IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. LINDA DIANE FESSENDEN, Defendant-Appellant, Petitioner on Review.	Douglas County Circuit Court No. 10CR2252MI SC S061740 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. TERESA ANN DICKE, Defendant-Appellant, Petitioner on Review.	Douglas County Circuit Court No. 10CR2251MI SC S061770

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Douglas County
Honorable GEORGE W. AMBROSINI, Judge

Opinion Filed: September 25, 2013
Author of Opinion: Hadlock, Judge
Before: Ortega, P.J., and Sercombe, J., and Hadlock, J.

Continued……

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
ELIZABETH GILLINGHAM DAILY #111758
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: elizabeth.daily@opds.state.or.us

Attorneys for Petitioner on Review
Linda Fessenden

RANKIN JOHNSON IV #964903
Law Offices of Rankin Johnson IV, LLC
714 SW 20th Place
Portland, OR 97205
Telephone: (503) 274-4394
Email: rankinjohnsonlaw@gmail.com

Attorney for Petitioner on Review
Teresa Dicke

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
PAMELA J. WALSH #894034
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: Pamela.J.Walsh@doj.state.or.us

Attorneys for Plaintiff-Respondent

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

INTRODUCTION

The issue in this case is whether the emergency-aid and exigent-circumstances exceptions apply when an officer acts without a warrant to save an animal. Under the emergency-aid exception to the warrant requirement in Article I, section 9, police can conduct warrantless searches and seizures when they reasonably believe that a warrantless entry is necessary to render immediate aid to save persons from serious physical harm. In applying that test, the court has previously addressed circumstances that involve people who are in peril. It has not yet addressed whether the exception applies when an animal is at risk of serious physical harm or death.

The emergency-aid exception applies when police encounter an animal at risk of serious physical harm or death. That conclusion comports with Oregon's societal interest in protecting animals, with the statutes that reflect our social values and norms by defining the legal parameters of our behavior toward animals, and with the history associated with Article I, section 9, and its federal counterpart. The court should announce that the emergency-aid doctrine applies when an officer reasonably believes that he or she must act immediately to save an animal from serious physical injury or death. For the same reasons, the court should rule that

the emergency-aid doctrine developed under the Fourth Amendment applies when officers must act immediately to assist animals in peril.

The exigent-circumstances exception—under both Article I, section 9, and the Fourth Amendment—should also apply to situations involving peril to animal life. That exception applies when probable cause exists to believe that a crime has occurred and an officer reasonably believes that an emergency situation poses a risk of serious harm or death.

Oregon, like numerous other jurisdictions, has expressed a strong societal interest in protecting animals, and its animal abuse laws have been recognized as among the most effective in the nation. That societal interest should guide the court in deciding the issues involved here. Without exception, every court that has considered whether these exceptions to the warrant requirement apply to cases involving animals has ruled that they do apply. This court should do the same.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented: Under the state and federal constitutions, does the emergency-aid exception permit law enforcement officers to conduct warrantless searches and seizures for the purpose of aiding animals that have suffered, or that are imminently threatened with suffering, serious physical injury or harm?

First Proposed Rule: Yes. When an officer has an objectively reasonable belief that an animal faces imminent danger, the emergency-aid exception permits the officer to enter property and take reasonable measures to assist the animal.

Second Question Presented: When an officer has probable cause to believe that a crime has been committed and encounters circumstances that pose an immediate threat to an animal's life, may the officer conduct a warrantless search and seizure to protect the animal under the exigent-circumstances exception to the state and federal warrant requirements?

Second Proposed Rule: Yes. If probable cause exists and an officer encounters circumstances that reasonably suggest that he or she must act swiftly to prevent danger to an animal's life, the officer may conduct a warrantless search and seizure, under the exigent-circumstances exception, to assist the animal.

Third Question Presented: Here, an officer with extensive training and experience in evaluating horses observed a severely emaciated horse from a lawful vantage point. He saw that the horse had difficulty standing and difficulty urinating, and he concluded that the life of the horse was in immediate danger due to possible organ failure or falling. Did the officer act lawfully when, without a warrant, he entered defendant's pasture to further examine the horse and then seized the horse and transported it to a veterinarian?

Third Proposed Rule: Yes. Under those circumstances, the emergency-aid exception allows a warrantless search and seizure to assist the animal. And

because the officer in this case had probable cause to believe that the horse's condition was the result of criminal animal neglect, the exigent-circumstances exception to the warrant requirement also justified a warrantless search and seizure.

STATEMENT OF MATERIAL FACTS

This factual statement is a complete and *verbatim* recitation of the undisputed facts recited by the Oregon Court of Appeals in *State v. Fessenden*, 258 Or App 639, 640-45, 310 P3d 1163 (2013). The only changes are minor formatting adjustments and edits, where necessary, to reflect that this case involves both defendants—Fessenden and Dicke.

> Defendant [Fessenden] and her codefendant Dicke together owned an "older" horse that they kept on Dicke's property. In August 2010, Deputy Sheriff Bartholomew responded to a call from Dicke's neighbors, the Kemplens, who had reported that the horse was "very skinny."[1] Bartholomew, who works in the Animal Control Unit at the Douglas County Sheriff's Office, has a bachelor's degree in animal science, has graduated from the National Animal Control Academy, and is trained to investigate animal cruelty. He has worked at the Sheriff's Office for 22 years and investigates animal-control issues on a daily basis. Bartholomew has specific expertise in evaluating the weight of horses using the "Henneke Scoring Method,"

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[1] The Kemplens, who raise animals themselves, including horses, testified at the suppression hearing that defendant's horse was severely underweight and had difficulty urinating. Mr. Kemplen testified specifically that he believed that the horse needed immediate medical care.

which he described as a method for determining whether "the animal's okay or if it's emaciated or thin," taking into account the amount of fatty tissue on specific areas of the horse's body. Bartholomew evaluates about 100 to 200 horses, including some older horses, every year.

In responding to the Kemplens' call, Bartholomew drove up a "common driveway" that the Kemplens shared with codefendant Dicke. Bartholomew contacted the Kemplens, who told him that the horse looked bad and had been out loose. Bartholomew went further down the driveway to see if the horse was still loose, but she was not; rather, she was "in a little fenced in area" about 100 feet from Dicke's residence. Bartholomew could see from his car that the horse's "backbone was protruding up way more than it should have," which is a sign of emaciation. The horse was "swaying a little bit" and her neck looked thin. "The withers stood way up as well as the backbone," which Bartholomew explained are "signs of emaciation." Bartholomew could see each of the horse's ribs as well as her tail bones; "you could see every bone protrusion, and there was no fatty tissue in the shoulder area you could see." Bartholomew made all of those observations before he touched the horse. He also saw the horse straining to urinate, "having a hard time." Such difficulty in urination can be "an issue of kidney failure."

Before touching the horse or going onto Dicke's property, Bartholomew gave the horse a Henneke body score of one out of nine on a scale where one represents emaciation, "two is very thin, three is thin" up to "seven, eight and nine" which can represent being "too fat." Bartholomew believed that the horse was suffering from a medical emergency:

> Yeah, anytime you get a horse this skinny internal organs start shutting down. This literally was the thinnest horse I've seen that was still on its feet. It was, of course, wavering. I was afraid it was going to fall over and not be able to get back up.

If a horse that thin falls down, Bartholomew explained, "a lot of times we can't get them back up and then they end up having to be put down." He explained further:

> [T]he uniqueness is a horse, if it goes down because it's too weak, it sometimes can't get back up and then you have problems with breathing and problems with if they roll they can flip their stomachs.
>
> * * * * *
>
> * * * Their stomachs get flipped over their intestines on the inside and so it constricts it off, and the only way to fix that is by surgery, and a horse in that kind of condition wouldn't be able to survive a surgery.

Given the horse's condition, Bartholomew believed that the crime of first-degree animal neglect had been committed. He told a man who lived in a nearby trailer that he was going to take the horse to a veterinarian because he was worried that the horse would fall down and not be able to get back up. Bartholomew then reached over the fence and touched the horse for the first time, again performing the steps to develop a Henneke body score. After that physical evaluation, Bartholomew again gave the horse a score of one, which is "the lowest score [that he had] ever given a horse that was still on its feet."

Bartholomew believed that the horse "was suffering," that its emaciation constituted a serious physical injury, and that the horse "was in immediate danger." Accordingly, Bartholomew contacted volunteers to bring a trailer to the area so he could transport the horse to a veterinarian for evaluation. The volunteers arrived about a half-hour later. As the horse was being loaded into the trailer, Bartholomew spoke with Dicke by telephone and informed her that he was taking the horse because he was worried about its immediate welfare. He said that he would return the horse if the veterinarian found nothing wrong with it. The horse was transported to a veterinary hospital, which took about half an hour. Bartholomew and the volunteers did their best "to get it done as quick as possible."

The horse was still standing when it arrived at the veterinary hospital, but veterinarian Giri, who evaluated the horse, gave it a body score of 0.5. Giri reported that the horse was the skinniest that she had seen. Using a stethoscope, Giri determined that the horse had a "really, really bad" heart murmur, which often is "related to being

starved." Giri also ran blood tests "to make sure there was no organ failure." Bartholomew explained that sometimes, if a horse's organs "have already started to fail there's really no being able to bring the horse back," making it more likely that the horse would "have to be put down."[2] Giri did not end up needing to give the horse an IV or perform any surgery.

Giri told Bartholomew that the horse "was definitely in immediate need of care" and Bartholomew took the horse to "Saving Grace" for water, food, and monitoring. He testified that caring for an emaciated horse involves "a very slow process of feeding it small amounts and gradually * * * getting the amounts up to a normal size." The next day, Bartholomew took the horse to a rehabilitation center run by Strawberry Mountain Mustang Rescue to see if the director of that organization, Clark, "could bring it back." A month later, Clark reported, the horse had gained about 100 pounds. Clark had provided the horse "with a simple, normal diet for older horses." By the end of the year, the horse's heart murmur had disappeared.

Defendant [Fessenden] called Bartholomew the day after he took the horse and informed him that the horse belonged to her as well as to Dicke. Bartholomew and [Fessenden] met the next day; at that time, she was "very emotionally upset about the condition of the horse."

[Dicke, on whose property the horse was kept, was charged with first-degree animal neglect under ORS 167.330,[3] and first-degree

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[2] At trial, Giri testified that the results of the blood tests were normal.

[3] Under ORS 167.330, a person commits the crime of first-degree animal neglect when the person, "with criminal negligence fails to provide minimum care" to an animal and the failure results in "serious physical injury or death to the animal." ORS 167.330(1).

> animal abuse under ORS 167.320.[4] Fessenden] was charged with second-degree animal neglect under ORS 167.325.[[5]] [Fessenden] later moved to suppress evidence derived from Bartholomew's search and seizure of the horse, including "any examination of the horse, photographs, body condition score, other observations of and statements about the condition of the horse," as well as her own statements about the horse's condition. [Fessenden] argued that the warrantless search and seizure had violated Article I, section 9, of the Oregon Constitution,[6] and the Fourth Amendment to the United States Constitution,[7] and she specifically contended that neither the

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[4] In the form charged by the state in this case, the count alleging first-degree animal abuse required the state to prove that Dicke "recklessly" caused "serious physical injury to an animal." ORS 167.320(1)(a).

[5] Under ORS 167.325(1), a person commits the crime of second-degree animal neglect when she "intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in such person's custody or control." "Minimum care" means "care sufficient to preserve the health and well-being of an animal," and includes "food of sufficient quantity and quality to allow for normal growth or maintenance of body weight" and "veterinary care deemed necessary by a reasonably prudent person to relieve distress from injury, neglect or disease." ORS 167.310(7).

[6] 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.

* * * * *

[7] The Fourth Amendment provides, in part:

Footnote continued…

emergency-aid doctrine nor any other exigency justified Bartholomew's conduct.[] [Dicke also filed a motion to suppress, in which she alleged that the warrantless search and seizure violated Article I, section 9, and the Fourth Amendment. Fessenden and Dicke each adopted the arguments that the other made in association with their suppression motions.]

Bartholomew explained at the suppression hearing why he had not applied for and obtained a search warrant before he seized the horse. As noted above, Bartholomew had given this horse a body score of one—the lowest score that he would ever give. He testified that he usually starts "getting real nervous" about animals that have a body score of two or three; in those cases, he usually will give the animals' owners suggestions about how to feed the animals to help them gain weight, or he might ask a veterinarian to do so. It is "rare" for Bartholomew to seize an animal without first taking such other steps. Although he investigates animal-related cases daily, Bartholomew will "seize the animal right away" at most only two to three times a year.

In this case, Bartholomew seized the horse without first applying for a warrant because he "was afraid [the horse] was going to go down" and that taking the time to get a warrant "would have presented a danger to [the horse's] life." Based on his personal experience, Bartholomew testified that the process of preparing a search warrant and affidavit for submission to a judge—including drafting the documents and having them reviewed by detectives, a supervisor, and someone at the District Attorney's Office—can take anywhere from four to eight hours. Although Bartholomew has never used a telephone warrant, he testified that he still would have to "go through all the steps" over the telephone, and believes that the process

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(…continued)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

> would still take a few hours. He did not apply for a warrant in this case because he "didn't think [the horse] had the time for [him] to go do it."
>
> The trial court denied the defendants' suppression motions. First, in a ruling that the defendants do not challenge on appeal, the court determined that Bartholomew was at "a lawful vantage point"—*i.e.*, that he was entitled to be on the driveway that Dicke shared with the Kemplens—when he first saw the horse. The trial court then determined that the requirements of the emergency-aid doctrine were satisfied and that the horse's condition justified the warrantless search and seizure. Finally, in an alternative ruling, the trial court concluded that the search and seizure were justified by probable cause and exigent circumstances. After the court denied defendants' suppression motions, a jury convicted Dicke of first-degree animal neglect and first-degree animal abuse and convicted Fessenden of second-degree animal neglect.
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> [The defendants appealed. They] assign[ed] error to the trial court's denial of their suppression motions, challenging both its "emergency aid" and its "exigent circumstances" rulings.

The Court of Appeals affirmed the convictions, finding that the emergency-aid exception allowed the warrantless search and seizure under Article I, section 9, and the Fourth Amendment.[8] This court allowed the petitions for review filed by both defendants.

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[8] The Court of Appeals decided Fessenden's case under Article I, section 9, and it decided Dicke's case under that provision and the Fourth Amendment. As Fessenden acknowledges in her brief, her challenge in the Court of Appeals relied exclusively on Article I, section 9. (Fessenden BOM 38). In this court, she raises claims under that provision and under the Fourth Amendment.

Footnote continued…

SUMMARY OF ARGUMENT

This case involves a warrantless search to examine a severely emaciated horse and, immediately following the search, a warrantless seizure of that horse. To determine the lawfulness of the search and seizure, the relevant question is whether it fell within one or more established exceptions to the warrant requirement. The search and seizure in this case was lawful under two such exceptions, which reasonably apply to animals due to our societal interest in protecting them.

First, the search and seizure was lawful under the state and federal emergency-aid exceptions. The emergency-aid exceptions to the state and federal constitutions permit searches and seizures that are reasonably necessary to render immediate aid to animals in peril. Here, Deputy Bartholomew had decades of experience in assessing horses and, based on his observations of the horse from a lawful vantage point, he developed an objectively reasonable belief that the horse was in immediate danger of dying. Further, he reasonably concluded that the horse would suffer harm if he took the time to apply for a warrant. He then reached over

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Dicke has consistently argued that the warrantless search and seizure violated her rights under Article I, section 9, and under the Fourth Amendment.

the fence on defendant Dicke's property, physically examined the horse, confirmed his visual assessment, seized the horse, and took it directly to a veterinarian. That search and seizure satisfied the emergency-aid exception and did not violate Article I, section 9, or the Fourth Amendment.

The search and seizure also was lawful under the exigent-circumstances exception to the state and federal warrant requirements. That exception requires probable cause to believe that a crime has been committed and circumstances that reasonably indicate an emergency. Based on the horse's emaciation and overall physical condition, the deputy had probable cause to believe that the horse was the victim of animal neglect. The deputy reasonably concluded that the horse faced imminent death and that he needed to act swiftly to save the animal's life. Under Article I, section 9, and the Fourth Amendment, probable cause and the exigency justified the warrantless search and seizure.

Finally, even if the trial court erred by not suppressing the evidence that resulted from the search and seizure, any error was harmless. The defendants made independent admissions about their knowledge of the standard of care and that evidence established the requisite mental states. The deputy's lawful observations of the horse prior to the search and seizure established every other element of the charged crimes. The jury would have likely convicted the defendants of the charged crimes—animal abuse and animal neglect—without any of the challenged evidence.

ARGUMENT

The underlying issue that this case presents reduces to this: Are officers allowed to take immediate action, without a warrant, to assist animals that face imminent death or serious physical injury? Without exception, state and federal courts that have addressed that issue have answered "yes." Those courts have held that the Fourth Amendment permits law enforcement officers to render emergency aid to animals, without a warrant, when exigent circumstances exist. In keeping with contemporary societal goals to protect animals from cruelty, courts have used the emergency-aid and exigent-circumstances exceptions to the warrant requirement to allow officers to assist animals in danger.

This court should follow suit. It should hold that the search and seizure in this case did not violate Article I, section 9, or the Fourth Amendment because it fell within well-recognized exceptions to the warrant requirement. Oregon has societal norms, values and goals similar to those recognized by other courts that have applied the exceptions to cases involving animals. Those social values are reflected in Oregon statutes, which have been acknowledged as advancing a strong policy of protecting animals from unnecessary suffering and physical harm. And the societal goals and values—as expressed in Oregon statutes—help inform what is "reasonable" under Article I, section 9, and the Fourth Amendment. For the reasons explained below, the state and federal constitutions permit officers to take immediate action where reasonably necessary to protect animals.

A. The emergency-aid exceptions to the state and federal warrant requirements encompass searches and seizures that are reasonably necessary to render immediate aid to animals.

Article I, section 9, guarantees citizens the right to be "secure in their * * * effects, against unreasonable search, or seizure." The Fourth Amendment states: "The right of the people to be secure in their * * * effects, against unreasonable searches and seizures, shall not be violated * * *." Under both provisions, a warrantless search and seizure is *per se* unreasonable unless it falls "within one of the few specifically established and well-delineated exceptions to the warrant requirement." *State v. Baker*, 350 Or 641, 647, 260 P3d 476 (2011) (citations and internal quotation marks omitted). *See also Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967) (warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions"). Thus, the question here is whether a warrantless search and seizure intended to save an animal may, despite the lack of a warrant, nonetheless be reasonable and therefore fall within established exceptions to the warrant requirement. As shown by this court's case law, discussed below, it is undisputable that the emergency-aid exception is a well-established exception. Whether the exception encompasses warrantless searches and seizures to assist animals in peril requires an assessment both of contemporary societal values and of the manner in which animals have historically been viewed in Oregon and in this country as a whole. *See, e.g., State v. Hemenway*, 353 Or

129, 155-57, 295 P3d 617, *vacated as moot*, 353 Or 498 (2013) (Landau, J. concurring) ("The requirement that searches and seizures be 'reasonable' seems to * * * necessitate constant reassessment in light of changing circumstances"); *Yancy v. Shatzer*, 337 Or 345, 362, 97 P3d 1161 (2004) (concluding that the framers "most likely understood" the "prevailing view throughout the American legal landscape in 1857"). The search and seizure in this case, for the reasons discussed below, was reasonable because it fell within the emergency-aid exception to the warrant requirement.

1. Article I, section 9, permits a warrantless search and seizure under the emergency-aid doctrine when an officer reasonably believes that those actions are necessary to render aid to animals that have suffered, or are imminently threatened with suffering,serious physical injury or cruel death.

a. There is an established emergency-aid exception to the Oregon Constitution's warrant requirement.

This court has long acknowledged the existence of the emergency-aid exception to Article I, section 9's the warrant requirement. *See State v. Davis*, 295 Or 227, 238, 666 P2d 802 (1983) (discussing analogous cases decided under the Fourth Amendment and recognizing that a warrantless entry can be justified under Article I, section 9, "where emergency aid was required by someone within"); *State v. Bridewell*, 306 Or 231, 236-37, 759 P2d 1054 (1988) (also recognizing the emergency-aid doctrine).

The court first applied that exception in *State v. Baker*, 350 Or 641, 260 P3d 476 (2011). In *Baker*, police rushed into the residence to assist a woman, whom they believed to be the victim of an ongoing assault. 350 Or at 643-44. In considering whether the warrantless entry was justified, this court observed that other states had applied the emergency-aid doctrine "under their own search and seizure provisions," and it discussed the application of the doctrine by the United States Supreme Court under the Fourth Amendment. *Id*. at 648-49 n 4, 6. The court reasoned that certain types of societal values justify exceptions to the warrant requirement, concluding that "[a] similar kind of societal interest—the need to immediately render aid to a person or to prevent the immediate threat of a serious personal injury or harm—is present here." *Id*. at 649. This court then announced:

> Consequently, we conclude that an emergency aid exception to the Article I, section 9 warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm.

Id. *Baker*, of course, involved "persons" and not animals. *Baker* did not present this court with the issue of whether the emergency-aid exception to the Article I, section 9, warrant requirement should apply to animals. This case does.

b. Oregon's emergency-aid exception encompasses aid to animals.

i. Oregon statutes reflect a very strong societal interest in protecting animals.

The logic of *Baker* applies to situations in which an animal, rather than a human, is the object of the imminent threat. Like the societal interest this court relied upon in *Baker*, the societal interest in protecting animals from serious physical injury or cruel death is a strong one. That societal interest, and the lawfulness of human conduct toward animals, is evident in the numerous Oregon statutes that protect animals from abuse and neglect. *See State v. Fessenden*, 258 Or App 639, 647-48, 310 P3d 1163 (2013) (addressing a wide variety of Oregon statutes that "focus on the prevention of unnecessary cruelty to animals"). And the societal interests reflected in the statutes help to inform courts in assessing the constitutional "reasonableness" of an officer's warrantless conduct.

For example, Oregon statutes classify repeated first-degree animal abuse, aggravated animal abuse, and involvement in animal fighting as Class C felonies. ORS 167.320(4), ORS 167.322(2), ORS 167.335. The decision to treat such conduct as a felony, punishable by imprisonment, reflects the seriousness that our state ascribes to the mistreatment of animals. *See, e.g.*, *Davis v. State*, 907 NE 2d 1043, 1050 (Ind Ct App 2009) (an Indiana statute provides that animal neglect is a Class B misdemeanor and therefore "evidences a strong public policy against the mistreatment of animals[.]"). In fact, Oregon's animal protection statutes are

among the strictest and most effective in the nation. Samantha D.E. Tucker, *No Way to Treat Man's Best Friends: The Uncounted Injuries of Animal Cruelty Victims*, 19 Animal Law 151, 157 n 42 (2012) (noting that the Animal Legal Defense Fund, based on 15 categories of information, recently recognized Oregon's animal protection statutes as among the five most effective statutory schemes in the nation). Even where conduct is exempt from the animal abuse statutes, our legislature has imposed measures intended to protect animals from unnecessary suffering. One example is ORS 603.065(1)(a), which allows livestock to be slaughtered, but only by a method that "[r]enders each animal insensible to pain" and is "rapid and effective." Another example is ORS 167.335, which exempts certain animals and activities from the animal abuse laws, but provides that those exemptions do not apply where "gross negligence can be shown." And Oregon law allows courts to enter protective orders to shelter pets and some other types of animals from domestic violence. *See* ORS 107.718 (authorizing a protective order to ensure the safety of "any service or therapy animal or any animal kept for personal protection or companionship").

Thus, Oregonians have enacted numerous laws that protect animals and punish those who subject animals to harm that is beyond our social norms. The statutes reflect social norms and values that favor protecting animals from cruelty and suffering. Those statutes also help illustrate which behaviors—as viewed by

contemporary society—may be deemed reasonable when animal welfare is involved.

ii. Historical context suggests that police could reasonably save animals without obtaining a warrant.

Historical context may assist this court in determining whether officers can reasonably act without a warrant to aid animals in peril. "[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies." *United States v. Stevens*, 559 US 460, 469, 130 S Ct 1577, 176 L Ed 2d 435 (2010). The framers of Article I, section 9, were likely aware of, and recognized, society's interests in protecting animals, because other American jurisdictions had laws reflecting that interest well before 1859. *See Yancy*, 337 Or at 362 (the framers "most likely understood" the "prevailing view throughout the American legal landscape in 1857"). Likewise, it was apparent when our constitution was approved that police had the authority to take measures, without a warrant, to save and secure "property." *See Bridewell*, 306 Or at 248 (Peterson, C.J., dissenting in part and concurring in part) (discussing the historical functions of local police organizations). Then, as now, animals are characterized as "property." *See, e.g.*, *Rose v. City of Salem*, 77 Or 77, 82, 150 P 276 (1915) (dogs and other domestic animals are the owner's "personal property," citing an 1867 case from Illinois as authority). *See also State v. Nix*, 251 Or App 449, 460, 283 P3d 442 (2012) ("animals are usually the property of persons"). It follows that

police historically could take measures, without a warrant, to save and secure animals.

The relevant history shows a long-standing societal interest in protecting animals. It also indicates that, well before the implementation of Article I, section 9, police could take immediate action to protect animals as property. Yet the framers took no action to restrict an officer's ability to protect animals in need of emergency aid. Instead, they approved a flexible standard in Article I, section 9, one that rests upon the reasonableness of the search and seizure. That suggests that the framers did not intend to preclude an emergency-aid doctrine that extended to animals.

Although there is no indication that the framers expressly considered whether a warrantless search might be permissible when necessary to protect animals, the "reasonableness" standard they implemented is capable of an interpretation that is consistent with evolving social norms. While history might provide context, Article I, section 9, should be construed in a manner consistent with relevant modern developments. *See, e.g.*, *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000) (discussing the historical principles behind the Oregon Constitution's right to allocution and their application "to modern circumstances as

those circumstances arise").[9] Put differently, this court should interpret Article I, section 9, to permit reasonable warrantless searches meant to provide emergency aid to animals. That interpretation is true to Article I, section 9's history and reflects the modern social desire to protect animal life and prevent animals from suffering.

iii. This court should frame the test in terms of reasonableness, with guidance from Oregon laws addressing the treatment of animals.

This court should adopt the test announced by the Court of Appeals. That test is based on the touchstone of reasonableness (and thus reflects Article I, section 9's text prohibiting "unreasonable" searches and seizures), recognizes our societal interest in protecting animals, and, as described in detail below, is circumscribed by Oregon laws pertaining to the treatment of animals. The Court of Appeals correctly framed the test as follows:

> [A] warrantless search or seizure is justified when law enforcement officers have an objectively reasonable belief, based on articulable facts, that the search or seizure is necessary to render

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[9] More enlightened views concerning how we treat others can form the basis for modern constitutional interpretation. *See, e.g.*, *Graham v. Florida*, 560 US 48, 85, 130 S Ct 2011, 176 L Ed 2d 825 (2010) (Stevens, J., concurring) (strict adherence to precedent is not appropriate when considering what type of punishment is unconstitutionally cruel and unusual, because "[s]tandards of decency have evolved * * *[.] They will never stop doing so").

> immediate aid or assistance to animals that have suffered, or which are imminently threatened with suffering, serious physical injury or cruel death, unless that injury or death is being inflicted lawfully.

Fessenden, 258 Or App at 649. As that court explained, the test mirrors "*Baker's* description of the emergency aid exception as closely as possible" and takes into account Oregon laws that permit "killing and physically altering animals in some contexts." *Id.*

Baker teaches that the appropriate test is objective reasonableness. *Baker*, 350 Or at 649. The test's reference to reasonableness "invites analysis that is not historically bound, but instead requires constant reassessment in the light of changing circumstances." Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 860 (2008). In other words, the concept of "reasonableness"—which is rooted in Article I, section 9's text—encompasses changing societal values, changes in relevant laws, and changes in the circumstances that occur from case-to-case.

On the other hand, whether an officer is facing a "true 'emergency' cannot be the test." *Bridewell*, 306 Or at 253 (Peterson, C.J., concurring in part, dissenting in part). *See also Baker*, 350 Or at 648-49 (abandoning the reference to a "true emergency" and adopting a test of objective reasonableness). The key is whether the officer acts in a reasonable manner under the circumstances encountered at the time of the search and seizure, not whether the officer's assessment ultimately turns out to be correct. As this court explained when

addressing a similar warrant exception, "[t]he proper focus is on the reasonableness of the officers' actions at the time they took them in response to the exigency, not on the results of those actions." *State v. Snow*, 337 Or 219, 225, 94 P3d 872 (2004).

Further, an officer's training and experience should be a factor in determining what is reasonable. *See*, *e.g.*, *State v. Heckathorne*, 347 Or 474, 485, 223 P3d 1034 (2009) (officer's training and expertise may provide the knowledge that forms the basis for the probable cause to support a warrantless search). And, though reasonableness must be assessed in every case, "[o]ur constitutional provision * * * would not be well served by an analysis that too readily second-guesses officers in the field [.]" *State v. Fair*, 353 Or 588, 613, 302 P3d 417 (2013).[10]

Relevant statutes—as noted already—provide an additional reference for what is reasonable. This court has considered such laws in formulating exceptions to the warrant requirement. *See State ex rel Juvenile Dept of Clackamas County v. MAD*, 348 Or 381, 390-91, 233 P3d 437 (2010) (looking to statutes that regulate

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[10] *See also Morgan v. State*, 289 Ga App 209, 212, 656 SE 2d 857, 860 (2008) (courts should not require officers in the field "to make a Hobson's choice between taking the time to obtain a search warrant or rescuing the distressed animal[].")

schools in determining whether school officials may conduct warrantless searches). Oregon statutes concerning animals therefore provide guidance for assessing whether a warrantless search or seizure, which is intended to protect animals, will be reasonable.

In part, those statutes show that an officer does not have an unrestricted or unlimited ability to assist an animal whose life or health is at risk. Oregon law allows, for example, the slaughter of livestock by methods that quickly render the animal insensible or by instantaneous severance of the carotid arteries. ORS 603.065. Animals may be used for research, given that it is a crime for a person to interfere with an animal research facility, and given that lawful scientific or agricultural research or teaching that involves the use of animals is excluded from our animal-abuse laws. ORS 167.312, ORS 167.335(9). The animal-abuse laws do not punish practices that constitute "good animal husbandry," which may include dehorning, tail docking, and castration. ORS 167.310(4), ORS 167.315. Oregon law also allows rodeos and other exhibitions involving animals, fishing, hunting and trapping, and wildlife management and vermin control—as long as those activities do not involve gross negligence. ORS 167.335(2), (7), (8), (10). Such laws provide guidance for assessing whether a search and seizure, in a case involving an animal, is reasonable.

The merits of the recommended test become apparent when applied to defendant Fessenden's suggestion that—under the Court of Appeals' approach—

an officer could effect a warrantless "home invasion" due to a "tadpole adoption gone awry." Fessenden BOM at 34. Naturally, in any assessment of reasonableness the setting involved in the warrantless entry will be a factor. A person's home receives strong protections. *See Fair*, 353 Or at 427 ("A government intrusion into the home is at the extreme end of the spectrum: Nothing is as personal or private. Nothing is more inviolate.") (internal quotations marks and citations omitted). Thus, when an officer enters a home without a warrant, the circumstances and societal interest behind the warrantless entry must be pressing or the entry will not be reasonable. Courts can turn to Oregon statutes for guidance in determining the nature and strength of any societal interest behind the warrantless entry. In a case involving a warrantless entry into a residence to assist distressed tadpoles, Oregon courts can consult, for example, our statutes that authorize fishing. ORS 167.335(7). That statute permits killing a cold-blooded aquatic animal, similar to a tadpole, even when the killing is for sport. It reflects societal values that afford little protection to such animals. The strong protection afforded to a person's home is balanced against the minimal protection society gives to animals like tadpoles. Such an analysis will almost certainly result in a ruling that a warrantless entry into a home to assist distressed tadpoles is unreasonable and unlawful. There will, of course, also be cases where there is no statute to provide the court with guidance. In those instances, the test is simply

objective reasonableness, as it is in other types of cases that examine the lawfulness of a warrantless search.

To summarize, this court should hold that the emergency-aid doctrine allows officers to act quickly, without a warrant, when reasonably necessary to render immediate aid to animals at risk of serious physical injury or cruel death. That test's foundation should be objective reasonableness. Courts should assess reasonableness by considering factors such as the circumstances the officer faced in the field, the officer's training and experience, the privacy right involved, and any relevant laws that concern animals. That formulation will protect an individual's right to be free from unreasonable searches and seizures, while effectuating Oregon's societal interest in preventing unnecessary harm to animals.

iv. The emergency-aid doctrine also applies to animals as a form of "property."

The foregoing discussion is, to a large extent, based on the premise that our society ascribes special value to animals and has an interest in protecting them from suffering. At bottom, that type of societal interest affords to animals intrinsic value as sentient beings. But even if this court rejects that rationale, it should still protect animals as "property" under the emergency-aid doctrine.

As discussed, Oregon cases concerning the emergency-aid doctrine rely on Fourth Amendment jurisprudence. When it announced and discussed the emergency-aid doctrine under the Fourth Amendment, the United States Supreme

Court adopted the reasoning of a lower court opinion, *Wayne v. United States*, 318 F2d 205 (DC Cir 1963). *Mincey v. Arizona*, 437 US 385, 392, 98 S Ct 2408, 57 L Ed 290 (1978). In *Wayne*, Judge Burger had explained: "[A] warrant is not required to break down a door to enter a burning home to rescue occupants or to extinguish a fire, to prevent shooting or to bring emergency aid to an injured person. * * * When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on the information, even if ultimately found erroneous." 318 F2d at 212. Thus, courts have long recognized that the emergency-aid doctrine applies to emergency action that is necessary to protect life or "property." *See also* Wayne R. LaFave, 4 *Search and Seizure* § 6.6(b) (5th ed 2012) ("Police may also enter private property for the purpose of protecting the property of the owner or occupant or some other person.").

Under Oregon law, animals are still deemed "property." *See, e.g.*, ORS 167.310(2) (defining "domestic animal" as "an animal * * * that is owned or possessed by a person"). Animals are a unique type of property. Society ascribes to animals a special status that is worthy of protections beyond those afforded inanimate property. *See, e.g.*, *Morgan v. Kroupa*, 702 A2d 630, 633 (Vt S Ct 1997) ("[M]odern courts have recognized that pets generally do not fit neatly within traditional property law principles. A pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.")

(internal citations omitted). Under the emergency-aid exception, an officer thus can act without a warrant to protect animals as a form of property. Combining that principle with the formulation that this court developed in *Baker*, law enforcement officers may conduct a warrantless search or seizure when they have an objectively reasonable belief, based on articulable facts, that the search or seizure is immediately necessary to protect animals, as a form of property, from death or physical harm. Because that formulation is hinged upon reasonableness, it can encompass situations in which officers take actions that might not be reasonable with respect to other kinds of property, but which are appropriate to protect animals as a unique type of property.

v. There is no reason to interpret Oregon's emergency-aid exception differently from the emergency-aid exception that has developed under the Fourth Amendment.

As mentioned in the foregoing discussion of *Baker*, this court based Oregon's emergency-aid exception on Fourth Amendment jurisprudence. *Baker*, 350 Or at 649 n 6 (noting that *Mincey v. Arizona* announced the exception). *See also Davis*, 295 Or at 238 (citing federal cases under the Fourth Amendment in recognizing the emergency-aid exception). For purposes of an exception to the warrant requirement such as this one, there is no reason to differentiate between Article I, section 9, and the Fourth Amendment.

When considering exceptions to the warrant requirement under Article I, section 9, this court has repeatedly observed the similarities in the protections afforded by that provision and the Fourth Amendment. In *Fair*, 353 Or at 602, this court considered the exigent-circumstances exception under Article I, section 9, and wrote: "Although the syntax differs, the guarantee of the Fourth Amendment to the United States Constitution is substantively the same [.]" The court explained that "for both provisions, the touchstone is reasonableness." *Id.*

This court has also explained that the significance of differing interpretations of the two provisions—courts describe the Fourth Amendment as protecting a reasonable expectation of privacy and describe Article I, section 9, as protecting the privacy one has a "right" to expect—is simply that "a defendant's subjective expectation of privacy does not necessarily determine whether a privacy interest [under Article I, section 9] has been violated." *State v. Brown*, 348 Or 293, 298, 232 P3d 962 (2010). In modern practice, the courts make no substantive distinctions when applying the two provisions to assess whether a warrantless search or seizure is lawful; they analyze lawfulness by using a standard of objective reasonableness. *See State v. Wacker*, 317 Or 419, 425-27, 856 P2d 1029 (1993) (Article I, section 9, imposes an "objective test" and the test under the Fourth Amendment is whether an individual "reasonabl[y]" expected to preserve something as private); *State v. Ainsworth*, 310 Or 613, 621 n 9, 801 P2d 749 (1990) (Article I, section 9, imposes an objective test of reasonableness and similar

"objective standards" have been applied in United States Supreme Court cases under the Fourth Amendment). *See also Fernandez v. California*, 571 US ___, 134 S Ct 1126, ___ L Ed 2d ___ (2014) (applying objective reasonableness to determine the validity of a search under the Fourth Amendment, and observing that the Court has repeatedly rejected a subjective approach). Given the similarities in the two provisions, and in the "reasonableness" analyses that apply to both, this court should look freely to Fourth Amendment jurisprudence as guidance for formulating the parameters of Oregon's emergency-aid doctrine.

2. The Fourth Amendment permits a warrantless search and seizure under the emergency-aid exception when an officer reasonably believes that those actions are necessary to assist animals that face an imminent risk of serious physical injury or death.

The Fourth Amendment permits a warrantless search, like the one that occurred in this case, under the emergency-aid doctrine. In *Mincey*, the United States Supreme Court described the emergency-aid exception to the Fourth Amendment warrant requirement as follows:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.

437 US at 392 (footnotes omitted). *See also Brigham City v. Stuart*, 547 US 398, 403-04, 126 S Ct 1943, 164 L Ed 2d 650 (2006) (no violation of the Fourth Amendment where officers have an objectively reasonable belief that

they need to immediately enter without a warrant to assist persons who are seriously injured or threatened with such injury).

The United States Supreme Court has not specifically considered whether the emergency-aid doctrine applies when an officer renders aid to an animal, but it has acknowledged that American society has long expressed and recognized an interest in protecting animals. *See Stevens*, 559 US at 469 (noting America's "long history" of preventing animal cruelty). And other courts, with apparent unanimity, have held that the federal emergency-aid exception allows officers to take action to protect animals. Without fail, courts that have decided cases under the Fourth Amendment emergency-aid exception have held that it allows officers to conduct warrantless searches and seizures to assist animals. *See, e.g., Scott v. Jackson County*, 403 F Supp 2d 999, 1007 (D Or 2005), *rev in part on other grounds*, 297 Fed Appx 623 (9th Cir 2008) (warrantless seizure of starving rabbits justified under emergency-aid exception to Fourth Amendment); *Shapiro v. City of Glen Cove*, 2005 WL 1076292 at 15 (EDNY 2005) (warrantless search found reasonable under the Fourth Amendment emergency-aid doctrine where police entered building in response to a call about dogs in distress); *Suss v. ASPCA*, 823 F Supp 181, 187 (SDNY 1993) ("Real immediacy may allow emergency entries to preserve animal life that is threatened because of cruelty."); *State v. Goulet*, 21 A 3d 302, 314-15 (RI 2011) (Fourth Amendment emergency-aid exception allowed police to search property where there was a report that the defendant was shooting

his dog, defendant told officer that he would never find the dog, and officer observed freshly-dug earth); *Hegarty v. Addison County Humane Society*, 176 Vt 405, 848 A 2d 1139, 1143 (Vt S Ct 2004) (a statute that allows an officer to take immediate action, without a warrant, to protect an animal's health and safety does not violate the Fourth Amendment); *People v. Rogers*, 184 Misc 2d 419, 708 NYS 2d 795, 797 (NY App Term 2d Dept 2000) (no Fourth Amendment violation where police entered pet shop to save animals under emergency-aid exception); *Brinkley v. County of Flagler*, 769 So 2d 468 (Fla App 2000) (large numbers of dead, filthy, and distressed animals justified officer's entry under emergency-aid exception, because "any reasonable person would have concluded that an urgent and immediate need for protective action was warranted."); *Broden v. Marin Humane Society*, 70 Cal App 4th 1212, 1221-22, 83 Cal Rptr 2d 235 (1999) ("[t]here is no question that a law enforcement officer may make a warrantless entry of a building when there are reasonable grounds for believing that persons inside are in need of immediate aid" and, under state laws that mirror familiar Fourth Amendment search and seizure law, "animals shall receive a similar solicitude"); *State v. Kilburn*, 1998 WL 142412 at 4 (Ohio App 1998) (unpublished decision) (emergency doctrine allowed warrantless search; the public interest "in the prevention of cruelty to animals" requires a flexible application of the general rule that a warrant is required); *People v. Thornton*, 286 Ill App 3d 624, 629-31, 676 NE 2d 1024 (1997) (officer's desire to assist dog in distress justified warrantless

entry into apartment under federal emergency-aid exception); *State v. Pine*, 889 SW 2d 625, 631-32 (Tex Ct App 1994), *rev den* (1995), *cert den*, 516 US 914 (1995) (warrantless seizure of starving colt did not violate Fourth Amendment; it was justified under emergency-aid doctrine); *State v. Bauer*, 127 Wis 2d 401, 379 NW 2d 895, 897-99 (Wisc Ct App 1985), *rev den*, 129 Wis 2d 550 (1986) (warrantless seizure of horses that were "near death" was justified under emergency-aid exception to Fourth Amendment warrant requirement).

It is worth noting that neither defendant has cited a single case in which any court has stated that it would *not* apply the emergency-aid doctrine where officers act reasonably to prevent animal cruelty. This court should similarly hold that a warrantless search and seizure does not violate the Fourth Amendment where police reasonably believe that an animal is in need of immediate aid.[11]

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[11] This part of the state's brief illustrates another reason that the Oregon emergency-aid exception should apply in cases such as this one. This court has indicated that the unanimity of other state and federal courts gives weight to a particular exception to the warrant requirement. *See Fair*, 353 Or at 605-07 (assessing a warrantless seizure under Article I, section 9; finding persuasive that "[w]ith apparent unanimity other courts and authorities examining that question under the Fourth Amendment" had concluded that such seizures were lawful). The apparent unanimity of every other court that has considered this type of issue is powerful reason to adopt similar reasoning in addressing the emergency-aid exception under Article I, section 9.

3. The state and federal emergency-aid doctrines allowed the warrantless search and seizure in this case.

Here, Deputy Bartholomew's conduct was objectively reasonable and therefore lawful. This particular deputy was eminently qualified to assess the health of the horse. Deputy Bartholomew was the sole animal control officer in Douglas County, and he had held that position for 22 years. (Tr 100-01). He had a bachelor's degree in animal science, and had studied livestock production and disease. (Tr 101). Deputy Bartholomew had graduated from the National Animal Control Academy, had over 100 hours of training in animal cruelty from the Humane Society and the American Society for Prevention of Cruelty to Animals, had been in charge of training for the Oregon Animal Control Council, and served as president of that organization. (Tr 101). He also taught courses in the Henneke Scoring Method, which is used to assess the body condition of horses. (Tr 102). In the course of his job, he had evaluated the condition of more than two thousand horses, including older horses such as the one involved in this case. (Tr 166). In addition, the deputy had life-long personal experience with horses; when he was growing-up, his father was a horse-trader and the deputy and his brother started and trained horses for sale. (Tr 102).

Deputy Bartholomew articulated facts that supported the warrantless search and seizure. His exceptional training and experience informed the deputy's observations. The deputy could see every bone in the horse's body – "every rib"

and every bone protrusion. (Tr 111-12). This horse in this case was the thinnest horse that the deputy had seen that was still standing. (Tr 114). The deputy knew that a horse that thin, especially a horse that was having difficulty urinating like this one, could be suffering from organ failure; "anytime you get a horse this skinny internal organs start shutting down." (Tr 113-14). In addition, the horse was unsteady and swaying. (Tr 111, 113). Deputy Bartholomew was afraid that the horse would fall and would not be able to get back up because she was too weak. (Tr 114, 162). If a horse cannot get up, it can develop problems breathing and intestinal constriction that requires surgery. (Tr 162-63). A horse in that condition could not survive the surgery needed to correct such problems and would have to be euthanized. (Tr 114, 162-63). The deputy concluded that the horse's emaciation was so severe that it constituted a serious physical injury. (Tr 167). His photographs of the horse bolster the reasonableness of his belief.[12]

Obtaining a warrant would have taken about four hours. (Tr 122). Deputy Bartholomew believed that the horse was "in immediate danger" and that taking the time to obtain a warrant would have endangered her life. (Tr 122). He seized

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[12] The photos were received in evidence during the hearing on the motion to suppress. (Tr 114). Some of the photographs are attached, as SER 1-2, to the state's responsive brief in the Court of Appeals.

the horse from Dicke's pasture[13] and had her transported to a veterinarian, who was able to examine the horse less than two hours after the deputy first saw the horse. (Tr 108-09, 143-45, 150, 154, 165). The veterinarian confirmed the deputy's assessment that the horse was in immediate need of medical care. (Tr 126, 128-29).

To the extent that reference to relevant statutes is necessary to assess reasonableness in a case like this one, those statutes reflect a public interest in Oregon to protect horses from starvation and cruelty. *See* ORS 167.310(6) (defining minimum care for animals); ORS 167.315-167.330 (defining animal abuse and neglect); ORS 167.335 (no exemption from animal-abuse laws for situations such as this one).

The *Baker* test for a warrantless search and seizure under the emergency-aid exception does not require the deputy's belief that an emergency exists to be correct; it only requires that the belief be "objectively reasonable." And here, it was: the deputy had an objectively reasonable belief that the horse was in imminent danger of death or serious physical harm and that a warrantless seizure

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[13] The horse was seized from a fenced area to the east of Dicke's house, about 100 feet away from the residence. (Tr 108-09). The house was not inside the fenced area that contained the horse. (Tr 110).

was necessary to render immediate aid. Deputy Bartholomew's search and seizure of the horse was justified under the emergency-aid doctrine, and it did not violate Article I, section 9, or the Fourth Amendment.

B. Exigent circumstances also justified the deputy's warrantless search and seizure of the horse, under the Oregon Constitution and the Fourth Amendment.

1. The exigent-circumstances exception allows warrantless searches under the state and federal constitutions.

Another independent basis for finding that the deputy's search and seizure was lawful is the exigent-circumstances exception to the warrant requirement. The exigent-circumstances exception under Article I, section 9, allows warrantless searches and seizures when police are presented with both probable cause to believe that a crime has occurred and an exigent circumstance.[14] *Bridewell*, 306 Or at 235-36. A particular officer's training and expertise may provide the basis for the probable cause requirement. *Heckathorne*, 347 Or at 485. "Exigent circumstances" are present when an emergency exists. *Bridewell*, 306 Or at 235.

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[14] Oregon animal protection statutes allow warrantless seizures under circumstances similar to the exigent-circumstances exception, stating that an officer may impound an animal if there is probable cause to believe the animal has been subjected to first-degree animal abuse and first-degree animal neglect (as in this case) and if the officer either obtains a warrant or the animal is subject to seizure in "any other manner authorized by law[.]" ORS 167.345(2).

As with the emergency-aid exception, whether an officer's conduct falls within the exigent-circumstances exception depends on whether the officer acts in an objectively reasonable manner. *See Fair*, 353 Or at 611 (discussing the application of the exigent-circumstances exception and assessing whether the officers' conduct had an "objectively reasonable basis"). The relevant analysis is not well-served by too readily second-guessing the decisions that officers make when they encounter an emergency situation in the field. *Fair*, 353 Or at 613.

One type of exigent circumstance that can support a warrantless entry or seizure is "a situation that requires police to act swiftly to prevent danger to life[.]"[15] *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). This court has not ruled on whether Article I, section 9, permits application of the exigent-

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[15] Exigent circumstances may also occur when immediate action is necessary to preserve evidence. *See State v. Machuca*, 347 Or 644, 656, 227 P3d 729 (2010) (warrantless search permissible because possible loss of blood-alcohol evidence through dissipation creates an exigency). In this case, Deputy Bartholomew seized the horse due to her medical condition and the record did not show that the defendants made any attempt to conceal the horse from law enforcement. (Tr 125-26). Because nothing indicated that the defendants were going to take any measures that might affect the availability of the horse as evidence of the crimes, the possible destruction of evidence was not an exigent circumstance in this case. Nevertheless, if there was a situation involving animals and the possible destruction of evidence, the exigent-circumstances exception should apply to that type of case as well, particularly if the "evidence" is the animal and the charge involves harm to the animal.

circumstances exception to situations involving a threat to animal life. But the societal interests and history already discussed supports such an application.

Moreover, this court has observed the similarity between the exigent-circumstances exception permitted by the Oregon Constitution and that permitted by the Fourth Amendment. *See Fair*, 353 Or at 602 (discussing the exigent circumstances exception, noting that the guarantees under Article I, section 9, and the Fourth Amendment are "substantively the same," and explaining that "reasonableness" is the touchstone under both provisions). *See also State v. Miskell*, 351 Or 680, 696, 698, 277 P3d 522 (2012) ("exigent circumstances" is "used by this court in discussing exceptions to the search warrant requirement under Article I, section 9, and by the federal courts in discussing exceptions to the warrant requirements under the Fourth Amendment"). Many other jurisdictions have already recognized that the "exigent circumstances" exception to the Fourth Amendment applies when police act to save animals. *See, e.g.*, *People v. Chung*, 185 Cal App 4th 247, 110 Cal Rptr 3d 253, 258-61 (2010), *rev den*, 123 Cal Rptr 3d 575 (2011) (Fourth Amendment not violated by officer's warrantless entry into home, because report of dog's torture and officer's observation of whimpering amounted to exigent circumstances); *Morgan*, 289 Ga App at 212 (warrantless seizure of starving dogs lawful under Fourth Amendment, because it was justified by exigent circumstances); *Davis v. State*, 907 NE 2d 1043, 1050 (Ind App 2009) (finding "animal life to be a basis for the exigent circumstances exception to the

warrant requirement, [because] Indiana's animal cruelty statute evidences a strong public policy against the mistreatment of animals"); *Trimble v. State*, 842 NE 2d 798, 803-04, *adh'd to on rehearing*, 848 NE 2d 278 (Ind S Ct 2006) (warrantless search and seizure of emaciated and injured dog permissible under state and federal constitutions due to exigent circumstances); *State v. Stone*, 321 Mont 489, 496-98, 92 P3d 1178 (Mont S Ct 2004) (observing that several states have extended the exigent-circumstances exception to include danger to the life of animals, and holding that "the prevention of needless suffering and death of the animals on [the defendant's] property created exigent circumstances justifying the warrantless search for and rescue of the animals."); *State v. Berry*, 92 SW 3d 823, 830 (Mo App 2003) ("we acknowledge that exigent circumstances in cases involving animal abuse constitute an exception to the search warrant requirement," but the deputy's seven-day delay belied exigency); *DiCesare v. Stuart*, 12 F 3d 973, 977-78 (10th Cir 1993) (although police had probable cause to seize horses in poor condition and could have seized them if there was exigency, delay of 16 hours between discovery of horses and seizure demonstrated absence of exigency). *See also Pine*, 889 SW2d at 631 (Texas court referred to the "emergency doctrine," but

required probable cause and a need to act immediately to protect animal life).[16]

The constitutional analyses used by at least some of those state courts—in cases such as *Stone* and *Pine*—are virtually identical to this court's "exigent circumstances" analysis in cases such as *State v. Stevens*. And those other courts are apparently unanimous in holding that there is no constitutional violation when police conduct a warrantless search and seizure to preserve the life of an animal. *See Fair*, 353 Or at 605-07 (finding persuasive the "apparent unanimity" of other courts that have considered, under the Fourth Amendment, whether police can stop and question potential witnesses without a warrant). As discussed, numerous Oregon statutes address the treatment of animals, and those statutes provide guidance in assessing the reasonableness of an officer's actions with respect to animals. In light of Oregon's societal interest in protecting animals, and in light of

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[16] Other courts, including federal courts, appear to conflate our versions of the emergency-aid and exigent-circumstances exceptions to the warrant requirement, at least to some extent. For example, they address exigent circumstances without separately requiring probable cause as a predicate. *See Brigham City*, 547 US at 403-04 (referring to an "exigency" and stating that "law enforcement officers may enter a home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," but noting that the test is simply the objective reasonableness of the officer's action). Even though the state and federal exigent-circumstances tests are not identical, Oregon's test encompasses the elements contained in the federal test. Thus, if an officer's conduct passes muster under the Oregon exigent-circumstances exception, it will pass muster under the Fourth Amendment as well.

pertinent Oregon statutes, the state urges this court to hold that the exigent-circumstances exception under Article I, section 9, applies when officers (1) have probable cause to believe that a crime has occurred and (2) encounter circumstances that cause them to reasonably conclude they must act immediately to protect the life of animals. And, given the cases cited above and America's historical interest in animal protection, this court should also hold that a warrantless search and seizure, where reasonably necessary to save animal life, does not violate the Fourth Amendment.

2. The exigent-circumstances exceptions permitted the warrantless search and seizure in this case.

The record in this case shows that exigent-circumstances exceptions to the state and federal warrant requirements justified the warrantless search and seizure at issue. It demonstrated that (1) Deputy Bartholomew had probable cause to believe that the horse was the victim of animal neglect, and (2) the deputy reasonably took swift action to protect her life.

a. The deputy had probable cause to believe that the horse was the victim of animal neglect.

As mentioned, Deputy Bartholomew had exceptional education and experience in assessing the health of horses. (Tr 100-02). Indeed, he taught others how to assess the physical condition of horses. (Tr 102). That education and experience enhanced the deputy's observations of the horse in this case. After viewing the horse, Deputy Bartholomew concluded that her emaciation was so

severe that her organs were likely failing and she was so weak that she could barely stand. (Tr 111, 113-14). The deputy further concluded that the horse's condition was grave and constituted a serious physical injury. (Tr 167). The deputy believed that the horse was suffering. (Tr 167).

Based on his observations, training and experience, the deputy believed that he had probable cause to conclude that the horse was the victim of the crime of animal neglect, and he was correct. (Tr 114-15). "Probable cause" is present when there is a substantial objective basis for believing that, more likely than not, an offense has been committed and a person to be arrested has committed it. ORS 131.005(11).[17] Probable cause does not require certainty or proof beyond a reasonable doubt. *State v. Goodman*, 328 Or 318, 326, 975 P2d 458 (1999). Officers are not required to eliminate all other possible explanations for the suspicious circumstances. *See State v. Foster*, 350 Or 161, 173, 252 P3d 292 (2011) ("an observation made by police that is consistent with criminal conduct does not have to eliminate any possibility of an innocent explanation to provide probable cause"). To determine probable cause, courts consider the "totality of the

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[17] Oregon's statutory probable-cause requirement is more stringent that the federal constitutional requirement of probable cause. *State v. Anfield*, 313 Or 554, 562, 836 P2d 1337 (1992). Thus, if an officer has probable cause under the Oregon statute, he necessarily has probable cause under the federal standard. *Id.*

circumstances, including the officer's training and experience." *State v. Vasquez-Villagomez*, 346 Or 12, 23, 203 P3d 193 (2009).

Here, the horse's appearance convinced the deputy that criminal conduct has caused the horse to be on the verge of death, either from starvation or from neglecting her medical needs. A person commits the crime of animal neglect when he or she "intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in such person's custody or control." ORS 167.325. "Minimum care" means "care sufficient to preserve the health and well-being of an animal," and includes "food of sufficient quantity and quality to allow for normal growth or maintenance of body weight" and "veterinary care deemed necessary by a reasonably prudent person to relieve distress from injury, neglect or disease." ORS 167.310(7). Based on the deputy's observations of the horse, and in light of his extensive training and experience, he had probable cause to believe that the horse's owners had failed to provide minimum care and that the crime of animal neglect had occurred.

b. The deputy needed to act swiftly to save the horse's life.

Further, Deputy Bartholomew reasonably believed that he faced a situation that required him to act swiftly to prevent danger to the horse's life. The horse was in danger of collapsing. (Tr 111, 113-14). When a horse is as weak as this one, falling can be fatal. (Tr 162-63). In addition, she displayed symptoms of organ failure. (Tr 113-14). Deputy Bartholomew believed that, if he took the time to get

a warrant, it would endanger the horse's life. (Tr 119-22).

The deputy arranged for the horse to be transported from the site where he had first observed her to the closest veterinary clinic, the veterinarian examined the horse less than two hours after the deputy first saw her, and the deputy could not have secured a warrant in that length of time. (Tr 143-45, 150, 154, 165). The veterinarian confirmed the deputy's assessment of the situation. She found that the horse had a severe heart murmur, a condition linked to starvation, and was close to cardiac failure. (Tr 128-29). The veterinarian rated the horse as a 0.5 on the Henneke Scale, meaning that the horse was extremely emaciated, and she said that the horse was "definitely in immediate need of care." (Tr 126, 128-29).

Significantly, this was not a situation in which the deputy could have allowed the horse to remain in place and could simply have thrown it some "food." Defendants had given the horse "food" in the form of hay, but it was not the type of care and nutrition that the horse needed. (Tr 175). Instead, this was an old horse with dental problems, one who could not process hay as a younger horse could. (Tr 180-81). To obtain adequate nutrition, she required pelleted feed,

softened by soaking, and dressed with oil and molasses.[18] (Tr 180-81). Providing the horse with food while it remained in place would not have revealed the extent of its medical problems in a timely manner or satisfied the urgent need for monitoring and proper care. When the deputy observed this starving animal, he reasonably concluded that he needed to promptly conduct a further assessment of the horse and then take her for immediate medical attention and care.

In sum, the horse was extremely weak and had signs of organ failure; she was starving to death. Her condition provided probable cause that she had not received minimum care, that she was the victim of animal neglect, and that she needed immediate care. Obtaining a warrant would have delayed the assessment, monitoring, and the administration of the special diet that the horse required to preserve her life. Because Deputy Bartholomew had probable cause and faced exigent circumstances, he properly seized the horse without waiting to first obtain a warrant.

C. If there was error, it was harmless.

Under the Oregon Constitution, this court must affirm the judgment of

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[18] Notably, after the horse was monitored and received appropriate care and feeding, she gained approximately 150 pounds and the heart murmur completely disappeared. (Tr 129-31).

the trial court "if there is little likelihood that the error affected the verdict." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). The evidence of the deputy's initial observations, together with evidence unrelated to the seizure, was more than sufficient to convict the defendants. The evidence defendants sought to suppress did not have any appreciable effect on the verdict.

To prove that Dicke committed first-degree animal abuse, the state had to prove that she recklessly caused serious physical injury to the horse. ORS 167.320(1). To prove that Dicke committed first-degree animal neglect, the state had to prove that "with criminal negligence [she] fail[ed] to provide minimum care" to the horse and that the failure resulted in "serious physical injury." ORS 167.330(1). To prove that Fessenden committed second-degree animal neglect, the state needed to prove that "with criminal negligence [she] fail[ed] to provide minimum care" to the horse. ORS 167.325(1). "Minimum care" means "care sufficient to preserve the health and well-being of an animal," and includes "food of sufficient quantity and quality to allow for normal growth or maintenance of body weight" and "veterinary care deemed necessary by a reasonably prudent person to relieve distress from injury, neglect or disease." ORS 167.310(7).

Evidence in the case, from defendants themselves, established that both defendants knew that the horse required special feeding due to her age and condition. (Tr 713-14, 776-78, 785-86). That evidence did not derive from the deputy's examination and seizure of the horse, and it proved the mental states for

each of the crimes. Moreover, the visual observations the deputy made from his lawful vantage point in the driveway, before he physically examined and seized the horse, sufficed to prove all other elements of the crime. The horse's skeletal structure was "clearly visible." (Tr 382-83). The deputy gave the horse a Henneke body-score of 1.0, which is "extremely emaciated," before he conducted any search or seizure. (Tr 381-83). His visual inspection from the driveway, 15 to 20 feet away from the horse, revealed that this was "the thinnest horse I had really ever seen since doing this job that was still standing." (Tr 382-83). He also observed, before the search and seizure, that the horse was swaying and having trouble urinating. (Tr 383-84). Those observations caused him to believe that the horse might fall or was experiencing organ failure. (Tr 384).

Thus, the readily observable condition of the horse—even from a distance—established that she had not received minimal care and that she suffered from either a severe untreated illness or starvation. Even without the deputy's hands-on search of the horse and the evidence obtained after the seizure, there was ample evidence to convict the defendants. It follows that, if the court erred by allowing the additional evidence of abuse and neglect, the error was not likely to have affected the verdict in this case and this court should nevertheless affirm.

CONCLUSION

The emergency-aid and exigent-circumstances exceptions encompass situations in which officers act reasonably to provide emergency assistance to animals. Under the circumstances in this case, the deputy's conduct satisfied the requirements of both exceptions. That conduct did not violate Article I, section 9, of the Oregon Constitution, or the Fourth Amendment to the United States Constitution, and this court should affirm.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Pamela J. Walsh
PAMELA J. WALSH #894034
Assistant Attorney General
Pamela.J.Walsh@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

PJW:kak/5119220

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 24, 2014, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Elizabeth Gillingham Daily, attorneys for petitioner on review, Linda Fessenden, and Ranking Johnson, IV, attorney for petitioner on review, Teresa Dicke, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 12,127 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Pamela J. Walsh
PAMELA J. WALSH #894034
Assistant Attorney General
Pamela.J.Walsh@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

PJW:kak/5119220