IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, vs. TAMERA LOUISE MEREDITH, Defendant-Appellant, Petitioner on Review.	Douglas County Circuit Court CA No. 98CF2120FE Appellate Court No. A106960 SC No. S50173

AMICUS CURIAE ACLU FOUNDATION OF OREGON, INC.'S BRIEF ON THE MERITS

On review of the *en banc* decision of the Court of Appeals on appeal from the judgment of the Circuit Court for Douglas County, Honorable Joan G. Seitz, Judge

Opinion Filed: October 30, 2002
Author of Opinion: Edmonds, J.
Dissenting Judges: Kistler, Armstrong, Wollheim, and Brewer, J.J.

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INTRODUCTION

The ACLU Foundation of Oregon, Inc. ("ACLU") submits this brief as *amicus curiae* to address the application of Article I, section 9, of the Oregon Constitution to the facts of this case, and to urge reversal of the Court of Appeals' decision in *State v. Meredith*, 184 Or App 523, 56 P3d 943 (2002) (*en banc*).

QUESTIONS PRESENTED FOR REVIEW AND PROPOSED RULE OF LAW

Does Article I, section 9, of the Oregon Constitution preclude law enforcement from surreptitiously attaching and monitoring a radio transmitter on a government employee's work vehicle without first obtaining a warrant? *Proposed Rule:* The surreptitious attaching and monitoring by law enforcement of a radio transmitter on a vehicle to conduct surveillance of an individual, whether or not that individual is a government employee, is a search within the meaning of Article I, section 9, of the Oregon Constitution. Accordingly, law enforcement generally must obtain a valid warrant before attaching and monitoring a radio transmitter to a vehicle to conduct surveillance.

NATURE OF THE ACTION BELOW

In this criminal proceeding, defendant was indicted on 35 counts of first-degree arson in Douglas County Circuit Court. Before trial, defendant moved to suppress evidence that law enforcement obtained from monitoring a radio transmitter that law enforcement had attached to her work vehicle. Specifically, she contended that the law enforcement officers' monitoring of the radio transmitter to conduct surveillance on her constituted an invasion of a privacy interest protected by Article I, section 9, of the Oregon Constitution. The trial court denied the motion to suppress, and a jury convicted defendant of two counts of first-degree arson. Defendant appealed, and the Court of Appeals affirmed in a split, *en banc* decision. This Court allowed defendant's petition for review.

STATEMENT OF MATERIAL FACTS

The ACLU takes the following facts from the Court of Appeals' opinion and the record:

> "Defendant was employed as a fire prevention technician by the United States Forest Service (USFS). Her duties required her to travel in her employer's vehicle in the Tiller District of the Umpqua National Forest. In August 1998, [USFS law enforcement agents were assigned to investigate fires that were being set in and around the Tiller District. At their request,] the USFS district ranger in charge of the Tiller District authorized USFS law enforcement agents to attach an electronic transmitter to the undercarriage of a USFS pickup truck that defendant customarily used during her work shift. The following day, USFS law enforcement agents monitored the location of the vehicle within the Tiller District from an airplane through the transmissions from the transmitter as defendant traveled. The signals indicated when the pickup was moving and when it was stopped. By monitoring the strength or weakness of the signal, agents were able to pinpoint the truck's location and keep it in sight, except when forest cover obscured their view.
>
> "At one point, defendant radioed to the ranger station that she was returning to headquarters. Then, as the agents monitored her vehicle, they saw the pickup stop and back up a road. The pickup went onto a logging spur and into a grassy open area. The agents observed defendant get out of the truck and squat down for about 20 seconds, 'do something' with her hands, get back into the pickup, and drive away from the area. One of the agents immediately saw a flash of orange at the exact spot where defendant had been, and within seconds, he saw smoke rising from the spot and a widening dark patch on the ground."

Meredith, 184 Or App at 525.

SUMMARY OF ARGUMENT

At issue in this case is the scope of an individual's right of privacy against the government under Article I, section 9, of the Oregon Constitution. Article I, section 9, of the Oregon Constitution provides:

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

Specifically, the issue is whether the law enforcement arm of defendant's public employer can attach and monitor a radio transmitter to defendant's work vehicle for the purposes of law enforcement without first obtaining a valid warrant.

This Court held in *State v. Campbell*, 306 Or 157, 172-73, 759 P2d 1040 (1988), that government's monitoring of a private automobile for the purposes of law enforcement is a search under Article I, section 9. Contrary to the Court of Appeals' majority opinion, the reasoning in *Campbell* applies equally to this case. As in *Campbell*, the government here was unable to follow defendant without using the radio transmitter. As in *Campbell*, the government here tracked defendant on public roads. And, as in *Campbell*, defendant here was unaware that she was being tracked.

None of the reasons advanced by the Court of Appeals' majority is sufficient to distinguish *Campbell* from this case. First, the facts that defendant was at work and was employed by a public entity are largely irrelevant, as the monitoring of the radio transmitter was done by law enforcement for law enforcement purposes, not by her employer *qua* employer for work-related purposes. Under this Court's case law, inspections for law enforcement purposes generally require a warrant. Second, the fact that defendant did not own the truck is not of consequence, as she was legitimately in possession and control of the truck while she was being monitored. That is sufficient for her to have a constitutionally protected interest in it.

Alternatively, a public employer may not search its employees without individualized suspicion and a properly authorized administrative program, neither of which the state established here. Accordingly, defendant should have prevailed on her motion to suppress. *See* ORS 133.693(4) (requiring state to prove validity of warrantless search).

Radio transmitters and other surveillance technologies carry the specter of George Orwell's Big Brother:

> "Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC. In the far distance a helicopter skimmed down between the

> roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. The patrols did not matter, however. Only the Thought Police mattered."

George Orwell, *1984*, 4 (1949).

The capacity of a radio transmitter to intrude on the people's privacy mandates that the government simply obtain a warrant before using radio transmitters for surveillance. *See* ORS 133.619 (setting out requirements for execution of warrants for radio transmitters). Because the government had no warrant, and because no exception to the warrant requirement applies, the trial court should have suppressed the evidence derived from the radio transmitter.

ARGUMENT

I. Legal Standards

A. Article I, Section 9, Applies to This Case

At the outset, the ACLU notes that there is no dispute that Article I, section 9, governs the admissibility of evidence in this case. Under *State v. Davis*, 313 Or 246, 254, 834 P2d 1008 (1992), the admission of evidence in a state criminal proceeding, whether that evidence is obtained by state or by federal law enforcement officials, is governed by Article I, section 9. *See also Meredith*, 184 Or App at 532 & n 1 (Kistler, J., dissenting) (noting that, although federal law enforcement officials acted consistently with Fourth Amendment, Article I, section 9, governs admissibility of evidence in state criminal prosecutions).

At issue in *Davis* was whether Article I, section 9, governs the admissibility of evidence obtained by Mississippi state law enforcement officials in Mississippi when introduced in Oregon state criminal proceedings. 313 Or at 247. In holding that Article I, section 9, indeed governed, the *Davis* court explained that the Oregon Constitution protects individuals appearing in Oregon courts:

> "If the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the individual by Article I, section 9, of the Oregon Constitution. It does not matter *where* that

> evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply."

Davis, 313 Or at 254 (italics in original; underlining added). Consistent with *Davis*, this Court should expressly hold that Article I, section 9, governs the admissibility of evidence in a state criminal proceeding where the evidence was obtained by federal law enforcement.

B. Article I, Section 9, Protects Privacy and Possessory Interests

The analysis under Article I, section 9, begins with a determination of whether the police conduct at issue was a search or a seizure. *State v. Nagel*, 320 Or 24, 28, 880 P2d 451 (1994). Only if a search or seizure has occurred will a court consider whether that search was reasonable under the circumstances. *Id.* at 28-29.

Whether the government's conduct is a search for Article I, section 9 purposes "is defined by the general privacy interest of 'the people' rather than by the privacy interests of particular individuals." *State v. Tanner*, 304 Or 312, 320, 745 P2d 757 (1987). The general right of privacy "is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *State v. Wacker*, 317 Or 419, 425, 856 P2d 1029 (1993) (quoting *Campbell*, 306 Or at 164) (emphasis in *Wacker* and *Campbell*). As this Court has noted, "if subjective expectations were determinative of privacy rights, 'the government could diminish each person's subjective expectations of privacy merely by announcing half-hourly on television * * * that we were all forthwith being placed under comprehensive electronic surveillance.'" *Tanner*, 304 Or at 321-22 n 7 (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn L Rev 349, 384 (1974)). "Whether or not a particular person expects to be free from observation, therefore, is not relevant to an analysis under the Oregon Constitution." *Wacker*, 317 Or at 425 n 11.

Article I, section 9, protects privacy and possessory interests. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). Physical invasion of private space, such as a home, is a violation of the general right of privacy. *Tanner*, 304 Or at 320. Under this Court's

jurisprudence, whether a non-physical invasion is a search under Article I, section 9, depends largely on the nature of the government's technique used to obtain the information.

The more invasive the technique, the more likely a search has occurred. For example, in *Wacker*, the court held that the use of a starlight scope, which magnifies images and enables the user to see better in the dark, is not a search when used from a lawful vantage point 29 feet away. 317 Or at 426-27. In *State v. Ainsworth*, 310 Or 613, 617-18, 901 P2d 749 (1990), the court held that purposive aerial surveillance was not a search. In *State v. Smith*, 327 Or 366, 373-74, 963 P2d 642 (1998), the court held that a dog sniff was not a search because the dog did not gather information from the interior of a private space. *Cf. State v. Fleetwood*, 331 Or 511, 529-30, 16 P3d 503 (2000) (affirming on statutory grounds suppression of evidence obtained through government informant's use of body wire recording device). And, of course, in *Campbell*, the court held that use of a radio transmitter to monitor a private vehicle on public roadways was a search. 306 Or at 172.

Absent an exception, warrantless searches are per se unreasonable. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983). Evidence obtained through a warrantless search must be suppressed. *State v. McMurphy*, 291 Or 782, 785, 635 P2d 372 (1981). Suppression is both an Article I, section 9, *right* as well as a *remedy* for the government's violation of that right. *Armatta v. Kitzhaber*, 327 Or 250, 282, 959 P2d 49 (1998). *Compare Terry v. Ohio*, 392 US 1, 12, 88 S Ct 1868, 20 L Ed 2d 889 (1968) (stating that major rationale for exclusionary rule under Fourth Amendment is to deter unlawful police conduct), *with State v. McMurphy*, 291 Or 782, 785, 635 P2d 372 (1981) (stating that, although deterring police misconduct may be a "desired consequence, [it] is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence").

II. This Court's Decision in *State v. Campbell* Controls the Analysis

A. *State v. Campbell*

Campbell directly confronted the issue of whether law enforcement's use of a radio transmitter attached to an automobile was a search under Article I, section 9. 306 Or at 159.

Campbell held that it was. *Id.* at 172. Because of the importance of *Campbell* to this case, the ACLU discusses the facts and analysis in *Campbell* in some detail.

The police in *Campbell* suspected that the defendant was committing residential burglaries in a rural area. To verify their suspicion, police officers attempted unsuccessfully to follow the defendant's automobile on several occasions. Following in-house criteria for use of radio transmitters, the officers determined that surveillance via radio transmitters (also known as "bird dogs" or "beepers") was appropriate. The officers surreptitiously attached a radio transmitter to the defendant's private automobile while it was parked in a public parking lot. After eight days of monitoring the vehicle, the police from an airplane tracked the vehicle some 40 miles away to a rural area. There, they observed evidence suggesting that the defendant burglarized a home. The defendant consequently was indicted for burglary. On the defendant's motion, the trial court suppressed the evidence derived from the use of the radio transmitter. *Campbell*, 306 Or at 159-61. The Court of Appeals affirmed in a 2-1 decision. *State v. Campbell*, 87 Or App 415, 420, 742 P2d 683 (1987).

On review, this Court affirmed the trial court's suppression order, reasoning that the use of a radio transmitter was a search under Article I, section 9, for which the police did not have a warrant. *Id.* at 172-73. In holding that the use of a radio transmitter was a search, the *Campbell* court expressly rejected the contrary outcome of two United States Supreme Court decisions interpreting the Fourth Amendment. *United States v. Karo*, 468 US 705, 716, 104 S Ct 3296, 82 L Ed 2d (1984); *United States v. Knotts*, 460 US 276, 285, 103 S Ct 1081, 75 L Ed 2d 530 (1983). *Knotts* and *Karo* collectively hold that the government's surreptitious use of a radio transmitter is not a search unless the transmitter enters a home. Specifically, in *Knotts*, the Court held that law enforcement's monitoring of suspected drug dealers' vehicle over public highways via a beeper attached to a chloroform container did not invade any legitimate expectation of privacy and, thus, was not a search under the Fourth Amendment. 460 US at 284-85. The *Knotts* Court reasoned that because a radio transmitter discloses only what a member of the public could legitimately have observed, the radio transmitter invades no privacy interests. *Id.* at 281-82 ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to

another."). The next year, in *Karo*, the Court decided that the warrantless use of a beeper to monitor the location of a chemical container in a private home is an unconstitutional search. 468 US at 714-16 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.").

Knotts and *Karo* were decided under the United States Supreme Court's modern interpretation of the Fourth Amendment. Until 1967, the Court had defined a Fourth Amendment search as a physical trespass to a constitutionally protected area, *viz.*, persons, houses, papers, and effects. *Olmstead v. United States*, 277 US 438, 465-66, 48 S Ct 564, 72 L Ed 944 (1928). In 1967, the Court decided *Katz v. United States*, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967), and abandoned that trespass-based interpretation of the Fourth Amendment in holding that placing wire taps on a public phone booth was a search: "For the Fourth Amendment protects people, not places. * * * [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

As stated above, *Campbell* squarely rejected the rules and the reasoning in *Knotts* and *Karo*. First, *Campbell* rejected the reasoning that because a radio transmitter discloses only what a member of the public could legitimately have observed, the radio transmitter invades no privacy interests of the defendant. The *Campbell* court stated that such reasoning was factually unsound, as the police in *Knotts*, *Karo*, and *Campbell* had found it impossible to follow the defendant without using the radio transmitter. 306 Or at 165-66. The *Campbell* court also rejected the legal argument that surveillance that could have been conducted without technology (*e.g.*, by old-fashioned "tailing") is constitutionally permissible when conducted with technology. *Id.* at 166-67. The court explained that Article I, section 9, forbids certain *acts* of the government, not the *results* of those acts. *Id.* at 166.

Second, *Campbell* expressly rejected the narrow *Knotts/Karo* rule that government's monitoring of a radio transmitter is not a search unless it enters a home. 306 Or at 169-170 ("Using a transmitter is either a search or it is not. Whether using the transmitter is a search

cannot depend upon the fortuity of where the transmitter happens to be taken by the person under observation."). The *Campbell* court ruled that the government's monitoring of a radio transmitter was a search under Article I, section 9, even if the radio transmitter remained on public roads during the monitoring. *Id.* at 172. The court explained that the secrecy and continuity characteristics of tracking with a radio transmitter resulted in the people's inability to ascertain when they were being scrutinized and when they were not being scrutinized. *Id.* at 172. This, the *Campbell* court held, is nothing short of "a staggering limitation upon personal freedom." *Id.*

> "Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny, as the facts of this case demonstrate. The limitation is made more substantial by the fact that the radio transmitter is much more difficult to detect than would-be observers who must rely upon the sense of sight. Without an ongoing, meticulous examination of one's possessions, one can never be sure that one's location is not being monitored by means of a radio transmitter. Thus, individuals must more readily assume that they are the objects of government scrutiny. Professor Amsterdam and Justice Harlan, among others, have observed that freedom may be impaired as much, if not more so, by the threat of scrutiny as by the fact of scrutiny. *See United States v. White*, [401 US 745, 787-89, 91 S Ct 1122, 28 L Ed 2d 453 (1971)] (Harlan, J., dissenting); Amsterdam, *supra*, at 402-03.
>
> "But if the state's position in this case [that use of a radio transmitter does not constitute a search] is correct, no movement, no location and no conversation in a 'public place' would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation upon personal freedom. We could not be faithful to the principles underlying Article I, section 9, and conclude that such forms of surveillance were not searches.
>
> "We hold that the use of the radio transmitter to locate defendant's automobile was a search under Article I, section 9, of the Oregon Constitution. Because the police did not have a warrant to use the transmitter, and because no exigency obviated the need to obtain a warrant, use of the transmitter violated defendant's rights under Article I, section 9. Accordingly, the circuit court properly suppressed all evidence obtained through use of the device."

Id. at 172-73 (footnote omitted).

B. The Two Reasons on Which the *Campbell* Decision Rests Apply With Equal Force to This Case

The Court of Appeals' majority failed to recognize the underpinnings of *Campbell* when it ruled that the government's use of a radio transmitter here was not a search under Article I, section 9. The reasons underlying the decision in *Campbell* also apply to this case, and those reasons dictate that the government's conduct in this case, contrary to the Court of Appeals' holding, was a search.

First, like the officers in *Campbell* (and in *Knotts* and *Karo*, for that matter), the officers here could not have tracked defendant without the radio transmitter, as "forest cover obscured their view" at times. *Meredith*, 184 Or App at 525. Although the record does not disclose whether law enforcement previously had attempted to track defendant without technology devices, the fact is that the evidence at issue here was discovered through use of the radio transmitter.

Second, the nature of the scrutiny here – surreptitious monitoring a radio transmitter – is identical to the nature of the scrutiny in *Campbell*. Defendant in this case was not aware that a radio transmitter had been attached to her work truck. Therefore, she had no way to ascertain when the government was scrutinizing her and when the government was not scrutinizing her. That is exactly what the *Campbell* court termed "a staggering limitation upon personal freedom." 306 Or at 172. In framing the issue as "whether defendant's location in a USFS vehicle while she was *working* on public land carries with it a cognizable privacy interest under Article I, section 9," the Court of Appeals' majority failed to consider, as *Campbell* requires, the nature of the technique that law enforcement used to locate defendant in the first place. *Meredith*, 184 Or App at 530 (emphasis in original).

Additionally, the fact that defendant remained on public land during the government's monitoring of her work vehicle – which is key to the Court of Appeals' majority's analysis – is no different than *Campbell*, where the police tracked the defendant while he drove on public roads. *Campbell*, 306 Or at 161. Indeed, *Campbell* expressly rejected the state's *Knotts/Karo*-based argument that, because the police followed the defendant on public roads

and highways, using a radio transmitter was not a search. 306 Or at 169-170. *See also Meredith*, 184 Or App at 535 (Kistler, J., dissenting) (noting that majority embraces reasoning in *Knotts*, rejected by *Campbell*, that an individual's location on a public highway is not truly private).

As *Campbell* recognizes, a radio transmitter has special characteristics of duration, continuity, and secrecy not shared by ordinary physical searches. *See* Note, *Tracking* Katz: *Beepers, Privacy and the Fourth Amendment*, 86 Yale LJ 1461, 1463 (1977) (so stating). It has the capacity to obtain information about location and movement despite their effective concealment from the public. *Id.* at 1492. Indeed, it is precisely to exploit this capacity that police use a radio transmitter. "It may be that a person's location and movements are more frequently matters accessible to the public than are his conversations, but [a person] should be as free to preserve the privacy of the one as of the other, without fear that [the person's] control over [the person's] own privacy will be secretly wrested from [him or her] by an electronic device." *Id.* at 1508. Because of the invasiveness of radio transmitters, the government should be required to obtain a warrant to ensure that adequate cause exists for attaching and monitoring a radio transmitter.

C. No Other Reason Justifies Distinguishing *Campbell*

The Court of Appeals' majority and the state advance several reasons for distinguishing *Campbell* from this case. First, the Court of Appeals' majority and the state rely heavily on the fact that defendant was on the job while being monitored. Second, they note that defendant's employer, not defendant, owned the truck on which law enforcement attached the radio transmitter. Finally, the Court of Appeals' majority emphasized that law enforcement monitored the transmitter here only for one day, rather than the days-long monitoring in *Campbell*. None of those reasons supports the Court of Appeals' and the state's conclusion that *Campbell* is distinguishable from this case.

1. The fact that defendant was at work is irrelevant

The Court of Appeals' majority and the state make much of the facts that defendant was at work during the monitoring of the radio transmitter and that "her employer was

entitled to know where its vehicle was at all times during the work day." *Meredith*, 184 Or App at 530. Accordingly, they reason, defendant had reduced privacy interests such that use of the radio transmitter here was not a search. The fact that defendant was at work, however, is largely irrelevant because defendant's employer did not attach and monitor the transmitter for employment-related purposes. Rather, USFS special agents attached and monitored the transmitter for law enforcement purposes.

When an inspection is conducted for law enforcement purposes and the offender faces criminal sanctions as a consequence of the inspection, then officers generally must obtain a warrant. *State v. Boyanovsky*, 304 Or 131, 134, 743 P2d 711 (1987) (plurality); *Nelson v. Lane County*, 304 Or 97, 101, 743 P2d 692 (1987) (plurality); *see also State v. Atkinson*, 298 Or 1, 7-8, 688 P2d 832 (1984) (stating that police inventory of impounded automobile for purposes of protection of private property and police safety can be constitutional, if certain conditions are met). In *Boyanovsky* and *Nelson*, the issue was the legality of sobriety roadblocks (that is, roadblocks conducted for the purposes of discovering persons driving while under the influence of intoxicants) under Article I, section 9. Five members of the court agreed that sobriety roadblocks for the purpose of prosecuting criminal violations were unconstitutional. *Boyanovsky*, 304 Or at 134; *id.* at 137-38 (Gillette, J., specially concurring); *see also Nelson*, 304 Or at 115 n 2 (summarizing justices' positions in *Nelson* and *Boyanovsky*). According to the plurality opinions, factors showing that an inspection is for law enforcement purposes include the facts that an individual is arrested during the inspection and that law enforcement intended to arrest and prosecute individuals as a result of the inspection. *Boyanovsky*, 304 Or at 134; *see also Nelson*, 304 Or at 101 (inferring that roadblock was inspection for law enforcement purposes, although there was no direct evidence in record concerning purposes of roadblock).

Even federal law distinguishes between searches at work for law enforcement purposes and searches at work for work-related purposes. *O'Connor v. Ortega*, 480 US 709, 718, 107 S Ct 1492, 94 L Ed 2d 714 (1987). In *O'Connor*, the Court held that a public employer need not have either probable cause or a warrant to conduct a noninvestigatory

work-related search. Instead, such a search would be judged under the test of "reasonableness under the circumstances." *Id.* at 725-26. The Court explained, "While police, and even administrative law enforcement personnel, conduct searches for the primary purposes of obtaining evidence for use in criminal and other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. * * * * Imposing unwieldy warrant procedures in such cases * * * is simply unreasonable." *Id.* at 721-22. Notably, all nine members of the *O'Connor* Court would have found that the defendant, a publicly employed physician, had a reasonable expectation of privacy in his desk and file cabinets in his office, and five members found that he had a reasonable expectation of privacy in his office. *Id.* at 718 (summarizing votes).

USFS law enforcement agents monitored the radio transmitter here in the course of their investigation of fires that had been set in the Tiller District. As a consequence of their monitoring, defendant was indicted for and convicted of arson. Under *Boyanovsky* and *Nelson*, the monitoring of the radio transmitter must be treated as an inspection for law enforcement purposes.[1] Accordingly, the facts that defendant was at work and that she was publicly employed make little, if any difference to the analysis. If, for example, a private employer had employed defendant and had authorized the government to attach and monitor a radio transmitter on defendant's work truck, law enforcement's conduct here still would be judged under Article I, section 9, because defendant faced criminal sanctions as a result of the monitoring. A hypothetical private employer's "consent" to police to invade a constitutionally protected interest of defendant would have been wholly ineffective.

To the extent that the record does not contain direct evidence that the purpose of the search was law enforcement, the fact that defendant actually was criminally prosecuted with

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[1] The ACLU expresses no opinion here on the *Nelson* plurality's discussion of an "administrative" exception to the warrant requirement of Article I, section 9. 304 Or at 104-05. The existence and scope of any "administrative" exception is not a question presented by this case. *Cf. Weber v. Oakridge School Dist. 76*, 184 Or App 415, 56 P3d 504 (2002), *rev den* 335 Or 422, 69 P3d 1233 (2003) (holding that, on record before the court, random drug testing urinalysis of public high school students was a constitutional "administrative" search).

evidence obtained from the USFS agents' monitoring of the radio transmitter supports the inference that the monitoring was for law enforcement purposes. *See Nelson*, 304 Or at 101 (inferring that plaintiff would have faced criminal prosecution and analyzing sobriety roadblock as law enforcement search under Article I, section 9).[2]

2. The fact that defendant's employer, and not defendant, owned the truck to which the radio transmitter was attached is of no consequence

The Court of Appeals' majority and the state emphasize that defendant's employer, not defendant, owned the truck to which the radio transmitter was attached. *See Meredith*, 184 Or App at 528 ("Here, unlike in *Campbell*, there was no physical invasion or trespass of defendant's property interests."); State's Br. in Ct. of App. at 5 ("[T]he truck defendant drove did not belong to her; the law enforcement officers had consent from the truck's owners to attach the tracking device, and they committed no trespass by doing so."). Under this Court's precedent, however, the fact that the defendant did not own a searched or seized automobile is not dispositive of whether the government invaded a protected interest of the defendant. *State v. Herrin*, 323 Or 188, 192-93, 915 P2d 953 (1996); *State v. Hoover*, 219 Or 288, 296, 347 P2d 69 (1959). As long as the defendant was legitimately in possession and control of the searched vehicle at the time of the search, the defendant had a constitutionally protected interest against warrantless searches. *Herrin*, 323 Or at 192-93; *Hoover*, 219 Or at 296.

Herrin and *Hoover* are on point. In *Herrin*, the court held that the defendant, who had "told the police that he was buying the automobile" that the police had searched, had a

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[2] Moreover, any evidentiary deficiency concerning the purpose of the surveillance should be held against the state, as it is the state's burden to prove the validity of a warrantless search. ORS 133.693(4); *State v. Tucker*, 330 Or 85, 90-91, 907 P2d 182 (2000). In *Tucker*, this court held that a criminal defendant need not assert a privacy or possessory interest to prevail on the defendant's motion to suppress evidence discovered through a warrantless search. 330 Or at 90. In that case, the defendant had moved to suppress a gun found in a camera case during a warrantless search of an automobile in which the defendant had been riding as a passenger. *Id.* at 88. Notably, the *Tucker* court did not reach the state's constitutional argument that a passenger in an automobile has no protected privacy or possessory interest in the automobile or its contents. *Id.* at 88-89. Applying *Tucker* to this case, to the extent that this record contains insufficient evidence to decide the constitutional issue of whether the use of a radio transmitter invaded a protected interest of defendant, this Court should hold that the state failed to carry its statutory burden.

protected privacy interest in the automobile. 323 Or at 192-93. The *Herrin* court reasoned that, as defendant was driving the vehicle at the time the police stopped it, the defendant was exercising control over and had the right to control the vehicle searched. *Id.* at 193. Therefore, the court concluded, the "[d]efendant's connection with the automobile is sufficient to support a privacy interest in him for the purpose of search and seizure law." *Id.* Similarly, in *Hoover*, the court held that the defendant, who was driving a borrowed vehicle, was a bailee with "an interest of sufficient substance to fall within the constitutional protection." 219 Or at 296.

Furthermore, case law shows that an employer's loan of a company car to an employee creates a bailor-bailee relationship, such that the employee has "special ownership" in the vehicle. *Bird v. Central Manufacturers Mutual Insurance Company*, 168 Or 1, 6, 120 P2d 753 (1942); *see also Kantola v. Lovell Auto Co.*, 157 Or 534, 538, 72 P2d 61 (1937) (defining bailment as "a delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished"). Although the *Bird* decision involved insurance coverage issues, not search and seizure issues, the common law concepts of bailment inform the decision of this case. *See State v. Cook*, 332 Or 601, 607-08, 34 P3d 156 (2001) (stating that property law is relevant, though not conclusive, in deciding Article I, section 9, issues).

In cases involving searches of effects other than automobiles, the fact that the defendant does not legally own the effect does not preclude a finding that the defendant has a constitutionally protected interest in the effect. For example, in *Tanner*, the court held that a person who entrusts goods to another for storage in the other's home has a privacy interest against an unlawful search that discovers the goods. 304 Or at 323. As another example, in *State v. Morton*, 326 Or 466, 469-70, 953 P2d 374 (1998), the court held that the defendant had a protected interest in a bindle seized by the police, although she had "denied vehemently any ownership interest in or knowledge of" the bindle, as there was no question that she possessed it moments before the police seized it. *Accord Cook*, 332 Or at 609 (holding that defendant's disclaimer of ownership did not, under the circumstances, relinquish defendant's constitutionally protected privacy and possessory interest in duffel bag).

In this case, the facts show that defendant was legitimately in possession and control of her employer's work vehicle. The truck at issue had been assigned to defendant for her use during her entire shift. See Defendant's Opening Brief in Court of Appeals at 4 and citations therein. Although it was theoretically possible for other USFS employees to drive the truck assigned to defendant during defendant's working hours, only defendant drove the truck during her shift. *Id.* Defendant kept personal belongings in the truck, and at times would leave her belongings in the truck overnight, with the expectation that they would be there the next day. *Id.* Defendant was free to drive wherever her duties took her. *Id.* Because she was legitimately in possession and control of her truck when law enforcement was monitoring her truck, she had constitutionally protected interests in it. Such interests are indistinguishable from the interests that the *Campbell* Court held were invaded by law enforcement's monitoring of a radio transmitter.

3. The actual duration of the monitoring is not important

The Court of Appeals' majority suggests that the difference between the government's monitoring of the radio transmitter in this case (one day) and the *Campbell* case (eight days) is significant. *See Meredith*, 184 Or App at 530 (emphasizing duration of monitoring in *Campbell*). The relevant issue, however, is that the radio transmitter in both cases had the *capability* of round-the-clock, days-long surveillance. *See Campbell*, 306 Or at 172 ("Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny[.]"). The fortuity that law enforcement was able to obtain the evidence that they sought in a single day does not affect the objectionable nature of the scrutiny.

D. Law Enforcement Should Obtain a Warrant Before Conducting Surveillance With a Radio Transmitter

The ACLU is not arguing here that the government always should be precluded from surreptitiously monitoring a radio transmitter when conducting surveillance. The ACLU's position simply is that the government must obtain a valid warrant before engaging in such surveillance. *See* ORS 133.545 (requiring probable cause for issuance of warrant);

ORS 133.619 (setting out requirements for execution of warrant authorizing "mobile tracking device"); *see also* ORS 133.617 (defining "mobile tracking device" as "an electronic or mechanical device which permits the tracking of the movement of a person or object"). As the court explained in *Poddar v. Department of Revenue*, 328 Or 552, 562, 983 P2d 527 (1999), Article I, section 9, "does not erect an absolute barrier" against a search that invades an individual's privacy interest. "Rather, it permits searches * * * that are not 'unreasonable' and, subject to certain exceptions that are not applicable here, requires that a judicial officer, rather than an executive branch officer, determine in advance that adequate factual and legal grounds justify [the search]." *Id.* at 562-63.

Not only did the government fail to obtain a warrant in this case, there is no evidence showing that the government had any basis whatsoever to suspect defendant had engaged in wrongdoing. On this record, this Court could infer that USFS law enforcement was conducting random, suspicionless searches of all USFS employees. *See* ORS 133.693(4) (requiring state to prove validity of warrantless search). And that is exactly the type of conduct against which Article I, section 9, protects. Before the government attaches a radio transmitter to a vehicle and monitors it for law enforcement purposes, Article I, section 9, merely requires the government to meet the factual and legal standards for the issuance of a warrant.

USFS's consent was insufficient to justify the use of the radio transmitter. Although the Court of Appeals' dissent stated that USFS's consent to attach the transmitter meant that the government did not invade defendant's "property" interest, the ACLU notes that the cases discussed in Part II.C.2 above show that an employee who is legitimately in possession and control of the company vehicle still has a constitutionally protected interest (whether labeled "property" or "privacy") against an unreasonable search or seizure of the vehicle. *Meredith*, 184 Or App at 536 n 3. Moreover, as the dissent correctly pointed out, if "defendant has a right of privacy against USFS's placing a monitoring device on her work truck, allowing the USFS to consent to that act would vitiate that privacy right." *Id.* at 536. Because no exception to the warrant requirement applies, the search was unreasonable under Article I, section 9. Any evidence derived from the search must be suppressed.

III. Alternatively, Individualized Suspicion and a Properly Authorized Administrative Program Are at Least Required

Even if the purpose of this search was not for law enforcement and this case is analyzed as a public employer's right to search its employees for work-related purposes, defendant's Article I, section 9, rights still were violated. That is because a public employer may not search its employees without individualized suspicion and a properly authorized administrative program. *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 83, 843 P2d 409 (1992). In this case, the state failed to show that USFS met either requirement. *See* ORS 133.693(4) (requiring state to prove validity of warrantless search); *State v. Tucker*, 330 Or 85, 90-91, 907 P2d 182 (2000) (same).

In *AFSCME Local 2623*, the court upheld the administrative rules of the Department of Corrections (the "Department") that permit the Department to ask employees to submit, upon individualized suspicion, to a search of their person and possessions for unauthorized property or contraband. 315 Or at 76. The court first ruled that the rules were within the Department's statutory authority to provide a secure and healthy environment inside prisons. *Id.* at 81-82. Turning to the constitutional issue, the court held that the rules "more than adequately rein in executive discretion by establishing a fully described administrative program that is triggered by individualized suspicion." *Id.* at 83; *see also State v. Atkinson*, 298 Or 1, 10, 688 P2d 832 (1984) (upholding police's ability to inventory contents of lawfully impounded automobile when conducted pursuant to properly authorized administrative program). Accordingly, the *AFSCME Local 2623* court upheld the Department's rules against a facial Article I, section 9, challenge.

The record does not contain any evidence showing that USFS specifically suspected that defendant had committed or was about to commit arson or any other wrongdoing. Neither did the state introduce any evidence showing that USFS had a properly authorized administrative program to attach to and monitor radio transmitters on its employees' work vehicles. *Cf. Campbell*, 306 Or at 160 (noting that police had attached transmitter to defendant's vehicle pursuant to "in-house criteria," including whether defendant was a

suspected active criminal and whether ordinary means to follow defendant had failed). Whether a public employer gives its employees adequate notice of possible surveillance techniques could be relevant to determining whether the executive has adequately reined in its discretion. *See Meredith*, 184 Or App at 534 (Kistler, J., dissenting) ("And the fact that a government employer tells its employees in advance that it will be monitoring their use of the office computers or phones can be an important factor in the analysis.").[3] On this record, therefore, USFS violated defendant's Article I, section 9, rights by attaching a radio transmitter to her work vehicle and monitoring it.

As the Court of Appeals' dissent noted, Oregonians do not give up their constitutional right to be free from unreasonable searches and seizures just because they happen to be government employees. *Meredith*, 184 Or App at 534 (Kistler, J., dissenting) (citing *AFSCME Local 2623*, 315 Or 74). A government employer may not "place a hidden bug in the office phones[,] surreptitiously monitor an employee's use of e-mail," or "secretly put a camera in the company bathroom" without implicating Article I, section 9. *Id.* "[G]overnment employees retain their right to be free from unreasonable searches and seizures in the workplace." *Id.* Defendant's public employer violated her right to be free from unreasonable scrutiny when it attached a radio transmitter to her work truck and monitored it.

IV. Advancing Technologies of Surveillance Underscore the Importance of the Article I, Section 9, Right

This case highlights the intersection of Article I, section 9, with the current lightning-fast advances in the technologies of surveillance. *See Olmstead*, 277 US at 473 (Brandeis, J., dissenting) ("Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."). Video surveillance cameras, face recognition software, iris scans, keystroke identification software, and cellular phone location technology are just a few examples of newer technologies with the capability for continuous surveillance and data-

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[3] As discussed above, if this Court analyzes the issue as a search for law enforcement purposes, as the ACLU urges, then this Court need not consider whether a public employer *qua* public employer can attach to and monitor a radio transmitter on its employees' work vehicles consistent with Article I, section 9.

gathering. *See also Kyllo v. United States*, 533 US 27, 121 S Ct 2038, 150 L Ed 2d 94 (2001) (holding that government's use of thermal-imaging device to detect relative amounts of heat within home was search under Fourth Amendment and unreasonable without warrant). Commentators have particularly focused on cellular phone location technology as a real threat of an Orwellian surveillance society. *See* 47 CFR § 20.18(h) (requiring cellular telephone companies to install technologies in cellular telephones capable of locating origination of calls to within 50 meters for 67 percent of calls and to within 150 meters for 95 percent of calls); Note, *Lost? The Government Knows Where You Are: Cellular Telephone Call Location Technology and the Expectation of Privacy*, 10 Stan L & Pol'y Rev 103, 104 (1998) ("The cellular telephone call location technology now mandated by the FCC will turn each of the more than fifty million cell phones in the United States into a tracking device.").

As technologies advance, existing surveillance technologies become cheaper and more accessible, perhaps prompting public and private employers to use them to monitor their employees. This Court already has ruled on the constitutionality of police use of radio transmitters, dog sniffs, starlight scopes, and aerial surveillance. As in this case, those types of techniques could come before this Court again if they are used in the workplace, in shopping malls, or at the ball park.

Ongoing surveillance techniques such as the ones described above are objectionable because they reveal private affairs over a broad span of time. Video surveillance cameras result in the discovery of a person's potentially private actions. Keystroke identification software reveals unwritten thoughts. Radio transmitters and global positioning system ("GPS") devices allow the person monitoring to keep track of another person's movements over a significant period of time. *See State v. Jackson*, ___ Wash ___, ___ P3d ___, 2003 Wash Lexis 659 (Wash, Sept. 11, 2003) (holding that, under Washington Constitution, installation and use of GPS tracking device on automobile requires warrant; citing *Campbell* with approval). Many, if not all, of these techniques do not require the knowledge, consent, or participation of the subject. The effect of each of those techniques constitutes a serious intrusion of an individual's privacy rights, especially "the right to be let alone – the most comprehensive of rights and the right more valued by civilized

[people]." *Olmstead*, 277 US at 478 (Brandeis, J., dissenting). Moreover, "[w]hen these monitoring technologies are combined, they can create a surveillance network far more powerful than any single one would create on its own." Jay Stanley & Barry Steinhardt, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society*, 2 (2003) (available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=11573&c=39> (last visited Sept. 30, 2003)). It is the breadth of the intrusions rather than their depth at any particular instant in time that is most threatening to privacy.

So why would a law-abiding citizen be concerned about the explosion in surveillance technologies? As leading privacy advocates explain, it is because of the potential for abuse:

> "If we do not take steps to control and regulate surveillance to bring it into conformity with our values, we will find ourselves being tracked, analyzed, profiled, and flagged in our daily lives to a degree we can scarcely imagine today. We will be forced into an impossible struggle to conform to the letter of every rule, law, and guideline, lest we create ammunition for enemies in the government or elsewhere. * * * Americans will not be able to engage in political protest or go about their daily lives without the constant awareness that we are – or could be – under surveillance. We will be forced to constantly ask of even the smallest action taken in public, 'Will this make me look suspicious? Will this hurt my chances for future employment? Will this reduce my ability to get insurance?' The exercise of free speech will be chilled as Americans become conscious that their every word may be reported to the government by FBI infiltrators, suspicious fellow citizens or an Internet Service Provider."

Id. at 14.

The question for surveillance technology cases is, "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *See* Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev at 403. With regard to radio transmitter tracking devices, this Court already has answered affirmatively that question. Nothing about this case alters that conclusion. The ACLU respectfully requests this Court to hold that law enforcement's warrantless use of the radio transmitter in this case violated defendant's Article I, section 9, rights.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests this Court to reverse the decision of the Court of Appeals and the judgment of the Circuit Court and to remand this case to the Circuit Court for further proceedings.

DATED: October 1, 2003.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing *AMICUS CURIAE* **ACLU FOUNDATION OF OREGON, INC.'S BRIEF ON THE MERITS** on October 1, 2003, by mailing the original and 12 copies thereof by first-class mail with the United States Postal Service to:

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