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NO. 100135-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

ZACHERY K. MEREDITH,

Petitioner

BRIEF OF *AMICI CURIAE* ACLU OF WASHINGTON, WASHINGTON DEFENDER ASSOCIATION and KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Washington Cases

Federal Cases

Rules

Other Authorities

I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interests of *Amici Curiae* ACLU of Washington, Washington Defender Association and King County Department of Public Defense are set forth in the Motion for Leave to Participate as *Amici Curiae*, filed concurrently with this brief.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Petitioner Meredith's Petition for Review.

III. INTRODUCTION

RCW 81.112.210(2)(b)(i)'s authorization of suspicionless, warrantless seizure by law enforcement of any person using public transportation violates the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution and perpetuates already unacceptable racial and economic disparities in the

criminal legal system. The statute disproportionately penalizes Black, Indigenous and People of Color (BIPOC) and economically disadvantaged people, many of whom have no alternative but to use public transportation.

The Court of Appeals held that people who ride public transportation consent to being seized when they enter a bus or train. *State v. Meredith*, 18 Wn.App.2d 499, 510-11, 492 P.3d 198 (2021). However, to be constitutionally valid, consent must be voluntary – not a condition of using a public good. Because the statute conditions provision of a government benefit on waiver of an individual's constitutional right to be free from suspicionless seizure, it violates the doctrine of unconstitutional conditions and results in involuntary "consent".

IV. ARGUMENT

A. RCW 81.112.210 violates the State and Federal Constitutions because it allows law enforcement to seize individuals for criminal investigation without suspicion, a warrant, or authority of law.

Freedom of movement is among our most basic, fundamental liberties as citizens and residents, and the physical seizure of individuals by law enforcement constitutes an extraordinary incursion of that right.

> [The] right to freely move about and stand still has been recognized as fundamental to a free society. '[F]reedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking.'

State v. J.D., 86 Wn. App. 501, 506, 937 P.2d 630 (1997) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) and quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 520, 84 S.Ct. 1659, 1671, 12 L.Ed.2d 992 (1964) (Douglas, J., concurring)).

Because freedom of movement is sacrosanct, police may not seize an individual absent a warrant or application of one of the narrow, jealously guarded exceptions to the warrant requirement. *See State v. Meredith*, 18 Wn. App. 2d 499, 505, 492 P.3d 198 (2021) ("[A]rticle I, section 7 protects against unauthorized seizures by government, despite not using the word 'seize.'").

In the face of longstanding protections of privacy and warrantless seizures, the Court of Appeals erroneously concluded that every rider of public transportation consents to suspicionless seizure of their person by law enforcement by their mere use of public transportation.

The statutory scheme of RCW 81.112.210(2)(b)(i) is a close analog to that rejected as violating the less protective federal constitutional standard in *State v. Marchand*, 104 Wn.2d 434, 441, 706 P.2d 225 (1985) ("[B]eing bound by the [*Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)] standard, we need not reach Const. art. 1,

§ 7 arguments.”). In *Marchand* our Supreme Court invalidated a statute that permitted law enforcement to seize motorists without suspicion in order to confirm that they were properly licensed and insured and had working vehicle equipment. *See id*. at 435, 438. The federal constitutional reasoning underlying the Court’s decision applies with equal force here. First, even though the statute at issue in *Marchand* imposed certain conditions on how and when seizures may occur—that is, it cabined officers’ discretion *more* than the fare enforcement statute here—it failed the Fourth Amendment’s reasonableness requirement because of the “unconstrained authority” it bestowed on law enforcement. *Id.* at 439 (“It is clear that the statutes authorize any officer, without reasonable suspicion or probable cause, during daylight hours, in a plainly marked patrol car, to stop *any* motorist,” thus “attempt[ing] to establish the very type of unconstrained authority condemned [by the United States Supreme Court in [*Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)]).

Second, the search in *Marchand* was unconstitutionally unreasonable under the Federal Constitution because the State could not establish that "the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." *Id*. at 437. The *Marchand* Court concluded that "[t]here is nothing in this record that indicates that the spot check is a sufficiently productive mechanism to justify the intrusion. The assertion that the practice contributes to highway safety is completely unsupported." *Id*. Likewise, the State here has failed to establish that the fare enforcement mechanism is "sufficiently productive to justify the intrusion" into a constitutionally protected area of an individual's life. To the extent any such evidence exists, it appears to confirm that the fare enforcement mechanism is wildly unproductive. For example, in 2016 in King County, fare enforcement cost $1.7 *million*, including $300,000 just to process citations in Court. King County Auditor's Office, *RapidRide Fare Enforcement: Efforts Needed*

To Ensure Efficiency and Address Equity Issues at 5 (Apr. 4, 2018).[1] Totaling up all of the processed fines which were paid that year, the County's investment resulted in collection of less than $5,000. *Id*. at 5–6.

Because mere access of a public benefit such as public transportation does not itself constitute a constitutional waiver of one's right to be free from suspicionless, warrantless seizure, and because RCW 81.112.210(2)(b)(i) authorizes precisely that, the statute is unconstitutional. The statute cannot even survive federal constitutional analysis, as it vests law enforcement with fully unfettered discretion to engage in suspicionless detention, and the State has failed to establish that the fare enforcement program is sufficiently productive to justify unfettered intrusion of a person's constitutional rights.

1. ***RCW 81.112.210 fails to meet the requirements for valid, meaningful constitutional consent.***

[1] https://www.kingcounty.gov/~/media/depts/auditor/new-web-docs/2018/rapidride-2018/rapidride-2018.ashx?la=en.

A person is seized "when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). Federally, the Fourth Amendment prohibits unreasonable searches and seizures. A warrantless seizure is unreasonable if police lack probable cause or reasonable suspicion and no exception to the warrant requirement applies. *Terry v. Ohio*, 392 U.S. 1, 20, 30-31, 288 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Article 1, section 7 provides greater protection than the Fourth Amendment. Under the Washington Constitution, police may not justify a warrantless search or seizure under the guise that it is "reasonable." Rather, in Washington law enforcement may not disturb a person's private affairs without authority of law – a valid warrant or an exception to the warrant requirement. *State v. Villela*, 194 Wn.2d 451, 458, 450 P.3d 170 (2019); *Blomstrom v. Tripp*, 189 Wn.2d 379, 399–400, 402 P.3d 831, 842 (2017)

Consent can constitute an exception to the warrant requirement. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).[2] However, to be a valid exception to the warrant requirement, consent must be voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 249, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 854 (1973). Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The burden of proving consent is significant, and rests with the State. As our Supreme Court acknowledged more than sixty years ago:

> "It is fundamental, in the absence of a valid warrant, either of arrest or for a search, that the burden of proving there was a truly voluntary and fully informed consent rests upon the Government. Such proof must be made by clear and positive evidence, and it must be established that there was no coercion, actual or implied. The

[2] Petitioner Meredith asserts that an individual may consent to a search, but not to an unlawful seizure of their person. *Amici* below join in that argument, but discuss the requirements of valid consent in the event the Court rejects Petitioner's argument on that issue.

> Government must show a consent that is unequivocal and specific, freely and intelligently given."

State v. Greco, 52 Wn.2d 265, 267, 324 P.2d 1086 (1958) (quoting *United States v. Kidd*, 153 F.Supp. 605, 609 (W.D. La. 1957)).

Under both the United States and Washington Constitutions, consent is constitutionally sufficient only if it meets three requirements: (1) consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) a search or seizure may not exceed the scope of the consent. *Walker*, 136 Wn.2d at 682. As will be discussed, mere usage of public transportation cannot constitute voluntary consent to a suspicionless seizure by law enforcement.

2. ***There is no "implied consent" exception that can stand in for actual consent.***

The Court of Appeals opinion affirming the denial of Mr. Meredith's suppression motion was based on a notion of "implied consent" that finds no application here and cannot

result in the waiver of constitutional protections against otherwise unlawful searches and seizures.

The Court of Appeals' reliance on an "implied consent" exception to the warrant requirement for all public transit users creates a completely new exception to the warrant requirement—one that must be rejected. Washington courts have discussed "implied consent" in the context of searches and seizures only in relation to RCW 46.61.506, which governs police requests that people arrested for driving under the influence submit to breath tests. Critically, the DUI implied consent statute is constitutional only because *it falls under the search incident to arrest exception to the warrant requirement*, which itself requires the existence of probable cause that a crime has been committed. *State v. Baird*, 187 Wn.2d 210, 222, 386 P.3d 239 (2016). Washington courts have made it clear that "implied consent" is *not* a constitutional substitute for actual consent. *Id.* at 229, fn 8. ("[T]he 'implied consent' in the statute does not act as a valid consent for a search. . . . Rather, absent a

warrant or an exception, an officer must obtain actual consent for a breath test."); *see also State v. Rivard*, 131 Wn.2d 63, 77, 929 P.2d 413 (1997) (clarifying that the "implied consent statute" passes constitutional muster only *after* a valid arrest). Riding a bus does not equate to "consenting" away one's constitutional rights.

3. ***An individual's constitutional rights are not curtailed merely because they rely on public transportation.***

RCW 81.112.210(2)(b)(i) and the decision below presume that transit passengers have fewer rights than other Washington residents who utilize the same highway system or are walking on the exact same public street. *Meredith*, 18 Wn. App. 2d at 514 ("for purposes of a seizure analysis, a passenger of a common carrier, such as a public bus or train, is legally distinct from a pedestrian or a person in a private automobile") (internal citations omitted).

Under Article I, section 7, each person possesses constitutional rights individually that do not hinge on the mode

of transportation chosen. *State v. Parker*, 139 Wn.2d 486, 497-498, 987 P.2d 73 (1999) (quoting *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 92, 100 S. Ct. 338, 62 L.Ed.2d 238 (1979)). ("Under article I, section 7, we have specifically recognized that '[r]egardless of the setting ... constitutional protections [are] possessed individually'").

There is no "public transit" exception or separate and lower protection afforded to public transit riders under article I, section 7. To the contrary, article I, section 7 protects even an individual using public property in a way that might violate the law. *See State v. Pippin*, 200 Wn. App. 826, 845, 403 P.3d 907, 917 (2017) (finding that article I, section 7 applied equally to a houseless resident's home while living on public property, even though the individual was doing so in violation of a City ordinance). *See also Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) (finding the same even under the Fourth Amendment's less protective standard: "Violation of a

City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment").

The court below erred by creating a less protective standard for warrantless seizures of public transit users than of those walking or driving on the same street in a private vehicle. *Meredith*, 18 Wn.App.2d at 514-15. Our constitution neither makes nor permits any such distinction. Washingtonians' constitutional rights do not diminish by virtue of using public transit, nor is use of public transit an exception to the warrant requirement.

4. ***Forcing individuals to waive their right to be free from suspicionless seizures in exchange for the benefit of using public transit violates the doctrine of unconstitutional conditions.***

RCW 81.112.210's structure—conditioning access to public transportation on implied consent to suspicionless, warrantless seizure by law enforcement—does not result in

valid constitutional consent because the scheme violates the doctrine of unconstitutional conditions.

Under the doctrine of unconstitutional conditions, an individual's consent to a search or seizure is not voluntary if made in exchange for a discretionary benefit from the State, because such a bargain constitutes a "governmental end-run[] around" constitutional prohibitions like suspicionless seizures. *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1413, 1492 (1989)). Put otherwise, the doctrine "limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *Scott*, 450 U.S. at 866. The doctrine and its protections flow from the right to substantive due process. *MS Rentals, LLC v. City of Detroit*, 362 F.Supp.3d 404, 413 (E.D. Mich. 2019) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. at 1415-16).

The doctrine is a critical check on constitutional abuses by government:

> Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

Scott, 450 U.S. at 866. The doctrine is "especially important in the Fourth Amendment context," and where "constitutional right[s] 'function[] to preserve spheres of autonomy.'" *Id*. at 866–67. Both contexts are implicated by RCW 81.112.210.

The *Scott* case is illustrative. Mr. Scott was arrested, charged with a state offense, and released on personal recognizance. *Id*. at 865. To be eligible for such release, he was required to sign a form and "consent" to warrantless random drug testing when requested by law enforcement, and to warrantless searches of his home for drugs. *Id*. Mr. Scott was later arrested on federal charges when a warrantless drug

test— which he consented to as a condition of his release — resulted in a positive test, arrest, and discovery of contraband in his home. *Id*. The issue on appeal was whether the inculpatory evidence should have been suppressed because the initial drug test from which it sprung was unlawful, despite Mr. Scott's express written consent to such a search.

The Ninth Circuit held unreservedly that Mr. Scott's "consent" was not valid, and thus could not serve as an exception to the Fourth Amendment. The Court noted that Mr. Scott's "consent" could only be valid if the search in question were constitutionally lawful. Because the Ninth Circuit applied federal constitutional law they utilized a reasonableness standard—a lesser standard than mandated by article I, section 7 of the Washington State Constitution–and held that the suspicionless drug testing of a pretrial defendant was unlawful even under that lesser federal standard, notwithstanding actual knowing written "consent." *Id*. at 874 (holding that "Nevada's decision to test Scott for drugs without probable cause does not

pass constitutional muster under any of the three approaches: consent, special needs or totality of the circumstances").

Similarly, the State here cannot condition access to public transportation on an individual's waiver of their constitutional right to be free from seizure without authority of law. Mr. Meredith's "consent" is not valid because it provides the State an end-run around the prohibition against suspicionless, warrantless seizures. The seizure here is precisely that which our state and federal constitutions prohibit--suspicionless, warrantless seizure of an individual by law enforcement for law enforcement purposes. *Id*. at 870 (identifying "quintessential general law enforcement purpose[s]" like crime prevention and investigation as "the exact opposite of a special need" which in rare non-law-enforcement circumstances may relax Fourth Amendment requirements); *see also State v. Meredith*, 18 Wn. App. 2d 499, 502 (2021) (noting that the Fare Enforcement program at issue relied on multiple Sheriff's officers boarding buses on foot to

contact individuals, followed by one or more officers in a "chase vehicle").

Allowing people to ride public transportation only if they consent to being seized ratchets constitutional protections downward. The ability to access public transportation only upon consent to an otherwise unlawful, suspicionless seizure violates the doctrine of unconstitutional conditions and does not amount to constitutionally valid consent. Consent does not justify the warrantless seizure in this case.

B. RCW 81.112.210(2)(b)(i)'s authorization of suspicionless seizure of any rider who accesses public transit will further exacerbate existing disparities in the criminal legal system and in individuals' ability to move freely.

1. ***RCW 81.112.210(2)(b)(i) disproportionately penalizes members of historically marginalized groups, who often have little choice but to rely on public transit.***

For many, the use of public transit is not a choice, but is necessary to access the economic mainstays of life, such as employment. Over half of all King County transit riders use

public transit primarily to travel to and from their jobs. Two historically marginalized groups are particularly impacted by permitting warrantless, suspicionless seizures of individuals by law enforcement merely for accessing public transportation.

First, BIPOC use King County Metro more often than White people. While over forty percent of Metro's riders are BIPOC, those individuals make up a third or less of King County residents as a whole. Metro Transit Department, *King County Metro Transit 2019 Rider and Non-Rider Survey*, at 54, (March 2020); Quick Facts, King County Washington, U.S. Census Bureau.[3].

Second, those with low incomes are less likely to own a car and more likely to rely on public transit than residents with greater economic resources.[4] People with annual incomes less

[3] https://www.census.gov/quickfacts/kingcountywashington
[4] *See e.g.* Sara Amri, *Fighting for Fair Fares in New York City Through Civil Society Enforcement of Title VI*, 26 J.L. & Pol'y 165, 180 (2018) (N.Y.); Nicole Stelle Garnett, *The Road from*

than $35,000 use King County Metro more than people in other income groups.[5] Metro Transit Department, *King County Metro Transit 2019 Rider and Non-Rider Survey*, at 54, (March 2020).[6] More than half of Metro's ridership make less than twice the federal poverty level. *Id.* at 56.[7] Allowing "choosing to get on the bus" to constitute constitutional consent to suspicionless warantless seizures will further reduce

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Welfare to Work: Informal Transportation and the Urban Poor, 38 Harv. J. on Legis. 173, 182 (2001); Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 Calif. L. Rev. 1131, 1133 n.11 (2013) (nation as a whole).

[5] This publicly available report and others cited in this brief contain "legislative facts" this Court may consider when weighing the policy implications of its decision in this case. *Wyman v. Wallace*, 94 Wn.2d 99, 102–03, 615 P.2d 452 (1980 (citing ER 201(a)).

[6] https://kingcounty.gov/~/media/depts/metro/accountability/reports/2019/2019-rider-non-rider-survey-final.pdf

[7] *See also*, *United States Demographics of Low-Income Children*, National Center for Children in Poverty (available at https://www.nccp.org/demographic/) ("Research suggests that, on average, families need an income of about twice the federal poverty threshold to meet their most basic needs.").

constitutional protections both for BIPOC individuals and low-income communities, who really heavily on public transit.

2. ***RCW 81.112.210(2)(b)(i) exacerbates already racially biased public transit policies and practices.***

Racial bias permeates public transit fare enforcement. Black people made up only 9 percent of the ridership in 2018 and 2019, and yet they accounted for 21 percent of warnings and citations. Sound Transit Rider Experience and Operations Committee, *Fare Enforcement Policy Update* at 15 (Oct. 3, 2019)[8] Notably, these inequalities only grow *more* disparate as the penalties resulting from fare enforcement increase. Between May 2015 and July 2019, 19 percent of warnings were issued to Black people; 43 percent of citations were issued to Black people; and 57 percent of cases treated as theft involved Black people. *Memo from Matthew Brenton, Sound Transit*

[8]Https://www.soundtransit.org/st_sharepoint/download/sites/PRDA/FinalRecords/2019/Presentation%20-%20Fare%20Enforcement%20Procedure%20Updates%20191003.pdf.

Security Operations Program Manager, to Kenneth Cummins, Sound Transit Director of Public Safety, at 3–4 (Aug. 6, 2019).[9] Thus, while RCW 81.112.210(2)(b)(i) may be facially neutral, enforcement data shows that the suspicionless seizures it authorizes are mostly effectuated against BIPOC individuals.

There are numerous reasons for such racial disparities, including targeted enforcement strategies. These are not unlike stop and frisk policing, for which police historically have used "high rates of crime" in an area as an end-run around constitutional protections. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 581 (S.D.N.Y. 2013) (a person's mere "presence in an area with high rates of crime is not a sufficient basis for a stop"). Indeed, King County Metro *itself* has "admit[ted] that its [targeted] enforcement strategy results in 'a

[9] https://www.documentcloud.org/documents/6434966-Sound-Transit-Fare-Enforcement-Demographics.html.

higher proportion of citations [being issued to BIPOC] than if enforcement was more evenly distributed'" *Id.*

While the data and Metro's admission are illuminating, there can be no serious doubt that both presently and historically BIPOC individuals are and have been stopped by law enforcement officers at significantly higher rates than their White counterparts. National studies show that police stop Black, Latinx, and Asian people approximately eight to ten times as often as police stop white people. *Symposium: Panel V: Promoting Racial Equality*, 9 J.L. & Pol'y 347, 365 (2001) (discussing comments of Professor Deborah A. Ramirez).[10] In Washington, people of color are disproportionately stopped and

[10] *See generally* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 Colum. Hum. Rts. L. Rev. 551, 562 n.59 (1997) (stating that an ACLU independent rolling survey found that minority motorists made up 21.8% of violators but 80.3% of those stopped and searched on Maryland portions of I-95); *United States v. Leviner*, 31 F. Supp. 2d 23, 33-34 (D. Mass 1998) (discussing numerous studies reporting that African-American motorists are stopped and prosecuted more than any other citizens).

searched even though they are less likely to possess narcotics or weapons than white people who are searched. *See Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, at 2, Fred T. Korematsu Center for Law and Equality, (2021).[11] Permitting law enforcement to seize any individual who accesses public transit will further reinforce and perpetuate these disparities.

V. CONCLUSION

In contrast to well-established constitutional principles, RCW 81.112.210(2)(b)(i) authorizes the seizure of any passenger on public transportation at any time without suspicion, a warrant or any valid exception to the warrant requirement. For the reasons stated above, this Court should reverse the Court of Appeals decision and declare RCW 81.112.210(2)(b)(i) unconstitutional.

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[11]https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center

Pursuant to RAP 18.17, I certify that this memorandum contains 3929 words.

Respectfully submitted this 6th day of January, 2022.

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