No. 100135-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHERY K. MEREDITH,

Petitioner.

PETITIONER'S ANSWER TO BRIEF OF AMICI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal and Other States Cases

Constitutional Provisions

Statutes

Other Authorities

A. INTRODUCTION

Protecting the public's right to privacy against unrestrained intrusion by law enforcement is a necessary function of a free society. Suspicionless seizures by law enforcement, like Deputy Dalton's seizure of Mr. Meredith, have long been recognized as hostile violations of the right to privacy. They disturb individuals' fundamental freedom to move about or stand still. For this reason, law enforcement is prohibited from arbitrarily and erratically seizing members of the public.

Neither the State nor Amici[1] demonstrate that necessary protections against arbitrary and erratic seizures should bend for law enforcement officers to have unrestrained power to seize individuals who use public benefits like public transit.

[1] For purposes of this briefing, "Amici" refers to the parties who filed the Amicus Brief of Sound Transit, Community Transit, King County Metro & WSTA. Their brief will herein be cited to as "Br. Amici"

B. ISSUES

Mr. Meredith addresses the following issues in answering the brief of Amici:

1. Whether Amici address the primary issue before this Court.
2. Whether the efficiency and the desire to ensure fare compliance is a special need justifying law enforcement's hostile violation of the right to privacy for thousands of members of the public who rely on public transportation.
3. Whether members of the public waive their constitutional right to be free law enforcement restricting their freedom of movement if they simply walking past signs in a barrier-free transit system indicating the need to pay fare.
4. Whether conditioning access to public transportation on the waiver of constitutional rights that preserve spheres of autonomy violates the doctrine of unconstitutional conditions and disproportionately penalizes marginalized groups who often rely upon public transportation.

C. STATEMENT OF THE CASE

Mr. Meredith adopts the Statement of the Case in his Petition for Review and Supplemental Brief of Petitioner as if fully stated herein.

D. ARGUMENT

Deputy Dalton violated Mr. Meredith's right to privacy without authority of law.

The security of one's privacy against intrusion by law enforcement is a basic component of a free society. *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *State v. White*, 97 Wn.2d 92, 99, 640 P.2d 1061 (1982). Such security necessarily extends to seizures by law enforcement, which have long been recognized as one of the most hostile violations of the right to privacy. *State v. Mesiani*, 110 Wn.2d 454, 458, 755 P.2d 775 (1988) (citing *Camara v. Municipal Court*, 387 U.S. 523, 530, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)). They disturb individuals' most basic and fundamental freedom under this right – the freedom to move about or stand still. *White*, 97 Wn.2d at 99. For this reason, both the Washington and federal constitutions prohibit law enforcement from arbitrarily and erratically seizing members of the public. *Id.*; *Mesiani*, 110 Wn.2d at 456-460. This basic protection is necessary for citizens and residents to truly exist in a free society.

The Washington Constitution demonstrates that this state recognizes the significance of securing the right to privacy. Under article 1, section 7, "No person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." Without focusing on the reasonableness of the intrusion, this language "creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions." *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (internal citations and quotations omitted).

Accordingly, law enforcement may not seize members of the public without authority of law. The "authority of law" generally required under article 1, section 7 is a valid warrant. *State v. Villela*, 194 Wn.2d. 451, 458, 450 P.3d 170 (2019). As a result, warrantless seizures are considered per se violations of the right to privacy unless a carefully drawn exception applies. *Id.*

The person asserting an unconstitutional seizure must show that a seizure occurred. *State v. O'Neill*, 148 Wn.2d 564,

574, 62 P.3d 489 (2003). The State then bears the heavy burden of establishing that the seizure was permitted under authority of law. *Villela*, 194 Wn.2d at 458.

Mr. Meredith has demonstrated that Deputy Dalton seized him.[2] A seizure occurs when, under a totality of the circumstances, a reasonable person "would not [have felt] free to leave, terminate the encounter, refuse to answer the officer's question, decline a request, or otherwise go about his business." *State v. Carriero*, 8 Wn. App. 2d 641, 655, 439 P.3d 679 (2019). No reasonable person in Mr. Meredith's position would have felt free to decline Deputy Dalton's command to provide proof of fare since they would have faced a legal penalty if they did so.[3] Moreover, no person would have felt free to refuse such a command from a uniformed police officer while trapped in A

[2] *See* Amended Brief of Appellant at 5-8 and Supplemental Brief of Petitioner at 9-10.

[3] Under RCW 81.112.220(2)(b) and RCW 36.57A.230(2)(b), passengers using public transportation like Mr. Meredith are liable for a civil infraction if they fail to comply with a law enforcement officer's request for proof of fare.

moving bus with multiple officers onboard. Deputy Dalton's command was effectively an order to "stop." *See State v. Butler*, 2 Wn. App. 2d. 549, 411 P.3d 393 (2018) (defendant seized when told to "stop").

While Mr. Meredith has met his burden, neither the State nor Amici have demonstrated that his seizure was justified under authority of law. Law enforcement cannot warrantlessly seize individuals without any suspicion to believe that they are engaged in unlawful activity. *State v. Duncan*, 146 Wn.2d 166, 172-73, 43 P.3d 513 (2002); *State v. Thorp*, 71 Wn. App. 175, 181, 856 P.2d 1123 (1993). And Deputy Dalton, had no suspicion whatsoever that Mr. Meredith was engaged in unlawful activity when he seized him.

1. Amici do not address the primary issue to be decided by this Court.

The primary issue before this Court is whether Deputy Dalton – a law enforcement officer – had authority of law under

RCW 81.112.210(2)(b)(i) or RCW 35.58.585(2)(b)(i) to seize Mr. Meredith for simply riding the bus.

At the beginning of their brief, Amici state that they "did not address whether the unique facts of this case present an illegal seizure of [Mr.] Meredith." Amici Br. at 1. Instead, Amici describe barrier-free transit and assert their reasons for utilizing such a system. They also assert how they conduct fare enforcement under their respective systems, explaining that they primarily use non-law enforcement personnel.[4]

Thus, Amici's briefing does not address the primary issue for this Court to decide. This Court does not need to decide whether non-law enforcement personnel may conduct fare enforcement under RCW 81.112.210(2)(b)(i) or RCW 35.58.585(2)(b)(i). Rather, this Court must only decide whether RCW 81.112.210(2)(b)(i) or RCW 35.58.585(2)(b)(i)

[4] "Sound Transit and Metro apply RCW 81.112.210 and RCW 36.57A.230, respectively, without involvement of law enforcement officers or like government agents. . . . Other use law-enforcement as necessary for the safety of employees and passengers." Br. Amici at 24.

independently provide authority to law enforcement officers like Deputy Dalton to arbitrarily and erratically seize passengers without any suspicion to believe they are engaged in unlawful activity.

Mr. Meredith only addresses additional topics raised by Amici to the extent that it may be helpful for this Court to decide the primary issue at hand.

2. Efficiency and the desire to ensure fare compliance are not special needs justifying law enforcement's hostile violation of the right to privacy for thousands of members of the public who rely on public transportation.

Neither the State nor Amici demonstrate that there is a special need justifying law enforcement to hostilely invade individuals' right to privacy without suspicion of unlawful activity.

Developed from federal jurisprudence analyzing the Fourth Amendment, the "special needs" doctrine has been recognized as a limited exception to the warrant requirement. *See State v. Griffith*, 11 Wn. App. 2d 661, 455 P.3d 152 (2019).

This doctrine's broader application effectively supplanted the more narrow "administrative search" doctrine. *Id.* at 672 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)).

The special needs doctrine only permits warrantless searches when they are "directed toward special needs, beyond the normal need for law enforcement and the warrant and probable-cause requirements are impracticable." *Id.* (quoting *Griffin*, 483 U.S. at 873) (internal quotation and alteration marks omitted). "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* (quoting *Skinner v. Ry. Labor Execs.' Assn.*, 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)) (internal quotation marks omitted). The doctrine is not justified under the theory of implied consent because it focuses

on the extent of the government interest and the intrusion into the individual's right to privacy. *Id.* at 670.

While the Supreme Court of the United States has applied the special needs doctrine to uphold the constitutionality of searches under the Fourth Amendment, this Court has yet to extend the doctrine to article 1, section 7, especially for seizures of an individual's person. *Compare York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (holding that random drug searches of student athletes violated article 1, section 7 despite the school's strong interest in preventing drug and alcohol use among students) *with Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (holding that random drug searches of student athletes was permissible under the Fourth Amendment's prohibition against unreasonable searches in light of the school's interest in preventing drug and alcohol use among students). This Court's reluctance is grounded on the widely accepted principle that article 1, section 7 provides

greater protection to individuals' privacy than the Fourth Amendment. *York*, 163 Wn.2d at 305-06; *Mesiani*, 110 Wn.2d at 456-58.

In *Mesiani*, this Court held that sobriety checkpoints violated individuals' constitutional right to privacy under article 1, section 7. 110 Wn.2d at 458. Police officers were briefly stopping "all oncoming motorists without warrants or individualized suspicion of any criminal activity." *Id.* at 456. "[T]he checkpoints were designed to stop or deter the maximum number of intoxicated drivers," giving due consideration to the driver's convenience. *Id.* at 456-57.

While recognizing the "very strong societal interest in dealing effectively with the [carnage] of drunken driving," this Court reasoned that it only recognizes narrow exceptions under article 1, section 7, and the City's interest failed to justify seizing drivers in violation of the right to privacy. *Id.* at 457-460. This Court also emphasized that "seizure[s] to discover

evidence of crimes is more 'hostile' than an administrative search." *Id* at 458.

Notably, the City's request to validate these suspicionless seizures improperly balanced all the harm of drunk driving against the intrusion into just one individual's private affairs. This Court said the proper balance "weigh[s] the actual expected alleviation of the social ill against the cumulated interests invaded." *Id.* at 459; *compare Michigan Department of State Police v. Sitz,* 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (holding that the State's interest in preventing drunk driving justifies a brief intrusion into individuals' constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment).

Unsurprisingly, in *Marchand,* this Court also held that law enforcement's suspicionless "spot checks" of drivers on public highways to inspect driver's licenses, proof of registration, and vehicle equipment was unconstitutional. *State v. Marchand*, 104 Wn.2d 434, 439-441, 706 P.2d 225 (1985).

The officers were performing these spot checks under RCW 46.64.070, which states:

> officers . . . are hereby empowered . . . to require the driver of any motor vehicle being operated on any highway of this state to stop and display his or her driver's license and/or to submit the motor vehicle being driven by such person to an inspection and test to ascertain whether such vehicle complies with the minimum equipment requirements prescribed by chapter 46.37 RCW.

Id. at 439. Analyzing the seizures under the Fourth Amendment's reasonableness standard, this Court reasoned that the State failed to demonstrate its unsupported interest in highway safety justified the intrusion.[5] *Id.* If such intrusions were permissible, individuals would be "subject to unfettered governmental intrusion every time [they] entered an automobile. . . ." *Id.* at 438. Thus, the statute did not provide the officers with sufficient authority to perform the suspicionless seizures. *Id.* at 439-441.

[5] Since it is more protective than the Fourth Amendment, the case would have had the same result under article 1, section 7. *Mesiani*, 110 Wn.2d at 456-58.

Griffith is the only published Washington case to directly apply the special needs doctrine to article 1, section 7. There, the court held that suspicionless courthouse searches cabined to find weapons and explosives were constitutionally permissible after first determining that the intrusions addressed a special need. *Id.* at 681-87. Courthouses, like airports, have faced numerous acts of terrorism and bombings, causing death and serious injury to innocent bystanders. *Id.* at 682-83.

With such threats, the court found there was a special need to protect the safety of those in the justice system and prevent violence that would undermine the rule of law. *Id.* at 684. The court then balanced the significant harm to be alleviated against the minimal intrusion against visitors' right to privacy by courthouse screenings. *Id.* at 685-86. The court, however, was unable to determine whether the search was constrained to the scope of the special need because of an inadequate record. *Id.* at 686.

Griffith is distinguishable from the case at hand. First, *Griffith* involved a significant and demonstrated government interest in preventing violence in courthouses, whereas no such interest exists here. Secondly, *Griffith* involved a minimally invasive screening instead of a hostile violation against an individual's fundamental right to move about and stand still. *Mesiani*, 110 Wn.2d at 458. The defendant in *Griffith* could have walked out of court while Mr. Meredith was not afforded that option. Notably, conducting a minimally invasive screening of one person carrying an explosive device could prevent serious harm, which properly balances the actual expected alleviation of the social ill against the cumulated interests invaded.

Amici cites to additional cases for the proposition that this Court should adopt a different balancing test to determine whether the use of non-law enforcement fare enforcers is consistent with article 1, section 7. But as mentioned earlier, that issue is not before this Court. Additionally, the cases cited

by Amici are inapplicable – they involve individuals who were subject to intrusions as the result of an adversarial hearing or criminal conviction. *See State v. Olsen*, 189 Wn.2d 118, 135, 399 P.3d 1141 (2017); *State v. Meacham*, 93 Wn.2d 735, 739, 612 P.2d 795 (1980).

Mesiani and *Marchand* are controlling authorities here. Like the drivers subject to the sobriety checks in *Mesiani* and spot checks in *Marchand*, passengers on public transit are suspicionlessly seized when law enforcement use unfettered discretion under RCW 81.112.210(2)(b)(i) to demand proof of payment, infringing their fundamental freedom to move about or stand still.

And much like the City in *Mesiani* and the State in *Marchand*, the State here has failed to demonstrate any special need justifying the violation of such a fundamental right. While they may disagree as to whether law enforcement should conduct fare enforcement, both the State and Amici assert that fare enforcement is necessary to ensure efficient transit services

in a barrier-free system.[6] Courts, however, will "not sacrifice constitutional rights on the altar of efficiency." *State v. Madsen*, 168 Wn.2d 496, 509, 229 P.3d 714 (2010).

The State also attempts to balance all the weight of the entire transit system onto the shoulders of just one passenger and compares it with the freedom affected by just one intrusion. *See* Supp. Br. Resp't at 29-30. As stated by this Court, the proper balance would be to weigh the harm to be actually alleviated against the cumulated interests invaded. *Mesiani*, 110 Wn.2d at 459. The harm to be alleviated here is the cost of fare, which is just a couple of dollars.[7] When compared to the thousands of passengers suspicionlessly seized by this practice, a couple of dollars – the actual expected alleviation of harm –

[6] The State's Supplemental Brief of Respondent and Amici's briefing contains the words "efficiency," "efficient," "efficiently," and "efficiencies" a combined sixteen times.

[7] The costs of fare for Washington transit services can be found at the following websites: https://www.communitytransit.org/fares/fares-and-passes; https://www.soundtransit.org/ride-with-us/how-to-pay/fares; https://kingcounty.gov/depts/transportation/metro/fares-orca.aspx; and https://www.seattle.gov/transportation/getting-around/transit/streetcar/fares-and-orca-card.

cannot justify these hostile intrusions, especially when the harms of drunk driving and drug abuse by minors were not enough.

Thus, the State cannot meet it burden to show that the special needs doctrine permits suspicionless seizures conducted by law enforcement under RCW 81.112.210(2)(b)(i).

3. Members of the public do not waive their constitutional right to be free from law enforcement restricting their freedom of movement if they simply walk past signs in a barrier-free transit system indicating the need to pay fare.

As discussed in greater detail in Mr. Meredith's Supplemental Brief of Petitioner, the State has failed to demonstrate that passengers like Mr. Meredith consented to their seizures. Like the State, Amici fails to mention a fact critical to consent analysis – passengers are never notified that they waive their constitutional right against suspicionless seizures when entering public transit.

For this reason, even if passengers like Mr. Meredith could consent to their seizures, they do not do so knowingly or

voluntarily. The State has the burden to show that consent was made voluntarily and that the search or seizure did not exceed the scope of the consent. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). This depends on the totality of the circumstances, including whether the individual knew what he or she was consenting to. *See State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998) (law enforcement must notify the residents of their request to search when seeking consent to search an individual's home); *see also State v. Carter*, 244 A.3d 1041, 1056 (2021) ("It is difficult to understand how someone can impliedly consent to a search or seizure without having [express] notice that the search or seizure may occur").

A well-established and basic requirement for forming a contract is very similar. The terms of the contract must be sufficiently definite, meaning parties must know the terms of the contract to "avoid trapping parties in surprise contractual obligations." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004) (internal citations

omitted). This is especially true when the terms involve waiving individual rights. *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 49-51, 470 P.3d 486 (2020).

For this reason, even if passengers like Mr. Meredith could consent to their seizures (and they cannot), they do not so knowingly or voluntarily. There is no indication in the record that passengers, including Mr. Meredith, were notified that they waive their constitutional right to be free from suspicionless seizures when they use public transit. He did not have to sign any agreements or read any paperwork to get onto the bus.

And even if Mr. Meredith implicitly agreed to conform his conduct to terms of RCW 81.112.210 and RCW 81.112.220 by entering public transit, these statutes failed to explicitly notify him that he is waiving his right to privacy by doing so. RCW 81.112.220(2)(b) only notifies passengers that they are liable for a civil infraction if they fail to provide proof of payment and RCW 81.112.210(2)(b)(i) merely informs them that law enforcement may request proof of payment. Neither of

these statutes, however, indicate that law enforcement may make these requests and seize them without any reason to believe they do not have proof of fare.

Therefore, even if consent is an exception to seizure of an individual's person, Mr. Meredith did not consent to the waiver of his right to privacy because he had no notice of such material terms. He cannot be held to such "surprise contractual obligations." *Keystone*, 152 Wn.2d at 178 (internal citations omitted).

4. Conditioning access to public benefits like public transit on the waiver of constitutional rights that preserve spheres of autonomy violates the doctrine of unconstitutional conditions and disproportionately penalizes marginalized groups who often rely upon public transportation.

Under the doctrine of unconstitutional conditions, "the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." *Butler v. Kato*, 137 Wn. App. 515, 530, 154 P.3d 259 (2007) (citing

Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1415 (1989)). It serves to prevent the government from chipping away at the "constitutional rights that preserve spheres of autonomy." *Id.*

Public transit is a benefit offered to members of the public for a nominal fee. "For many, the use of public transit is not a choice, but is necessary to access the economic mainstays of life, such as employment."[8] And the individuals who rely most on public transit are those who are economically disadvantaged or identify as Black, Indigenous, or a Person of Color ("BIPOC"). *Id.* at 20.

Members of these groups are much more likely to suffer from law enforcement disturbing their private affairs. "National studies show that police stop Black, Latinx, and Asian people approximately eight to ten times as often as police stop white people." *Id.* at 24 (citing *Symposium: Panel V: Promoting*

[8] Amici Br. of ACLU of Washington, Washington Defender Association, and King County Department of Public Defense at 19.

Racial Equality, 9 J.L. & Pol'y 347, 365 (2001)). This is compounded by the fact that members of the BIPOC community are more likely to face discrimination in the workplace and have less access to socioeconomic resources during times of need.[9]

Thus, conditioning the use of public transit on waiving the fundamental right to move about or stand still would further diminish the constitutional rights that preserve spheres of autonomy of those already most vulnerable to government intrusion. The government should not be able to offer an essential benefit to the community just to have law enforcement intrude upon the private affairs of those who rely upon it.

Washington is better than that.

[9] Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth* Gap, AMERICANPROGRESS.ORG (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality/; Beth Jarosz et al., *Disadvantage for Black Families Compounded by Economic Circumstances of Kin*, CPIPR (April 16, 2020), https://www.prb.org/resources/disadvantage-for-black-families-compounded-by-economic-circumstances-of-kin/.

E. CONCLUSION

This Court should reverse Division I and the lower courts because Deputy Dalton seized Mr. Meredith without authority of law.

This brief is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 4026 words (word count by Microsoft Word).

RESPECTFULLY SUBMITTED this 16th day of February 2022.

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