IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JAMES EDWARD KELLER, Defendant-Appellant, Respondent on Review.	Multnomah County Circuit Court No. 110342882 CA A148749 SC S064353

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable DAVID F. REES, Judge

Opinion Filed: June 15, 2016
Author of Opinion: ARMSTRONG, P. J.
Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge
Dissenting Judge: Hadlock, C. J.

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
JOSHUA B. CROWTHER #032998
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
joshua.b.crowther@opds.state.or.us

Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DOUG M. PETRINA #963943
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: doug.petrina@doj.state.or.us

Attorneys for Petitioner on Review

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INTRODUCTION

This case concerns the application of Article I, section 9, to a traffic stop that began in Washington but continued into Oregon. A Washington trooper initiated the stop in Washington after observing defendant commit traffic violations, but defendant failed to stop until he reached Oregon. When he contacted defendant, the trooper observed that defendant was intoxicated and detained him until Portland police could respond and conduct a driving-under-the-influence-of-intoxicants (DUII) investigation. That investigation revealed that defendant's blood alcohol level was over three times the legal limit.

The issue is whether the evidence obtained from the stop must be suppressed because the Washington trooper lacked statutory authority for the traffic stop in Oregon. As explained below, the evidence did not have to be suppressed. That follows regardless of whether the trooper is deemed a state actor for purposes of Article I, section 9, of the Oregon Constitution. If he was not a state actor, because he was not acting at the behest of Oregon law enforcement or under the mantle of Oregon law, then the seizure was by a private citizen that would not implicate Article I, section 9. If, on the other hand, the trooper was a state actor, then the seizure was constitutional, because

it was supported by probable cause. Either way, the trooper's lack of statutory authority was not grounds for suppressing any evidence.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

This case presents the following questions to which the state proposes the following answers:

> **First question presented:** When is a seizure by a non-Oregon officer state action that implicates Article I, section 9?
>
> **First proposed rule:** A seizure by a non-Oregon officer is state action for purposes of the Oregon Constitution only if the officer was acting as an agent of the State of Oregon. That means the seizure is state action only if the seizure was made at the behest of Oregon authorities or under the mantle of Oregon law.
>
> **Second question presented:** Does an officer's lack of statutory authority to stop a motorist also render the seizure "unreasonable" under Article I, section 9?
>
> **Second proposed rule:** The fact that an officer exceeds his or her statutory authority in conducting a seizure is not—by itself and without more—a constitutional violation. A seizure is reasonable for purposes of Article I, section 9, if it is supported by the requisite reasonable suspicion or probable cause. Those standards apply regardless of whether the seizure is performed by an Oregon officer or a non-Oregon officer who is engaging in state action.

STATEMENT OF THE CASE

A. Legal Background

Because this case involves a traffic stop by a Washington trooper in Oregon, the state begins with an overview of the statutes and leading cases governing the actions of non-Oregon law-enforcement officials.

1. Statutes Governing Non-Oregon Officers' Conduct in Oregon

The legislature has authorized officers from other states to seize suspects in Oregon in various circumstances. *See e.g.*, ORS 190.472 (providing for mutual-aid agreements with law-enforcement agencies from Washington, Idaho, or California); *cf.* ORS 133.245 (providing authority for federal officers to make arrests). Two merit mention.

First, under Oregon's Fresh Pursuit Act, an officer from another state may pursue into Oregon and arrest a suspect believed to have committed a felony:

> Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order *to arrest the person on the ground that the person is believed to have committed a felony in the other state* has the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.

ORS 133.430(1) (emphasis added).[1]

Second, an officer—like any private citizen—may seize a suspect if the officer has probable cause to believe that the suspect has committed a crime in

[1] In 2011, the Oregon legislature enacted ORS 133.405 *et seq.* to provide additional statutory authority for officers from adjoining states to provide law-enforcement services in Oregon. That legislation was enacted after the incident here and, hence, is not implicated.

the officer's presence. ORS 133.225(1) authorizes private persons to stop and arrest persons and to turn them over to authorities in that instance:

> A private person may arrest another person for any crime committed in the presence of the private person if the private person has probable cause to believe the arrested person committed the crime. A private person making such an arrest shall, without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to a peace officer.

The authority to stop is encompassed by the authority to arrest. *See generally State v. Tucker*, 286 Or 485, 492, 595 P2d 1364 (1979) ("[t]he authority to stop is a necessary part of the authority to arrest or to issue a citation").

Therefore, as a statutory matter, a Washington officer who pursues a motorist into Oregon may seize the motorist if the officer has probable cause to believe that the motorist committed a felony in Washington or (in the officer's presence) any other crime. But a Washington officer does not have statutory authority to conduct a traffic stop in Oregon for traffic violations.

2. State Constitutional Constraints on Non-Oregon Officers

Four of this court's precedents discuss the applicability of Article I, section 9, to the conduct of non-Oregon law-enforcement officials. In *State v. Olsen*, 212 Or 191, 317 P2d 938 (1957), this court held that neither the state nor federal constitutional protections against unreasonable searches and seizures applied to a search in Washington by Spokane police officers, because the officers were not Oregon governmental actors or agents.

In *State v. Krogness*, 238 Or 135, 138, 388 P2d 120 (1963), however, this court explained that the federal constitutional analysis in *Olsen* was no longer good law in light of intervening United States Supreme Court caselaw extending the federal constitutional exclusionary rule to the states. Without distinguishing between the constitutional provisions, the *Krogness* court apparently applied both Article I, section 9, and the Fourth Amendment to the conduct of Washington police officers in Washington.

Roughly thirty years later, in *State v. Davis*, 313 Or 246, 248-49, 834 P2d 1008 (1992), this court held that Article I, section 9, applied to an arrest of the defendant by Mississippi officers in Mississippi based on a Mississippi fugitive warrant that was based on Oregon arrest warrants. This court concluded that "[t]he standard of governmental conduct and the scope of the individual rights protected by Article I, section 9, are precisely the same as those that would apply to a search by Oregon police in Oregon." *Id.* at 253. The court explained:

> If the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the individual by Article I, section 9, of the Oregon Constitution. It does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply.

313 Or at 254 (emphasis original). The *Davis* court concluded that "for these purposes, action by state officers in Mississippi is the same as action by the state officers in Oregon." *Id*. at 249.

Finally, in *State v. Rodriguez*, 317 Or 27, 29, 34-36, 854 P2d 399 (1993), this court relied on *Davis* to hold that Article I, section 9, applied to an Oregon arrest made by a special agent with the United States Immigration and Naturalization Service (INS) who was accompanied by six Portland police officers and an FBI agent. This court concluded that the reasoning from *Davis* governed, because "the factual distinction between a state officer and a federal officer" did not have "any legal significance in determining whether certain evidence is admissible in an Oregon criminal prosecution." 317 Or at 35.

B. The incident: A Washington traffic stop continues into Oregon. The trooper detains defendant, who is intoxicated, until Portland police respond and conduct a DUII investigation.

On March 21, 2011, shortly after 1:30 a.m., Washington State Trooper Thompson was on patrol in Clark County, Washington driving an unmarked police vehicle. (Tr 12-13, 15, 32). Thompson was heading southbound on Interstate 5 and was just north of the Interstate Bridge. (Tr 14). In his rear-view mirror, Thompson observed a vehicle (driven by defendant) approach his vehicle from behind at a high rate of speed. (Tr 15). The speed limit was 50 miles per hour. (*Id*.). Using his vehicle's radar, Thompson measured defendant's speed at 75 miles per hour. (Tr 17). Thompson was approximately

a half-mile north of the Oregon-Washington border when he first observed defendant's vehicle. (Tr 18). Thompson, who was in the center lane, slightly reduced his speed. (*Id.*). Defendant's vehicle got extremely close to Thompson's patrol car—so close that Thompson could no longer see defendant's headlights. (*Id.*). Defendant then changed lanes to the left lane and rapidly accelerated. (*Id.*).

Thompson believed that defendant had committed the Washington infractions of speeding and following too close to another vehicle, both of which are a basis for a traffic stop in Washington. (Tr 19, 33-34). Thompson pulled into the left lane behind defendant and activated his emergency lights to initiate a traffic stop. (Tr 19-20). At that point, Thompson and defendant were just north of the state line. (Tr 20). Thompson intended to stop defendant just south of the Interstate Bridge on the right shoulder of the interstate by Jantzen Beach. (Tr 19-21, 38-39). Defendant's vehicle slowed and eventually moved to the right lane but passed Jantzen Beach. (Tr 21, 38-39). Thompson activated his siren and air horn to attempt to get defendant's vehicle to stop but defendant continued driving. (*Id.*). Thompson used his public-address system to direct defendant to pull over but defendant did not respond. (Tr 21, 40). Defendant took the exit to Marine Drive/MLB Boulevard. (Tr 21). Thompson again used his public-address system to order defendant to pull over, and defendant motioned out his window indicating that he intended to pull over. (Tr 21).

Defendant stopped in the bus pull-out. (*Id*.). The time of the stop was 1:40 a.m. (Tr 32).

Before getting out of his patrol car, Thompson requested that dispatch contact Portland police so they could respond and provide assistance. (Tr 22). Thompson was concerned for his safety given the extreme amount of time defendant took to pull over. (Tr 22, 27). Thompson approached defendant's vehicle with his weapon drawn but holstered it before approaching defendant's window after the trooper concluded that defendant did not pose a safety risk. (Tr 22, 42-43).

Thompson told defendant that he stopped him for speeding and for following too close and asked why he didn't stop immediately. (Tr 23). Defendant stated that he was trying to find a safe place to park. (Tr 24). Thompson immediately detected a strong odor of alcohol and observed that defendant had bloodshot and watery eyes and that his speech was extremely slurred. (Tr 25-27). Thompson believed that defendant was under the influence of alcohol and, in fact, well over the legal limit. (Tr 29, 32-33).

Thompson asked defendant for his license, registration, and proof of insurance, and defendant stated "You caught me; I don't have a license." (Tr 27). Defendant stated that it was his girlfriend's vehicle. (Tr 28). The only documentation that defendant provided was an Oregon identification card. (*Id*.). Thompson asked defendant about the consumption of alcohol. (Tr 29).

Defendant stated that he had had three beers, and that the trooper should do what he had to do, but that the trooper was causing a real inconvenience for him. (Tr 28-29).

Thompson returned to his patrol car and requested that dispatch inform Portland police that they would need to conduct a DUII investigation. (Tr 29, 32, 46). Thompson did not arrest defendant but detained him while they waited for Portland police to arrive. (Tr 30, 45-46). Defendant remained in his own vehicle, and Thompson waited in his. (Tr 30-31, 51).

Portland Police Officer Tobey arrived at the scene roughly 8 to 12 minutes after the stop, sometime around 2:00 a.m. (Tr 23, 51). Thompson advised Tobey what he observed and asked him to take over the DUII investigation, because they were in Oregon. (Tr 30-31, 51-52). Tobey spoke with defendant and noted that he had a strong odor of alcohol, slurred speech, and bloodshot, watery eyes. (Tr 53-54). Tobey asked defendant if he knew why he was stopped, and defendant stated "I guess I was speeding." (Tr 53). Tobey asked defendant if he had consumed any alcohol, and defendant stated that he had three beers. (Tr 54). Tobey believed that defendant was under the influence of intoxicants, and asked him if he would consent to perform field-sobriety tests. (Tr 54-55). Defendant stated that he was "not fucking doing anything" and rambled about how he did not care what happened to him but was more concerned with what would happen to his girlfriend's vehicle. (Tr

55). Tobey arrested defendant and turned over custody to another officer. (Tr 56-57, 62, 69). At 3:15 a.m., defendant submitted to the breath test, which yielded a .27 percent blood-alcohol-content result. (Tr 108). Defendant was charged with DUII.

C. The trial court concluded that the traffic stop did not violate Article I, section 9, because the stop was supported by probable cause.

Defendant moved to suppress the evidence, arguing that the seizure violated Article I, section 9, because the trooper lacked authority to stop him in Oregon. The trial court denied the motion. The court assumed that the trooper lacked statutory authority to conduct the traffic stop in Oregon. But the court concluded that the stop was constitutional, because the trooper had probable cause for the initial traffic stop and then reasonable suspicion for DUII to detain defendant while waiting for Portland police to respond. (Tr 99-100). Defendant was convicted of DUII in a stipulated-facts trial. (Tr 108).

D. The Court of Appeals held that the trooper engaged in unlawful state action by stopping defendant without statutory authority.

Defendant appealed, renewing his argument that the seizure violated Article I, section 9, because of the lack of statutory authority. The state responded that the trooper was not a state actor, because he was not an Oregon

governmental actor or agent and that, regardless, the traffic stop was constitutional, because it was supported by probable cause. (Resp Br 8-20).[2]

The Court of Appeals reversed in a divided opinion. *State v. Keller*, 278 Or App 760, 379 P3d 545 (2016). The majority and dissent agreed that *State v. Davis*, 313 Or 246, mandated that the trooper's conduct be treated as state action but disagreed on whether the seizure violated Article I, section 9.

The majority opinion held that the traffic stop was "unreasonable" under Article I, section 9, because the trooper lacked statutory authority to stop defendant in Oregon for traffic violations committed in Washington. 278 Or App at 761-66. The majority concluded that Article I, section 9, "reasonableness" requires that "the police in effecting a search or seizure based on probable cause are exercising their lawful authority to act in their official capacity as the police." *Id*. at 765. Because the trooper "acted beyond his jurisdiction," he was "not exercising his lawful authority as a Washington State

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[2] In the trial court, the state did not advance its argument that the Washington trooper was not a state actor. But the state advanced that argument in its answering brief in the Court of Appeals and argued that it would be appropriate to affirm on that ground as "right for the wrong reason," because the pertinent facts were undisputed, and because the issue otherwise was purely legal. (Resp Br 10); *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (discussing "right for the wrong reason" doctrine). At oral argument, defendant did not dispute that it was appropriate to reach the issue under the "right for the wrong reason" doctrine, and he responded to the state's argument on the merits. Defendant argued that *Davis* controlled and established that state action is conduct by any governmental actor and is not limited to conduct of the State of Oregon.

Trooper." *Id*. The majority thus held that the traffic stop violated Article I, section 9, notwithstanding the fact that it was supported by probable cause. *Id*.

The dissent would have held that the traffic stop did not violate Article I, section 9. *Id*. at 766-70 (Hadlock C.J., dissenting). The dissent noted that, were it not for this court's *Davis* decision, the trooper could have been treated as a private citizen whose conduct did not implicate Article I, section 9, because the trooper lacked authority to conduct a traffic stop in Oregon. *Id*. at 766-67. But the dissent concluded that *Davis* mandated that the Washington trooper be treated as if he was, in fact, an Oregon officer. *Id*. at 767-70. The dissent would have held that suppression was not required, because "[a]n Oregon police officer does not violate Article I, section 9, by performing a traffic stop that is justified by probable cause to believe that the driver has committed traffic violations" and that is so regardless of whether the Oregon officer exceeds his statutory authority in conducting the stop. *Id*. at 768-70.

SUMMARY OF ARGUMENT

The circumstances of this case can be viewed one of two ways, neither of which results in an Article I, section 9, violation.

First, the trooper was not a state actor, which means that his conduct did not implicate Article I, section 9. The pertinent "government" for the state-action requirement in the Oregon Constitution is the Oregon government: it applies to the conduct of Oregon governmental actors and their agents. The

trooper was a Washington officer. The Washington trooper's unauthorized seizure of defendant was not state action, because he was not acting as a state agent. The seizure was made neither at the behest of Oregon governmental authorities nor under the mantle of Oregon authority.

Second, if the trooper was a state actor, *Davis* would require that he be viewed as if he were, in fact, an Oregon officer. The trooper's seizure did not violate Article I, section 9, because he had probable cause to believe that defendant had committed traffic violations, and he then developed reasonable suspicion (and actually probable cause) to believe that defendant had committed the crime of DUII. Although the trooper exceeded his statutory authority by conducting the traffic stop, that statutory violation did not constitute a constitutional violation. Article I, section 9, does not incorporate statutory standards that regulate seizures. Rather, Article I, section 9, protects against unreasonable seizures by requiring reasonable suspicion or probable cause depending on the type of seizure. The trooper's constitutional authority for the traffic stop arose from the facts that created the probable cause. The lack of statutory authority is particularly insignificant because, in addition to the statutes regulating seizures, the legislature enacted ORS 136.432, which precludes suppression as a remedy for statutory violations.

ARGUMENT

A. An unauthorized seizure by a non-Oregon officer is not state action, unless the officer was acting as a state agent.

As this court explained in *State v. Sines*, 359 Or 41, 379 P3d 502 (2016), Article I, section 9, applies only to state action, and agency principles govern whether the conduct of a private citizen is state action. As a result, a private citizen's conduct is not state action unless the state authorized the conduct or asked the person to act on the state's behalf. The same analysis applies to the conduct of a non-Oregon officer. Although that approach admittedly is at odds with language from *Davis*, that language was not necessary to the result there. Moreover, the broad language from *Davis*—suggesting that government conduct with no connection to Oregon constitutes Article I, section 9, state action—conflicts with the approach adopted in *Sines*, conflicts with the scope of the Oregon Constitution, and conflicts with the rationale for the state-action requirement. This court should clarify that a seizure by a non-Oregon officer cannot violate Article I, section 9, unless the officer was acting as a state agent.

1. Article I, section 9, applies only to state action.

Article I, section 9, of the Oregon Constitution, provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

"It is axiomatic * * * that Article I, section 9, applies only to *government*-conducted or directed searches and seizures, not those of private citizens" and "that is true even if citizens act unlawfully in obtaining the evidence that later makes its way into the state's possession." *Sines*, 359 Or at 50 (emphasis added).[3] Therefore, the threshold question is whether the trooper's conduct was state action or private action for purposes of Article I, section 9.

2. Agency principles govern whether the conduct of a private citizen is state action.

Although the vast majority of Article I, section 9, cases involves the conduct of police officers, state action also includes the conduct of other Oregon officials and employees. *See State ex rel Juv Dept of Clackamas County v. M.A.D.*, 348 Or 381, 233 P3d 437 (2010) (assistant principal at public school). State action also includes those acting as state agents. *See State v. Tucker*, 330 Or 85, 89, 997 P2d 182 (2000) (tow truck driver who searched a vehicle at the request of police). Therefore, for purposes of the Oregon Constitution, state action is conduct of Oregon officers, officials, employees, and their agents. *Cf.*, *Coolidge v. New Hampshire*, 403 US 443, 487, 91 S Ct

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[3] The Fourth Amendment similarly is a limitation on governmental action, not private action. The Fourth Amendment is a restraint "upon the activities of sovereign authority" and applies only to government conduct. *Burdeau v. McDowell*, 256 US 465, 475, 41 S Ct 574, 576, 65 L Ed 1048 (1921). "[P]rivate wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Walter v. United States*, 447 US 649, 656, 100 S Ct 2395, 65 L Ed 2d 410 (1980).

2022, 29 L Ed 2d 564 (1971) (under federal constitution, state action is conduct of governmental actors and their agents).

In *Sines*, this court adopted common-law agency principles to determine whether the acts of a private citizen are state action for purposes of the Oregon Constitution. In that case, the defendant's housekeeper seized evidence from the defendant's home and turned it over to the state, and the issue was whether the seizure was state action. This court held that the acts of a private person may become state action if the person acts as the state's agent—that is, if the person acts either at the behest of the state or under the mantle of the state's governmental authority. A seizure by a private citizen is state action if the state directed or controlled the seizure or if the state manifested assent that the citizen shall act on the state's behalf and subject to the state's control, and the citizen manifests assent or consents to act as the agent. 359 Or at 52-59 (discussing analysis). Because the housekeeper in *Sines* seized the evidence on her own initiative, she was not a state actor and the seizure did not implicate Article I, section 9. *Id.* at 59-62.

3. The same analysis applies to non-Oregon officers.

The same test applies to determine whether a non-Oregon officer is a state actor for purposes of Article I, section 9. The officer's conduct is state action only if the officer was acting as an agent of the State of Oregon.

That conclusion flows from the simple fact that the pertinent "government" for purposes of Article I, section 9, is the State of Oregon. Article I, section 9, is a provision that is in the Oregon Constitution and was intended as a limitation and restraint only upon the actions of the sovereign authority of the government that the instrument was creating, which was the Oregon government. *See generally Barron ex rel Tiernan v. Mayor of Baltimore*, 32 US (7 Pet) 243, 247, 8 L Ed 672 (1833) ("the limitations on power [in a constitution] * * * are naturally[] and * * * necessarily[] applicable to the government created by the instrument"). Unlike the state-action requirement in the federal constitution, which applies to all federal and state governmental actors, the state-action requirement in the Oregon Constitution necessarily means action by an Oregon governmental actor or agent, not governmental action that is attributable to other states and jurisdictions.

This court recognized as much in *State v. Olsen* by holding that neither Article I, section 9, nor the Fourth Amendment was implicated by a search in Washington conducted by Spokane police officers, because Oregon officials were not involved. 212 Or at 192-96. This court explained that it was a "rule of universal application" that the prohibition against unreasonable searches and seizures in the federal constitution and in state constitutions "are limitations upon the powers of the Federal Government and state governments and their officers while acting in their official capacity or under color of right or authority

of the governing body" and that the "weight of authority" established that "the evidence to be excluded must have been the fruits of the unlawful acts of the prosecuting jurisdiction." *Id*. at 193. The salient inquiry reduces to "whether or not the jurisdiction offering the evidence has violated through its officers, the constitutional rights of the defendant against unreasonable searches or seizures." *Id*.

The court framed the issue as whether the conduct of the Washington officers could be treated as state action under Oregon law and held that it could not, because Oregon had not authorized or been involved in the conduct:

> The question here presented is whether or not the police officers of a sister state making an illegal search are to be treated as officers operating under the Constitution of the state of Oregon or as private individuals when appearing in a state court. The answer is quite apparent. Police officers of the city of Spokane would have no authority to make a search under the laws of the state of Oregon or vice versa. The police officers of the city of Spokane are not in any manner amenable to the laws of this state in arresting and searching a person in the State of Washington. The evidence is conclusive that the arrest and search was made in Spokane and the search was not made at the instance and request of officers of the state of Oregon. In fact, the police officers of this state had no knowledge of the search and seizure until after the search and seizure had been made.

Id. at 195. Consequently, the *Olsen* court held that "[a]ssuming [that] the acts of the Spokane police were wrongful in obtaining the articles of the defendant,

their acts were done beyond the jurisdiction of this state and [could not] be considered wrongful acts of the state of Oregon." *Id.* (citations omitted).[4]

At the time of *Olsen*, the United States Supreme Court had not yet extended the exclusionary rule to the states through the Fourteenth Amendment or repudiated the silver-platter doctrine.[5] But that occurred shortly thereafter. *See Elkins v. United States*, 364 US 206, 213, 80 S Ct 1437, 4 L Ed 2d 1669 (1960) (repudiating silver-platter doctrine and stressing that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers"); *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961) (extending exclusionary rule applies to states); *Ker v. California*, 374 US 23, 83 S Ct 1623, 10 L Ed 2d 726 (1963) (same).

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[4] This court cited to *People v. Touhy*, 197 NE 849, 857 (Ill 1935), which held that the Illinois Constitution applied only to "state officers acting under color of authority from [Illinois]," and to *Kaufman v. State*, 225 SW 2d 75, 76-77 (Tenn 1949), which held that the Tennessee Constitution applied only to the conduct of Tennessee officers. *Olsen*, 212 Or at 195.

[5] Originally, the Fourth Amendment applied only to the federal government and did not extend to state officers. *See Weeks v. United States*, 232 US 383, 398, 34 S Ct 341, 58 L Ed 2d 652 (1914) ("the limitations of the Fourth Amendment "reach [only] the federal government and its agencies"). Accordingly, evidence that was independently obtained by state officials could be "turned over to the federal authorities on a silver platter." *Lustig v. United States*, 338 US 74, 79, 69 S Ct 1372, 93 L Ed 1819 (1949). But the foundation for that rule disappeared when the Court held that the search-and-seizure standards of the Fourth Amendment applied to the states through the Fourteenth Amendment. *Wolf v. Colorado*, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1949).

In *State v. Krogness*, this court explained that the Fourth Amendment analysis in *Olsen* was superseded by those developments, and that "the fruits of illegal police conduct may no longer be used as evidence in state courts" and that is so regardless of "whether [the evidence was] seized by Oregon officers or by police of another jurisdiction." 238 Or at 138. This court did not address the fact that federal constitutional developments could not alter the state-action requirement in the Oregon Constitution, and the court did not differentiate between Article I, section 9, and the Fourth Amendment in resolving the case. *See id.* at 142 (basic analysis same "[w]hether we take our standards from the federal Fourth Amendment (though the Fourteenth) or from our own constitution's Article I, [section] 9").

Nonetheless, the rule that this court recognized and applied in *Olsen* is the correct rule for purposes of the state-action requirement in the Oregon Constitution. It is axiomatic that the "protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity." *State v. Mollica*, 554 A2d 1315, 1324 (NJ 1989). "With regard to law-enforcement activities, a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law." *Id.* That principle explains why in the absence of an agency relationship, neither the conduct of a private person nor the conduct of an officer of a foreign country are regulated by Article I, section 9, even though the provision would regulate

the actions of an Oregon officer who engaged in the same acts. *See id*. at 1325 (officers from foreign countries are not state actors). By parallel reasoning, Article I, section 9, does not normally regulate the conduct of an officer from another state unless the officer was acting as a state agent. *See generally id*.

The text and history of Article I, section 9, point in the same direction. Article I, section 9, declares that "[n]o law shall violate" the search-and-seizure right, suggesting that it is triggered by governmental action taken under Oregon law. *See generally* Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 838 (2008) (the phrasing suggests "that the focus * * * was on limiting the power of the legislature, not on abuses by executive branch law enforcement officials," and that Article I, section 9, is implicated only by conduct authorized by the legislature). And historically, officers who acted outside their authority were not state actors. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547, 660 (1989) (the Framers "did not equate an officer's misconduct with government illegality; rather they perceived only personal misconduct when an officer exceeded his official authority" and, consequently "misconduct by an ordinary officer could not constitute an 'unconstitutional' government act"). Although Oregon officers who exceed their statutory authority are state actors, because they are Oregon officers, *State v. McDaniel*, 115 Or 187, 209, 231 P 965 (1926), the same is not true of non-Oregon officers. The constitutional text and

history suggests that the unauthorized conduct of a non-Oregon officer who is not acting as a state agent is not state action.

Not only does that rule flow from the limited scope of the Oregon Constitution but it also comports with the justification for the state-action requirement. The state-action requirement exists to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co., Inc.*, 457 US 922, 936, 102 S Ct 2744, 73 L3d 2d 482 (1982). "[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct" that is challenged. *Blum v. Yaretsky*, 457 US 991, 1004, 102 S Ct 2777, 73 L Ed 2d 534 (1982) (emphasis original). Simply put, the state should not suffer the consequence of being deprived of the use of the evidence unless the state was responsible for the violation. *See Olsen*, 212 Or at 195 (stressing that the claimed wrongful acts by out-of-state officers "cannot be considered wrongful acts of the state of Oregon").

The State of Oregon *is* responsible for the violation, however, when a non-Oregon officer acts as an agent of the State of Oregon. Some other states have recognized as much and apply agency principles to determine whether the conduct of officers from other jurisdictions should be treated as state action for state-constitutional purposes. *See, e.g., State v. Hudson*, 849 SW 2d 309, 310-12 (Tenn 1993). In *Mollica*—which involved conduct by federal officers and

which is a lead case in this area—the New Jersey Supreme Court announced that it would look to "the presence or absence of agency between the officers of the two sovereigns" to determine whether the New Jersey Constitution applies. 554 A2d at 1326. The analysis hinges on whether there was "intergovernmental agency" such that the officer from the other jurisdiction can be said to have acted under the color of New Jersey Law. *Id.* at 1329.[6]

This court should return to the analysis outlined in *Olsen* and tether the state-action requirement to conduct that can fairly be attributable to the State of Oregon. And the court should apply agency principles to make that determination. An agency approach comports with the private-citizen analysis adopted in *Sines*, with the limited reach of the state constitution, and with the reason for the state-action requirement. It is only when a non-Oregon officer is acting as a state agent that it can be said that the State of Oregon is responsible for the conduct such that the Oregon Constitution applies and could require the suppression of the evidence in an Oregon criminal prosecution.

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[6] In *Mollica*, the New Jersey Supreme Court added the caveat that the officer's conduct must be lawful under the law of the officer's jurisdiction. 554 A2d at 1328-29. From a state-action perspective, that gloss does not make sense. If the conduct was not state action, then it is immaterial whether it was unlawful. In *Olsen*, this court held that, even assuming that the Washington officers' conduct was unlawful, the conduct was not state action, because it could not be attributed to the State of Oregon. 212 Or at 195.

4. This court should clarify that a seizure by a non-Oregon officer does not implicate Article I, section 9, unless the officer was acting as a state agent.

Although *Davis* and *Rodriguez* broadly suggest that Article I, section 9, applies to government conduct that has "no connection to Oregon," *Keller*, 278 Or App at 769 (Hadlock, C.J., dissenting), that principle was not necessary to resolve either case. This court should clarify that that is not the correct rule. Article I, section 9, is only implicated by the conduct of Oregon governmental actors and their agents. A non-Oregon officer is not a state actor unless the officer is acting as a state agent.

The state's proposed rule comports with the results in both *Davis* and *Rodriguez*. The broad language at issue was unnecessary to resolve either case, because the seizures appear to have been made at the request, or with the involvement, of Oregon authorities. In *Davis*, the Mississippi officers arrested the defendant based on a Mississippi fugitive warrant that in turn was based on Oregon arrest warrants. 313 Or at 248. And in *Rodriguez*, the federal officer arrested the defendant with the assistance of six police Oregon officers, one of whom conducted the search that found the evidence. 317 Or at 29. Furthermore, in both cases, this court held that the evidence was *not* subject to suppression. In *Davis*, the arrest was lawful under Article I, section 9, and in *Rodriguez*, the defendant's voluntary consent attenuated the alleged and assumed illegality. Neither case required the court to dispense with the state-

action requirement or to establish that the conduct of non-Oregon officers always will constitute state action regardless of the circumstances.

In *Davis*, this court emphasized that the justification for the exclusionary rule is the protection of the individual's rights. This court explained that Article I, section 9, rights are vindicated through the suppression of evidence, that "the focus * * * is on protecting the individual's rights *vis-à-vis* the government, not on deterring or punishing the excessive conduct of any particular governmental actor, local, or otherwise," and that the "only * * * place and only * * * way" to protect those rights is to "exclud[e] from use in Oregon prosecutions any evidence obtained in a manner contrary to Oregon's constitutional rules." 313 Or at 253-54. Article I, section 9, "includes the right in a criminal prosecution in Oregon to be free from the use of evidence that has been obtained in violation of the defendant's rights prescribed by that provision." *Id.* at 249.

Yet those considerations do not establish that the conduct of non-Oregon officers who are not state agents is state action for purposes of Article I, section 9. And that is so for at least three reasons.

First, the *Davis* court placed heavy reliance on exclusionary analysis but the exclusionary rule applies *after* it has been determined that a constitutional violation occurred which can only happen *if* there was a state action. If the challenged conduct was not state action, then that action cannot violate Article I, section 9, and the analysis is over.

Second, *Davis* mistakenly treated the admission of the evidence as the constitutional violation. Yet a search or seizure is either lawful or unlawful at the time it is conducted, and its legality is unaffected by whether the evidence subsequently is admitted in a trial. *Cf. State v. Vondehn*, 348 Or 462, 467-70, 236 P3d 691 (2010) (Article I, section, 12, violation occurs at the time of interrogation, rather than when the statements are admitted at trial).

Third, even if the justification for the Article I, section 9, exclusionary rule was pertinent, that supports the state's position, because the justification for suppression is based on the fact that Oregon was a party to the wrongdoing and that an Oregon officer, employee, or agent did something wrong. *See State v. Davis*, 295 Or 227, 231, 666 P2d 802 (1983) (stressing that a party to a suit cannot benefit from its illegal actions). If no Oregon officer, employee, or agent committed the wrongdoing, then neither logic nor fairness principles preclude Oregon prosecutors from relying on the evidence. *See Sines*, 359 Or at 50 (Article I, section 9, does not apply to illegal searches or seizures conducted by private citizens). The "pertinent inquiry * * * is whether or not the jurisdiction offering the evidence has violated through its officers[]the

constitutional rights of the defendant against unreasonable searches and seizures." *Olsen*, 212 Or at 194.[7]

This court should clarify that a seizure by a non-Oregon officer cannot violate Article I, section 9, unless the officer was acting as a state agent. The Oregon Constitution covers state action, which is action that may fairly be attributed to the State of Oregon.

5. The Washington trooper's conduct was not state action, because he was not acting as a state agent.

Applying agency principles, the Washington trooper who conducted this traffic stop was not a state actor. The trooper was not acting at the behest of Oregon governmental authorities. The trooper's decision to stop defendant was his own, and he contacted Oregon authorities after the fact. Nor did the trooper act under the mantle of Oregon authority. To the contrary, the traffic stop violated Oregon law. The trooper was a Washington officer, not an Oregon officer, and Oregon has not authorized Washington officers to pursue motorists into Oregon to conduct stops for traffic infractions committed in Washington.

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[7] *Davis* appears to have treated the issue as a choice-of-laws issue, which is a logical step in the analysis but which does not answer the separate issue of state action. Choice-of-law principles establish the applicable body of law, which for Oregon criminal prosecutions will be the Oregon Constitution. But the fact remains that, in applying the Oregon Constitution to the facts of a particular case, the threshold question is whether the state-action requirement is satisfied. If it is not, then the state constitutional analysis is at an end.

Accordingly, the trooper was not acting as a state agent, his conduct was not state action, and his seizure did not implicate Article I, section 9.

B. The traffic stop comported with Article I, section 9, because it was supported by probable cause.

In all events, even if the trooper's conduct was state action for purposes of the Oregon Constitution, the seizure did not violate Article I, section 9, because the trooper had probable cause for the traffic stop and then developed reasonable suspicion that defendant had committed DUII. The fact that the trooper exceeded his statutory authority in conducting the traffic stop did not mean that he violated Article I, section 9, because the constitutional validity of the stop did not depend on the existence of statutory authority.

1. Article I, section 9, requires only probable cause for a traffic stop, regardless of any statutory limits on an officer's authority.

Whether a traffic stop is constitutionally reasonable does not hinge on the existence of statutory authority. Article I, section 9, protects against "unreasonable" seizures. *See* Or Const, Art I, § 9. It does so by requiring reasonable suspicion or probable cause depending on the nature of the seizure. *See State v. Matthews*, 320 Or 398, 401-02, 884 P2d 1224 (1994) (traffic stop is constitutionally reasonable if supported by probable cause); *State v. Ashbaugh*, 349 Or 297, 308-09, 244 P3d 360 (2010) (criminal stop is reasonable if supported by reasonable suspicion, and arrest is reasonable if supported by probable cause). Article I, section 9, does not incorporate statutory standards

that govern police authority to conduct seizures. It is the presence or absence of reasonable suspicion or probable cause, not the presence or absence of statutory authority to seize, that determines whether a seizure is constitutional.

An officer has authority to conduct a traffic stop if the officer has probable cause to believe that the driver has committed a traffic violation. *State v. Watson*, 353 Or 768, 774, 305 P3d 94 (2013).[8] The probable cause furnishes the constitutional authority for the stop. "Police authority to perform a traffic stop arises out of the facts that created probable cause." *State v. Rodgers/Kirkeby*, 347 Or 610, 623, 227 P3d 695 (2010). That remains so regardless of whether an officer exceeds his statutory authority by conducting the stop.

The evolution of caselaw involving statutory limits on officers' authority confirms that the constitutional analysis is focused on probable cause, not statutory authority. Prior to 1997, this court applied the statutory standards in ORS 810.410—which regulate the conduct of police officers during traffic stops—and suppressed evidence that was obtained in violation of the statute. *State v. Porter*, 312 Or 112, 120, 817 P2d 1306 (1991); *State v. Farley*, 308 Or

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[8] "The requirement that an officer have probable cause to believe that a driver committed a traffic violation is a statutory requirement." *Watson*, 353 Or at 774 n 7. This court has reserved the question whether Article I, section 9, imposes that requirement. *Id*. The court need not answer that question here, because it is undisputed that the trooper had probable cause.

91, 94-95, 775 P2d 835 (1989); *State v. Dominquez-Martinez*, 321 Or 206, 212, 895 P2d 306 (1995). The court did so as a matter of legislative intent.

But in 1997, the legislature enacted ORS 136.432, which precludes the suppression of evidence for a statutory violation. ORS 136.432 provides:

> A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by:
>
> (1) The United States Constitution or the Oregon Constitution;
>
> (2) The rules of evidence governing privileges and the admission of hearsay or
>
> (3) The rights of the press.

"ORS 136.432 prohibits the judicial branch from excluding evidence obtained by government conduct that exceeds statutory authority." *Rodgers/Kirkeby*, 347 Or at 621.

As a result, the fact that an officer exceeds his statutory authority in conducting a traffic stop is no longer a basis for suppression. Instead, the issue reduces to whether the search or seizure was unconstitutional. ORS 136.432 reflects that the mere fact that a search or seizure is unauthorized is not, itself, a constitutional violation, and that the constitutional analysis is independent from, and different than, the question of statutory authority.

Consistent with that view, both this court and the Court of Appeals repeatedly have applied ORS 136.432 in various contexts to hold that the fact

that an officer violates statutory provisions, and thereby lacks authority to conduct a search or seizure, is not a basis to suppress evidence. *See, e.g.*, *Rodgers/Kirkeby*, 347 Or at 619-21 (ORS 810.410, which authorizes traffic stops); *State v. Rudder*, 347 Or 14, 20, 217 P3d 1064 (2009) (ORS 131.625, which authorizes officer frisks and related safety measures); *State v. Carter*, 342 Or 39, 42 n 2, 147 P3d 1151 (2006) (ORS 133.565(2), which imposes a search warrant particularity requirement); *State v. Hays*, 234 Or App 713, 718-19, 228 P3d 731 (2010) (ORS 813.100, ORS 813.130, and ORS 813.131, which regulate administration of blood-alcohol tests under the implied-consent law); *State v. Boatman*, 185 Or App 27, 30-32, 34, 57 P3d 918 (2002) (ORS 807.570(4), which regulates seizures for failure-to-display offenses); *State v. Warner*, 181 Or App 622, 630-35, 47 P3d 497 (2002) (ORS 813.160(2), which regulates the administration of blood draws for chemical testing). That authority refutes the Court of Appeals' assertion that reasonableness hinges on the police exercising their "lawful authority" and demonstrates that the constitutional inquiry has a different focus.

The analysis from *Rodgers/Kirkeby* demonstrates that the constitutional focus for traffic stops revolves around the existence of probable cause. In *Rodgers/Kirkeby*, this court explained that, "[a]lthough the legislature has continued to circumscribe the authority of the police in ORS 810.410—requiring that, during a traffic stop, police investigatory conduct be reasonably

related to the traffic violation, the identification (of persons), and the issuance of a citation—any evidence that is obtained when the police exceed that authority is not suppressible unless it violates some constitutional rule." 347 Or at 621. The court then analyzed the seizures under Article I, section 9, and held that an officer unlawfully seizes a person by extending a traffic stop without reasonable suspicion of criminal activity. *Id*. at 621-28.

The *Rodgers/Kirkeby* court thus articulated a constitutional rule grounded in traditional, Article I, section 9, analysis—*viz*., one that hinges on reasonable suspicion—and recognized that the constitutional authority for the stop derived from the officer's probable cause to believe that the driver committed a traffic violation. The basis for the rule was this court's recognition that "[p]olice authority to perform a traffic stop arises out of the facts that created probable cause to believe that there had been * * * a traffic infraction." *Id*. at 623. That recognition has, in turn, formed the basis for subsequent decisions delineating the constitutional boundaries of police authority during traffic stops. *See Watson*, 353 Or at 781 (relying on principle in addressing whether warrant check during traffic stop was constitutional); *State v. Jimenez*, 357 Or 417, 428,

353 P3d 1227 (2015) (relying on principle in addressing whether safety-related inquiry was constitutional).[9]

Hence, the Court of Appeals was mistaken in looking to statutory law or common law for the source of officer authority for a traffic stop. An officer's constitutional authority for a traffic stop does not emanate from statutory standards regulating seizure or from the common law, which has been superseded by statutes. Instead, the officer's constitutional authority derives from the probable cause for the traffic stop. Regardless of whether the seizure was statutorily authorized, the constitutional inquiry reduces to the traditional, familiar questions of probable cause for the traffic stop and reasonable suspicion of criminal activity for the continued detention.

2. The analysis and rule under the Fourth Amendment is the same.

Fourth Amendment caselaw is instructive, because the reasoning from the cases is persuasive, and because the rule ultimately is the same as the rule under Article I, section 9. A traffic stop is reasonable under the Fourth

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[9] As those cases demonstrate, individualized suspicion like probable cause is sufficient to satisfy Article I, section 9, regardless of statutory authority. But individualized suspicion is not always necessary, and when it is not—for example, for inventory and administrative searches—the existence of a sub-constitutional source of authority may be pertinent to the analysis. *See generally State v. Atkinson*, 298 Or 1, 9-10, 688 P2d 832 (1984) (administrative search conducted without individualized suspicion may be valid if authorized and circumscribed by sub-constitutional source of authority).

Amendment if it is based on probable cause, and that is so regardless of whether the officer exceeds his statutory authority in conducting the stop.

The United States Supreme Court has explained that, under the Fourth Amendment, a traffic stop is reasonable if it is based on probable cause, and the Court will not engage in further reasonableness analysis. *Whren v. United State*s, 517 US 806, 817, 116 S Ct 1768, 135 L Ed 2d 89 (1996). Accordingly, in *Whren*, the Court rejected a claim that a traffic stop supported by probable cause for minor traffic violations was unlawful, because a reasonable officer would not have stopped the defendants for the reason given. The Court explained that the reasonableness of a search or seizure "with rare exceptions* * * is not in doubt where [it] is based upon probable cause" and distinguished searches and seizures that were not based on individualized suspicion, including inventory and administrative searches. *Id*. at 811-12, 817-18. The Court stressed that the probable cause for a traffic stop not only authorizes the stop but serves to limit the scope of the police officer's discretion during the seizure. *Id*. at 817-18 (discussing *Delaware v. Prouse*, 440 US 648, 654-56, 659, 661 99 S Ct 1391, 59 L Ed 2d 660 (1979)).

Furthermore, as is the case under Article I, section 9, the fact that an officer violates his statutory authority in conducting a search or seizure based individualized suspicion is immaterial to the analysis under the Fourth Amendment. *See Cooper v. California*, 386 US 58, 62, 87 S Ct 788, 17 L Ed

2d 730 (1967) (whether state law authorized seizure was immaterial); *Whren*, 517 US at 815 (violation of regulations limiting the authority of officers was immaterial).

Virginia v. Moore, 553 US 164, 128 S Ct 1598, 170 L Ed 2d 559 (2008), is the lead case. In *Moore*, the Court held that a police officer does not violate the Fourth Amendment by making an arrest supported by probable cause but prohibited by state law. The Court began its analysis with history and by explaining that the Court was:

> aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted. The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists. That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.

553 US at 168-69 (footnote and internal citations omitted). The Court also explained that early legal scholars viewed the Fourth Amendment as embodying the common law, which was "defined in opposition to statutes," and that it was unaware of any commentary or early case that "suggested the Amendment was intended to incorporate subsequently enacted statutes." *Id*. at 169. "Moreover, even though several state constitutions also prohibited unreasonable searches and seizures, citizens who claimed officers had violated

state restrictions on arrest did not claim that the violations also ran afoul of the state constitutions." *Id*. at 170 (footnote omitted).

The Court held that an arrest is constitutionally reasonable if it is supported by probable cause. A long line of cases established that rule, and the Court concluded that the result is no different simply because a state provides enhanced protections. *Id*. at 171-78. "A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Id*. at 174. The Court noted that a contrary rule would "frustrate rather than further state policy" because Virginia had chosen not to require suppression for statutory violations. *Id*. States should not be put to the choice of losing control over the remedy or abandoning state law restrictions altogether. *Id*.[10]

The reasoning from *Moore* is sound and bolsters the state's argument. The state is not aware of any historical support for the view that the framers intended Article I, section 9, to incorporate statutory standards regulating

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[10] Some jurisdictions have relied on *Moore* to hold that the mere fact that an officer makes an unauthorized arrest outside of the officer's territorial jurisdiction is not a constitutional violation. *See State v. Morris*, 92 A3d 920, 927-29 (RI 2014); *United States v. Ryan*, 731 F3d 66, 68-71 (1st Cir 2013); *United States v. Sed*, 601 F3d 224, 228 (3d Cir 2010); *United States v. Goings*, 573 F3d 1141, 1142-43 (11th Cir 2008); *see also State v. Smith*, 908 A2d 786, 789-90 (NH 2006) (pre-*Moore* case reaching same conclusion); *State v. Jolin*, 639 A2d 1062, 1064 (Maine 1994) (same).

seizures. *See* Landau, *supra*, 87 Or L Rev at 822-28, 838 (text and history suggest that Article I, section 9, was directed against authorized searches and seizures). For purposes of Article I, section 9, the constitutional reasonableness of seizures is assessed under the traditional requirements of probable cause and reasonable suspicion. The fact that the Oregon legislature chose to enact statutes limiting police authority to seize does not alter the analysis. That result makes sense given that the Oregon legislature also enacted ORS 136.432, which expressly provides that statutory violations are not a basis to suppress evidence in criminal actions. *See Moore,* 553 US at 174 (noting that it would be "odd" to attach significance to state restrictions on authority but to then disregard state law precluding suppression as a remedy).[11]

3. The trooper lawfully seized defendant, because he had probable cause for the traffic stop.

Applying the above analysis, the trooper's seizure of defendant did not violate Article I, section 9. The traffic stop was constitutional, because the

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[11] Because it would not violate Article I, section 9, for the Oregon legislature to broaden Oregon's Fresh Pursuit Act to authorize Washington officers to pursue motorists into Oregon to complete traffic stops initiated in Washington, an officer does not violate Article I, section 9, by engaging in the same underlying conduct. *See also* ORS 810.410(1) & (2) (authorizing Oregon officers to act outside their territorial jurisdictions); ORS 133.235(2) (same). That is especially true, because statutory rules limiting the jurisdiction of law enforcement officers exist for reasons other than protecting privacy, such as sovereignty and efficiency considerations. *Cf. Knowles v. Gladden*, 227 Or 408, 413, 362 P2d 763 (1961) ("[i]f any comity between sovereigns is violated the offended sovereign may complain, but not the prisoner").

trooper had probable cause to believe that defendant had committed traffic violations. (*See* App Br 10, containing defendant's assertion in his Court of Appeals' brief that he "does not argue that [the trooper] did not have probable cause to support the stop").[12] Once the trooper made contact with defendant, he immediately developed reasonable suspicion (and in fact probable cause) to believe that defendant had committed the crime of DUII. Consequently, the trooper lawfully detained defendant until the Portland police arrived to investigate defendant for DUII.

The fact that the trooper exceeded his statutory authority in stopping defendant did not mean that the trooper violated Article I, section 9. As discussed above, Oregon appellate courts repeatedly have held that statutory violations committed by Oregon officers are not constitutional violations. The same holds true for statutory violations by non-Oregon officers. In both situations, the Oregon legislature has provided officers with limited authority to operate in Oregon, and the officers exceeded those limits. *Keller*, 278 Or App at 768-69 (Hadlock C.J., dissenting). There is "no reason why suppression should follow simply because a Washington officer has exceeded his or her

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[12] Because the trooper had probable cause for the traffic stop, there is no further inquiry into its "reasonableness." But it is worth noting that these traffic violations involved unsafe driving on Interstate 5, that the trooper immediately initiated the traffic stop after observing the violations, and that the trooper promptly notified Portland police and asked them to respond and to take over the investigation.

statutory authority in Oregon, when, under ORS 136.432, that is not the result when an Oregon officer does the same thing." *Id*. at 769.

Any distinction in the degree or type of lack of authority is a distinction without a difference. A seizure is either authorized or it is not. It is immaterial how unauthorized a seizure may be. Moreover, virtually any seizure—including the one here—can be characterized as a seizure that is only a little unauthorized as opposed to totally unauthorized. The trooper had statutory authority in Washington when he initiated the stop,[13] later had statutory authority in Oregon to detain defendant until Portland police arrived, and had some statutory authority under the Fresh Pursuit Act to pursue suspects into Oregon but simply exceeded the scope of that authority. Regardless of how the absence of statutory authority is characterized, the fact that the trooper lacked authority for the traffic stop in Oregon for the infractions did not mean that he committed a constitutional violation. *See e.g.*, *Boatman*, 185 Or App at 30-32, 34 (seizure was lawful under Article I, section 9, even assuming that the officer violated the failure-to-display statute by detaining the defendant after verifying

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[13] Under Article I, section 9, the seizure began in Washington when the trooper initiated the traffic stop by activating the overhead lights on his police vehicle. *See State v. Puffenbarger*, 166 Or App 426, 433-35, 998 P2d 788 (2000) (Article I, section 9, seizure may occur by show of authority regardless of whether the subject submits to authority).

his identity). The Court of Appeals' majority was mistaken in concluding otherwise.

4. If the Washington trooper was a state actor, *Davis* requires that he be treated as if he were an Oregon officer.

The majority's reasoning also conflicts with *Davis*. It would only be because of *Davis* that Article I, section 9, could apply to the trooper's conduct, because "if not for *Davis*, and its general admonition that Article I, section 9, protects individuals against certain actions committed by *any* government actor—even those with no connection to Oregon—[the trooper's] acts would be viewed as private action that could not form the basis for suppression under Article I, section 9." *Keller*, 278 Or App at 769 (Hadlock C.J., dissenting; emphasis original). Under *Davis*, "[t]he standard of governmental conduct and the scope of the individual rights protected by Article I, section 9, are precisely the same [when non-Oregon officers conduct a search] as those that would apply to a search by Oregon police in Oregon." 313 Or at 253. *Davis* would "require[] courts to treat the actions of officers from jurisdictions other than Oregon precisely as courts would treat those actions had they been performed by Oregon officers." *Keller*, 278 Or App at 770 (Hadlock C.J., dissenting).

If this case had involved an Oregon officer making a traffic stop in Oregon that continued into Washington, no constitutional violation would have occurred. An Oregon officer does not violate Article I, section 9, by conducting

a traffic stop based on probable cause regardless of whether he exceeds his statutory authority. It makes no difference that this case, instead, involved a Washington trooper. The Washington trooper should not be deemed an Oregon officer for "state action" purposes despite the fact that he was not an Oregon officer, employee, or state agent but then also treated as a Washington trooper for "authority and constitutional reasonableness" purposes. *Davis* would require that the trooper be treated as if he was actually an Oregon officer.

That is the approach that courts take when applying search-and-seizure provisions to governmental employees who are not police officers. Those governmental actors are treated as if they were police officers. The analysis thus includes whether any of the typical exceptions to the warrant requirement apply—such as a search based on consent or a search based on exigency and probable cause—even though those governmental employees are not authorized police officers. *See State ex rel Juv Dept v. Dubois*, 110 Or App 314, 821 P2d 1124 (1991) (applying collective-knowledge principle and exigent-circumstances exception to uphold search by school officials); *State ex rel Juv Dept v. Doty*, 138 Or App 13, 906 P2d 299 (1995) (applying consent exception to uphold search by school official); *Michigan v. Tyler*, 436 US 499, 509-511, 98 S Ct 1942, 56 L Ed 2d 486 (1978) (applying exigency and plain-view exceptions to search and seizure by firefighters); *M.A.D.*, 348 Or at 389-90

(assuming school official could invoke consent and exigent-circumstances exceptions).[14]

In short, the analysis from *Davis* and the caselaw treating government employees who are not police officers as if they actually were police officers both point to the same rule. If the Washington trooper must be deemed a state actor because of *Davis*, he must be treated as if he actually was acting as an authorized Oregon officer, and the absence of statutory authorization is immaterial.

5. If Article I, section 9, incorporates statutory standards, ORS 136.432 would defeat defendant's argument.

Finally, even if the state is mistaken and even if the application of Article I, section 9, turns on statutes regulating searches and seizures by police officers, defendant's argument fails, because ORS 136.432 precludes suppression.

The issues of statutory authority and remedy are intertwined. The Oregon legislature may enact statutory standards regulating searches and

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[14] In *M.A.D.*, which involved a search by a public school official, this court rejected an argument by the state that the probable-cause standard should not apply to school officials, because they are not police officers trained in search-and-seizure law. 348 Or at 390 n 4. This court explained that the probable-cause standard for all "government actors" is the one that applies to police officers. *Id.* Although the *M.A.D.* court adopted an exception for school searches when a school official reasonably suspects a student poses a threat to school safety, the court did so because of the unique context of the school setting and not because a school official—rather a police officer—was the government actor who conducted the search. *Id.*

seizures and yet restrict the remedies available when police violate those statutes. It would be anomalous for the Article I, section 9, analysis to give any effect to statutory restrictions on authority but to disregard the related statute that precludes suppression of the evidence as a remedy. *Cf. Moore,* 553 US at 174 (making point in holding that statutory restrictions are immaterial to constitutional analysis). Consequently, if state statutes governing searches and seizures factor into the analysis, that includes statutes that delineate the remedy for the violation of those statutes. The net result is that consideration of Oregon statutes regulating seizure could not assist defendant, because ORS 136.432 prohibits the suppression of evidence for statutory violations.

Defendant's invocation of the trooper's violation of Oregon's Fresh Pursuit Act is misguided, because defendant selectively picks from amongst the statutes that apply to this case. Defendant is asking this court to "credit" Oregon law on a police officer's authority to seize a motorist "but only in part" and would have this court "ignore * * * the limited consequences" that Oregon statutory law attaches to statutory violations. *Moore*, 553 US at 180 (Ginsburg, J., concurring). That he cannot do. *See id.* at 178-80 (Ginsburg, J., concurring) (concluding that statutory authority might factor into analysis but the approach would be unavailing for a defendant if state law also precludes suppression for statutory violations). Because Oregon statutory law does not demand the suppression of evidence seized by an officer who exceeds his statutory authority

in conducting a traffic stop, the trooper's statutory violation was not a constitutional violation even if the statutory framework is part of the analysis. For that final reason, no Article I, section 9, violation occurred.

CONCLUSION

The circumstances of this case could be viewed one of two ways, neither of which involved an Article I, section 9, violation. Because the trooper was not acting at the behest of Oregon governmental authorities or under the mantle of Oregon authority, the trooper should be treated as a private citizen, which means that his conduct did not provide a basis for suppression under Article I, section 9. Article I, section 9, is implicated only by state action that can be attributable to the State of Oregon.

Alternatively, if the trooper is treated as a state actor, no suppression is required, because an Oregon police officer does not violate Article I, section 9 by conducting a traffic stop based on probable cause that the driver has committed traffic violations. The lack of statutory authority is immaterial. If the trooper is deemed to be a state actor—despite the fact that he was more akin to a private person—then the trooper should be treated as if he was, in fact, an

authorized Oregon officer. The trooper's seizure of defendant did not violate Article I, section 9. This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorneys for Plaintiff-Respondent,
Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 5, 2016, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Joshua B. Crowther, 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 11,238 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).

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorney for Petitioner on Review
State of Oregon

DMP:aft/7900829