

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,  
Petitioner on Review,

v.

JOSEPH LUCIO JIMENEZ, aka  
Joseph L. Jimenez,

Defendant-Appellant,  
Respondent on Review.

Supreme Court No. S062473

Court of Appeals No. A148796

Multnomah County Circuit Court  
No. 110241478

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

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On Review of the Opinion of the Court of Appeals  
On an appeal from a judgment of the Circuit Court for Multnomah County  
Honorable Christopher J. Marshall, Judge

Court of Appeals Opinion filed: May 21, 2014  
Author of Opinion: Schuman, Senior Judge  
Concurring: Duncan, Judge, and Wollheim, Judge

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

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**INTRODUCTION**

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to “dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities.” OJRC Mission Statement, [www.ojrc.info/mission-statement](http://www.ojrc.info/mission-statement). The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where the OJRC is located.

The Oregon Criminal Defense Lawyers Association (OCDLA) is a statewide organization of criminal defense attorneys and others engaged in criminal defense. OCDLA advocates for the vigorous defense of constitutional rights and the rights of those accused and convicted of crimes.

*Amici curiae* wish to be heard by this court because all *amici* support preserving the robust individual rights and liberties afforded by the Oregon Constitution. Ensuring the strength of those rights and liberties in the context of routine traffic stops—which comprise hundreds of thousands of police-citizen encounters in Oregon every year—is critically important.<sup>1</sup>

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<sup>1</sup> Undersigned counsel would like to thank and credit law students Justin Withem and Michael Beilstein for their excellent research assistance.

## SUMMARY OF ARGUMENT<sup>2</sup>

The Court of Appeals in this case held, consistently with existing case law, that a police officer may not permissibly ask the subject of a traffic stop whether he or she possesses weapons when the officer has no reason, based on articulable facts, for doing so. *State v. Jimenez*, 263 Or App 150, 161, 326 P3d 1222 (2014). On review, the state asks this court to reverse that decision and to announce a novel rule of law that would strike from this court’s constitutional jurisprudence any requirement that police have a specific reason for asking a stopped individual whether he or she possesses weapons. Instead, the state argues, police should be free to ask individuals about weapons in every traffic stop. Consistently with this court’s prior case law and the reasons set forth in defendant’s brief on the merits, this court should reject the state’s invitation to so broadly expand police discretionary authority.

*Amici* submit this brief to offer a broader perspective on the detrimental consequences that would flow from a *per se* rule allowing police to ask *all* stopped individuals during *all* traffic stops whether they possess weapons. Specifically, social science research has established that—for a number of reasons, including the unconscious influence of negative racial stereotypes—law enforcement officers target racial minorities consistently, and disproportionately, for so-called “pretext” stops, despite the fact that stops of

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<sup>2</sup> *Amici* adopt defendant’s question presented and proposed rule of law.



racial minorities have proven no more successful than others in producing evidence of a crime. Unfettered discretion to ask about weapons during traffic stops—or to decline to ask based on factors not subject to review—would grant police a broad investigatory tool without constitutional limitations on its use and would unjustifiably increase the disproportionate impact of pretext stops on minority communities.

Additionally—and with due regard for the important and difficult work that law enforcement officers perform in our society—the state’s position in this case rests on a false assumption. Social science research shows, as a statistical matter, that traffic stops are not inherently dangerous and, indeed, that violence against police officers has declined in recent years. At the same time, however, the public’s perception of police legitimacy, a cornerstone of public safety, also has declined—a broader trend punctuated emphatically by the recent events in Ferguson, Missouri, and New York. A rule allowing police officers to inquire about weapons without a specific reason for doing so will have little benefit for officer safety and will continue to erode the public’s confidence in the legitimacy of law enforcement practices.

## ARGUMENT

- I. ***A per se rule allowing officers to question motorists, bicyclists, and pedestrians about weapons during traffic stops will disproportionately impact minorities.***

Police have broad discretion regarding when and how to conduct traffic

stops. Social science studies establish overwhelmingly that minorities are the most common targets of that discretion, particularly African-Americans. And strong evidence also suggests that negative racial stereotypes influence police decision-making, even when that influence operates unconsciously. Expanding police discretion during traffic stops will unnecessarily widen the existing inequality.

**A. Police have broad discretion to utilize traffic stops as a law enforcement tool.**

Both Article I, section 9, of the Oregon Constitution<sup>3</sup> and the Fourth Amendment to the United States Constitution<sup>4</sup> condone “pretext stops,” which allow police officers to initiate traffic stops when the officer’s motive is not to promote traffic safety, but rather to investigate possible criminal activity unrelated to the traffic stop, and for which the officer lacks reasonable suspicion. *Whren v. United States*, 517 US 806, 813, 116 S Ct 1769, 135 L Ed 2d 89 (1996) (holding under the Fourth Amendment that the reasonableness of a traffic stop does not “depend[] on the actual motivations of the individual officers involved” and that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”); *State v. Carter/Dawson*, 287 Or

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<sup>3</sup> Article I, section 9, provides, in part, that “[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]”

<sup>4</sup> The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

479, 485, 600 P2d 873 (1979) (holding, under Article I, Section 9, that an “officer’s motives for an otherwise justifiable traffic stop are \* \* \* not relevant to the question of [the stop’s] validity” and that “a policeman who wants to get a closer look at a car or its occupants may follow it and, if the driver commits a traffic violation while the officer is following, may then stop it”).

Traffic stops offer significant investigative opportunities. For example, during traffic stops, police routinely learn the driver’s identity, the place from where the driver is coming and to where he or she is going, and whether the driver has valid driving privileges or outstanding warrants. *See, e.g., State v. Watson*, 353 Or 768, 305 P3d 94 (2013) (holding that a police officer acted reasonably in learning a driver’s name and conducting a 10-minute check of driving privileges, during which time the officer also conducted a warrants check, asked the driver to step out of the car, engaged him in conversation, and obtained incriminating evidence). By conducting a traffic stop, an officer may be able to develop reasonable suspicion of a crime, conduct a consent search or a patdown, or take other investigatory steps. Indeed, law enforcement training encourages officers to utilize traffic stops as a tool in the investigation of non-traffic crimes. *See, e.g., Richard J. Ashton, Bridging the Legal Gap Between the Traffic Stop and Criminal Investigation*, *The Police Chief* (July 2007) (describing techniques to legitimately extend the length of a traffic stop while

waiting for a narcotics canine to arrive)<sup>5</sup>; Devallis Rutledge, *Investigative Traffic Stops*, Police Magazine (Sept 1, 2005) (listing investigative steps to take during routine traffic stop).<sup>6</sup>

Given the wide array of traffic rules that apply to motorists, bicyclists, and pedestrians, pretext stops provide police officers with nearly limitless discretion in choosing whom to stop and when. Police training encourages officers to use that discretion freely to pursue hunches about criminal activity, even when they have little or no evidence that any crime has occurred.

Many commentators argue that officers already have too much discretion during traffic stops and urge courts to impose additional limits on that discretion or to provide remedies for its abuse. *See, e.g.*, Lewis R. Katz, “*Lonesome Road*”: *Driving Without the Fourth Amendment*, 36 Seattle U L Rev 1413, 1415 (2013) (arguing in the context of the Fourth Amendment that Supreme Court decisions have “largely eliminat[ed] Fourth Amendment oversight of the decision to stop a particular car and the scope of investigation that follows the stop”); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 Mich L Rev 1843, 1853 (2004) (noting that “virtually anyone (even a Supreme

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<sup>5</sup> Available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1229&issue\\_id=72007](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1229&issue_id=72007).

<sup>6</sup> Available at <http://www.policemag.com/channel/patrol/articles/2005/09/point-of-law.aspx>.

Court Justice) can readily be stopped,” and commenting that *Whren* “slammed the door” on limitations that otherwise might help prevent pretextual or arbitrary seizures). LaFave argues that state and federal court decisions have already pushed officer discretion during traffic stops to “the absolute limits \* \* \* thereby treating the Fourth Amendment as largely an irrelevancy in the context of ‘routine traffic stops.’” *Id.* at 1905.

**B. Social science research establishes overwhelmingly that police disproportionately target African-Americans in conducting traffic stops.**

Nationwide, research uniformly establishes that police use their traffic enforcement authority disproportionately against racial minorities, particularly African-Americans. *See, e.g.,* Kenneth J. Novak and Mitchell B. Chamlin, *Racial Threat, Suspicion, and Police Behavior: The Impact of Race and Place in Traffic Enforcement*, 58 *Crim & Delinq* 275, 277 (2012) (“There is little doubt that racial minorities are disproportionately stopped by the police. \* \* \* [A]ll the published research to date \* \* \* demonstrates some level of disparity.”); Robin Shepard Engel and Jennifer M. Calnon, *Examining the Influence of Drivers’ Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 *Just Q* 49, 55 (March 2004) (“Nearly all of the publicly available reports and studies that we are aware of reveal disparities in the percentages of minority citizens who are stopped, cited, searched, or arrested as compared to selected benchmarks.”). The disparity is common

knowledge: “[T]here is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact.” President Barack Obama, Press Conference (July 22, 2009).<sup>7</sup>

Recent research has exposed troubling details underlying that disparity. For example, a study in Kansas City demonstrated that only investigatory (pretext) stops disproportionately target minorities; traffic-safety stops do not. Charles Epps and Steven Maynard-Moody, *Driving While Black*, Washington Monthly (Jan/Feb 2014).<sup>8</sup> More specifically, that study found that a young black man was more than twice as likely as a young white man to be subject to a pretextual stop (28 percent versus 12.5 percent). *Id.*

An analysis of the 1999 Public Police Contact Survey (PPCS) data similarly suggested that minorities were stopped as a pretext for conducting an investigation more frequently than they were stopped purely for traffic-safety reasons. Engel and Calnon, 21 Just Q at 69-70, 79. That study also noted that drivers with multiple prior stops were more likely to be searched, but not more likely to receive a citation or to be arrested, suggesting that those drivers were stopped because of their “profile,” not their behavior. The “profile” of individuals subject to repeated stops consists of “drivers who are male, younger,

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<sup>7</sup> Available at [http://www.whitehouse.gov/the\\_press\\_office/News-Conference-by-the-President-July-22-2009/](http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-July-22-2009/).

<sup>8</sup> Available at [http://www.washingtonmonthly.com/magazine/january\\_february\\_2014/ten\\_miles\\_square/driving\\_while\\_black048283.php?page=all](http://www.washingtonmonthly.com/magazine/january_february_2014/ten_miles_square/driving_while_black048283.php?page=all).

black, unemployed, and have incomes lower than \$20,000[.]” *Id.* at 79.

Racial profiling research also has confirmed that, aside from the initial stop, post-stop investigative actions are more commonly directed towards African-Americans. In the Kansas City study, African-American drivers were five times more likely than whites to be subjected to searches in investigatory stops. Epps and Maynard-Moody, *supra* note 8. An analysis of Oakland traffic stops determined that, while police issued citations to African-American drivers at rates similar to other drivers, police stopped African-American drivers for longer periods of time, and police frisked African-American drivers *six times more frequently* than white drivers. Greg Ridgeway, *Assessing the Effect of Race Bias in Post-traffic Stop Outcomes Using Propensity Scores*, 22 J of Quantitative Criminology 1, 18-22 (March 2006).<sup>9</sup> The PPCS data yielded similar results: minority drivers were significantly more likely during traffic stops to be searched, arrested, and subject to police use of force. Engel and Calnon, 21 Just Q at 77 (“[C]ontrolling for other relevant extralegal and legal factors, the odds of citation, search, arrest, and use of force for black drivers are

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<sup>9</sup> Ridgeway’s analysis purported to account for non-race factors that may impact the stop outcome, such as the neighborhood of the stop, the reason for the stop, the time of day, and the age and sex of the driver. Ridgeway further performed a “sensitivity analysis,” which suggested that no unobserved variable could account for the race disparity. Ridgeway, 22 J of Quantitative Criminology at 25. After Ridgeway released his findings, the Oakland Police Department implemented additional policies that required officers to document their reasons for conducting searches and to advise citizens that they have a right to refuse the search. *Id.* at 27.

1.5, 1.5, 1.8, and 2.1 times higher, respectively, than for white drivers.”).

Finally, the research flatly contradicts any argument that the increased scrutiny of minorities during stops is justified by the outcome of the stop. The nationwide PPCS analysis showed that officers asked minorities for consent to search more often than they asked whites, yet searches of whites were twice as likely to produce contraband (16.6 percent versus 7.5 percent). *Id.* at 75-76. A 2008 study of Los Angeles stops found that “[s]earched Blacks were 37% less likely to be found with weapons than searched Whites, 24% less likely to be found with drugs, and 25% less likely to be found with other contraband[.]” Bernard E. Harcourt, *Racial Profiling: What’s the Problem?* 3-5 (Sept 14, 2009) (discussing Los Angeles study and other studies with similar results).<sup>10</sup> Lower hit rates for minorities suggest that officers employ a lower threshold of suspicion with respect to non-white drivers than they do with respect to white drivers. Because police officers act with less suspicion, the searches necessarily encompass a larger pool of innocent African-American drivers. *Id.* at 80-81.<sup>11</sup>

Racial disproportionality occurs locally as well as nationally. Recently released data from the Portland Police Bureau establishes that stops of African-

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<sup>10</sup> Paper presented at the Malcolm Wiener Inequality & Social Policy Seminar, Harvard University, *available at* <http://www.hks.harvard.edu/inequality/Seminar/Papers/Harcourt09.pdf>.

<sup>11</sup> The research regarding hit rates is not unanimous, but a substantial amount of research shows a lower hit rate for minorities. *See* Engel and Calnon, 21 Just Q at 57-60 (summarizing research).



Americans accounted for 12.8 percent of all stops in 2013, although African-Americans make up only 6 percent of the city's population. Portland Police Bureau Strategic Services Division, *Stops Data Collection: 2013 Annual Report* 6 (January 5, 2015).<sup>12</sup> Once stopped, African-Americans were searched twice as frequently as whites, even though those searches were less likely to produce any kind of contraband, including alcohol, drugs, or weapons. *Id.* at 8. Notably, the disparities were not as stark in the stops conducted solely by the Police Bureau's traffic division, suggesting that the disparity is exacerbated by patrol, special unit, and gang enforcement officers who are more likely to use the traffic stop as a pretext for a criminal investigation.

Although the cited studies provide evidence of significant racial profiling in law enforcement, the impact of racial profiling may be even greater than the available data suggests. In Portland, police may delete the record of any encounter if the officer self-categorizes the encounter as "mere conversation." *Id.* at 4. In 2013, more than 4,000 records were deleted for that reason, and presumably more encounters were never recorded based on the officer's belief that the encounter constituted "mere conversation" rather than a stop. If some of those encounters should have been categorized as stops, then the data discussed above is significantly underinclusive.

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<sup>12</sup> Available at <https://www.portlandoregon.gov/police/article/514465>.

**C. Negative racial stereotypes influence the use of police discretion.**

Some experts link racial profiling to the influence of unconscious negative racial “stereotypes.” *See, e.g.,* Jacinta M. Gau and Rod K. Brunson, “*One Question Before You Get Gone . . .*”: *Consent Search Requests as a Threat to Perceived Stop Legitimacy*, 2 *Race & Just* 250, 254 (2012) (“[A]n officer can act in a biased manner without even being aware that she or he is stereotyping a citizen[.]”); Charles Crawford and Jack Glaser, *Drivers of Racial Disproportion in Police Stops and Searches* 9 (Aug 10-11, 2011).<sup>13</sup>

Stereotypes are “cognitive shortcuts” that allow people to filter and process information more quickly. *Id.* at 10. Stereotypes help our brains “*disambiguate* inherently ambiguous information, such as the behaviors and characteristics of other people to whom we have had limited exposure.” *Id.* at 10 (emphasis in original). Studies demonstrate that the unconscious associations driven by stereotypes impact decision-making, even when the stereotype would be rejected if made conscious. *Id.*

Negative racial stereotypes linking African-Americans to crime and violence are widespread, and even those who repudiate racism can be subject to their influence. *Id.* at 11 (“One of the consistent findings is a strong, longstanding stereotype associating Blacks with crime and aggression.”).

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<sup>13</sup> Prepared for the UK-US Roundtable on Racial Disparities in Police-initiated Stops in the UK and US, *available at* [http://www.jjay.cuny.edu/centers/race\\_crime\\_justice/1935.php](http://www.jjay.cuny.edu/centers/race_crime_justice/1935.php)

“Merely thinking about [African-Americans] can lead people to evaluate ambiguous behavior as aggressive, to miscategorize harmless objects as weapons, or to shoot quickly, and, at times, inappropriately.” Jennifer L. Eberhardt, *et al.*, *Seeing Black: Race, Crime and Visual Processing*, 87 J of Personality & Soc Psychology 876, 876 (2004).

The effects of those stereotypes are pervasive; they are not limited to the criminal justice system. As one commentator observed:

“Widely reported examples [of the unconscious effects of negative racial stereotypes] include significant racial bias when otherwise well-intentioned people evaluate job applications. White applicants are selected significantly more frequently than black applicants when the applications are otherwise identical. Or consider how a white person in a crowd will summon help in an emergency, such as someone fainting, 75% of the time when the victim is white but less than 40% when the victim is black. Unconscious racial bias will even lead otherwise progressive, inclusive physicians to more frequently recommend life-saving blood-clot dissolving therapies for white cardiac patients than black cardiac patients.”

Todd Essig, *Unconscious Racial Bias: From Ferguson To The NBA To You*, Forbes.com (September 21, 2014).<sup>14</sup>

Social science research has proved the effects of unconscious bias. One study found that children judged behavior by African-American perpetrators as more menacing and threatening than identical behavior by whites. Crawford and Glaser, *Drivers of Racial Disproportion* at 10. Another study demonstrated

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<sup>14</sup> Available at <http://www.forbes.com/sites/toddessig/2014/09/21/racism-from-ferguson-to-the-nba-to-you/>

a link between viewing African-American faces and the speed with which an individual will conclude that an unclear image of an object is actually a weapon. In that study, participants were shown an unclear image of a weapon that became clearer over time after being “primed” by viewing either African-American or white faces. Eberhardt, *et al.*, 87 J of Personality & Soc Psychology at 879-80. After viewing African-American faces, participants concluded that the image was a weapon much more quickly, identifying the object as a weapon even while the image remained very distorted. *Id.* at 879-80. Priming the participants with white faces actually had the opposite effect—in that circumstance, the participants waited significantly longer to identify the image as a weapon—even longer than when they had not been “primed” at all. *Id.*

Stereotypes play an important role in police work because officers constantly receive ambiguous information that they must quickly interpret and act upon in a high-stress environment. Crawford and Glaser, *Drivers of Racial Disproportion* at 13. “When assessing the suspiciousness of a suspect, the belief that that person belongs to a group that is more likely to engage in crime is bound to influence that judgment.” *Id.* Studies have confirmed the existence of “shooter bias” in law enforcement—*i.e.*, the bias that causes white people to shoot unarmed black suspects more often than unarmed white suspects. *Id.* at 14. In the context of traffic stops, unconscious racial stereotypes may affect an

officer's perception of the citizen's dangerousness or suspiciousness, and may ultimately lead to the more prevalent use of patdowns and requests for consent to search. All the while, the influence of that unconscious racial bias operates without regard to whether specific facts surrounding the police-citizen encounter actually merit heightened suspicion on the officer's part.

**II. Expanding police discretion to allow questioning about weapons during all traffic stops will significantly increase the intrusiveness of traffic stops and will have the highest negative impact on minorities.**

A rule permitting police to question every stopped motorist, bicyclist, and pedestrian about weapons would not be a minimal intrusion. That expanded authority would create a significant new opportunity for officers to utilize traffic stops as a tool of criminal investigation, because it would automatically permit officers to engage the citizen in conversation about criminal conduct.

*See* Resp BOM at 24-25 (citing examples of weapons-related offenses).

Additionally, the answer, whether negative or affirmative, would invite the follow-up question, "Mind if I check?" *See, e.g., State v. Amador*, 230 Or App 1, 4-5, 213 P3d 846 (2009) (quoting trial judge describing conversation, "do you have any drugs or weapons, no, I don't; do you mind if I look, sure, go ahead," as being "an exchange that is probably repeated around this city more common tha[n] I love you" (alteration in original)).

The overwhelming majority of individuals grant police consent to search upon request. *See, e.g., Engel and Calnon*, 21 Just Q at 76 (97.7% of drivers

gave consent to search upon request). The inherently coercive pressure to comply with police authority exerts an even stronger influence over minority communities. *See* Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val U L Rev 243, 253-55 (1991) (discussing the history of violent encounters between African-American men and the resulting increased pressure to cooperate and avoid confrontation with authorities). Despite that inherent coercive pressure, police are not required to ensure that an individual understands his or her right to refuse to consent to a search. *See State v. Flores*, 280 Or 273, 281-82, 570 P2d 965 (1977) (refusing to adopt a rule requiring proof that a criminal suspect was aware of his right to refuse consent). In light of this research, a rule permitting routine questioning about the presence of weapons could lead to more consent searches, which would substantially increase the duration and intrusiveness of traffic stops.

LaFave bluntly notes that it is not law enforcement’s “intense interest in such matters as burned-out taillights and unsignaled lane changes” that has increased the use of pretext stops as a law-enforcement tool; rather, it is the movement since the mid-1990s to utilize traffic enforcement as a tool in the “war on drugs.” LaFave, 102 Mich L Rev at 1844; *see also* Engel and Calnon, 21 Just Q at 50 (tracing the origin of the increased use of traffic stops as an investigatory tool to the war on drugs). As the research discussed above

suggests, the “aggressive targeting of drug offenders at the street level and the profiling of drug traffickers” has taken its heaviest toll on young minority men, who—despite similar rates of drug usage as whites—are more likely to be stopped, arrested, convicted, and imprisoned for drug offenses. *Id.* at 52.

Expanding law enforcement’s already broad discretion during traffic stops will only exacerbate the existing risk of official abuse of that discretion. And, as racial minorities are the most common target of that discretion, racial minorities necessarily will suffer the greatest impact from further expansions of police discretion. The present case demonstrates that conclusion: When Officer Borchers stopped defendant for crossing against the traffic signal, he chose to stop a minority individual wearing clothing that, in Borchers’s view, might indicate gang affiliation. *Jimenez*, 263 Or App at 152. The circumstances strongly suggest that Borchers’s goal was to investigate defendant for potential gang activity rather than to promote traffic safety. Borchers singled out, or “profiled” defendant because of his race and the way that he was dressed rather than because of any behavior indicating that he was involved in criminal activity. Moreover, the record does not suggest that defendant presented any type of threat to Borchers’s safety; Mr. Jimenez was not hostile or aggressive. *See id.* at 152-53. In fact, Mr. Jimenez tried to avoid the encounter with Borchers altogether and, when he realized that that was not possible, he was mild and cooperative, even submissive, throughout. *See id.* at 152-53, 161

(describing Mr. Jimenez’s conduct during encounter).

Expanding police authority to ask about weapons during *every* traffic stop—the *per se* rule for which the state advocates—would significantly increase the intrusiveness of traffic stops, and minority communities would suffer the greatest impact of that expanded discretion. And, furthermore, just as the state’s proposed rule would allow officers to ask about weapons without having any specific reason for doing so, it also would shield from review an officer’s decision *not* to ask others the same question. As the United States Supreme Court has warned, granting state actors broad discretion invites arbitrary enforcement. *City of Chicago v. Morales*, 527 US 41, 52, 119 S Ct 1849, 144 L Ed 2d 67 (1999) (an ordinance providing insufficient standards to guide law enforcement was unconstitutionally vague because it failed to protect against arbitrary and discriminatory enforcement). In light of those impacts, this Court should approach with extreme caution the state’s invitation to announce a *per se* rule.

The current rule—which allows police to take reasonable safety measures when they have an articulable suspicion that a particular individual poses a risk to the officer’s safety—fully satisfies the need to protect police in the performance of their duties, and does so without unnecessarily infringing on individuals’ constitutional rights or widening further the existing racial disparities in law enforcement. The state has failed to provide this Court with a



sufficient justification to abandon that existing rule. And, as explained further below, no sufficient justification for doing so exists.

**III. The current rule allowing police to take reasonable safety measures when they have an articulable suspicion of an identifiable safety risk better serves the goals of officer and public safety than would a *per se* rule permitting questioning about weapons.**

A *per se* rule expanding police discretion to permit questions about weapons during every traffic stop would not significantly enhance officer safety. On the contrary, it would increase the dangerousness of traffic stops by turning routine encounters into adversarial investigations. Moreover, expanding police discretion to ask questions about weapons during every traffic stop likely would adversely impact the public's perception of police legitimacy, which is a cornerstone requirement for public safety.

**A. Research demonstrates that routine traffic stops are not inherently dangerous for police officers.**

In answering the question whether additional officer-safety measures, such as questions about weapons, are a reasonable intrusion on the individual liberty interests protected under Article I, section 9, the rule this court announces should be informed by the reality of the risks posed to police officers during routine traffic stops. Contrary to the state's position, research shows that routine traffic stops are, in fact, not a particularly dangerous police activity. Moreover, recent data demonstrates that violence against police officers generally has declined over the last decade.

The United States Supreme Court opinions cited by the state as support for its position that routine traffic stops are a particularly dangerous aspect of police work relied on data that failed to examine the potential danger of traffic stops in relation to their frequency. In *Maryland v. Wilson*, for example, the Court recited the number of occasions in which police officers were harmed during traffic stops. 519 US 408, 413, 117 S Ct 882, 137 L Ed 2d 41 (1997). But Justice Stevens' dissent recognized that "the number of stops in which an officer is actually at risk is dwarfed by the far greater number of routine stops." *Id.* at 418 (Stevens, J., dissenting).

A study that actually analyzed the number of incidents of violence during traffic stops in relation to the millions of routine traffic stops that occur annually has proved Justice Stevens' dissenting view to be more accurate. Illya D. Lichtenberg and Alisa Smith, *How Dangerous Are Routine Police-Citizen Traffic Stops? A Research Note*, 29 J Crim Just 419, 420 (2001). Even based on a conservative estimate of the total number of traffic stops, the study found that, on average over a ten-year period, "the risk of homicide to a police officer during a traffic encounter was one in 6.7 million" stops and "the risk of assault to a police officer was one in 10,256 stops." *Id.* at 423.

The Supreme Court's conclusions regarding officer safety during traffic stops in *Pennsylvania v. Mimms*, 434 US 106, 110, 98 S Ct 330, 54 L Ed 2d 331 (1977), similarly lacked evidentiary support. The Court in *Mimms* cited a 1963

study for the proposition that “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.” 434 US at 110. The Court relied on the same study in *Michigan v. Long*, 463 US 1032, 1047 n 13, 103 S Ct 3469, 77 L Ed 2d 1201 (1983). That study, however, involved an analysis of only 110 police shootings that took place between 1959 and 1961. Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J Crim L C & Police Sci 93, 93 (1963). The study’s author recognized that “the validity and reliability” of any conclusions regarding the hazards posed to officers “is easily challenged on the size of the sample (35 cases).” *Id.* at 94.

The other two, relatively more recent Supreme Court cases cited by the state as support for its position that traffic stops are dangerous do not cite to any research at all. *See Arizona v. Johnson*, 555 US 323, 330, 129 S Ct 781, 172 L Ed 2d 694 (2009) (citing *Long* without addressing the limitations of the 1963 study on which *Long* relied); *Maryland v. Buie*, 494 US 325, 334 n 2, 110 S Ct 1093, 108 L Ed 2d 276 (1990) (remarking, without citation to any authority, that on-the-street encounters are inherently dangerous).

Moreover, assaults on officers and firearms-related officer fatalities are on the decline. *Compare* Federal Bureau of Investigation, 2004 Law Enforcement Officers Killed and Assaulted, Table 63,<sup>15</sup> *with* Federal Bureau of

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<sup>15</sup> Available at <http://www.fbi.gov/about-us/cjis/ucr/leoka/2004> (last accessed Feb 20, 2015) (follow “Section II” hyperlink; then follow “Table 63” hyperlink).

Investigation, 2013 Law Enforcement Officers Killed and Assaulted, Table 65<sup>16</sup>

(showing that assaults on officers have decreased over the past decade from a rate of 11.9 per 100 officers in 2004 to 9.3 per 100 officers in 2013). In fact, firearms-related officer fatalities “reached a 126-year low in 2013.” National Law Enforcement Officers Memorial Fund, *Research Bulletin: Law Enforcement Officer Deaths: 2013*.<sup>17</sup>

The research cited above demonstrates that, in fact, traffic stops are not especially dangerous. Only one in many millions of traffic stops results in an officer homicide. Lichtenberg, 29 J Crim Just at 424. And the odds of an officer being assaulted during a routine traffic stop are roughly comparable to the risk of being struck by lightning during one’s lifetime. *Id.*<sup>18</sup> The

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<sup>16</sup> Available at [http://www.fbi.gov/aboutus/cjis/ucr/leoka/2013/tables/table\\_65\\_leos\\_asltd\\_region\\_and\\_geographic\\_division\\_2013.xls](http://www.fbi.gov/aboutus/cjis/ucr/leoka/2013/tables/table_65_leos_asltd_region_and_geographic_division_2013.xls) (last accessed Feb 20, 2015).

<sup>17</sup> Available at <http://www.nleomf.org/assets/pdfs/reports/2013-EOY-Fatality-Report.pdf> (last accessed Feb 20, 2015). A study that compared homicide victimization rates among male police officers and male civilians age twenty to fifty-four from 1986 through 1995 revealed that “the victimization rates between the two groups are very similar.” Illya D. Lichtenberg *et al.*, *Terry and Beyond: Testing the Underlying Assumption of Reasonable Suspicion*, 17 Touro L Rev 439, 458-459 (2000-2001). It concluded, “this finding contradicts the assumption \* \* \* that police face greater risk than the general population.” *Id.*

<sup>18</sup> Under conservative estimates, the risk of assault to a police officer was one in 10,256 stops. Lichtenberg, 29 J Crim Just at 423. Under a mid-range estimate of the number of traffic stops, the risk of assault dropped to one in 20,152 stops. *Id.* at 425. The odds of a person being struck by lightning in his or her lifetime are 1 in 12,000. National Weather Service, *Lightning – Frequently Asked Questions*,

supposition that traffic stops pose an inherent danger to police—too frequently supported only by anecdote rather than scientific analysis—should be scrutinized carefully before becoming the basis for a constitutional rule that would expand police authority and diminish the liberty of hundreds of thousands of non-dangerous motorists, bicyclists, and pedestrians stopped by the police in Oregon every year.

**B. Permitting police to question citizens about weapons during traffic stops will increase the adversarial tenor of police-citizen encounters and will decrease perceptions of police legitimacy.**

The state argues that an officer who knows whether the subject of a stop is armed will be safer because he has better “control” over the stop. But simply asking about weapons does not provide officers with that knowledge. The officer will have no way of knowing whether the answer is true or false, particularly if the answer is “No.” And even if the person answers in the affirmative, that information may have no bearing on the stop: Many people who possess “weapons” do so for purposes other than violence. For example, individuals may possess firearms for personal protection or recreation, or they may possess knives for work or everyday use. Such individuals may have no intention of using those items to harm the police. And, if that is so, the officer’s knowledge of the item’s existence during what should be a brief, routine stop

does not significantly advance safety. *See also* Resp BOM at 28-29 (further articulating reasons that safety-related questions yield little protection).

Asking stopped individuals about weapons not only fails to advance officer safety in a great many cases, it may have the opposite effect. More specifically, an officer's questions about weapons may provoke a more confrontational encounter than otherwise would have occurred. Research has demonstrated that the public's perception of the legitimacy of a traffic stop decreases when officers take actions that bear no connection to the apparent purpose of the stop. Gau and Brunson, 2 *Race & Just* at 262 (analyzing PPCS data and determining that consent search requests were associated with "declines in perceived stop legitimacy"). "Pervasive, ongoing suspicious inquiry sends the unmistakable message that the targets of this inquiry look like criminals: they are second-class citizens." Epps and Maynard-Moody, *supra* note 8.

Police effectiveness is "largely dependent on the degree to which the public respects law enforcement." Nancy La Vigne *et al.*, *Key Issues in the Police Use of Pedestrian Stops and Searches, Discussion Papers from an Urban Institute Roundtable* 6 (August 2012).<sup>19</sup> In turn, public respect for law enforcement is closely linked to procedural justice, the "fair, equitable, rational treatment of civilians by officers." Gau and Brunson, 2 *Race & Just* at 255.

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<sup>19</sup> Available at <http://www.urban.org/UploadedPDF/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.pdf>.

“Race-based inequality \* \* \* compromises public trust in the police institution.”

*Id.* Thus, even if traffic stops result in the seizure of contraband, the net effect on public safety may be negative if the public perceives the stops as unfairly targeting minorities.

The importance of police legitimacy to public safety is a timely issue, with public anti-police sentiment reaching a fever pitch and stirring public outcry, rioting, and violence in places like Ferguson, Missouri, and New York. *See, e.g.,* Matt Taibbi, *The Police in America are Becoming Illegitimate*, Rolling Stone (Dec 5, 2014) (discussing the dangerous cumulative effect of pretextual stops targeting particular neighborhoods: “[T]he psychic impact of these policies on the massive pool of everyone else in the target neighborhoods is a rising sense of being seriously pissed off”).<sup>20</sup> And, recently, F.B.I. Director James Comey publicly discussed the “difficult relationship” between police and African-American communities as a serious public safety concern and urged law enforcement agencies to adopt “systems and processes” to overcome unconscious racial bias in police work. James B. Comey, Director, Federal Bureau of Investigation, Address at Georgetown University (Feb 12, 2015).<sup>21</sup>

Because this court already has made clear that officers permissibly may

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<sup>20</sup> Available at <http://www.rollingstone.com/politics/news/the-police-in-america-are-becoming-illegitimate-20141205#ixzz3Rt1FZt53>.

<sup>21</sup> Available at <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (last accessed Feb 20, 2015).

ask about weapons when they have specific reasons, based on articulable facts, for doing so, the *per se* rule that the state urges expands discretion only in those cases where the police lack any reason at all for asking about weapons. Any benefit to officer safety that might come from allowing police unfettered discretion to interrogate individuals about weapons when they have no specific reason for doing so pales in comparison to the negative consequences that would attend such a rule. Namely, the adversarial tenor of police-citizen encounters would increase significantly—with the greatest impacts on minority communities—and the public’s perception of police legitimacy would only continue to deteriorate.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals decision.

Respectfully submitted,

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WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

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I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,093 words.

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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 by ORAP 5.05(4)(f).

s/ Jordan R. Silk

Jordan R. Silk, OSB #105031

## **CERTIFICATE OF FILING AND SERVICE**

I certify that on February 20, 2015, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on February 20, 2015, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system:

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