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STATE OF WASHINGTON
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No. 100135-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHERY K. MEREDITH,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Tobin S. Klusty, WSBA #52567
Attorney for Zachery K. Meredith

The Blankenship Law Firm
1000 Second Avenue, Suite 3250
Seattle, WA 98104
(206) 343-2700

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A. INTRODUCTION

Deputy Dalton commanded Mr. Meredith to provide “proof of payment or ORCA Card” while he was riding the bus. Mr. Meredith was frozen – he had no choice but to comply. Failing to provide proof would have made him liable for a civil infraction. Despite Division I’s holding that he consented to Deputy Dalton’s command, Mr. Meredith cannot do so under article 1, section 7 and he was never notified that getting onto the bus meant an officer may command proof of payment without any reason to believe that he did not have it.

This Court should hold that Deputy Dalton seized Mr. Meredith without authority of law in violation of article 1, section and reverse Mr. Meredith’s conviction.

B. ISSUES PRESENTED

1. Did Deputy Dalton seize Mr. Meredith when demanding “proof of payment or ORCA card” if refusing to comply is an infraction?
2. Did Deputy Dalton have authority of law to seize Mr. Meredith if the only reason for his seizure was because he was riding the bus?

C. STATEMENT OF THE CASE

RCW 81.112.210(2)(b)(i)¹ permits officers to request proof of payment from passengers riding public transit.

Passengers who fail to comply with these requests are liable for civil infraction under RCW 81.112.220(2)(b).²

Deputy Dalton was one of three officers investigating whether passengers on the Swift bus line had proof of fare. CP 78, 90-91, 94. Deputy Dalton's standard practice was to

¹ The text of this section:

(2)(b) In addition to the specific powers granted to enforcement officers under RCW 7.80.050 and 7.80.060, persons designated to monitor fare payment also have the authority to take the following actions:

(i) Request proof of payment from passengers.

² The text of this section:

(2) The following constitute civil infractions punishable according to the schedule of fines and penalties established by the authority under RCW 81.112.210(1)(a) or violations punishable according to an alternative fare enforcement system established by the authority under RCW 81.112.210(1)(b):

(b) Failure to produce proof of payment in the manner required by the terms of use established by the authority including, but not limited to, the failure to produce a validated fare payment card when requested to do so by a person designated to monitor fare payment;

approach passengers and say, “proof of payment or ORCA card.” CP 105. He would then use a device to scan the ORCA³ card or transit ticket to determine whether the passenger paid fare. CP 90. If passengers did not comply or have proof, Deputy Dalton would pull them off the bus to give them a warning, issue an infraction, or arrest them for Theft in the Third Degree. CP 92.

The officers followed their standard practice with Mr. Meredith. CP 105. Mr. Meredith was riding the bus when Deputy Dalton entered the back door and another officer entered the middle door. CP 94-95, 105. Deputy Dalton approached Mr. Meredith and said, “proof of payment or ORCA card.” CP 105. Deputy Dalton never watched any video surveillance, never received any witness statements, and never heard Mr. Meredith say that he did not pay. CP 102-03.

³ An ORCA card is a device that may be loaded with transit fare to pay for various public transportation services throughout Washington State. ORCA OPTIONS, https://orcacard.com/ERG-Seattle/p3_001.do?m=3 (last visited December 31, 2022).

Mr. Meredith said he had proof and began looking through his pants and backpack. CP 105-06. After searching, he was unable to find it. CP 99. Deputy Dalton then ordered Mr. Meredith off the bus and told him to identify himself. CP 99-100. Mr. Meredith said his name was “Jason McGumery.” CP 100. Deputy Dalton asked dispatch to confirm Jason McGumery’s identity, but dispatch was unable to do so. CP 100. Deputy Dalton then arrested Mr. Meredith. CP 93-94. The officers were able to identify Mr. Meredith using a Mobile Identification device that scanned his fingerprints. CP 94, 100-01.

The State charged Mr. Meredith with Making a False or Misleading Statement to a Public Servant. CP 280. Mr. Meredith moved to dismiss the charge, arguing that the evidence obtained from his arrest must be suppressed because Deputy Dalton unconstitutionally seized him, but the trial court denied his motion, finding that Deputy Dalton’s order to provide “proof of payment or ORCA card” was lawful to

enforce RCW 81.112.220(2)(b). CP 328-333. Mr. Meredith then proceeded to a jury trial where he was convicted of the crime charged. CP 304.

Mr. Meredith timely appealed to the Superior Court, which affirmed his conviction. Mr. Meredith then timely filed a motion for discretionary review to Division I of the Court of Appeals, and the court accepted review.

Mr. Meredith maintained that his right to privacy was violated when Deputy Dalton seized him without any suspicion of unlawful activity. Appellant Am. Br. at 3. He argued that he was seized when Deputy Dalton's demanded "proof of payment" because no reasonable person would feel free to terminate the encounter or decline to answer because doing so would make him liable for an infraction under RCW 81.112.220(2)(b). He also argued that the authority provided to Deputy Dalton under RCW 81.112.210(2)(b)(i) to make these demands is unconstitutional because it permits law enforcement

to arbitrarily and erratically seize passengers without any suspicion that they are engaged in unlawful activity.

Division I affirmed Mr. Meredith's conviction, holding that Mr. Meredith consented to his seizure because, by entering the bus, he contracted with Swift transit and thereby agreed to comply with all terms of transportation, which included the authority provided to law enforcement under RCW 81.112.210(2)(b)(i) to request proof of payment from passengers. App. A. at 11-17.

D. ARGUMENT

This Court should reverse. Deputy Dalton unconstitutionally disturbed Mr. Meredith's right to privacy by seizing him without authority of law.

The Fourth Amendment and article 1, section 7 both protect individuals' right to privacy from government intrusion. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). It is fundamental to this right "that no law may unnecessarily interfere with a person's freedom . . . to move about or to stand

still.” *State v. White*, 97 Wn.2d 92, 99, 640 P.2d 1061 (1982).

“The right to be let alone is inviolate, interference with that right is to be tolerated only if it is necessary to protect the rights and welfare of others.” *Id.*

It is well-established, however, that the plain language of article 1, section 7 protects the right to privacy to a greater extent than the Fourth Amendment. *State v. Valdez*, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009); *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). While the Fourth Amendment focuses on the reasonableness of the intrusion, article 1, section 7 states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This Court explained the significance of this language in *Valdez*:

Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs “without authority of law.” This language not only prohibits unreasonable searches, but also provides no quarter for ones that, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. This creates an almost

absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.

Id. at 772 (internal citations and quotations omitted).

In essence, the primary focus of the Washington Constitution is “protecting an individual’s right of privacy” – not the reasonableness of the intrusion. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). The text of article 1, section 7 does not change when the person asserting its protections is a passenger on public transportation instead of a private vehicle.

Whether an officer’s undisputed actions unconstitutionally violated an individual’s private affairs is a question of law reviewed de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

The person asserting an unconstitutional seizure has the burden of establishing 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. *State v. Villela*, 194 Wn.2d. 451, 458, 450 P.3d 170 (2019); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

The State is unable to meet its heavy burden here.

1. Deputy Dalton seized Mr. Meredith because no reasonable person would have felt free to decline his command.

Deputy Dalton seized Mr. Meredith when commanding him to provide “proof of payment or ORCA card.”

A seizure occurs when an officer restrains an individual’s freedom of movement. *Id.* at 695. Restraint amounting to a seizure may arise from the use of force or a show of authority, such as a command to “stop.” *Id.*; *State v. Butler*, 2 Wn. App. 2d. 549, 561, 411 P.3d 393 (2018). The relevant inquiry is whether a reasonable person “would not feel 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). Courts

must look objectively at the totality of circumstances when answering this question. *Rankin*, 151 Wn.2d at 695.

No reasonable person in Mr. Meredith's position would believe that he could terminate the encounter with Deputy Dalton. As stated above, passengers riding the bus are liable for an infraction if they "[fail] to produce proof of payment . . . when requested to do so by [law enforcement]." RCW 81.112.220(2)(b); RCW 81.112.210(2)(b)(i). Accordingly, reasonable people would not feel to walk away from Deputy Dalton's command since doing so would make them liable for a legal penalty.

Thus, Deputy Dalton's command seized Mr. Meredith because it was a show of authority that restrained his freedom to move about or stand still.

2. Deputy Dalton did not have authority of law to seize Mr. Meredith when he was only riding the bus.

The "authority of law" generally required under article 1, section 7 is a valid warrant. *Villela*, 194 Wn.2d at 458. As a

result, warrantless seizures are considered per se violations of an individual's right to privacy unless the State shows that a carefully drawn exception applies. *Id.*

No exception to the warrant requirement applies here.

- a. RCW 81.112.210(2)(b)(i) does not provide authority of law to seize passengers without suspicion of unlawful activity.

It is undisputed that Deputy Dalton demanded "proof of payment or ORCA card" under 81.112.210(2)(b)(i) because Mr. Meredith was riding the bus. Resp't Br. at 2, 10.

Under article 1, section 7, law enforcement cannot seize individuals if they have no reason to believe they are engaged in unlawful activity. *State v. Duncan*, 146 Wn.2d 166, 172-73, 43 P.3d 513 (2002). This protection "cannot be amended by statute, and while the legislature can give more protection to constitutional rights through legislation, it cannot use legislation to take that protection away." *Villela*, 194 Wn.2d. at 454. Statutes may only provide law enforcement with authority

of law to warrantlessly seize an individual if it “is consistent with the guaranties of article 1, section 7.” *Id.* at 459.

In *Villela*, this Court held that RCW 46.55.360 did not provide an officer with authority of law to impound a vehicle. *Id.* at 460. RCW 46.55.360 required law enforcement to impound vehicles when the driver is arrested for driving under the influence. *Id.* at 455. Article 1, section 7 only permits warrantless seizures of vehicles when it is reasonable under the circumstances and there are no reasonable alternatives or there is probable cause to believe it contains evidence of a crime. *Id.* at 460. Accordingly, mandatory impounds were inconsistent with the guaranties of article 1, section 7, making the statute unconstitutional. *Id.* at 459-463.

Like the statute in *Villela*, RCW 81.112.210(2)(b)(i) is inconsistent with the guaranties of article 1, section 7 to the extent it permitted Deputy Dalton to seize Mr. Meredith without any reason to believe he was engaged in unlawful activity.

Thus, RCW 81.112.210(2)(b)(i) did not provide Deputy Dalton with authority of law to seize Mr. Meredith. The statute cannot authorize seizures prohibited by article 1, section 7.

- b. Mr. Meredith did not consent to his seizure because he cannot do so under article 1, section 7 and he was never notified that he waives his constitutional right to privacy when he enters public transit.

Mr. Meredith did not consent to his seizure.

Consent is an exception to the warrant requirement for most searches and seizures. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Individuals, however, cannot consent to the seizure of their person under article 1, section 7. *See State v. Thorp*, 71 Wn. App. 175, 181, 856 P.2d 1123 (1993) (holding that the theory of implied consent cannot justify seizures of an individual's person under article 1, section 7 without suspicion of unlawful activity).

This is especially true in the context of RCW 81.112.210(2)(b)(i). The act of consent is synonymous with the ability to revoke consent. *State v. Ruem*, 179 Wn.2d 195, 207,

313 P.3d 1156 (2013). A person providing consent must “ha[ve] the right to restrict or revoke that consent at any time.” *Id.* at 207. But passengers seized by an officer’s request for proof of payment cannot withdraw consent – they must comply with the officer’s request or face a legal penalty. Without the ability to revoke, consent to such seizures is illusory at best. *Id.*

Even if passengers like Mr. Meredith could consent to their seizures, they do not so knowingly or voluntarily. To establish consent, the State must show that it was made knowingly and voluntarily and that the intrusion did not exceed the scope of the consent. *Reichenbach*, 153 Wn.2d at 131. This depends on the totality of the circumstances, including whether the individual was notified about the nature of the intrusion and his right to refuse. *State v. Ferrier*, 136 Wn.2d 103, 116-17, 960 P.2d 927 (1998).

Contract formation rests upon consent. *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 48, 470 P.3d 486 (2020). A contract is “an agreement between two or more parties

creating obligations that are enforceable or otherwise recognizable at law.” CONTRACT, Black's Law Dictionary (11th ed. 2019). But to be enforceable, the parties to the contract must have mutually assented to agreement. *Burnett*, 196 Wn.2d at 48. The party asserting the existence of a contract bears the burden of demonstrating that each essential element has been satisfied. *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957).

Mutual assent requires parties to have a “meeting of the minds” when forming a contract. *Swanson v. Holmquist*, 13 Wn. App. 939, 942, 539 P.2d 104 (1975) (citing *Wetherbee v. Gary*, 62 Wn.2d 123, 278 P.2d 395 (1955)). In other words, the parties must mutually assent on the agreement’s essential terms and those terms must be sufficiently definite. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). This requirement works to “avoid trapping parties in surprise contractual obligations.” *Id.* at 178. (internal citations omitted).

Parties must objectively manifest their mutual assent. *Id.* at 177. It must be objectively clear from the agreement that the parties had knowledge of the material terms. *Burnett*, 196 Wn.2d at 49. And when a contract involves waiving individual rights, the terms must explicitly notify the party subject to the waiver that the agreement includes the waiver. *Id.* at 50-51.

In *Burnett*, this Court emphasized the necessity of explicit notice when waiving individual rights. The defendant there moved to compel arbitration after a former employee sued for several wage related claims. *Id.* at 43, 45. During his orientation, the plaintiff signed an “Employee Relationship Agreement” (ERA). *Id.* at 42-43. It instructed him to “learn and comply with the rules and policies outlined in [the employee handbook].” *Id.* at 43. The handbook contained a mandatory arbitration policy (MAP) prohibiting employees from filing lawsuits against the defendant and instead requiring them to submit claims through an internal process then undergo binding arbitration if the claims were not resolved internally. *Id.* at 43-

44. The defendant gave the handbook to the plaintiff at orientation, but told him to read it at home. *Id.* at 43.

This Court held that the plaintiff did not assent to the MAP. *Id.* at 50. Even though it referenced the employee handbook, the ERA did not explicitly notify the plaintiff of the MAP's incorporated terms. *Id.* at 50-51. The ERA did not mention arbitration and the plaintiff signed it before reading the handbook. *Id.* at 49. Consequently, without knowingly agreeing to its incorporated terms, the plaintiff did not assent to the MAP and the parties did not form a contract to enforce its terms. *Id.* at 50, 63.

Burnett is analogous to the case here. Much like the plaintiff in *Burnett*, Mr. Meredith did not knowingly or voluntarily agree to waive his individual rights. There is no indication in record that Mr. Meredith was notified he would forgo his right to move about or stand still to ride the bus. Even if Mr. Meredith implicitly agreed to conform his conduct to terms of RCW 81.112.210 and RCW 81.112.220 by riding the

bus, the 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 without any reason to believe the passengers do not have proof of fare. And like waiving the right to judicial forum, waiving the right to privacy under article 1, section 7 is a material term that cannot be left out of any agreement that seeks to diminish its protection.

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 terms. He cannot be held to such "surprise contractual obligations." *Keystone*, 152 Wn.2d at 178 (internal citations omitted).

- c. Conditioning the use of public transit on waiving protections against arbitrary and erratic seizures violates the right to privacy under the doctrine of unconstitutional conditions.

The doctrine of unconstitutional conditions “holds that 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.*

While courts have yet to apply it directly to the Washington State Constitution, the doctrine is directly applicable to the concerns raised here. As described by the Ninth Circuit, the doctrine prevents the government from using discretionary benefits to slowly diminish our right to privacy:

Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically,

striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right functions to preserve spheres of autonomy ... [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands.

United States v. Scott, 450 F.3d 863, 866 (9th Cir. 2006)

(internal quotations and citations omitted).

The doctrine prevents legislation from slowly eroding the greater protection article 1, section 7 affords to the right to privacy. Washingtonians face significant risk against this right if the government may continue to condition community benefits, such as public transit, on the surrendering the right to privacy.

Thus, Deputy Dalton's use of RCW 81.112.210(2)(b)(i) to seize Mr. Meredith violated article 1, section 7 under the doctrine of unconstitutional conditions because it reduced conditioned a benefit on the surrender of constitutional rights.

E. CONCLUSION

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

This brief is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 3,519 words (word count by Microsoft Word).

RESPECTFULLY SUBMITTED this 3rd day of January 2021.



TOBIN S. KLUSTY, WSBA #52567
Attorney for the Appellant

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ZACHERY K. MEREDITH,

PETITIONER.

NO. 100135-5

1 **DECLARATION OF DOCUMENT FILING AND SERVICE**

2 I, Tobin S. Klusty, hereby state That on the 3rd day of January, 2022, I caused the
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5

6 Zachery Kyle Meredith
7 1130 112th St. SW
8 Everett, WA 98204
9 Petitioner

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

10 Nathaniel Sugg, WSBA No. 44672
11 Diane Kremenich
12 Snohomish County Prosecutor's Office
13 3000 Rockefeller Ave.
14 Everett, WA 98201
15 Email: Nathan.sugg@snoco.org
16 Diane.kremenich@snoco.org

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

17 Brian Flaherty, WSBA No. 41198
18 King County Department of Public Defense
19 420 W. Harrison St Ste 202
20 Kent, WA 98032
21 Email: brian.flaherty@kingcounty.gov

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

22 Katherine Hurley, WSBA No. 37863
23 La Rond Baker, WSBA No. 43610
24 Christina Alburas
25 King County Department of Public Defense
26 710 2nd Ave. Ste 200
Seattle, WA 98104
Email: Katherine.hurley@kingcounty.gov
lbaker@kingcounty.gov
calburas@kingcounty.gov

- by Electronic Mail
- by Facsimile Transmission
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21
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23
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25
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Breanne Schuster, WSBA No. 49993
Julia Mizutani, WSBA No. 55615
American Civil Liberties Union of Washington
PO Box 2728
Seattle, WA 98111
Email: bschuster@aclu-wa.org
jmizutani@aclu-wa.org

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

Magda Baker, WSBA No. 30655
Washington Defender Association
110 Prefontaine PL S Ste 610
Seattle, WA 98104
Email: magda@defensenet.org

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

DATED this 3rd day of January, 2022, at Seattle, Washington.



Tobin S. Klusty, WSBA No. 52567
Attorney for Zachery K. Meredith

BLANKENSHIP LAW FIRM

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- magda@defensenet.org
- nathan.sugg@snoco.org

Comments:

Supplemental Brief of Petitioner

Sender Name: Tobin Klusty - Email: tklusty@blankenshiplawfirm.com

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Phone: 206-343-2700

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