search.

B. A *per se* exigency rule allows police and prosecutors to create exigencies in order to exploit the automobile exception to the warrant requirement.

The second problem with the *per se* exigency rule is that it provides a perverse incentive for law enforcement to avoid warrant applications. *Amici* are concerned that some counties and law enforcement officers and agencies have chosen (or will choose) to game any *per se* exigency rule that allows them to proceed without a warrant even when it is feasible to obtain one.

The *per se* exigency rule encourages police officers to manufacture exigency in order to avoid pursuing a warrant. The automobile exception currently pivots on whether the vehicle was "mobile" when encountered in connection with a crime. *See State v. Bliss*, 363 Or 426, 431 423 P3d 53 (2018). As a result, officers need simply to wait to detain or arrest a suspect for whom they have probable cause until that suspect has begun driving in order to justify a two-for-one search of both suspect and the suspect's vehicle. Indeed,

officers likely pursued such a strategy in this case. Officers suspected drug activity because of their surveillance of a drug house, but they did not pursue a search warrant for the drug house or an arrest warrant for the defendant, for whom police had probable cause to arrest. Instead, they waited to stop and arrest defendant until after he left the suspected drug house, got into a truck, and started to drive. The detectives stopped the truck for a very minor traffic violation. Eventually, officers deployed a drug dog and ultimately searched the truck without a warrant. *See State v. McCarthy*, 302 Or App 82, 83-84, 459 P3d 890, *rev allowed*, 366 Or 691(2020). The officers had several opportunities to seek warrants before defendant started driving the truck. It appears that the officers took advantage of the fact that they could avoid seeking a warrant by waiting for the defendant to drive a vehicle. Such gamesmanship is concerning. Waiting for a suspect to drive an automobile may save police officers the trouble of securing a warrant, but it does not respect the intent of Article I, section 9, or serve the narrow purpose that animates the automobile exception.

The perverse incentive to rely on the automobile exception instead of seeking a warrant also exists at a policy level for executive agencies. If it is considered infeasible to obtain a warrant because county officials choose not to "allow" telephonic warrants, then the state—through its local law enforcement officers and county prosecutors—has good reason to game the rule and avoid judicial scrutiny by simply refusing to allow telephonic or computer-aided

warrants. Because such policies are not a matter of legislative action but local executive practice, it is unfortunately unclear which counties in Oregon already refuse to use telephonic warrants. Nevertheless, *amici*'s concern is not without material support. Indeed, the record here indicates that the trial prosecutor twice attempted to claim local practice as an excuse for why the officers here failed to pursue a warrant. As the trial court found:

> " 'The state fails to address why one of the officers could not avail themselves of an existing process under Oregon law, make a call on a cell phone to the courthouse, lay out the facts under oath to a judicial officer and have the judicial officer determine if probable cause existed. The answer seems to be that "we just don't do it that way."
>
> " 'Additionally, the state seemed to argue that there is a "policy" from the Marion County Circuit Court bench that judges will not accept telephonic warrant requests. The court rejects that such a policy exists although acknowledges the bench has had discussions about some of the practical problems associated with telephonic warrants.' "

Id. at 87 (quoting trial court findings). Any rule must be formulated to avoid that brand of gamesmanship.

The officer- and policy-level incentives to avoid warrant applications is troubling because it means that Oregonians have different privacy rights depending on the discretionary choices of the agency performing the search. OCDLA's members are aware of different policies regarding the availability of telephonic warrants in different counties throughout the state. Their professional experience is consistent with the record in this case and in

examples found in case law. *See Andersen*, 361 Or at 203 & n 2 (Walters, J., concurring) (noting that, in Multnomah County, warrant affidavits can be submitted "in person, by telephone or by email" but that in *State v. Sullivan*, 265 Or App 62, 65, 333 P3d 1201 (2014), an officer testified that telephone warrants are not available in Washington County). The Article I, section 9, warrant requirement should not work differently in different counties. Simply put, residents of Multnomah County should not enjoy higher levels of judicial scrutiny to guard their privacy than residents of Marion County because one county encourages telephonic warrants and the other does not. Any rule adopted by this court should be shaped to avoid such outcomes.

This court's case law in the broader exigency context generally discourages law enforcement from circumventing the warrant process when it is unnecessary to do so. *See State v. Matsen/Wilson*, 287 Or 584, 586-87, 601 P2d 784 (1979) (limiting scope of the Article I, section 9, exigency exception to *non-foreseeable* exigent circumstances in a case in which there was a law-enforcement decision not to obtain a warrant but when the claimed exigent circumstances were "were not in any way unforeseeable or exceptional"); *State v. Stevens*, 311 Or 119, 130, 806 P2d 92 (1991) (analyzing facts to determine whether it was "a case in which the police unreasonably delayed the decision to

search or waited for the passage of time predictably to create a foreseeable exigency" to justify a warrantless search).[1]

There are three crucial takeaways from *Matsen/Wilson* and *Stevens* that this court should consider in refining the automobile exception. First, "[t]he warrant process is more than an inconvenient formality." *Matsen/Wilson*, 287 Or at 587. Instead, it ensures that conclusions regarding probable cause are found by "'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Id.* (quoting *Johnson v. United States*, 333 US 10, 13-14, 68 S Ct 367, 92 L Ed 436 (1948)). Second, "'[an] officer cannot create exigent circumstances by his own inaction.'" *Id*. at 586 (quoting *State v. Fondren*, 285 Or 361, 367, 591 P2d 1374 (1979)). Third, circumstances that would create a desire to perform a warrantless search on a person or their effects do not generally qualify as "exigent circumstances" under Article I, section 9 when those circumstances are

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[1] Notably, cases affirming presumptive exigency in warrantless searches involving the collection of alcohol and drug intoxication evidence rely on the inherent "evanescent nature" of dissipating blood-alcohol evidence, *see State v. Machuca*, 347 Or 644, 656-57, 227 P3d 729 (2010), and on the transitory nature of "evidence of current [drug] impairment" and how "various drugs can dissipate at different rates, and that the effects of drugs wear off over time." *Mazzola*, 356 Or at 820.

Automobile searches do not typically involve similar, dissipating evidence concerns. Unlike a DUII suspect's blood alcohol content or level of current drug impairment, the evidence contained within an automobile is not evaporating with every breath while law enforcement meets the Article I, section 9 presumption in favor of obtaining a warrant from a neutral, detached magistrate.

foreseeable and predictable but the state nevertheless chooses to not pursue a warrant. *Stevens*, 311 Or at 130; *Matsen/Wilson*, 287 Or at 586-87; *State v. Wise*, 305 Or 78, 82 n 3, 749 P2d 1179 (1988). This court should extend those principles to searches under the automobile exception.

If this court retains the *per se* exigency rule, then it must refine that rule to discourage law enforcement gamesmanship. Specifically, the automobile's mobility or the availability of a telephonic warrant (and thus, the *per se* exigency to search the automobile) cannot be a circumstance created solely or primarily by the choices of law enforcement and prosecutors. In other words, any automobile-exception rule must not allow the state — through its local law enforcement officers and county prosecutors — to create its own exigency by making choices that create foreseeable exigencies instead of making choices to pursue a warrant as mandated by Article I, section 9.

The protections of Article I, section 9, are not mere obstacles to be met and overcome by law enforcement with the least amount of inconvenience or scrutiny. Indeed, rather than an inconvenient formality, the warrant requirement ensures that conclusions regarding probable cause are found by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Matsen/Wilson*, 287 Or at 587 (internal quotation marks omitted). Warrants approved by the judiciary provide an example of a check and balance that Oregon

schoolchildren are taught to expect of our government and societal system. This court's decision on automobile searches must be formulated in a way to that preserves that check on executive power and requires law enforcement to seek a warrant unless there is an actual, cognizable exigency that would make it infeasible for the police to seek a warrant.

C. Adopting a rule that requires an individualized showing of exigency can reduce racial disparities in policing and promote respect for law enforcement.

Narrowing police discretion and promoting transparency helps to ensure that police conduct is not motivated by racial biases. *See State v. Arreola-Bottello*, 365 Or 695, 714 n 9, 451 P3d 939 (2018). While Oregon law enforcement agencies do not collect racial-impact data on searches conducted under the automobile exception, multiple data points indicate that racial disparities pervade American policing.

By many metrics, Black and Hispanic Americans are policed differently than white Americans. Ronald Weitzer & Rod K. Brunson, *Policing Different Racial Groups in the United States*, 35 Cahiers Politiesudies Jaargang 129 (2015) *available at*

https://sociology.columbian.gwu.edu/sites/g/files/zaxdzs1986/f/downloads/Weit

zer%20%26%20Brunson%202015%20.pdf (last visited September 27, 2020). [2] In the literature, policing includes the wide range of possible police encounters, from being arrested on suspicion of a felony, to being stopped on the way home from school. *Id.* at 132. By each of those metrics, a person's Black or Hispanic racial identity leads to different experiences of and attitudes toward police contact. *Id*. at 132, 134-35 (noting that, "young ethnic minority males in the United States and other countries are uniquely susceptible to being stopped, interrogated and searched by the police") (citations omitted). Moreover, Black and Hispanic Americans are more likely to be killed by police. Washington Post, *Police Shootings Database, Updated September 23, 2020, available at* https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited September 27, 2020); Thomas Frank, *Black People are Three Times More Likely to be Killed in Police Chases*, USA Today (Dec 1, 2016), *available at* https://www.usatoday.com/pages/interactives/blacks-killed-police-chases-higher-rate/ (last visited September 27, 2020) (finding that Black

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[2] The Attorney General of the United States concedes as much. Pierre Thomas et al, *Unfair Policing of African Americans a 'Widespread Phenomenon' Attorney General Barr Says*, ABC News, June 9, 2020, available at https://abcnews.go.com/Politics/unfair-policing-african-americans-widespread-phenomenon-attorney-general/story?id=71673284 (last visited September 27, 2020) (reporting that: "[a]mid nationwide unrest and frustration with law enforcement, Attorney General William Barr on Wednesday acknowledged that communities of color are often policed differently from white ones, calling the unfairness a 'widespread phenomenon.'")

drivers are more likely to die in car chases with police). In addition, "[p]olicing is typically more aggressive in neighborhoods that are both economically disadvantaged and populated by a subordinate ethnic minority." Weitzer at 136 (citations omitted.)

Unfair and unequal policing of communities of color is reflected in cases of those wrongly convicted of crimes as well. Data indicates that Black defendants who were subsequently exonerated were more likely to victims police misconduct. Samuel R. Gross, et al, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exonerations (September 1, 2020) *available at* https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf, (last visited September 22, 2020). In a study of 2,400 exonerations nationally, the authors found that,

> "Black exonerees were slightly more likely than whites to have been victims of misconduct (57% to 52%), but this gap is much larger among exonerations for murder (78% to 64%)—especially those with death sentences (87% to 68%)—and for drug crimes (47% to 22%)."

Id.

The reality of unequal policing is compounded by the widely-held perceptions of unequal policing of communities of color. A majority of Americans share the opinion that "Black Americans are treated less fairly by

police and by the criminal justice system as a whole." Drew Desilver et al, *10 Things We Know About Race and Policing in the U.S.*, Pew Research Center, June 3, 2020, *available at* https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ (last visited September 27, 2020). The perception of being treated unfairly is almost as damaging as the reality. "When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 Harv L Rev 2283, 2356 (2018); *see also* US Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar 4, 2015) available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (last visited October 4, 2020 (observing that a "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime."). The public deserves transparency in police decision-making. A search warrant provides such transparency.

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If the police do not seek a warrant before a search, then they should be subject to judicial scrutiny after the fact, including on the question of why they did not seek a warrant in the first instance. A *per se* rule of exigency keeps police decision-making in the shadows. Transparency in decision making allows Oregon to advance equality in policing and promote public trust in law enforcement.

CONCLUSION

For the foregoing reasons, and the reasons stated in petitioner's brief on the merits, this court should reverse the judgment of the Court of Appeals and remand to the circuit court.

Dated: October 5, 2020

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 5, 2020, I filed Brief of Amicus Curiae to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that attorneys for the petitioner, Zachary Stern, and respondent, Christopher Perdue, will be served via the efiling system.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2). The work count of this brief as described in ORAP 5.05(2)(a) is **4,411** words. I further 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 and required by ORAP 5.05(2)(B).

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