IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Respondent,<br>Petitioner on Review,<br><br>v.<br><br>JOHN ALBERT SINES,<br><br>Defendant-Appellant,<br>Respondent on Review. | Deschutes County Circuit Court No. 06FE1054AB<br><br>CA A146025<br><br>SC S062493 |

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# REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

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Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Deschutes County
Honorable ALTA JEAN BRADY, Judge

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*Continued . . .*

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# REPLY BRIEF OF
# PETITIONER ON REVIEW, STATE OF OREGON

This case requires the court to determine whether state officials were sufficiently involved in the seizure of property by a private citizen such that the seizure constituted "state action" under Article I, section 9, of the Oregon Constitution. It is apparent from defendant's answering brief on the merits that the parties actually agree in a number of important respects about the legal framework for addressing that question. As explained below, however, defendant's brief mistakenly characterizes two aspects of the state's position.

## A. To determine whether conduct is "state action" for purposes of Article I, section 9 this court should adopt a test that is consistent with federal courts' approach to identifying "state action" for purposes of the Fourth Amendment.

In its opening brief, the state urged this court to adopt a "state action" test under Article I, section 9 that is consistent with the test which the federal courts apply under the Fourth Amendment. Under the state's proposed rule, a private citizen who seizes property is not a state agent for purposes of Article I, section 9, unless state officials conveyed to that citizen that he or she was authorized to act on the state's behalf by directing, instructing, asking, or otherwise actively encouraging and sanctioning the seizure. In his response brief, defendant asserts that the state's proposed rule would actually impose a "lesser" standard than that to

which state actors are held under the Fourth Amendment. (Resp BOM 25). But his argument in that regard is based on a mistaken understanding of federal law.

As the state explained in its opening briefing, federal courts generally apply a test that asks whether (1) the government knew of and acquiesced in the private search or seizure; and (2) the private individual intended to assist law enforcement or had some other independent motivation. In his response brief, defendant also argues that this court should adopt an Article I, section 9 test that is consistent with that applied under Fourth Amendment, and he also cites the same two-part federal test. To that extent, then, the parties' arguments are in agreement. But where the parties diverge is on what it means for the state to have "acquiesce[] in intrusive conduct" for purposes of the Fourth Amendment.

Defendant contends that if, as in this case, a state official knows a private seizure may occur the seizure but declines to take steps to discourage it, that is the sort of "acquiescence" which constitutes state action, and that to hold otherwise would be "flatly inconsistent" with federal law. (Resp BOM 24). Defendant does not discuss or even cite any case law in support of that proposition, however. Nor does he acknowledge any of the federal cases on the subject discussed in the state's opening brief.

As it happens, defendant's understanding of federal law is wrong. As the state endeavored to explain in its brief, federal courts have repeatedly explained that the first prong of the federal test requires *more* than the knowing that a citizen

seizure might take place and failing to take steps to stop it. In other words, to transform private conduct into state action requires "more than adopt a passive position toward the underlying private conduct." S*kinner v. Railway Labor Executives Ass'n*, 489 US 602, 614–15, 109 S Ct 1402, 103 L Ed 2d 639 (1989). In keeping with the principles of agency that underlie the Fourth Amendment test, federal circuit courts consistently have explained that passivity on the part of the state is *not* enough. *See, e.g.*, *United States v. Jarrett*, 338 P3d 339, 346 (4th Cir 2003); *United States v. Smythe*, 84 F3d 1240, 1242-43 (10th Cir 1996) ("[K]nowledge and acquiescence * * * encompass the requirement that the government must also affirmatively encourage, initiate or instigate the private action." (citation omitted; emphasis added)); *United States v. Koenig*, 856 F 2d 843, 850 (7th Cir 1988) ("Mere knowledge of another's independent action does not produce vicarious responsibility absent some manifestation of consent and the ability to control."; *United States v. Walther*, 652 F2d at 792 (9th Cir 1981) ("Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of Fourth Amendment standards." ); *United States v. Lambert*, 771 F2d 83, 89 (6th Cir 1985) (the government "must have instigated, encouraged or participated in the search".)

This court should adopt exactly the same approach under Article I, section 9. A private citizen who seizes property is not a state agent for purposes of Article I, section 9, unless state officials "acquiesced" in the seizure by conveying to that citizen she was authorized to act on the state's behalf. That did not happen in this case, and so the trial court correctly denied the motion to suppress.

**B. The rule proposed by the state would not allow state officials to circumvent a finding of state action merely by uttering "magic words."**

Defendant also mischaracterizes the state's position when he asserts that, "[t]he state asks this Court to create a complete excuse for any state official, no matter how strong he or she encouraged a private citizen to conduct a search, if the state official simply adds, 'it's up to you whether to conduct a search.'" (Resp BOM 28). Defendant thus characterizes the state as proposing a rule under which a state official need only incant certain "magic words" to avoid a finding of state action. (Resp BOM 28). But the state is not asking the court to create any such "excuse" or suggesting the existence of any "magic words."

Whether a private citizen's seizure is "state action" is an objective inquiry that requires considering the totality of circumstances to determine if a state official conveyed to that citizen—through the official's words and deeds—that citizen was authorized to act as an agent on the state's behalf. A public official telling a private citizen "it's up to you whether to conduct a search" may be enough to avoid the finding of state action, or it may not be, depending on the particular

facts of the case and on the context in which those words are uttered. If a reasonable person would understand from a state official's statements and conduct that the person had approval to seize property on the state's behalf, then—regardless of any particular "magic words" that the officer may have uttered—the seizure may indeed be state action. But where, in the totality of circumstances, an officer has not conveyed that approval to act on the state's behalf, there is not state action.

In this case, the DHS official, Mike Cleavenger, was careful to communicate to Ms. Offizer that, as a state official, he could not be involved in the decision to seize evidence from defendant's home, that he was not directing her to do anything, and thus that she was not authorized to act on the state's behalf. In fact, the record demonstrates that Cleavenger went so far out of his way to stress that point, repeatedly and emphatically, that Offizer actually got irritated with his insistence and the recurring reminders. (Tr 52, 62). In other words, this is not a case in which a state official asked or directed a private citizen to seize property for the state and then disingenuously tacked on a few "magic words" to avoid a finding of state action. It is, in fact, entirely the opposite. It is a case of a state official who went out of his way to ensure that the private citizen actually understood that, as a state official, he could and would not ask her to seize the evidence on the state's behalf.

## CONCLUSION

This court should rule that the seizure of the victim's underpants did not violate Article I, section 9, reverse the Court of Appeals' decision, and remand the case for further proceedings.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 17, 2015, I directed the original Reply Brief of Petitioner on Review, State Of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lisa A. Maxfield and Lawrence Matasar, attorneys for respondent on review, by using the court's electronic filing system.

## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1313 words. I further 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(2)(b).

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