IN THE SUPREME COURT FOR THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DENNY D. GHIM, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court Case No. C111491CR CA A152065 SC S063021

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC. IN SUPPORT OF PETITIONER'S OPENING BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
On appeal from a judgment of the Circuit Court for Washington County
Honorable Gayle A. Nachtigal, Judge

Opinion Filed: December 10, 2014
Author of Opinion: Sercombe, Presiding Judge

(Counsel Listed on Following Page)

August 2015

Julia E. Markley, OSB No. 000791
JMarkley@perkinscoie.com
Kristina J. Holm, OSB No. 112607
KJHolm@perkinscoie.com
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000

Attorneys for *Amicus Curiae* American Civil Liberties Union of Oregon, Inc.

Ernest Lannet, OSB No. 013248
Chief Defender
Criminal Appellate Section
Morgen E. Daniels, OSB No. 075739
Deputy Public Defender
Morgen.E.Daniels@opds.state.or.us
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Telephone: 503.378.3349

Attorneys for Petitioner Denny D. Ghim

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Anna M. Joyce, OSB No. 013112
Solicitor General
Robert M. Wilsey, OSB No. 085116
Assistant Attorney General
Robert.wilsey@doj.state.or.us
400 Justice Building
1162 Court Street NE
Salem, OR 97301
Telephone: 503.378.4402

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(continued)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

I. INTRODUCTION

The question in this case is whether Article I, section 9, of the Oregon Constitution requires the state to obtain a warrant before ordering a bank to turn over a depositor's bank records.

Amicus Curiae American Civil Liberties Union of Oregon, Inc. ("ACLU") urges this court to hold that there is a constitutionally protectable privacy interest in an individual's bank records. While a single financial transaction may reveal nothing private, the disclosure of aggregated data including payees, dates, amounts, and locations involving hundreds or thousands of personal financial transactions breaches historic and modern legal and social norms. Current technology allows police easily to cull, sort, and search through voluminous data in a sophisticated way, disclosing intimate details about a person's life. This data analysis enables law enforcement to develop a picture of an individual's life that is not open to public viewing and to which individuals do not implicitly consent. Accordingly, the ACLU supports Defendant's argument that this court should require the police to obtain a warrant, unless an exception to the warrant requirement applies, before the state can obtain an individual's bank records.

The ACLU takes no position on the sub-constitutional issue raised by Defendant whether the decision of the Court of Appeals should be reversed for the state's failure to comply with the subpoena process set out in ORS 192.603.

II. STATEMENT OF THE CASE

A. Questions Presented and ACLU's Proposed Rules of Law

1. First Question Presented and Proposed Rule of Law

Question: Does Article I, section 9, of the Oregon Constitution recognize a person's right to privacy in bank records?

Proposed rule: Article I, section 9, of the Oregon Constitution recognizes an individual's right to privacy in his or her bank records because those records, in the aggregate, contain intimate facts about a person's private financial affairs. Social and legal norms of behavior are such that a person's bank records—which could reveal a vast amount of personal information including sensitive pharmaceutical purchases, adult store purchases, visits and transactions at particular Internet websites, and cash withdrawals—should be free from government scrutiny absent probable cause for a warrant.

2. Second Question Presented and Proposed Rule of Law

Question: When a person employs an agent or purchases services from a business, and in the course of the agency or service relationship shares private financial information with the agent or service provider, does that sharing of information extinguish the person's privacy interest in the information?

Proposed rule: A person's limited sharing of private financial information with a service provider does not extinguish the person's privacy interest in the information. Social and legal norms of behavior have changed in

the digital age, where people reveal a great deal of information about themselves to third parties as a necessary incident to everyday tasks such as paying bills, purchasing items with physical and online retailers, and preparing and storing tax returns and schedules in the cloud. When a person shares financial information with a service provider for the limited purpose of using the financial services of the provider, the person does not intend to relinquish privacy interests in that financial information.

B. Nature of Proceeding and Statement of Facts

The ACLU adopts the description of the nature of the proceeding and the statement of facts from Defendant's Opening Brief.

C. Summary of Argument

Under this court's jurisprudence, sources of law and legal and social norms determine the individual freedom from scrutiny that Article I, section 9, of the Oregon Constitution, protects. Unlike the parties in *State v. Johnson*, 340 Or 319, 336, 131 P3d 173 (2006), Defendant and the ACLU point this court to several sources of law—Oregon, federal, and other states—that demonstrate that the people have a protectable privacy interest in their bank records. While a single financial transaction—a check written to a power company for August 2015 usage—may not be private, the aggregation of financial transaction data transforms it, like a Seurat painting. In the aggregate, bank records give a full and intimate picture of a person's life—buying at Amazon, buying gasoline at

certain locations, visiting a Target store or a 7-11 at a particular time, transacting at a porn site, taking certain Southwest Airlines flights, and so forth. Additionally, historical and modern social norms surrounding the privacy of financial information, which an individual does not abandon when using necessary third-party vendors to transact daily business, further support holding that a privacy interest exists in a person's bank records. It is impossible to participate in modern society (for example, shopping online) without relying on a host of providers who perform transactional services, store financial data, and hold and transfer funds. Accordingly, the state must have a warrant, or an exception to the warrant requirement, to obtain a person's bank records. A subpoena, whether criminal or administrative, is insufficient.

III. ARGUMENT

A. Article I, Section 9, of the Oregon Constitution Protects a Person's Privacy Interest

Article I, section 9, of the Oregon Constitution provides, in pertinent part: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure * * *." Under Article I, section 9, "a person's right to be free from unreasonable searches extends to those places and things in which the person has a 'privacy interest,' even when there is no physical or sensory invasion into the person's own possessions or space." *Johnson*, 340 Or at 336.

The individual freedom from scrutiny that Article I, section 9, protects "is determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping." *State v. Campbell*, 306 Or 157, 170, 759 P2d 1040 (1988). "[B]oth laws and social conventions have long recognized the right to exclude others from certain places deemed to be private. If the government were able to enter such places without constitutional restraint, 'the people's' freedom from scrutiny would be substantially impaired." *Id.* at 170-71. "Whether a person has a cognizable privacy interest in an item is an issue of law." *Johnson*, 340 Or at 336.

B. In *Johnson*, the Defendant Was Unable to Identify Sources of Law That Supported His Claimed Privacy Interest

Johnson is the leading case on third-party records under Article I, section 9, of the Oregon Constitution. There, this court affirmed the trial court's denial of the defendant's motion to suppress his cell phone records, which the state had obtained pursuant to a subpoena to his cell phone company. *Id.* at 335-36. In doing so, this court rejected the defendant's argument that he had a privacy interest in his cell phone records and, thus, the state needed a warrant to subpoena them.

> "Defendant clearly had a cognizable privacy interest in the content of his telephone calls. * * * * However, *we cannot identify a source of law that establishes that defendant also had some interest in keeping private any records kept by a third party, his cellular telephone provider, respecting his cellular telephone usage.* The cellular telephone provider generated and

> maintained those records from the provider's own equipment and for the provider's own, separate, and legitimate business purposes. * * * Neither are we aware of any principle that would prevent the cellular telephone provider from responding to a proper subpoena."

Id. at 336 (emphasis added).

Since *Johnson*, this court has not had the opportunity to consider other circumstances where a person has argued that he or she had a privacy interest in personal records held by a third party. The Court of Appeals has confronted the issue several times and uniformly has applied *Johnson* to reject the defendant's argument that a particular privacy interest exists. *State v. Sparks*, 267 Or App 181, 189-91, 340 P3d 688 (2014), *rev den* 357 Or 325 (2015) (affirming admission of electrical power subscriber information obtained via grand jury subpoena); *State v. Delp*, 218 Or App 17, 24-26, 178 P3d 259 (2008), *rev den* 345 Or 317 (2008) (affirming admission of subscriber information held by Internet service provider; rejecting federal statutes governing ISP subscriber information and identity theft); *State v. Magana*, 212 Or App 553, 556-57, 159 P3d 1163 (2007), *rev den* 343 Or 363 (2007) (affirming admission of cell phone records obtained via subpoena; considering and rejecting statutes governing "pen registers" and "trap and trace" not cited in *Johnson*); *State v. Gonzalez*, 120 Or App 249, 255-57, 852 P2d 851 (1993), *rev den* 318 Or 61 (1993) (affirming admission of hospital records; rejecting argument that statutes governing confidentiality of medical records create a constitutionally

protectable privacy interest), *rev den* 318 Or 61 (1993). *Cf. Gonzalez*, 120 Or App at 261-62 (stating that state's unfettered access to medical records significantly impairs the people's freedom from scrutiny) (Warren, J., dissenting).

The detailed data in a person's bank records stands in stark contrast to the type of data at issue in *Johnson* — and therefore this court should not derive or apply any bright-line rule from *Johnson*. The fact that someone uses a cell phone to call certain numbers, at certain times, for a certain duration reveals a certain type of conduct. By contrast, a monthly debit card statement can speak volumes more about the life of the card holder and her family. Other types of third-party records present entirely different issues. This court should not find from *Johnson* any bright-line rule for at least the reason that such a bright-line rule might inadvertently decide other cases that have not yet come before this court, such as the privacy of medical records considered by the Court of Appeals in *Gonzalez.* 120 Or App 249.

C. Several Sources of Law Support Finding a Privacy Interest in a Depositor's Bank Records

In contrast to *Johnson*, Defendant and the ACLU identify several sources of law—Oregon, federal, and other states—that establish that an individual has an interest in keeping bank records private from the state's warrantless search. Thus, the ACLU agrees with Defendant that this court need not call into doubt

or overrule *Johnson* to find that Defendant in this case had a constitutionally protectable privacy interest in the bank records at issue. Pet's Br 37-40.

1. Oregon and Federal Law Support a Privacy Interest in Bank Records

This court's case law dating back to 1896, the Federal Right to Financial Privacy Act of 1978, Oregon public policy as found by the Court of Appeals in a wrongful discharge case, and ORS 192.586 give this court ample basis to determine that an individual has a constitutionally protectable privacy interest in his bank records.

Since at least 1896, this court has recognized the inherent privacy and confidentiality in the relationship between a bank depositor and her bank. In *State v. Security Savings Company*, 28 Or 410, 421, 43 P 162, 165 (1896), this court reversed the trial court's denial of the bank's demurrer to the state's bill of discovery to produce names and account information for depositors pursuant to the state's investigation of whether the bank held property that had escheated to state. In its analysis, this court stated that the governor "has no authority to * * * require the bank not only to disclose, but to make a public record of, the confidential and private relations existing between it and its depositors." *Id.* at 421.

Federal statutes are another source of law that supports this court's finding a privacy interest in bank records. The Federal Right to Financial Privacy Act of 1978, which Congress enacted to overrule legislatively overrule

U.S. v. Miller, 425 US 435, 98 S Ct 1619, 48 L Ed 2d 71 (1976), prohibits, with certain exceptions, the disclosure of a customer's records by a financial institution to a government authority without the customer's consent. 12 USC § 3401 *et seq.*; *see Miller*, 425 US at 440-43 (holding that a bank depositor has no legitimate expectation of privacy in his bank records because checks are not confidential communications and documents at issue were voluntarily conveyed to bank with risk bank would reveal them to government). Additionally, the Gramm-Leach-Bliley Act, 15 USC § 6801, governs financial institutions' obligations of security, integrity, and confidentiality of customer information.

Indeed, the Court of Appeals has held that Oregon has a public policy to protect a bank's confidential customer financial information in reliance on the Federal Right to Financial Privacy Act of 1978 and other federal and state statutes. *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 377-380, 879 P2d 1288, 1294-95 (1994), *rev dismissed*, 321 Or 511 (1995). In *Banaitis*, the Court of Appeals affirmed the trial court's denial of the bank's motion for directed verdict on the plaintiff's wrongful discharge claim. 129 Or App at 373. In upholding the jury's verdict, the court held that the bank's termination of its employee for refusing to divulge confidential customer financial information was within the public duty exception to the general at-will employment rule. *Id.* at 377-80 ("Numerous statutes reflect a legislative recognition of the

important public policy of protecting from disclosure confidential commercial and financial information.").

Additionally, as Defendant points out, Oregon statutes expressly limit and delineate state access of individuals' financial records. Pet's Br at 25 (citing ORS 192.583 to 192.607). Specifically, ORS 192.586(1) provides the general rule that

> "(a) A financial institution may not provide financial records of a customer to a state or local agency.
>
> (b) A state or local agency may not request or receive from a financial institution financial records of customers."

Indeed, ORS 192.586(1) has existed in largely its current form since the 1977 Legislative Assembly enacted it, the year after the Supreme Court decided *Miller*. *See* Or Laws 1977, ch 517 § 8 (enacting ORS 192.550 *et seq*, renumbered in 2011 as ORS 192.583 *et seq*).

The Court of Appeals below rejected Defendant's argument that ORS chapter 192 demonstrated that bank records were private under Article I, section 9, of the Oregon Constitution, reasoning that the same laws that provide for confidentiality of bank records also contain an exception for a bank to disclose its customer records to the state pursuant to subpoena. *State v. Ghim*, 267 Or App 435, 441, 340 P3d 753, 756 (2014), *rev allowed* 357 Or 164 (2015); *see* ORS 192.596(1) (providing that financial institution may disclose

financial records of customer to state or local agency pursuant to lawful summons or subpoena).

But this court has never taken such an absolutist approach when analyzing whether a privacy interest exists under Article I, section 9. This court's holdings in the radio transmitter cases illustrate that principle. Under *Campbell*, the warrant requirement applies to the state's attachment of a radio transmitter to an individual's private car. 306 Or at 172. Yet under *Meredith*, no warrant requirement applies when the government attaches a radio transmitter to a vehicle that the defendant drove for work and that her employer owned. *State v. Meredith*, 337 Or 299, 307, 96 P3d 342 (2004). Thus, the exception in ORS 192.596 to the general presumption of nondisclosure in ORS 192.586 is not fatal.

Taken together, *Security Savings Company*, the Federal Right to Financial Privacy Act of 1978, Oregon public policy as identified in *Banaitis*, and ORS 192.586 are sources of law on which this court can rely in determining that Article I, section 9, protects the privacy of bank records from warrantless state scrutiny.

2. Other States Have Held That Their Constitutions Protect the Privacy of Bank Records

Other states have held that their constitutions protect the privacy of bank records. In two states, the high courts have held that their state constitutions provide citizens with a right of privacy in their bank records, such that the

warrant requirement applies to the state's seizure of bank records. *State v. Thompson*, 810 P2d 415, 418-20 (Utah 1991) (citing California Supreme Court's decision in *Burrows* and several law review articles criticizing *Miller*); *State v. Miles*, 160 Wash 2d 236, 246-252, 156 P3d 864, 869-72 (2007); *see also Burrows v. Superior Court of San Bernardino County*, 13 Cal 3d 238, 529 P2d 590 (1974) (holding that state constitution guaranteed a right of privacy against unreasonable seizure of bank records without legal process).

The *Miles* decision is most analogous here, because, similar to this court, Washington has rejected the *Katz*-"reasonable expectation of privacy" test in favor of analyzing the "privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." 156 P3d at 244 (quoting *State v. Young*, 123 Wash 2d 173, 181, 867 P2d 593 (1994)). In *Miles*, the court cited its prior case law supporting a robust privacy right and state statutes protecting the privacy of bank records. The court also discussed the sensitivity of bank records:

> "Private bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more. Little doubt exists that banking records, because of the type of information contained, are within a person's private affairs."

Id. at 246-47.

Another state has also found a state constitutional right against the unreasonable seizure of bank records, but it held that a subpoena adequately protected that right so long as the customer was notified in advance. *People v. Lamb*, 732 P2d 1216, 1221 (Colo 1987) (applying existing Colorado case law holding that a bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions; holding administrative subpoena for bank records invalid for lack of prior notice to depositor).

Other states have held that their state constitutions provide citizens a right of privacy in their bank records but, under their states' constitutions, the states did not violate a constitutional right when they obtained those bank records pursuant to a subpoena despite lack of notice of the subpoena to the depositor. *Winfield v. Division of Pari-Mutel Wagering, Dept of Bus Regulation*, 477 So 2d 544, 548 (Fla 1985); *People v. Jackson*, 116 Ill App 3d 430, 435-37, 452 NE2d 85, 89-90 (1983); *State v. McAllister*, 184 NJ 17, 32, 42, 875 A2d 866, 875, 881 (2005).

This court should decline to follow *Miller* because it is a result of the Supreme Court's "reasonable expectation of privacy" test under the Fourth Amendment, which this court has soundly rejected as the test for Article I, section 9, of the Oregon Constitution. *See Miller*, 425 US at 442 (applying reasonable expectation of privacy test); *Campbell*, 306 Or at 164 (rejecting Supreme Court's reasonable expectation of privacy test; Article I, section 9,

provides a "right" of privacy). Additionally, *Miller* wrongly focused on bank records individually and failed to consider or analyze an expectation of privacy in the aggregated data. *See* 425 US at 442-43 (noting that "checks are not confidential communications but negotiable instruments to be used in commercial transactions"). When the *Miller* court stated, for example, that financial statements and deposit slips "were exposed to [bank] employees in the ordinary course of business," and therefore not private, the court necessarily was not considering the aggregation of data presented by this case because it would be impossible for a human who saw a particular transaction one day to (1) remember the fact of the transaction let alone the details (amount, payee, date, location), and (2) associate them with past or future transactions of the customer. Thus, this court should reject the *Miller* rule.

D. Current and Historical Social Norms Establish that the People Have a Right to Be Free from Warrantless Government Scrutiny of Their Bank Records

Social norms also support the privacy of an individual's financial records, and those social norms, rooted in history, are amplified (and even more important) in today's digital world. Cases from the United States Supreme Court, cases from other jurisdictions, and law review articles have discussed issues arising from (1) the ease of collecting, storing, producing, and analyzing vast amounts of data, and (2) the requirement of entrusting third parties to

securely store an individual's confidential financial data as a necessity to participate in today's economy.

Sensitivity of bank records is nothing new. *See Miller*, 425 US at 451 (Brennan, J., dissenting) ("'it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography'" (quoting *Burrows*)). But in the digital age, those concerns are heightened. One justice of the Supreme Court recently called into question *Miller*'s holding given the reality of today's technology. *See United States v. Jones*, ___ US ___, 132 S Ct 945, 957, 181 L Ed 2d 911 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. [citing *Miller*, 425 US 435] This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.").

Modern technology presents a host of new issues with respect to the people's privacy rights and the state's proper role in regulating and policing our interactions with each other. *See, e.g.*, *State v. Combest*, 271 Or App 38, 350 P3d 222 (2015) (affirming admission of evidence police derived from using

computer software to locate and access defendant's files on his peer-to-peer network)[1]; Andrew A. Proia, *A New Approach to Digital Reader Privacy: State Regulations and Their Protection of Digital Book Data*, 88 Ind LJ 1593 (Fall 2013); Jacob M. Small, *Storing Documents in the Cloud: Toward an Evidentiary Privilege Protecting Papers and Effects Stored on the Internet*, 23 Geo Mason U Civ Rts LJ 225 (Summer 2013); Michael T.E. Kalis, *Ill Suited to the Digital Age: Fourth Amendment Exceptions and Cell Site Location Information Surveillance*, 13 U Pitt J Tech L & Pol'y 1 (Spring 2013); Jayni Foley, *Are Google Searches Private? An Originalist Interpretation of the Fourth Amendment in Online Communication Cases*, 22 Berkeley Tech LJ 447, 447-48 (2007).

Keeping up with the ever-changing digital technology can include an attorney's transferring to a client encrypted, password-protected, confidential, and privileged documents via Dropbox, storing personal photos in the cloud, paying for groceries using Google Wallet, reimbursing a colleague using PayPal, and using online banking to pay bills, shop online, and manage personal checking and savings accounts. In all of those transactions, the user employs a third party to facilitate the transaction, but does not intend to relinquish any privacy right in the data at issue.

---

[1] On July 24, 2015, this court granted the *Combest* defendant's motion for extension of time to file a petition for review. *See* Docket in case number N005411.

Here, the ACLU urges this court to consider historical and modern social norms in determining that Article I, section 9, of the Oregon Constitution protects an individual's privacy in her bank records. As discussed by Defendant, an individual contracts with a bank generally for the limited purpose of facilitating essential financial transactions. Pet's Br 30-31. The ease with which a bank stores and can produce voluminous amounts of customer data, the many details that an investigator could glean from a review of bank records, the tools now available to sort and search voluminous data, and the people's continued social norm of not disclosing financial information beyond the limited essential information necessary to conduct business today all point to a holding by this court that individuals hold a protectable privacy interest in their bank records.

IV. CONCLUSION

The ACLU asks this court to reverse the decision of the Court of Appeals and the trial court's judgment on the grounds that Defendant had a privacy interest under Article I, section 9, of the Oregon Constitution in his bank records such that the state needed a warrant, or an exception to the warrant requirement, to obtain his bank records.

DATED: August 11, 2015

PERKINS COIE LLP

By: s/Julia E. Markley
Julia E. Markley, OSB No. 000791
JMarkley@perkinscoie.com
Kristina J. Holm, OSB No. 112607
KJHolm@perkinscoie.com
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000

Attorneys for *Amicus Curiae* American Civil Liberties Union of Oregon, Inc.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

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 4,004 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Virus Scan

I certify pursuant to ORAP 9.17(5)(e) that the electronic form of the *Brief of Amicus Curiae* has been scanned for viruses and that it is virus free.

DATED: August 11, 2015

PERKINS COIE LLP

By s/Julia E. Markley

Julia E. Markley, OSB No. 000791
JMarkley@perkinscoie.com
Kristina J. Holm, OSB No. 112607
KJHolm@perkinscoie.com
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for *Amicus Curiae* American Civil Liberties Union of Oregon, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2015, I served a copy of this **AMICUS CURIAE BRIEF** via the court's electronic filing system to the email address(es) indicated below:

Ernest Lannet, OSB No. 013248
Chief Defender
Morgen E. Daniels, OSB No. 075739
Deputy Public Defender
Morgen.E.Daniels@opds.state.or.us
Office of Public Defender Services
1175 Court Street, NE
Salem, OR 97301
Telephone: 503.378.3349

Attorneys for Petitioner Denny D. Ghim

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Anna M. Joyce, OSB No. 013112
Solicitor General
Robert M. Wilsey, OSB No. 085116
Assistant Attorney General
Robert.wilsey@doj.state.or.us
400 Justice Building
1162 Court Street NE
Salem, OR 97301
Telephone: 503.378.4402

Attorneys for Respondent

DATED: August 11, 2015

PERKINS COIE LLP

By s/Julia E. Markley
Julia E. Markley, OSB 000791
JMarkley@perkinscoie.com
Kristina J. Holm, OSB No. 112607
KJHolm@perkinscoie.com
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for *Amicus Curiae* American Civil Liberties Union of Oregon, Inc.

CERTIFICATE OF FILING

I hereby certify that on August 11, 2015, I e-filed the original of this **AMICUS CURIAE BRIEF** with the State Court Administrator via the Oregon Judicial Department's Appellate e-File system to:

State Court Administrator
Appellate Court Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

DATED: August 11, 2015

PERKINS COIE LLP

By s/Julia E. Markley
Julia E. Markley, OSB No. 000791
JMarkley@perkinscoie.com
Kristina J. Holm, OSB No. 112607
KJHolm@perkinscoie.com
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for *Amicus Curiae* American Civil Liberties Union of Oregon, Inc.