APL No. 2021-00143

Court of Appeals
Of the State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

LANCE RODRIGUEZ,

Defendant-Appellant.

BRIEF OF AMICI CURIAE PROFESSORS ALICE RISTROPH, ALEXIS HOAG-FORDJOUR, CYNTHIA GODSOE, JOCELYN SIMONSON, STACY CAPLOW, AND SUSAN HERMAN IN SUPPORT OF APPELLANT

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Amici Curiae, Professors Alice Ristroph, Alexis Hoag-Fordjour, Cynthia Godsoe, Jocelyn Simonson, Stacy Caplow, and Susan Herman are professors of criminal law who have a significant interest in the legal standards protecting the fundamental right of individuals to be free from unreasonable seizures. *See* Amici's Motion in Support of Amicus Brief (filed with this brief).

INTRODUCTION AND SUMMARY OF ARGUMENT

A reasonable person obeys a police officer's command to stop. Compliance is not understood as voluntary, and a reasonable person does not feel free to leave. But the police must have a "reasonable suspicion" of criminal activity before issuing such a command. And the *quid pro quo* is that submitting to police authority wraps the defendant in constitutional protections, under both federal and New York law. That is, the defendant is considered "seized."

Here, the police pursued and twice commanded the defendant to stop, and he reasonably submitted. Yet the Appellate Division did not find that the police had a "reasonable suspicion" before issuing their commands, ignored the police pursuit that underscored their command to stop, and failed to shelter the defendant with his constitutional protections. That is, the court below did not treat the defendant as seized.

That turns New York law on its head. It provides the defendant with *less* protection than he would have received under federal law (*i.e.*, Fourth Amendment

protection in the face of a seizure) by wrongly treating an involuntary submission to police commands as a voluntary interaction equivalent to the common law right to inquire (a *De Bour* level two encounter). *See People v. De Bour*, 40 N.Y.2d 210, 222–24 (N.Y. 1976).

That approach also overlooks the presumption that the analogous driver of a moving vehicle is seized if they pull over in response to a police command to do so. Indeed, the police could not do their job if those on public roads were free to ignore police commands to stop. Here, the driver of a bicycle was moving along a public road, submitted to police commands to stop, and the Appellate Division treated his doing so as entirely voluntary.

If left to stand, the decision below would muddy the waters clarified in *De Bour* and foster confusion among New Yorkers and the police. When must one obey the police? What level of suspicion is necessary for the police to initiate a seizure? Are cyclists, even when travelling faster than the automobile traffic around them, free to ignore police directions? Does New York law offer lesser constitutional protections than federal law?

ARGUMENT

I. UNDER FEDERAL AND NEW YORK LAW, A POLICE COMMAND TO STOP, FOLLOWED BY SUBMISSION, IS A SEIZURE

A. Police conduct that reasonably indicates one is not free to leave, followed by submission to police authority, is a seizure

A seizure occurs "[w]henever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action." *People v. Cantor*, 36 N.Y.2d 106, 111 (N.Y. 1975). Under New York and federal law, police can effect a seizure either through the exercise of force or a show of authority. *See Landsman v. Village of Hancock*, 296 A.D.2d 728, 731–733 (3d Dept. 2002); *People v. Bora*, 83 N.Y.2d 531, 534–535 (N.Y. 1994); *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021). This case concerns a seizure by a show of authority.

To determine whether a show of authority constitutes a seizure, New York courts ask "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom." *Bora*, 83 N.Y.2d at 535. This analysis requires "consideration of all the facts," *People v. Ocasio*, 85 N.Y.2d 982, 984 (N.Y. 1995), and in particular whether an officer did or said anything to indicate that the defendant "was not free to leave." *People v. Carrasquillo*, 54 N.Y.2d 248, 252–53 (N.Y. 1981). Relevant factors include whether "there [was] a chase; were lights, sirens or a loudspeaker used; was the officer's gun drawn, was the individual prevented from moving; how many

verbal commands were given; what was the content and tone of the commands; how many officers were involved; where did the encounter take place." *Ocasio*, 85 N.Y.2d at 984 (citing *Bora*, 83 N.Y.2d at 535–36).

If a defendant submits to police authority—and does so because of police conduct that a "reasonable person would have believed, under the circumstances" was a "significant limitation on his or her freedom"—then the defendant has been seized. *Bora*, 83 N.Y.2d at 535. Where a defendant flees the police, the defendant has not submitted and is not necessarily considered "seized" while in flight (even if pre-flight police conduct would have indicated to a reasonable person that they were not free to leave). *See id.* at 533–36. If police pursue the suspect, New York law considers the encounter to be a seizure, *People v. Martinez*, 80 N.Y.2d 444, 447–48 (N.Y. 1981), because police pursuit communicates a command to stop that the suspect is not free to ignore. The conduct of both the defendant and the police is thus relevant to whether a seizure occurred, particularly with respect to whether the defendant "submit[ted] to the authority of the badge." *Cantor*, 36 N.Y.2d at 111.

Federal courts likewise consider "all of the circumstances surrounding the encounter" to determine whether police conduct would have communicated to a reasonable person that they were not free to leave. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 565–66 (S.D.N.Y. 2013) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). These circumstances include "the threatening presence of several

officers; the display of a weapon; the physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." *United States v. Glover*, 957 F.2d 1004, 1008 (2d Cir. 1991).

Under federal law, a show of authority that indicates to a reasonable person that they are not free to leave is a necessary, but not sufficient, condition for a seizure. *California v. Hodari D.*, 499 U.S. 626, 628 (1991). Submission to that authority is also necessary. A person who submits to police authority that would lead a reasonable person to believe they are not free to leave, has been seized. *United States v. Simmons*, 560 F.3d 98, 105-06 (2d Cir. 2009). If the suspect does not submit to police authority and flees, the suspect is not considered seized while in flight. *Id.* at 625–26, 628–29. Unlike under New York law, if the police pursue a fleeing suspect, the suspect is not considered seized under federal law (until the suspect submits or is forcibly restrained). *See Hodari D.*, 499 U.S. at 625–26.

B. New York law provides greater protection to defendants than federal law

New York law is more protective of defendants involved in police encounters than federal law in two respects. First, New York law defines "seizure" more broadly than does federal law. New York courts have interpreted the "significant interruption of . . . liberty of movement" inquiry, discussed above, to include a wider

range of encounters than those classified as seizures under federal law. Specifically, under New York law, submission to the police is not necessary to establish a seizure by show of authority. *Landsman*, 296 A.D.2d at 733; *Bora*, 83 N.Y.2d at 534 ("[W]hen construing our State provision, we have not required that an individual be physically restrained or submit to a show of authority before finding a seizure . . ."). For example, New York courts have held that police pursuit of a suspect indicates a command to stop that the suspect is not free to ignore, and the suspect is therefore seized—even if they are fleeing, and thus not submitting. *Martinez*, 80 N.Y.2d at 447–48; *People v. Madera*, 189 A.D.2d 462, 464 (1st Dept. 1993) ("Police pursuit, of course, constitutes a significant interference with the pursued person's freedom of movement akin to that occurring in the case of a detentive stop and, accordingly, is only permitted upon such grounds as would render a detentive stop legal."). Police pursuit indicates that the person does not enjoy "liberty of movement" and is not free to leave the encounter.

Second, New York law requires that the police have an objective basis for initiating any type of encounter, even those that do not rise to the level of a seizure. Those bases were explained in *De Bour*, where the Court developed a four-tiered standard for police interactions. *De Bour*, 40 N.Y.2d 210, 222–24. If there is some "objective credible reason" to do so, a police officer may "approach individuals and request information" in the performance of their "public service functions"

(functions "not related to criminal law enforcement"). That is a *level one De Bour* encounter. *See id.* at 218, 223. Where police have a "founded suspicion that criminal activity is present," a police officer has the "common-law right to inquire" and may "interfere with a citizen to the extent necessary to gain explanatory information." *Id.* at 215. This is a *De Bour level two* encounter. *Id.* Neither of the first two levels of *De Bour* encounters is classified as a seizure. Nevertheless, the first two levels require that the police have some objective basis in order to initiate the encounter.

The third and fourth levels of the *De Bour* framework address police encounters that are classified as seizures. If there is a "reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor," *id.* at 223, a police officer may *seize* a person, *i.e.*, cause a "significant interruption with an individual's liberty of movement." *Id.* at 216 (citing *Cantor*, 36 N.Y.2d at 111). That is a *De Bour level three* encounter. *Id.* at 223. Finally, if a police officer has probable cause to believe that "[a] person has committed a crime or offense in his presence," the officer may "arrest and take [that person] into custody." *Id.* Arrest is a *De Bour level four* encounter. *See id.* at 223.

Federal law does not recognize the *De Bour* categories. Instead, federal law divides police encounters into 1) consensual interactions; 2) *Terry* stops; and 3) arrests (as well as other categories like "custody," which are not relevant here).

Unlike New York law, federal law does not require that the police have an objective basis for conduct that would be considered *De Bour* level one or level two encounters. *See People v. Hinshaw*, 35 N.Y.3d 427, 431–33 (N.Y. 2020); *People v. Gates*, 31 N.Y.3d 1028, 1030 (N.Y. 2018); *see also* Andrea A. Long, *Stops, Frisks, and Police Encounters: The New York Court of Appeals's Strict Application of the* De Bour *Standard*, 77 Alb. L. Rev. 1465, 1465 (2013). Federal law does not require the police to have any basis or pre-existing suspicion for interactions classified as consensual encounters rather than seizures. *See United States v. McDow*, 206 F. Supp. 3d 829, 849–50 (S.D.N.Y. 2016).

Terry stops and arrests, however, are seizures and are subject to Fourth Amendment protections. A *Terry* stop occurs when the police accosts an individual and restrains their freedom to walk away. *See Terry v. Ohio*, 392 U.S. 1, 16–17 (1968). Cases following *Terry* have explained that this occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave as a result of the police activity." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion of Stewart, J.). In other words, a *Terry* stop—which amounts to a seizure under federal law—occurs when a suspect submits to "police conduct [that] 'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Floyd*, 959 F. Supp. 2d at 565–66 (quoting *Bostick*, 501 U.S. at 436–

37). Where a suspect does not submit to such a show of authority, the suspect is not seized under federal law—even during police pursuit of the suspect—until the suspect ultimately submits or is physically restrained. *Hodari D.*, 499 U.S. at 625–26. *Terry* stops require an adequate showing of cause or suspicion. *See Terry*, 392 U.S. at 16–17. In particular, *Terry* stops, like *De Bour* level three encounters, require the police to have a reasonable suspicion of the defendant's involvement in criminal activity. *See Mendenhall*, 446 U.S. at 553–54 (plurality opinion of Stewart, J.).

In sum, New York law is more protective of defendants in both the definition of a seizure and the justification required for encounters that do not constitute seizures. Police conduct that would constitute a seizure under federal law would also constitute a seizure under New York law. But the inverse is not true. At least some police conduct that would *not* constitute a seizure under federal law, such as pursuit, could nonetheless be classified as a seizure under New York law. *See Landsman*, 296 A.D.2d at 733 ("[P]laintiff's argument that one can be seized within the meaning of the 4th Amendment . . . and yet not also be seized within the meaning of the N.Y Constitution . . . is dependent upon plaintiff's erroneous perception that the standard under the former is broader than the standard under the latter, when the reverse is in fact the case.").

C. A command to stop is distinct from a request to stop

Both New York and federal law distinguish between a request to stop, which a reasonable person would feel free to ignore, and a command to stop, which a reasonable person would feel compelled to obey on the understanding that they are not "free to leave." *Carrasquillo*, 54 N.Y.2d at 252–53; *Floyd*, 959 F. Supp. 2d at 565–66. While the former is a voluntary encounter, the latter is involuntary and constitutes a seizure requiring the police to have reasonable suspicion of criminal activity. *De Bour*, 40 N.Y.2d at 223; *Mendenhall*, 446 U.S. at 553–54.

Federal law distinguishes between a "voluntary or consensual encounter," in which a "'reasonable person would have felt free to leave," and a *Terry* stop. *McDow*, 206 F. Supp. at 849–51. New York law likewise distinguishes between voluntary encounters (*De Bour* levels one and two) and seizures (*De Bour* levels three and four).

A *De Bour level two* encounter (resting on the common law right to inquire) is a right to *request* a voluntary stop, but not a right to command a stop. Because it is not a seizure, the subject of the request is not required to stop. In *De Bour*, this Court was clear that the police officer was permitted to invoke the common law right to inquire and approach the defendant, ask what he was doing in the neighborhood, and request his identification. But the police could *not* rely on that right to conduct a "stop involving actual or constructive restraint." *De Bour*, 40 N.Y.2d at 213–16;

see also People v. Moore, 6 N.Y.3d 496, 500 (N.Y. 2006) ("If these circumstances (observing defendant standing in an area known for drug trafficking with an unidentified bulge in his jacket pocket) could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize, and there would, in fact, be no right to be let alone" (citing *People v. Holmes*, 81 N.Y.2d 1056, 1058 (N.Y. 1993))).

D. A police command to stop, followed by submission to that command, is a seizure

New York courts have recognized that a defendant's submission to an authoritative police command to stop (*i.e.*, compliance with the command) is a seizure. *See, e.g.*, *People v. Howard*, 147 A.D.2d 177, 180–81 (1st Dept. 1989) (holding that the police's "authoritative directive to defendant to 'halt,'" followed by the defendant's immediate compliance, constituted a seizure); *People v. Lee*, 96 A.D.3d 1522, 1526–27 (4th Dept. 2012) (holding that police's commands for the defendant to stop while he was riding his bicycle and to remain at the scene, followed by the defendant's submission, constituted a seizure). Courts look to the surrounding circumstances of a police encounter to determine whether a defendant "submit[ted] to the authority of the badge"—in which case a seizure has occurred—rather than voluntarily complied with a police request. *See Cantor*, 36 N.Y.2d at 111. Among the relevant factors, courts have emphasized the repetition of an order to stop and police pursuit of a suspect as factors indicating an authoritative command that

initiates a seizure. *See People v. Reyes*, 199 A.D.2d 153, 155 (1st Dept. 1993) (distinguishing a request from a seizure, and finding no seizure when "there was no flight, no pursuit, no impediment to defendant's freedom of movement").

Likewise, federal courts repeatedly have recognized that commands to stop, followed by submission, are seizures triggering Fourth Amendment protections. In *Simmons*, for example, the Second Circuit held that a seizure occurred when the police twice ordered defendant to "hold on a second" and, after the second order, the defendant complied. *Simmons*, 560 F.3d at 101, 104–107. The court concluded that the defendant was "seized when he obeyed the officer's second order to stop," because a "reasonable person standing in [the defendant's] place would have felt bound to stop . . . ." *Id.* at 107 (internal quotations omitted); *see also United States v. Rios*, No. 09-cr-369-CPS, 2009 U.S. Dist. LEXIS 74895, at *12 (E.D.N.Y. Aug. 24, 2009) (holding that "[w]hen a police officer briefly detains an individual for questioning, the stop is considered a 'seizure' within the meaning of the Fourth Amendment"); *Davis v. City of New York*, 902 F. Supp. 2d 405, 428 (S.D.N.Y. 2012) (holding that defendant was seized when she attempted to walk to an elevator, an officer told her to "come back," and she stopped walking, because "the [officer's] order to 'come back' was an order to stop and [the defendant] obeyed the order").

II. THE DECISION BELOW IS BASED ON A MISREADING OF STATE LAW THAT ULTIMATELY PROVIDES *LESS* PROTECTION TO THE DEFENDANT THAN FEDERAL LAW

Although New York law extends more protection to defendants than federal law, the Appellate Division provided the defendant in this case with *less* protection than he would have had under federal law. This is due to two errors in the decision below: 1) a failure to recognize the relevance of the police pursuit as underscoring the command to stop; and 2) a failure to recognize the relevance of the defendant's submission to the police.

The uncontested facts of this case are that Mr. Rodriguez was riding his bicycle on a public street. A34-35, 49, 51; Resp. Br. at 2; App. Br. at 10. After following Mr. Rodriguez for a few blocks, a police officer commanded him to stop, calling out "[h]old up, police." A35, 58, 65; Resp. Br. at 2; App. Br. at 13-14. The police followed Mr. Rodriguez as he rode on, and again commanded him to stop. *Id.* Mr. Rodriguez then submitted to the commands and stopped his bicycle. A36, 52-53, 58; Resp. Br. at 2; App. Br. at 14.

The Appellate Division treated the police commands to stop followed by the defendant's submission as a *level two De Bour* encounter—requiring only a founded suspicion of criminal activity to initiate—and not as a seizure.

That is contrary to established New York law, as explained above. Police pursuit establishes that the suspect does not enjoy "liberty of movement" and is not

free to leave the encounter or ignore the police command to stop. Additionally, a police command to stop followed by submission amounts to a seizure. *See Howard*, 147 A.D.2d at 180–81; *Lee*, 96 A.D.3d at 1526–27; *Cantor*, 36 N.Y.2d at 111. When Mr. Rodriguez submitted to the police officer's command, a seizure occurred. This encounter was clearly a *level three De Bour* encounter requiring the police to have had a "reasonable suspicion" of some criminal activity before initiating the seizure. It was also a seizure requiring reasonable suspicion under federal law.

Yet the Appellate Division did not conduct any analysis of whether "reasonable suspicion" existed to justify Mr. Rodriguez's seizure, as required under *De Bour* level three. *See People v. Rodriguez*, 194 A.D.3d 968, 971 (2d Dept. 2021). The court instead wrongly assessed the encounter as a *De Bour* level two encounter—the consensual "common law right to inquire"—which requires only a "founded suspicion" of criminal activity. *Id.*

The Appellate Division's erroneous classification appears to be based on two oversights. First, the Appellate Division noted that the police pursued Mr. Rodriguez as he continued to ride down the street, but the court did not consider the relevance of that pursuit under state law. *Rodriguez*, 194 A.D.3d at 969 ("When defendant continued riding, the police followed him and Officer Schnell again stated, more loudly, '[h]old up, police.'"). The Appellate Division did not cite *People v. Martinez* or the subsequent New York decisions that reaffirm the principle

that police pursuit of a suspect is a seizure that requires reasonable suspicion. *See Martinez*, 80 N.Y.2d at 447; *Madera*, 189 A.D.2d at 464. Instead, the Appellate Division acknowledged that police had pursued Mr. Rodriguez, but concluded, contrary to clear precedent from this Court, that the pursuit was not a seizure. *Rodriguez*, 194 A.D.3d at 971–72 ("The unobstrusive manner in which the police followed the defendant did not elevate the pursuit itself to a seizure."). The court below cited apparent precedents for the principle that pursuit is not a seizure, but in fact both of the cases cited conclude that no pursuit occurred, not that pursuit is not a seizure. *See People v. Feliciano*, 140 A.D.3d 1776, 1777 (4th Dept. 2016) ("[T]he officer engaged in mere observation, and was not in pursuit . . . ."); *People v. Rainey*, 122 A.D.3d 1314, 1315 (4th Dept. 2014) ("Upon remittal, the court found that the police officers were not in pursuit of the defendant . . . and now we affirm.").

Second, the Appellate Division did not recognize that the conduct of a suspect or defendant can be a relevant factor to the seizure analysis. Consequently, the Appellate Division misread *People v. Bora*, taking the case to stand for the proposition that an instruction to "stop" is not a seizure, rather than the more nuanced principle that an instruction to "stop" followed by the suspect's flight is not necessarily a seizure.

The Appellate Division cited *Bora* for the proposition that "an officer's instruction to a pedestrian to 'stop' requires only a common-law right of inquiry and

does not constitute a seizure." *Rodriguez*, 194 A.D.3d at 971 (citing *Bora*, 83 NY2d at 533). But this is an incomplete reading of the decision. The *Bora* court explicitly based its finding that there was no seizure in that case on the fact that the defendant was fleeing the police, and thus had not submitted, at the time of the alleged seizure. *Bora*, 83 NY2d at 534–35. While a "verbal command, standing alone, will not usually constitute a seizure," a seizure occurs where that command is accompanied by the defendant's submission to police authority. *Id.* *Bora* does not undermine the clear precedent establishing that commands to stop followed by submission constitute seizures.

By classifying this encounter as a *De Bour* level two encounter, the Appellate Division has turned *De Bour* on its head. The *De Bour* categories are not supposed to legitimize police conduct that leads to non-consensual submission to police authority but lacks the requisite "reasonable suspicion" of a seizure. Rather, as this Court has repeatedly explained, the *De Bour* standard was intended to provide greater protections for citizens than corresponding federal standards. It does so by requiring some basis for initiating a *level one* encounter (some "objective credible reason") or a *level two* encounter (a "founded suspicion that criminal activity is present")—but does not authorize a seizure based on those lesser levels of suspicion. *De Bour*, 40 N.Y.2d 210, 215, 218, 223.

The Appellate Division in this case relied on *De Bour* not to provide additional protection to the defendant, but to shelter police conduct that would be found unlawful under federal Fourth Amendment law.

Federal law distinguishes between consensual and non-consensual encounters, as explained above. In *Simmons*, where the police twice ordered defendant to "hold on a second," after which the defendant complied, the Second Circuit held that the encounter was non-consensual and the defendant was seized. *Simmons*, 560 F.3d at 101, 104–07. Here, the police twice called "[h]old up, police," after which Mr. Rodriguez complied. Under federal law, Mr. Rodriguez submitted to police authority in a non-consensual encounter. Mr. Rodriguez was seized under the Fourth Amendment. Absent the requisite "reasonable suspicion" of criminal activity, the seizure would have been unlawful under federal law.

The Appellate Division forced Mr. Rodriguez's seizure into a *De Bour* category reserved for consensual encounters, and thus afforded him less protection under New York law than he would have enjoyed under federal law.

III. NEW YORK COURTS SHOULD NOT ENDORSE THE VIEW THAT REASONABLE PERSONS SHOULD SOMETIMES FEEL FREE TO DISREGARD POLICE COMMANDS

Although this case involves a seizure by show of authority rather than a seizure by force, the decision below invites increased uses of physical force by the police. It does so because it creates ambiguity about whether "stop" really means "stop."

The Appellate Division has implicitly suggested that reasonable persons should sometimes feel free to disregard a lawful police command to stop. This is a dangerous and potentially deadly principle. Under state and federal law, when police issue a lawful command to stop, grounded in probable cause or a reasonable suspicion of criminal activity, and the suspect disregards the command and flees, the police then gain the authority to use physical force to complete the seizure. To minimize circumstances in which police need to use physical force to complete a lawful seizure, this Court should reaffirm New York courts' clear guidelines about the definition of a seizure: police pursuit constitutes a seizure (and the suspect should take pursuit as an indication to stop); and a command to stop does, in fact, mean "stop."

The authority to seize a suspect includes the authority to use force. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."). How much force is permissible depends in part on the conduct of the person who is targeted for a stop or arrest: the reasonableness of a use of force will depend on an array of factors including "whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Id.*

When a suspect does resist a seizure by fleeing the police, police authority to use force expands. The flight itself may pose a threat to bystanders. Though the precise scope of reasonable force is a question to be determined on the facts of each case, multiple courts have found that flight from police warrants the use of deadly force. *See, e.g.*, *Coitrone v. Murray*, 642 Fed. Appx. 517, 521–22 (6th Cir. 2016); *Gravely v. Speranza*, 219 Fed. Appx. 213, 215 (3d Cir. 2007); *c.f. Vizzari v. Hernandez*, 1 A.D. 3d 431, 432 (2d Dept. 2003) (following *Graham v. Connor* and noting that flight is a relevant factor in evaluating police use of force to detain a suspect); *see also People v. Price*, 112 A.D.3d 1345, 1346 (4th Dept. 2013) (finding the officers' use of physical force to be reasonable where the suspect "was attempting to evade arrest by flight").

For these reasons, it is dangerous and potentially deadly to cultivate ambiguity about whether a police order to "stop" is a request that can be ignored or a command that must be obeyed. New York courts have taken steps to eliminate ambiguity around this question, including the adoption of the principle that police pursuit constitutes a clear seizure, or an indication to a suspect that he is not free to leave. This Court should reaffirm its clear guidance for the safety of police officers, the persons they investigate, and members of the public.

IV. NEW YORK LAW SHOULD NOT DENY CONSTITUTIONAL PROTECTIONS TO CYCLISTS WHO REASONABLY INTERPRET POLICE CONDUCT AS A COMMAND TO STOP

New York and federal courts consistently treat police stops of moving vehicles as seizures. This makes sense—a reasonable person in a moving vehicle has no easy way to distinguish between a police request to stop and a police command to stop. *See, e.g.*, *People v. Baez*, 95 A.D.3d 654, 657 (1st Dept. 2012) (recognizing that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so"); *Brendlin v. California*, 551 U.S. 249, 257 (2007) (explaining that an automobile driver or passenger's "attempt to leave the scene" after being told to pull over "would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place"). In recognition that the legal rationale for treating automobile stops as seizures applies with equal force to cyclists, this Court should provide operators of moving bicycles with the same constitutional protections afforded to operators of moving vehicles who reasonably interpret police conduct as a command to stop.

The expectation of a reasonable motorist when asked to pull over is that they will be "subject to some scrutiny" and are "not free to leave." *Brendlin*, 551 U.S. at 257. That too make sense given that vehicles are subject to traffic laws. While a police officer signaling to a pedestrian may be seeking to just ask a question, a police

officer signaling to a moving vehicle is presumptively requiring the driver to stop. By submitting to what a reasonable person would interpret to be a command to stop, the motorist has been seized.

As the United States Supreme Court has explained:

> [A] traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission . . . Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so. Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment[.]"

Berkemer v. McCarty, 468 U.S. 420, 436–37 (1984).

Save for narrow exceptions not applicable here, courts consistently treat police stops of moving vehicles as seizures. *See, e.g.*, *Hinshaw*, 35 N.Y.3d at 430 ("Under the settled law of New York, an automobile stop 'is a seizure implicating constitutional limitations'" (quoting *People v. Spencer*, 84 N.Y.2d 749, 752 (N.Y. 1950))); *People v. Sobotker*, 43 N.Y.2d 559, 563 (N.Y. 1978) (recognizing that, "absent at least a reasonable suspicion" of criminal conduct, "stopping . . . an automobile by the police constitutes an impermissible seizure"); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrol stops are seizures); *Delaware v. Prouse*, 440 U.S. 648 (1979) (stops to verify license and registration are seizures);

United States v. Cortez, 449 U.S. 411 (1981) (brief investigatory stops are seizures); *Gilles v. Repicky*, 511 F.3d 239, 244–45 (2d Cir. 2009) ("The temporary detention of a person when the police have stopped her vehicle, regardless of its brevity or limited intrusiveness, constitutes a seizure for Fourth Amendment purposes . . . .").

These same factors apply when police officers stop someone who is operating a moving bicycle. Just like an automobile driver, a moving cyclist cannot readily distinguish a police request from a police command. Indeed, urban cyclists travel faster, on average, than those in cars, *see, e.g.*, Carlton Reid, *Data from Millions of Smartphone Journeys Proves Cyclists Faster in Cities than Cars and Motorbikes*, Forbes (Nov. 7, 2018), https://www.forbes.com/sites/carltonreid/2018/11/07/data-from-millions-of-smartphone-journeys-proves-cyclists-faster-in-cities-than-cars-and-motorbikes/?sh=632a77b73794, and are thus at least as unable as motorists to distinguish a police request from a police command while traveling.

Cyclists too are subject to traffic laws that do not apply to pedestrians. They are treated the same as drivers of vehicles. *See, e.g.*, N.Y. Veh. & Traf. Law § 1231 ("Every person riding a bicycle . . . upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle"). A cyclist reasonably will interpret a police command to stop as a precursor to police scrutiny, which they are not free to ignore.

Thus, a cyclist who intentionally stops their moving bicycle in response to police conduct has submitted to police authority and has been seized. They could not distinguish between whether the police officer was *asking* them to pull over or *commanding* them to pull over. And they reasonably submitted to that command when they slowed down, moved to the side of the road, and came to a halt.

Protecting cyclists' right to their uninterrupted freedom of movement—absent a reasonable suspicion that grounds a police command a stop—is all the more important considering that, for thousands of New Yorkers, bicycles replace cars as the "basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." *Prouse*, 440 U.S. at 662–63. In New York City, there typically are 530,000 cycling trips each day. *See* New York City Department of Transportation, *Cycling in the City*, at 8 (2021), https://www1.nyc.gov/html/dot/downloads/pdf/cycling-in-the-city-2021.pdf. New Yorkers should be free to travel by bicycle, rather than by car, without surrendering the high standard of constitutional protection they otherwise enjoy in the face of police commands to stop.

CONCLUSION

It is important to have clear lines demarcating police seizures, since resistance to a lawful seizure can authorize police to use force. In this case, the Appellate Division misread New York and federal law to classify an encounter that was clearly

a seizure as something other than a seizure. The decision below violates state and federal law, creates new ambiguity about what constitutes a seizure, and thereby increases risks of violence to police officers, the persons they investigate, and bystanders.

Respectfully Submitted,

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DATED: October 6, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 500.13(c) of the New York Court of Appeals Rules of Practice because this document contains 5,775 words, excluding the parts of the document exempted by Rule 500.13(c)(3) of the New York Court of Appeals Rules of Practice.

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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,		
Respondent,	:	APL No. 2021-00143
v.	:	
LANCE RODRIGUEZ,	:	**AFFIDAVIT OF SERVICE**
Defendants –Appellant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Carrol Marshall, being duly sworn, deposes and says: that she resides in Elmsford, New York; that she is over the age of twenty-one years and that she is not a party to this proceeding.

That on the 24th day of October 2022, deponent caused to be served by Overnight United Parcel Service two (2) copies of the annexed: **BRIEF OF AMICI CURIAE PROFESSORS ALICE RISTROPH, ALEXIS HOAG-FORDJOUR, CYNTHIA GODSOE, JOCELYN SIMONSON, STACY CAPLOW AND SUSAN HERMAN IN SUPPORT OF APPELLANT,** upon the following parties:

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by depositing a true copy thereof, enclosed in a prepaid properly addressed overnight United Parcel Service wrapper, in an official depository under the exclusive care and custody of the United Parcel Service within the State of New York.

Carrol Marshall

Sworn to before me this
24th day of October, 2022

Notary Public

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