IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. **SAUL REYES-HERRERA**, Defendant-Appellant Petitioner on Review.	Washington County Circuit Court Case No. 18CR64910 Court of Appeals Case No. A170594 **Supreme Court Case** **No. S068223**

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER, ACLU OF OREGON, INTERFAITH MOVEMENT FOR IMMIGRANT JUSTICE, DISABILITY RIGHTS OREGON

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County Honorable Eric Butterfield, Judge

Affirmed Without Opinion: November 12, 2020
Before DeVore, Presiding Judge, and DeHoog, Judge, and Mooney, Judge

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INTRODUCTION

Amicus Curiae, Oregon Justice Resource Center (OJRC), is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by focusing on the principle that our criminal justice system should be founded on fairness, accountability, and evidence-based practices. OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

Amicus Curiae, American Civil Liberties Union of Oregon (ACLU of Oregon) is a statewide non-profit and non-partisan organization with over 28,000 members. As a state affiliate of the national ACLU organization, ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental rights protected in the Oregon Constitution and the United States Constitution. That includes holding police accountable to respecting the right of the public to be free from unreasonable searches and

seizures that is protected in Article I, section 9, of the Oregon Constitution and the Fourth Amendment of the U.S. Constitution.

Amicus Curiae Oregon Interfaith Movement for Immigrant Justice (IMIrJ), accompanies and equips communities and people of faith and deep love to advance immigrant justice. We do this work through direct accompaniment of immigrants facing detention and deportation, advocacy at local, state, and national levels, and prophetic action. IMIrJ is an organization made up of diverse faith communities, faith leaders, and individuals called by their conscience to respond actively and publicly to the suffering of immigrants in the United States due to unjust immigration policies. We believe that all of our systems should center the dignity in every person.

Amicus Curiae Disability Rights Oregon (DRO) is the nonprofit protection and advocacy agency mandated under federal law to promote and defend the rights of Oregonians with disabilities, including people with intellectual and developmental disabilities and Deaf or Hard of Hearing people. 29 USC § 794e; 42 USC § 15043. DRO regularly advocates for nondiscriminatory treatment of people with disabilities by law enforcement, including requiring effective communication supports and accommodation of the communication needs of people with disabilities. Since 1977, DRO has worked to ensure people with disabilities have

equality of opportunity and full participation in the community. In the last decade, DRO served 18,700 Oregonians with disabilities.

SUMMARY OF ARGUMENT

Petitioner, an Hispanic man and native Spanish-speaker, was approached by a Hillsboro police officer and told in English that he was free to leave. The officer later asked petitioner in Spanish to search him and found methamphetamine in his pocket. Petitioner moved to suppress that evidence under Article I, section 9, of the Oregon Constitution, arguing that the officer seized him without reasonable suspicion. The trial court denied the motion. Petitioner appealed, and the Court of Appeals affirmed without opinion. This court allowed review.

Amici write in support of petitioner in this case. *Amici* urge this court to reverse the decision of the Court of Appeals and the circuit court's denial of the motion to suppress, as Petitioner was stopped in violation of Article 1, section 9, of the Oregon constitution. In particular, *amici* urge this court to evaluate this case in light of social science research demonstrating the inherently coercive nature of police-civilian encounters, particularly when the civilian is a person of color and a language barrier exists. *Amici* urge this court to follow other courts in adopting a rule of law that considers a person's race and language in the totality of the circumstances analysis and objective reasonable person test as to whether a person is seized under Article I, section 9, of the Oregon Constitution.

ARGUMENT

Under Article I, section 9, of the Oregon Constitution,[1] a police officer seizes a person by "the imposition, either by physical force or through some 'show of authority,' of some restraint on the individual's liberty." *State v. Backstrand*, 354 Or 392, 399, 313 P3d 1084 (2013) (quoting *State v. Ashbaugh*, 349 Or 297, 309, 244 P3d 360 (2010)). The test used to determine if a person has been seized is an objective one: "Would a reasonable person believe that a law enforcement officer intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement." *Id*. For there to be a "show of authority," a police officer "must convey to the person with whom he is dealing, either by word, action, or both, that the person is not free to terminate the encounter or otherwise go about his or her ordinary affairs." *Id*. at 401–02. Given the wide array of police-civilian encounters, the inquiry necessarily is fact-specific and considers the totality of the circumstances. *Id*. at 309.

Social science research shows that police-civilian encounters are inherently coercive, and even more so when the civilian is a person of color. Research also shows that when there is a language barrier, a police officer's admonition that a

[1] Article I, section 9, of the Oregon Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure."

person is free to leave does not dispel the coercive atmosphere. Accordingly, a person's race and language are necessary factors in the totality of the circumstances analysis as to whether a person is seized under Article I, section 9. This court should follow other courts in considering race and language in the objective reasonable person test.

I. Social science research shows that individuals, particularly those in minoritized communities, find police encounters inherently coercive.

A. Police encounters are inherently highly coercive.

Encounters with the police are inherently highly coercive by their very nature. Social science research on the psychology of obedience and on the effect of social context on meaning support the conclusion that most individuals, but particularly those in lower and minoritized social strata, feel that they have been effectively deprived of their "liberty or freedom of movement" during encounters with police. *State v. Backstrand*, 354 Or 392, 400, 313 P3d 1084 (2013); Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J Personality & Soc Psychol 398, 409 (1991) (reviewing studies on the psychology of obedience demonstrating that "momentary situational pressures and norms (*e.g.*, rules of deference to an authority) can exert a surprising degree of influence on people's behavior"); Adrian J. Barrio, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience*

Theory into the Supreme Court's Conception of Voluntary Consent, 1997 U ILL L REV 215, 240–41 (1997).

Additional research into the effect of situational factors on the psychology of obedience demonstrates that compliance rates increase when the authority figure in the experiment is uniformed. In one study, the administrator — dressed variously as a civilian, a milkman, and an unarmed security guard — directed individuals to perform a simple task. Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind LJ 773, 808 (2005) (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J Applied Soc Psychol 47 (1974)). Individuals were overwhelmingly more likely to obey the security guard than the civilian; for example, when directed to give a dime to a stranger, only 33 percent of the subjects did so when ordered by the civilian, while 89 percent obeyed the uniformed security guard. *Id.* ("[T]he presence of a uniform increased compliance rates between 36% and 56%, depending on the task involved.") Another study, which examined compliance with someone dressed as a blue-collar worker as compared to compliance with someone dressed as a firefighter, found a similar tendency to obey a person in uniform. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J Crim L & Criminology 51, 63 (2008–09) (citing Brad J. Bushman,

Perceived Symbols of Authority and Their Influence on Compliance, 14 J Applied Soc Psychol 501, 502–06 (1984)).

One survey asked 406 respondents whether they would feel free to leave or to deny a police officer's request during a hypothetical encounter on a sidewalk or on a bus. Kessler, 99 J Crim L & Criminal at 69. Asked to indicate on a scale from one to five how free they felt — with one being "not free" and five being "completely free" — the average response was "below even the mid-point of the free-to-leave scale in the survey, meaning respondents did not even feel 'somewhat free to leave.'" *Id.* at 75. About half of the respondents selected one or two on the scale, and almost 80 percent selected three or less. *Id.; see also* Alisa M. Smith, Erik Dolgoff & Dana Stewart Speer, *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 Fla Coastal L Rev 285, 300 (2013) (100% of test subjects complied with requests by individuals dressed as security to provide names and identification, showing that "[e]ven without physical restraint, force, or commands, reasonable people are constrained to comply with authority").

The power differential between officer and civilian entails the "simple truism that many people, if not most, will always feel coerced by police 'requests' to search." Marcy Strauss, *Reconstructing Consent*, 92 J Crim L & Criminology 211, 221 (2001–02); *see also* Note, *The Fourth Amendment and Antidilution:*

Confronting the Overlooked Function of the Consent Search Doctrine, 119 Harv L Rev 2187 (2006) ("Outside the Court, however, the consent search doctrine has found few friends."). This is compounded by the fact that third party observers, such as judges and jurors, underestimate the environmental factors that profoundly affect behavior. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L J 1962, 2011–14 (2019). This leads to misjudgments about what a "reasonable person" would do in a given situation. *Id*. at 2005.

Other studies analyzing interactions between persons of differing social statuses and levels of authority demonstrate that the social context of a statement may greatly impact the way an indirect request is interpreted, such as the likelihood that it will be obeyed as a directive. "Higher status people frequently direct the actions of others, and hence others expect the remarks of higher status speakers (in the appropriate contexts) to act as directives." Thomas Holtgraves, *Communication in Context: Effects of Speaker Status on the Comprehension of Indirect Requests*, 20 J of Experimental Psychol: Learning, Memory, & Cognition 1205, 1214–15 (1994). For example, one study that compared listeners' comprehension of indirect requests by people of different social statuses found that listeners readily understood a negative observation (*e.g.*, that the room was cold) by a person of higher status as a directive to act. *Id.* at 1214. In another study,

subjects perceived a peer's statement, "don't be late again," as more coercive than the statement, "try not to be late again"; but when an authority figure, such as the subject's boss, made the same statements, both were perceived as being equally coercive. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 202 Sup Ct Rev 153, 189 (2002) (citing Jennifer L. Vollbrecht, Michael E. Roloff & Gaylen D. Paulson, *Coercive Potential and Face Threatening Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 Intl J Conflict Mgmt 235, 236 (1997)). Put another way, "power relationships dictate that when the police make a 'request' and they could apparently compel the suspect to carry out the request, the suspect will view the request as a command." Peter Tiersma, *The Judge as Linguist*, 27 Loy LA L Rev 269, 282 (1993).

B. Police officers' coercive power is even greater when wielded against persons of color and members of minoritized communities.

As problematic as consent searches are based on the clear empirical research showing that consent in the context of police-initiated interactions is largely a fiction, this is even more true when such encounters occur between police and members of minoritized communities. People of color are far more likely to feel compelled to consent to a search due to their perception — justified by the lived experiences of themselves and their communities — that people of color are, as a matter of fact, not free to refuse consent. Moreover, members of minoritized

communities may not know they have the right to refuse consent. One of the most frequent criticisms of consent jurisprudence is that "police searches cannot be truly voluntary if citizens do not know they have the option of withholding consent." Sommers & Bohns, 128 Yale L J at 1967. For this reason, scholars have argued for decades that civilians ought to be advised of their right to walk away from police-initiated encounters. Robert V. Ward Jr., *Consensual Searches, the Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 Touro L Rev 451, 457 (1999). However, often, due to a language barrier or the fact that withholding consent is not, in fact, an option due to disproportionate policing or justified fear that refusal will only invite an unreasonable — and potentially lethal — response from the police, members of minoritized communities often do not know or believe that they have the option of withholding consent.

Ample data show that people of color are routinely targeted by law enforcement. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val U L Rev 243 (1991) (compiling data). A recent empirical analysis of millions of police stops in several states shows that drivers of color are more likely to undergo a consent search than white individuals. Emma Pierson, *et. al*, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behaviour 736, 738 (2020) (showing Black drivers were 2.4%, and

Hispanic drivers 2.2% more likely than white drivers of undergoing a consent search, conditional on being stopped). Of course, this disproportionate stopping of minoritized people drives disproportionate numbers of "consent" searches, which drives disproportionate numbers of arrests. *Report to the United Nations on Racial Discrimination, Xenophobia, and related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, Sent'g Project 1, 5 (Mar 2018).

In response to the spurious assertion that an individual is free to disregard a police officer's requests, one author has noted:

> "This is what the law is supposed to be; black men, however, know that a different 'law' exists on the street. Black men know they are liable to be stopped at any time, and that when they question the authority of the police, the response from the cops is often swift and violent."

Maclin, 26 Val U L Rev at 253. The regular and increasingly-wide publicized news of police shootings and killings of unarmed, Black people reaffirm the reality that members of that community feel significant pressure to comply with officers' requests for fear of severe and potentially violent reprisal. *See id.* at 255 ("Black males learn at an early age that confrontations with the police should be avoided; black teenagers are advised never to challenge a police officer, *even when the officer is wrong*." (Emphasis added.)).

"There is a mountain of evidence documenting higher degrees of distrust of police in communities of color and suggesting that this distrust is, among other causes, the product of direct experiences with and indirect observations of excessive and unjustified use of force." Beau C. Tremitiere, *The Fallacy of a Colorblind Consent Search Doctrine*, 112 NW U L Rev 527, 548 (2017) (collecting authorities). The presence of deep-seated "racial stereotypes [creates] . . . greater pressure for blacks to say yes to consent searches than for whites" because people of color are aware that their assertion of rights "can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both." Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich L Rev 946, 1014, 1017 (2002). Thus, the very notion of "voluntary" consent to search by a person of color in a police-initiated interaction is a fiction. People of color face massive inherent coercion to submit to police authority, and this is only further exacerbated in situations where the police do not fully inform the person of their rights in an understandable and sincere manner.

II. A police officer telling a person they are free to leave does not dispel a show of authority when there is a language barrier.

Language differences can affect a person's ability to understand a police officer's statements and the context for the officer's actions, which heightens the

coercive nature of the police-civilian encounter. If a person does not clearly understand a police officer's statements due to a language barrier, that person would not feel free to leave when an officer has approached them in a criminal investigatory manner even if the officer says they are free to leave. In other words, telling a person that they are free to leave does not dispel a show of authority when the officer uses a language that the civilian does not clearly understand.

A. Limited English proficiency is a critical fact for the court to consider given Oregon demographics.

There are many people living in the United States and in Oregon for whom English is not their primary language. According to an Oregon state agency, "If these individuals have a limited ability to read, write, speak, or understand English, they are [considered] limited English proficient, or 'LEP.'" Oregon Department of Transportation Office of Civil Rights, Limited English Proficiency Plan, 4 (2020), *available at* https://www.oregon.gov/ODOT/Business/OCR/Documents/FINAL_VI_LEP_PLAN.pdf (last accessed June 4, 2021). In Oregon, an estimated 5.5% of the state's population five years and older, or 215,262 individuals, speak English less than "very well." *Id*. at 4–5 (citing the 2017 U.S. Census Bureau American Community Survey). Out of the estimated 15.3% of people in Oregon who speak a language other than English, 35.8% speak English less than "very well." *Id*. at 5. Looking at

these numbers more closely, there are an estimated 10.5% Spanish or Spanish Creole speakers in Oregon and 45% of those individuals speak English less than "very well." *Id*. Out of the estimated 2.6% of people in Oregon who speak other Indo-European languages, 24.3% speak English less than "very well." *Id*. For the estimated 3.1% of people living in Oregon who speak Asian and Pacific Island languages, 46% speak English less than "very well." *Id*. Finally, out of the estimated 0.7% of people living in Oregon who speak other languages, 36.5% speak English less than "very well." *Id*.

B. Limited English proficiency can significantly heighten the coercive nature of police-civilian encounters.

A person's limited ability to speak and understand English can significantly heighten the coercive nature of an encounter with the police. Recognizing this, under the Fourth Amendment, federal courts have considered defendants' ability to speak and understand English when considering whether a search or seizure was lawful under the totality of the circumstances. This court should similarly consider limited English proficiency when analyzing civilian-police encounters under Article I, section 9, of the Oregon Constitution.

In *United States v. Moreno*, 742 F2d 532, 536 (9th Cir 1984), the court held that the defendant, who was a Columbian citizen, was unlawfully seized due to his "lack of familiarity with police procedures in this country, his alienage and his

limited ability to speak and understand the English language" which "contributed significantly to the quantum of coercion present at the DEA office." The court noted that his "limited command of the English language added measurably to the detentive atmosphere of the office interrogation." *Id*. at 535.

In *United States v. Gaviria*, 775 F Supp 495, 502 (DRI 1991), the court considered, among other factors, the defendant's ability to comprehend the detective's statements in holding the defendant's consent to a search was not voluntary. Notably, the defendant in *Gaviria* was a Columbian citizen, and one of the detectives had some familiarity with the Spanish language. *Id*. at 496. Some of the conversation between the detective and the defendant was spoken partly in Spanish and partly in English. *Id*. However, the court found that both the detective and the defendant had "difficulty interpreting what the other was attempting to say." *Id*. While the detective "testified that he believed the defendant understood what he was saying," the court noted that the defendant "contends that he understood little of the conversation and picked up most clues through the detective's hand gestures." *Id*. at 500.

The *Gaviria* court reviewed how federal district and circuit courts have considered the degree of language comprehension necessary to guard against Fourth Amendment intrusions. *Id*. at 498–500:

- The Fifth Circuit has concluded that "in regard to Spanish speaking defendants, where there is sufficient conversation between the suspect and law enforcement officers to demonstrate that the suspect had an adequate understanding of English to fully comprehend the situation, a finding that consent was voluntary may be proper." *Id*. at 498 (quoting *United States v. Alvarado*, 898 F2d 987, 991 (5th Cir 1990)).
- The Second Circuit found that a defendant's consent to a search was voluntary when the defendant signed a Spanish-language consent form and the officer orally explained the defendant's rights to her in Spanish." *Id*. (citing *United States v. Zapata-Tamallo*, 833 F2d 25 (2d Cir 1987)).
- The Massachusetts District Court held that a defendant had not consented to a search, finding the following factors persuasive: "the defendant's age (twenty-two years old), his education (seven years of schooling in Colombia), his ability to speak and understand English (extremely limited), and the fact that 'he had only recently arrived in the United States and so probably lacked familiarity with his rights under the United States Constitution, including his right to insist that the officers obtain a search warrant.'" *Id*. at 499 (citing *United States v. Gallego-Zapata*, 630 F Supp 665 (D Mass 1986)).

- The Ninth Circuit remanded a case for factual determinations regarding voluntary consent and a language barrier. The factual questions centered on the defendant's "comprehension of the Spanish spoken to him by detectives and the Spanish language consent form he signed." *Id*. at 499 (citing *United States v. Castrillon*, 716 F2d 1279 (9th Cir 1983)). The court in *Gaviria* noted that the court's remand in *Castrillon* "indicates that language comprehension must be carefully scrutinized in voluntary consent cases." *Id*.

C. Constitutional protections should not be diminished for those who face language barriers.

In *Gaviria*, the court made clear that Fourth Amendment protections should not be abrogated by a language barrier:

> "Hispanic suspects who neither speak English nor are familiar with their rights under the Constitution are doubly disadvantaged in their encounters with law enforcement personnel. Fourth Amendment protections are particularly important in such cases and may not be abrogated by a language barrier. Some mechanism, whether it be the use of written Spanish consent forms, training of police officers in a second language, or some other creative device, must be adopted to ensure that police do not abridge the constitutional rights of these individuals simply because they do not speak English."

Id. at 502. The court acknowledged it was not its role to determine proper police procedure but "the Court can—and does—insist that each defendant be equally treated regardless of his or her native tongue." *Id*.

In Oregon, police encounters should similarly be viewed with an understanding of the import of language barriers. Therefore, Article I, section 9, of the Oregon Constitution must be construed to account for such barriers and the inherent coercion that accompany them.

III. The "reasonable person" standard should account for a person's language and race when determining perception about freedom to leave the presence of a police officer.

Presumed neutrality does not render equal results for people with minoritized identities or abilities. The law should account for racial, language, and other differences to ensure equal and just outcomes. This is especially true when determining whether a police-civilian encounter amounts to a stop. The purpose of Article I, Section 9, is to prohibit "arbitrary, oppressive, or otherwise 'unreasonable' intrusions" into a person's privacy and personal security. *State v. Barnthouse*, 360 Or 403, 413, 380 P3d 952 (2016). Therefore, accounting for the unique oppression(s) experienced based on a person's individual characteristics (*e.g.*, language or race) is imperative for the Article I, Section 9, inquiry.

Article I, Section 9, requires officers to have reasonable suspicion of a crime before detaining somebody for further investigation. *Ashbaugh*, 349 Or at 308-9. When determining whether a police officer has made an investigatory "stop," this court considers whether, under the totality of the circumstances, an "objectively reasonable person in [the] defendant's circumstances" would have understood they

were not free to leave. *Ashbaugh*, 349 Or at 317. The "reasonable person" standard in this context is intended to exclude reliance on the unreasonable subjective beliefs of a suspect or officer. This standard is not grounds to assume that every suspect speaks excellent English, hears perfectly, believes police are generally safe, or lacks an intellectual or psychiatric disability. *State v. Shaff*, 343 Or 639, 645, 175 P3d 454 (2007) (noting that the reasonable person test does not turn on "either the officer's or the suspect's subjective belief or intent" of freedom to leave). While the analysis is objective, it must "allow[] for the fact that our society is not homogenous and that, although some reasonable people may conclude that they are free to walk away from an officer who questions them, others may conclude otherwise just as reasonably." *Ashbaugh*, 349 Or at 327 (2010) (Walters, J., dissenting). History, social science, and common sense make clear that a person's language and race impact what they might reasonably understand about their freedom when a police officer approaches them and communicates with them in a particular way.

A. This court's Article I, section 9, case law supports an understanding of the reasonable person as possessing the same intersecting identity factors as the defendant, including their language and race.

As this court has recognized, "courts and academics across the country" recognize that police encounters with people of color should "consider how the

race of the person confronted by the police might have influenced his attitude toward the encounter." *Ashbaugh*, 349 Or at 313–14 n 15. The crux of the Article I, Section 9, test is whether an "objectively reasonable person *in defendant's circumstances*" would have understood they were free to leave. *Id.* at 317 (emphasis added). A person "in defendant's circumstances" necessarily must be understood as having the defendant's personal characteristics, such as age, sex, sexual orientation, gender identity, ability or disability status, language capacity, and racial identity. While the *Ashbaugh* court rejected a subjective analysis in determining whether a stop occurred, it did not adopt a monolithic objective test.

In *Ashbaugh*, this court acknowledged the challenge presented by "individual differences between arguably reasonable persons involved in citizen-police encounters," and affirmed that Article I, Section 9, specifically addresses that challenge by adopting the United States Supreme Court's test as articulated in *United States v. Mendenhall*, 446 US 544, 100 S Ct 1870, 64 L Ed 2d 497 (1980). *See* 349 Or at 313–14; *and see id.* at n 15 (citing *Mendenhall*). *Mendenhall* considered whether the defendant, a Black woman, was unreasonably seized by a DEA agent. Despite concluding that she was not seized because of other circumstances (for example, she was "questioned only briefly, and her ticket and identification were returned to her"), the Court made explicit that her age, education level, race, and gender, as well as the officers' gender and race, were

"not irrelevant" factors in its analysis under the Fourth Amendment. *Id.* at 558. In weighing those factors, the Court observed that she "may have felt unusually threatened by the officers" because she was Black and a woman. *Id*. Likewise, this court should consider the compounding oppressions that might occur in a police encounter given the identities a particular person holds.

While this court has not made explicit its intention to account for identity factors, it has explicitly noted that such an analysis remains available. In *State v. K.A.M.*, 361 Or 805, 401 P3d 774 (2017), this court examined the United States Supreme Court's opinion in *J.D.B. v. North Carolina*, 564 US 261, 131 S Ct 2394, 180 L Ed 2d 310 (2011) (holding that age should be considered in Fifth Amendment *Miranda* context). In *J.D.B.*, the Supreme Court again recognized that "some undeniably personal characteristics," such as blindness, were relevant to the totality of the circumstances analysis, and rejected arguments that some degree of individualization would obfuscate objectivity. 564 US at 278. The Court acknowledged that adopting a "one-size-fits-all reasonable-person" standard that ignores fundamental personal characteristics of a defendant undermined the utility of the inquiry. 564 US at 279. While the defendant in *K.A.M.* did not properly preserve the argument that age was relevant, this court made clear that it "[did] not foreclose considering a youth's age as part of the reasonableness inquiry." 361 Or at 809.

In addition to the United States Supreme Court's acknowledgement of the relevance of a defendant's age, race, and gender in *J.D.B.* and *Mendenhall* in the context of police-civilian interactions, several other courts have followed suit. *See, e.g.*, *State v. Jones*, 172 NH 774, 776, 235 A3d 119 (2020); *United States v. Smith*, 794 F3d 681, 687–88 (7th Cir 2015); *Miles v. United States*, 181 A3d 633, 641 n 14 (DC Ct App 2018) (implying, though not stating explicitly, that race may be a consideration in analyses involving police encounters)*; D.Y. v. State*, 28 NE3d 249, 256 (Ind Ct App 2015) (recognizing that race "might be relevant" in "determining whether a reasonable person would feel free to leave" (citing *Mendenhall*, 446 US at 558)); *United States v. Guzman-Santos*, No. 2:15-CR-00308-JCC, at *8 and n 4 (WD Wash Apr 6, 2016) (Docket No. 39 in Appendix to this Brief) ("As this Court has ruled previously, the perceptions of law enforcement personnel regarding the relative informality or civility of an interaction may be out of touch with the feelings of a reasonable person, and particularly a reasonable person of color."); *United States v. Gaviria*, 775 F Supp 495, 502 (DRI 1991) (discussed, *supra*, in Part II. B).

Likewise, several academics have provided rationales for the same. *See, e.g.*, Desiree Phair, *Searching for the Appropriate Standard: Stops, Seizure, and the Reasonable Person's Willingness to Walk Away from the Police*, 92 Wash L Rev 425 (2017); Marvin L. Astrada & Scott B. Astrada, *Law, Continuity and Change:*

Revisiting the Reasonable Person within the Demographic, Sociocultural and Political Realities of the Twenty-First Century, 14 Rutgers J L & Pub Pol'y 201 (2017); Beau C. Tremitiere, *The Fallacy of a Colorblind Consent Search Doctrine*, 112 NW U L Rev 527, 548 (2017) (discussed, *supra*, in Part I.B.). This court can and should affirm now that, like age, a defendant's race and language are relevant factors to be considered in the reasonable person analysis.

B. Considering a person's language and race is practical and necessary.

Courts, including this one, already consider characteristics of parties in objective reasonable person inquiries. For example, in sexual harassment law, several courts have adopted a reasonable woman standard to account for women's unique experiences and perspective in determining what behavior qualifies as sexual harassment. *See* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 BCL Rev 861, 869–77 (1997) (describing the adoption of the reasonable woman standard in sexual harassment case law); *and see Ellison v. Brady*, 924 F2d 872, 879 (9th Cir 1991) (recognizing that while not all women share the same viewpoints, there are "common concerns" that justify adopting the reasonable woman standard in a Title VII analysis).

Amici simply ask this court to consider the role language and race might play, along with the other factors it considers, when determining the constitutionality of a person's encounter with police. Language and race are hardly obscure factors. As with the question of age, police "need no imaginative powers * * * or training in social and cultural anthropology" to recognize that language and race may play a role in their interactions with civilians. *J.D.B.*, 564 US at 279–80. Further, since language and race are not in and of themselves determinative, but merely two factors among other considerations, police officers need not be expected to calculate precisely the effect these factors may have in every case. Rather, as in other constitutional and legal contexts, a nuanced test that examines the language and race of a person in scrutinizing the behavior of so-called reasonable people is appropriate because it would provide Spanish speakers, non-English speakers, people of color, and Spanish-speaking people of color what Article I, Section 9, already guarantees: protection against unreasonable seizures. Indeed, the *J.D.B.* court described a child's age as "a fact that generates commonsense conclusions about * * * perception." *J.D.B.*, 564 US at 272. While there are significant differences between language, race, and age, the social science examined in Sections I-II, *supra*, suggests that language and race, too, affect perception, reflecting the coercive power imbalance between a Spanish-speaking

Latino civilian and an inquiring police officer. A person's language and race, like age, are "a reality that courts cannot simply ignore." *Id.* at 277.

Furthermore, considering language and race is entirely consistent with the "free to leave" test's reliance on the totality of the circumstances. If it is truly to be a totality of the circumstances analysis, "the Court should include the consideration of [language and] race in order to gain a full view of the circumstances and dynamics surrounding the encounter." Maclin, 26 Val U L Rev at 273–74; *and see Ashbaugh*, 349 Or at 312 n 15 (citing Maclin). Otherwise, the "[c]ontinued use of a reasonable person test [absent consideration of race] runs the risk that majoritarian values and perceptions of police practices will go unchallenged." Maclin, 26 Val U L Rev at 274. Consistent with Justice Walters' point in her *Ashbaugh* dissent that "society is not homogenous," it "makes no sense to devise rules as if we lived in a nation where there are no differences among us." *Id*. This court should avoid such a fiction of neutrality here.

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CONCLUSION

For the foregoing reasons, and those provided in Petitioner's Brief on the Merits, *amici* respectfully request that this court reverse the decision of the Court of Appeals and the decision of the circuit court and remand for further proceedings.

DATED this 9th day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word count limitation in ORAP 5.05(1)(b)(ii)(A) because the word count of this brief (as described in ORAP 5.05(1)(d)(i)) is 5,773 words.

I 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 as required in ORAP 5.05(1)(d)(ii).

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 9th day of June, 2021, I served this **BRIEF OF *AMICI CURIAE*** with the State Court Administrator by the eFiling system. I certify that on the 9th day of June, 2021, I served this **BRIEF OF *AMICI CURIAE*** on the following parties via the eFiling system and by email:

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