APL-2017-00174

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

ALI CISSE,

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND CATO INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT UNDER RULE 500.1(f)

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STATEMENT OF INTEREST

The Brennan Center for Justice at NYU School of Law ("the Brennan Center") is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair criminal justice system.[1] The Brennan Center advocates for reshaping public policies that undermine this vision.

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This case concerns *amici* because of the important constitutional issues at stake in interactions between law enforcement and the public.

[1] This brief does not purport to represent the views, if any, that the New York University School of Law may have.

INTRODUCTION

In *People* v. *Reyes*, this Court held that a police officer's command to "stop!" is a level-one encounter under the framework set forth in *De Bour*. Twenty-five years of developments in both the law and social science show that *Reyes* was wrongly decided and should be overturned.

Empirical research and investigations of policing practices over the last quarter century have undermined *Reyes*'s assumption that commands to stop are neither intimidating nor threatening. Furthermore, *Reyes* creates a legal landscape where an officer's limited right to request information is transformed into broad authority to seize when citizens attempt to exercise their "right to walk away." And *Reyes* perversely incentivizes subjects of police suspicion to flee, escalating the risk of violence and danger to the subject, the police, and the public.

This Court should overrule *Reyes* and hold that an officer's command to "stop!" represents a level-two encounter under *De Bour*.

BACKGROUND

A. *De Bour* defines level-one encounters to exclude "threatening" or "intimidating" police conduct.

New York's common-law tradition protects its citizens' rights to privacy and security from unjustified police intrusions. In *People* v. *De Bour*, 40 N.Y.2d 210 (1976), this Court set forth a four-tiered framework for evaluating the propriety of police-initiated citizen encounters. This framework sought to balance police officers' important roles in society against citizens' "tendency to submit to the badge" and the Court's "belief that the right to be left alone is 'too precious to entrust to the discretion of those whose job is the detection of crime.'" *Id.* at 218–20 (internal citation omitted).

The least intrusive encounter, the level-one "request for information," "permits a police officer to request information from an individual"—such as the individual's identity, destination, or reason for being in the area—"and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality." *People* v. *Barksdale*, 26 N.Y.3d 139, 143 (2015). Next, under the level-two "common-law inquiry," when supported by a "founded suspicion that criminality is afoot," an officer may ask more

pointed questions such that a reasonable person might believe he or she is suspected of wrongdoing. *People* v. *Hollman*, 79 N.Y.2d 181, 191 (1992). At level three, officers who reasonably suspect that a person was involved in a crime may forcibly stop or "seize" that individual. *People* v. *Moore*, 6 N.Y.3d 496, 498–99 (2006); *accord Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). And finally, at level four, police may arrest an individual when supported by probable cause that the individual committed a crime. *Moore*, 6 N.Y.3d at 499.

While the distinction between level one and level two is "subtle," the hallmark of a level-one encounter is that it is not "threatening" or "intimidating." *Hollman*, 79 N.Y.2d at 191–92. It is also beyond question that in a level-one (or level-two) encounter, a reasonable person must "feel free to disregard the police and go about his business." *See Florida* v. *Bostick*, 501 U.S. 429, 434 (1991) (Fourth Amendment scrutiny triggered when police-citizen encounter "loses its consensual nature") (internal quotation marks omitted). If an officer makes a "show of authority" such that a reasonable person would not feel free to leave, then the encounter is a level-three seizure under New

York law. *See People* v. *Bora*, 83 N.Y.2d 531, 534–35 (1994); *see also California* v. *Hodari D.*, 499 U.S. 621, 626 (1991).

B. *Reyes* holds that a shouted command to "stop!" is a level-one encounter.

In *People* v. *Reyes*, an unsigned *sua sponte* merits decision, this Court held that an officer yelling at a citizen to "stop!" "constituted nothing more than a permissible [level-one] request for information." 83 N.Y.2d 945, 946 (1994). In *Reyes*, officers observed the defendant "walking briskly" away from a group of men standing in a "drug-prone location" while clutching something underneath his arm. 199 A.D.2d 153, 153–54 (1st Dep't 1993). The officers followed the defendant in a van until their vehicle hit traffic, and then walked after him. *Id.* Upon one of the officers yelling "Hey, stop, excuse me," or "Stop, hey, stop, police," the defendant "simply complied" and dropped a brick of cocaine. *Id.* This Court did not elaborate as to why the officer's shouted command that the defendant "stop!" amounted to only a request for information besides noting that it "agree[d] with the Appellate Division." 83 N.Y.2d at 946.

Central to the First Department's analysis was that the police officer's directive was "nonthreatening." 199 A.D.2d at 154. But the

court did not assess whether a reasonable person, at whom a police officer shouts to stop from behind, would be intimidated or threatened by the officer's instruction. Instead, the First Department reasoned that classifying a command to stop as something more than a request for information would make it impossible for police officers to get the attention of someone walking away from them, and thereby "defeat the right of the police to make a request for information." *Id.* at 155.

C. This case provides an opportunity to overturn *Reyes*.

Mr. Cisse's convictions depend on the continued validity of *Reyes*. On the night of his arrest, Mr. Cisse, then 17, was walking with three friends in Manhattan. A uniformed officer directed Mr. Cisse to stop, "hold up and turn around." Mr. Cisse complied, and the officer noticed an L-shaped bulge in Mr. Cisse's clothing that the officer identified as a firearm. The officer arrested Mr. Cisse and seized the firearm as well as Metrocards, on which the prosecution relied to place Mr. Cisse near the scene of a robbery. The trial court denied Mr. Cisse's suppression motion and, relying on *Reyes*, the First Department affirmed.

The parties agree that the officer lacked the requisite suspicion to initiate anything more intrusive than a level-one request for

information. Thus, if the officer's command was something more, then Mr. Cisse's motion for suppression should have been granted, and at least one of his convictions must be reversed.[2]

ARGUMENT

THE COURT SHOULD OVERRULE *PEOPLE* V. *REYES* BECAUSE IT IGNORES THE REALITY OF POLICE-CITIZEN INTERACTIONS AND CONTRIBUTES TO UNNECESSARY ESCALATION AND VIOLENCE.

Reyes should be overruled. It was wrong to hold that commands to stop are "non-threatening." *Reyes* is also a misfit in the law: it permits bootstrapping that renders illusory the "right to walk away," while at the same time encouraging dangerous flight. *Reyes* is an ill-considered branch of New York's common law that this Court can and should prune away.

I. COMMANDS TO STOP ARE INHERENTLY AND NECESSARILY "INTIMIDATING" AND "THREATENING."

A. Empirical evidence demonstrates that *Reyes* takes an unrealistic view of police/citizen encounters.

A *De Bour* level-one encounter must be "non-threatening"; it cannot be "intimidating." *Hollman*, 79 N.Y.2d at 191–92. Recent

[2] *Amici* express no view on the procedural or jurisdictional questions, if any, presented by this case.

evidence shows that the type of command at issue in *Reyes* (and here) is threatening and intimidating, especially to those who most often interact with the police. Because *Reyes* rests on a false assumption, and conflicts with *De Bour* and *Hollman*, it should be overturned. *See People* v. *Hobson*, 39 N.Y.2d 479, 487 (1976) (overturning precedent as "adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" (quoting *Helvering* v. *Hallock*, 309 U.S. 106, 199 (1940)).

1. National research shows that citizens find police commands to be both intimidating and threatening.

Investigations of police departments across the country show that a citizen's failure to obey a police command can be met with disproportionate force. These reports demonstrate that being the subject of a police command can in many cases be an "intimidating" and "threatening" experience.

For example, a U.S. Department of Justice report concerning Baltimore, issued after Freddie Gray's death attracted nationwide attention, found that police-citizen relations were "broken," in part because police encounters were an intimidating and fearful experience for citizens. That report further stated that "[o]fficers frequently resort

to physical force when a subject does not immediately respond to verbal commands, even where the subject poses no imminent threat to the officer or others."[3] The report detailed an encounter where an officer approached an 85-pound girl who the officer suspected was a missing juvenile. The officer told the girl to stop and when the girl tried to walk away, the officer discharged her taser at the girl.[4]

DOJ investigations in other jurisdictions have resulted in similar findings. In Ferguson, Missouri, the DOJ found that "[m]any officers are quick to escalate encounters with subjects they perceive to be disobeying their orders or resisting arrest," and that "[o]fficers expect and demand compliance even when they lack legal authority."[5] And the DOJ's letter summarizing its review of the Albuquerque Police Department similarly relays stories of individuals who were kicked and tasered by offers after failing to obey commands. In one such case, an

[3] U.S. Dep't of Justice, Civil Rights Div., Investigation of the Baltimore City Police Department 8–10 (Aug. 10, 2016), https://bit.ly/2staAmu.

[4] *Id.* at 86.

[5] U.S. Dep't of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 2, 28 (Mar. 4, 2015), https://bit.ly/1lV31kb.

officer tasered a young cyclist who rolled through a stop sign and failed to obey the officer's command to stop.[6]

Nationwide research also finds that people of color are more likely to be intimidated by interactions with police. For example, a study by *amicus* Cato reports that "African Americans are about twice as likely as whites to report [police use of] profanity or knowing someone physically mistreated by the police."[7] And the DOJ's Bureau of Justice Statistics reported that black respondents were 2.5 times more likely than white respondents to have experienced nonfatal threats or use of force during their contacts with police.[8] Hispanic respondents were 2.3 times more likely than white respondents to have experienced nonfatal threats or use of force.[9]

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[6] Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., to Richard J. Berry, Mayor of the City of Albuquerque 18–21, 36–37 (Apr. 10, 2014), https://bit.ly/1WRibHK.

[7] Emily Ekins, Cato Institute, Policing in America: Understanding Public Attitudes Toward the Police, Results from a National Survey 30 (2016) ("Cato Report"), https://bit.ly/2zlgICm.

[8] U.S. Dep't of Justice, Contacts Between Police and the Public, 2015, at 16 (2018), https://bit.ly/2DwusNJ.

[9] *Id.*

2. Empirical evidence confirms that New Yorkers also find police commands to be threatening and intimidating.

These experiences recounted above do not occur in a vacuum: such highly-publicized incidents inform all New Yorkers' views of policing. Additionally, New Yorkers have firsthand experience with police overreach.

In New York City, the legacy of stop-and-frisk and other misguided policies has frayed the relationship between the police and large swaths of the population, particularly black and Latino New Yorkers. In 2013, a federal district court found that 83 percent of people stopped by the New York City Police Department were African American or Hispanic, even though those two groups constituted only 52 percent of the city's population.[10] The court also found that the NYPD had engaged in racial profiling and "the odds of a stop resulting in any further enforcement action were 8% *lower* if the person stopped was black than if the person stopped was white." *Floyd* v. *City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013). The odds that a stop

[10] Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice 17 (2015), https://bit.ly/1fGM4XN.

would escalate to violence were also higher for African Americans and Latinos: "[B]lacks who were stopped were about 14% more likely—and Hispanics 9% more likely—than whites to be subjected to the use of force." *Id.* at 560.

These findings demonstrate why many New Yorkers feel that their contacts with police officers are both harassing and intimidating. Indeed, evidence introduced during the *Floyd* trial suggests that at least some NYPD officials intended for the stop-and-frisk program to "instill fear" in "young blacks and Hispanics." *Id.* at 606.

One psychologist, consulting as part of the stop-and-frisk Joint Remedial Process, found that the program changed how New Yorkers interact with police: "The intrusive commanding-presence style of policing embodied in stop-and-frisk interventions at unexpected and unprovoked times, combined with a history of use of excessive or deadly force by the police, has generated considerable fear."[11] Because of this history, people who live in more heavily policed neighborhoods are more

[11] New York City Joint Remedial Process: Final Report and Recommendations 389 (2018) (Memorandum of Michael Britton, Ed.D., at 7), https://bit.ly/2DxdFda.

likely to perceive police actions as threats "even though a given officer in a given situation may have no such intent."[12]

A recent survey by the New York Civil Liberties Union is to the same effect. It found that, "[f]or many in heavily policed communities"—which are disproportionately populated by people of color—"police not only fail to make people feel safe, but they represent a serious threat to their lives and the lives of their loved ones."[13] The report continues:

> More than two-thirds (67 percent) of respondents in heavily policed communities feared having a friend or family member killed by police (a surprising 15 percent of respondents in lightly policed communities felt the same way). Slightly fewer (64 percent versus 10 percent) feared that they themselves could be killed by police. And almost half (43 percent) of the respondents in heavily policed neighborhoods feared they could be sexually assaulted by police compared to six percent in lightly policed communities.[14]

Moreover, "[l]arge percentages of people in heavily policed communities reported that police at times made them feel scared (64 percent), unsafe

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[12] *Id.* at 388 (Britton Memorandum at 6).

[13] New York Civil Liberties Union, Shattered: The Continuing, Damaging, and Disparate Legacy of Broken Windows Policing in New York City 12 (2018) ("NYCLU Report"), https://bit.ly/2FwRNBl.

[14] *Id.*

(71 percent) and nervous (74 percent)."[15] And these negative experiences specifically included being shouted at by police. Thus,

> Sixty-one percent of survey respondents in heavily policed communities reported at least one negative verbal police encounter in 2016, compared to 15 percent in less policed communities. One in four people in heavily policed communities said they were shouted at by police, (25 percent versus five percent), cursed at (26 percent versus four percent) or threatened with arrest (33 percent versus three percent).[16]

Given the baseline intimidation members of these communities perceive in their interactions with the police, the addition of a shouted command to "stop!" is inherently intimidating and threatening.

B. Many courts have reexamined legal rules surrounding police/citizen encounters based on recent research.

Reyes was decided in the early 1990s—the height of the crack cocaine epidemic, the war on drugs, and the national crime rate—well before the current bipartisan consensus for criminal justice and policing reform emerged.[17] Since that time, examples of heavy-handed policing have become significantly more common, including through research

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[15] *Id.*

[16] *Id.* at 18.

[17] Matthew Friedman et al., Brennan Center for Justice, Crime Trends: 1990-2016, at 2, 5, 8 (2017), https://bit.ly/2opoSRU.

like that discussed above, despite historically low levels of crime and violence.[18] Other state high courts have taken notice and relied on empirical research to reevaluate search and seizure precedents that led to exacerbating tensions between police and the communities they serve.

In *Commonwealth* v. *Warren*, the Supreme Judicial Court of Massachusetts relied on empirical research to address the role of "flight" in analyzing reasonable suspicion. 475 Mass. 530, 538 (2016). The court took notice of a Boston Police Department report "documenting a pattern of racial profiling." *Id.* at 539. That report "suggest[ed] a reason for flight totally unrelated to consciousness of guilt": a black man who fled "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." *Id.* at 540. "Given this reality," the court instructed judges to "consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus." *Id.*

[18] Ames C. Grawert et al., Brennan Center for Justice, Crime and Murder in 2018: A Preliminary Analysis 2 (2018), https://bit.ly/2Bo1OwR.

Similarly, in *Miles* v. *United States*, the high court for the District of Columbia considered whether a defendant's flight was suspicious. 181 A.3d 633, 641–44 (D.C. 2018). Taking note of "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests," citing statistics concerning fatal police shootings, and collecting extensive research on racial disparities in policing, the court held the defendant's evasiveness in response to police presence was not "unprovoked." *Id.* 641–44 & n.14. "[T]he experience of being followed by a police officer on foot, blocked by a police cruiser, and then told to 'stop' would be startling and possibly frightening to many reasonable people." *Id.* at 644.

This salutary trend comports with psychological research that suggests that outside observers are ill-equipped to evaluate the situational pressures motivating the actions and responses of others. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup. Ct. Rev. 153, 168–72 (2002). Here, too, empirical research should inform how the Court analyzes the implications of police interactions, including the intrusiveness of a "stop!" command.

II. *REYES* ABRIDGES THE RIGHT TO BE LEFT ALONE AND RISKS UNNECESSARY VIOLENCE.

A. Overruling *Reyes* is necessary to protect the "right to walk away."

1. Courts have bootstrapped the right to request information into an unfettered power to seize.

Under *Reyes*, police are permitted to command a citizen to "stop" for any credible reason. 83 N.Y.2d at 946. A citizen's reaction, however, may then justify the further intrusion of a common-law inquiry—or even a finding of "reasonable suspicion." *See, e.g.*, *Hollman*, 79 N.Y.2d at 193 (lies in response to request for information contributed to founded suspicion); *People* v. *Sierra*, 83 N.Y.2d 928, 930 (1994) (evasive reaction to request for information "gave rise to reasonable suspicion").

Thus, "flight" may give rise to reasonable suspicion when "combined with other specific circumstances indicating that the suspect may be engaged in criminal activity." *People* v. *Holmes*, 81 N.Y.2d 1056, 1058 (1993). But flight is often indistinguishable from a suspect's refusal to abide by a command to stop. *See* Section II.A.2, *infra*. Thus, by permitting police to initiate requests for information by shouting "stop," as *Reyes* does, and then to rely on the suspect's (predictably)

frightened reaction to justify a further intrusion, the law risks bootstrapping the limited right to request information into an unfettered power to seize.

Courts and commentators have long recognized this danger. For example, in *United States* v. *Swindle*, the Second Circuit found that it was constrained to conclude that a suspect's reaction to a command to stop could contribute to reasonable suspicion, despite its belief that "[u]nreasonable stops and unreasonable orders to stop are both abuses of police power," and that there is "no principled basis for prohibiting the former, but not the latter." 407 F.3d 562, 567–68 (2d Cir. 2005); *see also* LaFave, Search & Seizure § 9.4(d) (criticizing federal law for permitting this sort of bootstrapping).

This Court has recognized the danger of bootstrapping too. "If merely walking away from the police were sufficient to raise the level of suspicion to reasonable suspicion," it has held, "the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified." *Moore*, 6 N.Y.3d at 500. In the past this Court has taken steps to avoid this type of bootstrapping by imposing

restrictions on police conduct that exacerbates that risk. *See, e.g.*, *People* v. *Martinez*, 80 N.Y.2d 444, 446 (1992) (requiring "reasonable suspicion" before officer may pursue fleeing suspect); *Bora*, 83 N.Y.2d at 534 (under New York Constitution, "we have not required that an individual be physically restrained or submit to a show of authority before finding a seizure").

Nevertheless, bare commands to stop remain virtually immune to scrutiny under *Reyes*, giving rise to the same risk of bootstrapping. As a result, a New Yorker's asserted "constitutional right not to respond" to police inquiries, including by "run[ning] away," *People* v. *Howard*, 50 N.Y.2d 583, 586 (1980), has been rendered largely illusory. *See, e.g.*, *Sierra*, 83 N.Y.2d at 930.

2. Professed safeguards against bootstrapping have proven inadequate.

Courts have identified safeguards to ensure that citizens will remain free to terminate ostensibly "consensual" police encounters. But those safeguards have proven inadequate.

First, New Yorkers are assured that, while "flight" may contribute to the justification for a seizure, a mere exercise of the "right to walk away" will not. *See, e.g.*, *Howard*, 50 N.Y.2d at 586; *see also* LaFave,

supra, § 9.5(g) (no contribution to reasonable suspicion where "the suspect, at best, merely manifested a desire 'to avoid contact with the police'") (citations omitted).[19] As one judge has observed, however, "the distinctions . . . draw[n] between what constitutes the legitimate exercise of the right to walk away and what constitutes illegitimate flight will often amount to a line drawn in the sand on a windy day." *State* v. *Young*, 294 Wis. 2d 1, 49 (2006) (Bradley, J., dissenting).

For example, in *State* v. *Harbison*, the New Mexico Supreme Court found "flight" where defendant either "hurried" away, or broke into a "slow run," at sight of police. 141 N.M. 392, 396 n.1 (2007).[20] But applying the same distinction in *United States* v. *Beauchamp*, the Sixth Circuit found no "flight" where defendant hurriedly walked away without making eye contact. 659 F.3d 560, 564, 570–71 (6th Cir.

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[19] *But see Dennis* v. *State*, 342 Md. 196, 207 (1996) ("Where a person walks away in defiance of a police officer's request to stop, persistence in walking away may be considered flight."), *adhered to on remand*, 345 Md. 649 (1997).

[20] *See also, e.g.*, *People* v. *Jenkins*, 472 Mich. 26, 34 (2005) ("attempt[ing] to walk away from [an] officer" gave rise to reasonable suspicion); *State* v. *Johnson*, 815 So. 2d 809, 811 (La. 2002) (officer's testimony "did not describe 'headlong' flight," but defendant's "quickened . . . pace" still supported reasonable-suspicion finding); *United States* v. *Gordon*, 231 F.3d 750, 756–57 (11th Cir. 2000) (finding "powerful evidence of flight" where defendant "ran or walked very quickly" after noticing police).

2011).[21] Indeed, members of the same court often reach opposite conclusions on the same facts.[22]

If courts cannot determine—with the benefits of hindsight, reflection, and a full appellate record—whether a citizen has exercised the right to walk away or engaged in suspicious "flight," then how are citizens supposed to do so in the moment, on the street, with an officer shouting "stop!" at their backs?

Second, we are assured that "[f]light alone" is insufficient to give rise to reasonable suspicion. *Holmes*, 81 N.Y.2d at 1058. But the "flight-plus" rule has likewise failed to provide meaningful protections. Perhaps most perniciously, presence in a "high crime neighborhood" can serve as the plus-factor under the Fourth Amendment, *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), although this label "can easily serve as a proxy for race or ethnicity." *Beauchamp*, 659 F.3d at 570 (citation omitted). And while this Court rejected the rule that those two factors

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[21] *See also, e.g.*, *Outlaw* v. *People*, 17 P.3d 150, 157 (Colo. 2001) ("[T]he fact that [defendant] and his companions began walking away . . . fails to provide reasonable suspicion."); *People* v. *Torres*, 115 A.D.2d 93, 95–97 (1st Dep't 1986) (no "founded suspicion of criminality" where defendant "twice told [officer] not to touch him and walked briskly away").

[22] *See, e.g.*, *State* v. *Anderson*, 155 Wis. 2d 77 (1990) (court split 5-2 on whether defendant fled or exercised right to walk away); *State* v. *Hammond*, 257 Conn. 610, 625–26 (2001) (same, splitting 3-2).

alone could justify a seizure, *Holmes*, 81 N.Y.2d at 1058, similarly stereotyped factors have been permitted to tip the scales even under New York law. *See People* v. *Perez*, 31 N.Y.3d 964, 976 (2018) (Rivera, J., dissenting) (standing "motionless and silent" is not suspicious behavior that would justify a stop). Indeed, as the Seventh Circuit has observed, "Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you." *United States* v. *Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.).

Finally, we are reassured that reactions "provoked" by illegal police conduct cannot contribute to a reasonable-suspicion finding. *E.g.*, LaFave, *supra*, § 9.5(g) ("refus[al] to stop in response to an illegal order" will not give rise to reasonable suspicion); *cf. People* v. *Cantor*, 36 N.Y.2d 106, 114 (1975) (suppressing evidence obtained "as a direct consequence of the illegal nature of the stop").

But under *Reyes*, a bare command to stop is a level-one encounter, and thus will almost never be illegal. In any event, courts routinely rely on reactions to illegal police conduct to justify seizures, finding "provocation" only in the most extreme circumstances. *See, e.g.*,

Harbison, 141 N.M. at 398–99 (flight "provoked" only if police engage in "fraud," or act "without reason" or with "sole purpose of provoking . . . flight"); *see also People* v. *Boodle*, 47 N.Y.2d 398, 404 (1979) (denying suppression where "police illegality lacked the 'quality of purposefulness' to uncover incriminating evidence").[23]

3. *Reyes* should be overruled to restore the right to walk away.

Under *Reyes* and its progeny, "the right to inquire [has become] tantamount to the right to seize," and, at least in heavily policed neighborhoods, "there [is] no right 'to be let alone.'" *Holmes*, 81 N.Y.2d at 1058. To reinstate that right, the Court should require founded suspicion before the police may issue a command to stop.

Such a rule would hardly put New York outside the mainstream. Rather, several states have gone even farther, effectively treating commands to stop as seizures requiring reasonable suspicion. *See, e.g.*, *State* v. *Gatewood*, 163 Wash. 2d 534, 540 (2008) ("Stop, I need to talk to you" is a seizure under Washington constitution).[24]

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[23] *Henson* v. *United States*, 55 A.3d 859, 869–70 (D.C. 2012) (flight, in response to unlawful seizure, contributed to reasonable suspicion).

[24] *See also Jones* v. *State*, 745 A.2d 856, 869 (Del. 1999) (finding that defendant "was seized within the meaning of [the Delaware constitution] when [a police officer] first ordered him to stop and remove his hands from his pockets");

Other courts treat the distinction between an officer's request and his command as dispositive of whether the defendant was seized, generally on the theory that a reasonable person would not feel free to disobey an order from the police. *See State* v. *Benton*, 304 Conn. 838, 844 n.4 (2012) ("[A] police officer's command to stop . . . constitute[s] a seizure for purposes of article first, §§ 7 and 9, of the constitution of Connecticut.") (citation omitted); *see also Beauchamp*, 659 F.3d at 575 (Kethledge, J., dissenting) ("That the officer asks, rather than commands, is critical" to distinguishing between a consensual encounter and a "show of authority" sufficient to cause a seizure).

This Court should draw the same distinction between *De Bour* levels one (polite requests) and two (commands). Indeed, the fact that courts applying the federal and state Constitutions have struggled to

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People v. *Hardrick*, 60 P.3d 264, 270 (Colo. 2002) (recognizing "generally applicable rule that police orders, instead of requests for cooperation, usually effectuate a seizure of the person to whom the order is directed"); *State* v. *Tominiko*, 126 Haw. 68, 77 (2011) (a person is "seized" under Hawaii constitution "when a police officer approaches that person for the express or implied purpose of investigating him"; such a seizure occurred when officer "told [defendant] to exit the vehicle"); *Commonwealth* v. *Nestor N.*, 852 N.E.2d 1132, 1135 (Mass. App. Ct. 2006) ("Because Officer Colon's statement was not a command to stop but a request to speak with the defendant and ask questions, it lacked the compulsory dimension that would thereby transform the encounter into a seizure.").

classify requests and commands to stop as either "consensual" or compulsory recommends using New York's nuanced approach.

B. *Reyes* should also be revisited because it risks escalating police/citizen encounters and incentivizes flight.

1. *Reyes* encourages citizens to disobey commands.

Reyes encourages disobedience to police commands to stop, including headlong flight. Because a command to stop may be issued for any credible reason, if the recipient of such a command complies, and—as here and in *Reyes*—evidence is recovered as a result, that evidence almost certainly will not be suppressed. On the other hand, if the recipient disregards the command, including by fleeing, the officer cannot pursue unless, before the flight, the officer had reasonable suspicion. *Martinez*, 80 N.Y.2d at 447. Thus, *Reyes* encourages flight specifically for those in possession of contraband.

The First Department in *Reyes* acknowledged this perverse consequence: "[i]t is anomalous that a person can better his chances of avoiding the consequences of illegal conduct if he refuses to comply with a police request for information and instead, by fleeing, induces the police to pursue him, even when the pursuit is successful." 190 A.D.2d at 155. Nevertheless, the court concluded that "[i]t would not be a

profitable resolution of the anomaly" to "extend the advantages of flight to an accused where, as here, there has been no attempt to flee." *Id.*

The First Department's reasoning in *Reyes*, which this Court did not address when it affirmed, is catastrophically wrongheaded. The law should not encourage citizens—especially those in possession of contraband—to run away from the police. *See People* v. *Peque*, 22 N.Y.3d 168, 194 (2013) ("compelling justification" to overrule precedent where it "leads to an unworkable rule") (citation omitted).

2. By encouraging citizens to disobey commands, *Reyes* risks escalation and violence.

"Cases abound in which a suspect's 'flight from the police set in motion an ensuing chase that resulted in death or serious injury to either a police officer, a suspect, or a bystander.'" *State* v. *Williams*, 192 N.J. 1, 12–13 (2007). Thus, "encourag[ing] suspects to disobey orders from law enforcement officers" and flee will "plac[e] the public at risk." *United States* v. *Dupree*, 617 F.3d 724, 737 (3d Cir. 2010); *see also People* v. *Matos*, 83 N.Y.2d 509, 512 (1994) (death of officer reasonably foreseeable consequence of defendant's flight).

One of the reasons flight is so dangerous is that the law permits the police to use force to restrain or subdue a fleeing suspect. Indeed, at

common law, the "use of deadly force against a fleeing felon" was presumptively reasonable. *Tennessee* v. *Garner*, 471 U.S. 1, 12–13 (1985). And although that broad sanction of police violence has since been circumscribed, it remains the case that an officer's use of less-than-deadly force may be justified, in part, by a suspect "actively resisting arrest or attempting to evade arrest by flight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989); *People* v. *Tiribio*, 88 A.D.3d 534, 535 (1st Dep't 2011) (upholding officers' use of force, in part because "defendant and his accomplice did not comply with the officers' initial command").

Thus, courts have consistently upheld the use of force against fleeing suspects, as well as suspects who merely refuse to obey police commands.[25] Indeed, "a long line of precedent . . . underscores the right of an officer to resort to force in arresting a suspect who is resistant" to commands. *Mitchell* v. *Yeadon Borough*, No. Civ.A. 01-1203, 2002 WL

[25] *See, e.g.*, *Bolden* v. *City of Euclid*, 595 F. App'x 464, 470–71 (6th Cir. 2014) ("[Suspect's] refusal to comply with [officer's] lawful commands justified the use of some force to control the situation."); *Beaver* v. *City of Federal Way*, 507 F. Supp. 2d 1137, 1145 (W.D. Wash. 2007), *aff'd*, 301 F. App'x 704 (9th Cir. 2008) (upholding use of force where "officer was alone with a fleeing felony suspect . . . who ignored his commands to stop").

265021, at *6 (E.D. Pa. Feb. 22, 2002); *see also, e.g., Tiribio*, 88 A.D.3d at 535.

Accordingly, the law speaks to citizens out of both sides of its mouth: The citizen is told he or she may disregard a shouted command to "stop!"—that's why, per *Reyes*, the command qualifies as a level-one encounter and not a seizure. But the officer is told that he or she can use force on a citizen who disregards a command. The law should speak with one voice, and the "anomalous" decision in *Reyes* should be discarded. *Compare Reyes*, 199 A.D.2d at 155, *with People* v. *Bing*, 76 N.Y.2d 331, 347–48 (1990) (overruling precedent in light of "anomalies" it produced).

3. Encouraging flight can have lethal real-world consequences.

The doctrinal confusion that *Reyes* fosters may also have deadly consequences in the real world. Reliable data on fatal encounters between the police and public is notoriously hard to come by. But the *Washington Post* currently maintains a database of all fatal police shootings in the United States since 2015, which shows that in the last four years, at least 471 people have been killed by police while "fleeing"

on foot. Of those 471 people, 54 were unarmed, suggesting that flight alone can quickly escalate to violence.[26]

Similar tragic anecdotes have also reverberated across the nation. Over the course of a single week in June of this year, three different suspects were killed after attempting to flee from the police. On June 19, 17-year-old Antwon Rose, Jr., was shot three times while fleeing a traffic stop in East Pittsburgh.[27] On June 23, 31-year-old Thurman Blevins was killed in Minneapolis while running from officers on foot.[28] And on June 25, 18-year-old Luis Argueta was killed while running away during a traffic stop in Galveston, Texas.[29]

It is impossible to know how many New Yorkers have died because of mixed messages sent by cases like *Reyes*. But the possibility of even one is intolerable.

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[26] The database is available at https://wapo.st/2Kh4r6n. Information on the project's background and methodology is available at https://wapo.st/2R28plG. The underlying data for all four years of the project is available at https://bit.ly/1YG0Nm8.

[27] Errin Haines Whack & Claudia Lauer, *Officer charged in death of black teen who was shot in back*, AP News (June 27, 2018), https://bit.ly/2FI1qxt.

[28] Mark Berman & Antonia Noori Farzan, *Minneapolis police officers won't be charged for fatally shooting Thurman Blevins*, Wash. Post (July 30, 2018), https://wapo.st/2DwqnsK.

[29] Nick Powell, *Galveston man, 18, fatally shot by police after traffic stop*, Houston Chron. (June 25, 2018), https://bit.ly/2Keqpa1.

4. By requiring founded suspicion to issue a command to stop, the Court can diminish the incentive to flee.

"Precedents remain precedents . . . not because they are established but because they serve the underlying nature and object of the law itself, reason and the power to advance justice." *Bing*, 76 N.Y.2d at 338 (internal quotation marks omitted). Overturning *Reyes* and requiring at least founded suspicion to issue a command to stop will diminish the incentive to flee, making police and citizens safer.

Such a rule would also be beneficial to police-community relationships because it both limits an officer's ability to escalate a request for information into a more threatening encounter and encourages compliance with such commands. As one court stated in finding that a command was a seizure, "[a] reasonable person, in a high crime neighborhood late in the evening, would not and should not reasonably feel free to resist a police officer's order to move." *Strange* v. *Commonwealth,* 269 S.W.3d 847, 851 (Ky. 2008). Rather, "[c]itizens are encouraged to comply with reasonable police directives, and the police should be permitted to expect reasonable compliance with reasonable demands." *Id.*

III. REQUIRING "FOUNDED SUSPICION" TO PRECEDE A COMMAND WILL NOT PREVENT REASONABLE REQUESTS FOR INFORMATION.

The benefits of overturning *Reyes* are compelling: the law is conformed to the reality of police-citizen encounters; the liberty of citizens is increased; and the dangers of flight are mitigated, for police and citizens alike. Balanced against these benefits, the costs are negligible, because requiring founded suspicion to issue a command to stop will not meaningfully interfere with the ability of police officers to make reasonable requests for information.

As this Court has recognized, in the context of street encounters with citizens, "the police should be accorded great latitude in dealing with those situations with which they are confronted." *Cantor*, 36 N.Y.2d at 112. But that latitude "should not be at the expense of our most cherished and fundamental rights." *Id.*

In *Reyes*, the First Department struck the wrong balance between these interests. It reasoned that "[a] request that somebody stop is a *necessary* preliminary to a request for information when a person is ahead of the officer, walking away from him, and—for all that

appears—unaware that the officer wished to inquire of him." 199 A.D.2d at 155 (emphasis added).

But that's not true: an officer can increase his speed and overtake the citizen; or get his attention without resorting to a command to stop; or continue following the citizen until he stops or turns around; or call for another officer to intercept the citizen in the direction he is walking; or continue unobtrusive surveillance until the citizen does something to raise the level of suspicion. Officers in jurisdictions that treat bare commands to stop as seizures, or treat as dispositive the distinction between commands and requests, already abide by such practices, demonstrating their practicality. But even if these alternatives are viewed as less convenient for police, that hardly justifies the deprivation of life and liberty to which *Reyes* contributes.

Moreover, police must already exercise care when issuing a command to stop, lest the command be deemed to constitute a seizure. *Bora*, 83 N.Y.2d at 535 ("While a verbal command, standing alone, will not usually constitute a seizure, we have recognized that when coupled with other behavior, it may."). Requiring founded suspicion to issue a command would be a simpler rule for police to follow.

Finally, empirical evidence suggests that "hands-on" policing measures like those endorsed in *Reyes* are not particularly effective. The odds of the police uncovering evidence during an encounter premised on little to no suspicion are notoriously low.[30] And many commentators have questioned the efficacy of New York City's stop-and-frisk program—perhaps one of the most famous examples of "hands-on" policing techniques—noting that it resulted in a low percentage of arrests and had no noticeable effect on crime.[31] Per an analysis by *amicus* Brennan Center, "[s]tatistically, no relationship between stop-and-frisk and crime seems apparent."[32]

"Hands-on" policing techniques can also cause rifts between police and the communities they serve, creating confidence gaps that make it more difficult for the police to do their jobs. As noted in a recent report

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[30] Hit rates for consent searches, which require the requesting officer to have no requisite level of suspicion, are illustrative here. As one academic article has noted, "The data on traffic stop searches indicates that police find evidence in only about 10% to 20% of the total traffic searches. And these numbers are likely overestimates, as police have every incentive to record searches that result in hits and much less incentive to record unfruitful searches." Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. Rev. 1609, 1655 (2012).

[31] *See, e.g.*, New York City Bar Association, Report on the NYPD's Stop-and-Frisk Policy 1 (2013), https://bit.ly/2DwhAXN.

[32] James Cullen and Ames Grawert, Brennan Center for Justice, Fact Sheet: Stop and Frisk's Effect on Crime in New York City (2016), https://bit.ly/2zf6oMk.

by the Cato Institute, "[I]ndividuals who have less favorable opinions of the police are less likely to report a crime."[33] In the same vein, a survey by the New York Civil Liberties Union found that "[n]early half . . . of respondents in heavily policed neighborhoods reported that calling police for help would actually make a situation worse, where only 16 percent of those in lightly policed areas held that view."[34]

Paradoxically, intrusive police questioning may even contribute to an *increase* in crime, by undermining community members' willingness to report crimes and cooperate with solving them.[35] Taken together, these findings suggest that the policies endorsed by *Reyes* not only fail to effectively detect crime, they may actually decrease the efficacy of law enforcement.

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[33] Cato Report, *supra*, at 14.

[34] NYCLU Report, *supra*, at 3.

[35] Richard Rosenfeld et al., National Institute of Justice, Assessing and Responding to the Recent Homicide Rise in the United States 13–19 (2017), https://bit.ly/2AwKiHG.

CONCLUSION

"Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the 'lessons of experience and the force of better reasoning.'" *Bing*, 76 N.Y.2d at 338. This Court should overrule *Reyes* and require founded suspicion to precede a command to stop.

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