IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

TAMERA LOUISE MEREDITH,

Defendant-Appellant,
Petitioner on Review.

Circuit Court No. 98CF2120FE

MAR 17 2004

Appellate Court No. A106960

Supreme Court No. S50173

RESPONDENT'S BRIEF ON THE MERITS

Review of the *En Banc* Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Douglas County
Honorable JOAN G. SEITZ, Judge

Opinion Filed: October 30, 2002
Author of Opinion: Edmonds, PJ.
Dissenting Opinion by: Kistler, J., joined by Armstrong, Wollheim, and Brewer, JJ.

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ISSUE PRESENTED

Defendant, who at the relevant time worked as a United States Forest Service fire prevention specialist, claims she had a constitutional right to keep her location on public land and public highways secret when she set an arson fire in a national forest during her working hours while she was supposed to be performing her job duties using her employer's publicly owned vehicle (over which she did not exercise exclusive control) that was entrusted to her for the performance of her public employment functions.

Summary of Argument

Government employees have no constitutional right to keep their location private from their employer during their working hours. An employer's authorization for placement of an electronic tracking device on its own vehicle that it allows its employees to use for work purposes – and the monitoring of that device to locate the vehicle during work hours when an employee was using it – does not violate the employee's privacy rights under either the federal or Oregon Constitutions. The government employer here did not record or intercept any private conversation by its employee, did not observe any conduct by its employee that society recognizes as private, and all monitoring was limited to tracking the employer-owned vehicle while it traveled in plain view on public roads inside public national forest land during working hours. The actions here unquestionably would have been lawful if they had been taken by a private employer vis-à-vis one of its own employees; government

employees have no greater privacy right in their location while on the job than private-sector employees have.

ARGUMENT

Defendant and amicus raise the ominous Orwellian specter of sinister surreptitious governmental surveillance and accuse the government of attempting to place the people's actions under a proverbial microscope, thereby depriving them of all semblance of commonly accepted notions of individual privacy rights. Their concerns misguide the analysis into issues that this case does not present.

To understand what this case is about, it is necessary to blow aside the smokescreen defendant's argument raises. "[P]resent fears are often no more than horrible imaginings, and *potential* privacy invasions do not constitute searches within the purview of the Fourth Amendment." *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F3d 174, 182 (1st Cir 1997) (Emphasis in original). The same should be true under Article I, section 9. Contrary to the concerns defendant and amicus spend most of their briefs discussing, this case is not about bugging phones or offices to intercept private conversations or placing cameras in bathrooms to observe personal conduct that society affords significant privacy. In addition, this case does not involve government intrusion – physically or electronically – into any citizen's private dwelling, possession, or location. Rather, it only involves the placement of an electronic tracking device (and the monitoring of that device during working hours) with the consent and at the direction of a government employer on its own publicly owned vehicle that it provided to its employee to be used for limited work-related purposes. This case is significantly different from the case on which defendant relies

almost exclusively: *State v. Campbell*, 306 Or 157, 759 P2d 1040 (1988). Unlike in *Campbell*, where the government surreptitiously placed an electronic tracking device on a private citizen's car without consent or authorization by warrant, here the tracking device was placed on a publicly owned vehicle with the full knowledge and consent of the government owner of the vehicle. Had the vehicle in the present case belonged personally to defendant, and had the government (without a warrant) attached a tracking device to it and monitored it without her consent during times when she was not at work, then this case would be no different from *Campbell*. However, the distinctly different facts here lead to a different result than was reached in *Campbell*. The issue this case presents is whether defendant had a privacy right at that particular time and in that particular place.

NO PRIVACY RIGHT OF DEFENDANT'S WAS VIOLATED

Defendant raises a claim under Article I, section 9, of the Oregon Constitution, which provides in part: "No law shall violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search, or seizure[.]" Article I, section 9, "protects privacy, property, and 'some sort of a nebulous, poorly-defined right to be protected from undignified, forceable violations of the person.'" *State v. Tanner*, 304 Or 312, 319, 745 P2d 757 (1987). Unlike the Fourth Amendment, which protects a person's "reasonable expectation of privacy," *see Katz v. United States*, 389 US 347, 88 SCt 507, 19 LEd2d 576 (1967), "the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *Campbell*, 306 Or at 164 (Emphasis in original).

Defendant raises only a privacy right claim, not a property right or a right against forceable violation of the person as identified in *Tanner*.

"Not all governmental intrusions trigger the protections guaranteed by Article I, section 9, of the Oregon Constitution. * * * Thus, in determining whether a particular governmental action violates Article I, section 9, of the Oregon Constitution, [the court] must first decide whether the action is either a 'search' or a 'seizure' within the meaning of that section." *State v. Juarez-Godinez*, 326 Or 1, 5, 942 P2d 772 (1997) (Footnote and citation omitted). Article I, section 9, only protects against unreasonable searches or seizures. *State v. Ainsworth*, 310 Or 613, 616, 801 P2d 749 (1990) (purposive aerial observation of objects visible in open view from lawful vantage point held not to be search).

Under Article I, section 9, a search is "an intrusion by a government officer, agent or employee into the protected privacy interest of an individual." *State v. Nagel*, 320 Or 24, 29, 880 P2d 451 (1994) (requiring defendant to perform field sobriety tests was a search because police created a situation where they could obtain evidence that was not otherwise subject to scrutiny by the police or others). A search occurs only when a person's privacy interest is invaded. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). To determine whether conduct constitutes a search, the court "must decide whether the practice, if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny [.]" *Campbell*, 306 Or at 171. Thus, this court must consider here whether the government's practice of placement and monitoring of an electronic tracking device

(with consent of the employer) on the employer's own vehicle significantly impairs "the people's" right to be free from scrutiny. It does not.

In *State v. Wacker*, 317 Or 419, 856 P2d 1029 (1993), this court held that police observation of drug activity inside a car parked in a business's parking lot by use of a starlight scope and camcorder did not constitute a search because the activity was in plain view from a lawful vantage point. It set out the following framework for analyzing whether conduct is a search: 1) Determine whether the defendant exhibited an intent to protect his privacy; 2) if no privacy interest is implicated, the government conduct is not a search; and 3) if no search occurred, the court will not scrutinize police conduct to see if it was reasonable. *Id.* at 426. Defendant in the instant case exhibited no intent to keep her conduct private; she drove on public highways in a national forest visible to anyone else on them.[1] The employer's Forest Service green truck that she was driving (Tr 86, 89) remained in open view, and government observation of it (through monitoring with consent of the owner of the vehicle) was not a search.

In determining if police conduct is sufficiently intrusive to be classified a search, the pivotal question is whether the police invaded a protected privacy interest. *Ainsworth*, 310 Or at 616-17. According to this court in *State v. Smith*, 327 Or 366, 372, 963 P2d 642 (1988), "[o]ur cases suggest that some form of invasion of a private

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[1] Indeed, two vehicles followed defendant's work truck until moments before she stopped and set the fire. (Tr 52, 81).

space is a common, although not essential, element of the search construct under the Oregon Constitution." It continued:

> [W]e acknowledge that private *space* and privacy *interests* often are inextricably intertwined. That is so because privacy interests generally are not self-announcing and, with a few possible exceptions, can be recognized only by their association with a private *place, i.e.*, by the fact that an object is kept or conduct occurs in a place that legitimately can be deemed private.

Id. at 372-73. (Emphasis in original).

Private citizens may wish to keep their location private, but they have no absolute right to do so when in public view or when on private property belonging to someone else. This court explained in *State v. Dixson/Digby*, 307 Or 195, 211, 766 P2d 1015 (1988):

> Areas such as the "vast expanse of some western ranches or *** the undeveloped woods of the Northwest" described by the *Oliver* majority, [*Oliver v. United States*, 466 US 120, 104 SCt 1735, 80 LEd2d 214 (1984)] 466 US at 179 n 10, may involve little or no privacy interest. Some areas of this state contain large unmarked tracts of land in which it is difficult to tell where one piece of property ends and another begins. The public may be in the habit of using these areas to hike, fish, hunt or camp. *However lonely a person usually may be in such places, he or she has no true privacy in them.*

(Emphasis added).

Plain view or open view observations are not searches because a person has no "generally recognized freedom from such scrutiny by private individuals. Such observation by the police would thus not significantly reduce the freedom from scrutiny available to 'the people.'" *Campbell*, 306 Or at 170. "[T]he privacy interests that are protected by Article I, section 9, commonly are circumscribed by the space in

which they exist, and, more particularly, by the barriers to public entry (physical and sensory) that define that public space." *Smith*, 327 Or at 373 (Footnote omitted).

However, "[p]ersons may conduct themselves in otherwise protected areas in such a way that their words or acts can plainly be seen or heard outside without any special effort." *State v. Louis,* 296 Or 57, 61, 672 P2d 708 (1983). Thus, in *Louis*, the defendant's exposure inside his house – clearly a private location in the abstract – of his genitals was not entitled to constitutional privacy protection when his display was visible to the public from a lawful vantage point outside the house, especially when defendant was aware that he could be seen. "[A] police officer's unaided observation, purposive or not, from a lawful vantage point, is not a search under Article I, section 9." *Ainsworth*, 310 Or at 621. Defendant's actions here all were done in open view on public land and all were observed from a lawful vantage point. Therefore, it was not a search to observe her employer's vehicle as it traveled on public roads or to observe her actions in plain view when she momentarily stepped out of that vehicle and set an arson fire.

Through pretrial proceedings, trial, briefing and argument in the Court of Appeals, and briefing in this court, defendant never has identified precisely what constitutional privacy right of hers that she claims was violated here. As explained in *Tanner*, "the search or seizure must violate the *defendant's* section 9 rights before evidence obtained thereby will be suppressed; a defendant's section 9 rights are not violated merely by admitting evidence obtained in violation of [another's] section 9 [right's]." 304 Or at 315-16 (Emphasis added). Inasmuch as defendant does not

claim that the government searched her person, or the interior of the government-owned vehicle she was using during her work hours, or any of her private personal belongings (whether inside that vehicle or not), it appears that her sole claim of a privacy right is her contention that she had a constitutional *right* to keep her physical *location* private from her employer while she was on the job during working hours, collecting salary for her work, and while she was using her employer's vehicle entirely on public highways and public land. This right defendant claims – that is, to be cloaked with invisibility while on public land inside an employer's vehicle – simply does not exist.

The sole authority defendant cites for her claim is *Campbell,* which, as noted earlier, involved a significantly different factual situation where the tracking device was surreptitiously placed without a warrant and without consent on a private vehicle, not the placement with consent of the government owner of a tracking device on a publicly owned vehicle that was used only for work purposes on public land. Contrary to defendant's interpretation of *Campbell*, that case did not hold that citizens have an inviolable right to keep their physical location private while they are in open view. As this court explained: "The constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or 'private,' secret from the government." *Campbell*, 306 Or at 166. Rather, *Campbell* merely held that the method used by police in that case under the circumstances presented there constituted a search for which – based on that particular record – no exception to the warrant requirement had been established. *Campbell* did

not hold, as defendant wrongly suggests, that government use of a tracking device *per se* requires a warrant; nothing in that opinion suggests that this court would have ruled as it did if the police first had obtained consent from the car owner to place the tracking device on it or if they had had probable cause to believe a crime was being committed and exigent circumstances precluded their ability to obtain a warrant before attaching the transmitter.

In essence, *Campbell* rests on the same fundamental concern that the Fourth Amendment cases do: the concern that surveillance of this type would intrude into private locations and would reveal information from inside those private locations that citizens had taken reasonable steps to remove from public scrutiny and that they reasonably believed would not or could not be observed or retrieved from outside that private venue. *See Kyllo v. United States*, 533 US 27, 121 SCt 2038, 150 LEd2d 94 (2001) (holding that use of thermal imaging device to detect amount of heat inside house was an unreasonable search without a warrant); *United States v. Karo*, 468 US 705, 104 SCt 3296, 82 LEd2d 530 (1984) (search held unlawful when tracking device allowed police to learn information unobtainable by visual surveillance, *i.e.*, location of chemicals inside private property outside of plain view).

EMPLOYERS HAVE THE RIGHT TO KNOW THE PHYSICAL LOCATION OF THEIR EMPLOYEES DURING WORKING HOURS

In general, business premises afford lesser privacy interests than private residences. *See G.M. Leasing Corp v. United States*, 429 US 338, 353, 97 SCt 619, 50 LEd2d 530 (1977). "When all is said and done, employees must accept some circumscription of their liberty as a condition of continued employment." *Vega-*

Rodriguez, 110 F3d at 180. Unless the employee's activity occurs during personal break time, an employer has the right to know where its employees are during the work day. "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 US 210, 104 SCt 1758, 80 LEd2d 247, 256 (1984).

An employer, whose financial stability, livelihood, and good name often rests in the hands of its employees, has the right to know the location of its employees while they are at work being paid by the employer to perform their job duties. "Employers possess a legitimate interest in the efficient operation of the workplace * * * and one attribute of this interest is that supervisors may monitor at will that which is in plain view within an open work area." *Vega-Rodriguez*, 110 F3d at 180. Employers, private or public, can be financially liable for the acts of their employees and have an obligation to provide for their safety. As part of its inherent supervisory authority, an employer is entitled to know where its employees are during on-the-job hours, whether it be by conspicuously walking the halls or by using some form of hidden electronic monitoring. *See Vega-Rodriguez*, 110 F3d at 181 ("the mere fact that the observation is accomplished by a video camera rather that the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one.").

Video surveillance in banks and convenience stores is the norm – not only to photograph robbers, but also to allow employers to see whether their employees are

stealing from the till. Department stores reportedly surreptitiously observe changing rooms and place electronic tags on items to track whether they are taken off the premises without payment by their customers as well as by their employees. Public areas such as office hallways, lobbies, and elevators – in both public and private buildings – routinely are monitored by camera for security and safety purposes.

Surreptitious government surveillance of the public on public highways occurs daily. Police conduct radar speed traps on the ground as well as from the air to catch the unwary. Even defendant presumably does not claim that this action constitutes a violation of the public's right to privacy. Government-operated traffic cameras expose any motorist who chooses to be on the public highway within its view. The "people" have no right to be free from such observation or from having their location identified by those cameras potentially for use in criminal prosecutions.

Particularly where, as here, an employee is entrusted with expensive employer-owned equipment (a vehicle) and where her job duties entailed traveling throughout the entire national forest, her employer was entitled to know that she was working when and where she was supposed to be, and it had the right to track its own vehicle's use – whether by observing the odometer readings or electronically tracking it – to make sure that it was not used for unauthorized purposes, as well as to know its location in the event the vehicle was needed elsewhere. Defendant herself admitted that all her activities that day were Forest Service work-related activities and that she did not engage in any personal activities. (Tr 103-05). She was required to report her location if her supervisors asked for it. (Tr 19, 32). Defendant simply had no privacy

right to keep her location secret from her employer. Because she had no constitutional right to keep her location private here, the use of the tracking device was not a search.

EMPLOYEES RETAIN CERTAIN PRIVACY RIGHTS AT WORK

That is not to say that employees abandon all privacy rights merely by accepting a job and a paycheck. For example, restroom and locker room changing facilities unquestionably have privacy protection from undisclosed observation. *See generally Sterling v. Cupp*, 290 Or 611, 624, 625 P2d 123 (1981) ("the final bastion of privacy is to be found in the area of human procreation and excretion *** [if] a person is entitled to any shred of privacy, then it is to privacy as to these matters."). Although it would be a violation of the employee's privacy rights to place a camera in those places (at least without posted notice), it would not be a violation of any privacy right for the employer to place a camera outside the door of its restroom or locker room to monitor when its employees enter and how long they stay during working hours when they are not on personal break time. Employees simply have no right to keep their location private from their employer – even if they can keep their activities secret or concealed.

Employers have no right to intercept their employees' private conversations by bugging their private offices or intercepting their private telephone conversations. *See, e.g., Deal v. Spears*, 980 F2d 1153 (8th Cir 1992) (awarding damages and attorney fees to employee whose telephone calls were intercepted by her employer). They also cannot read their private mail or rummage through their personal belongings or their desks, where such belongings likely will be kept. *See O'Connor*

v. Ortega, 480 US 709, 107 SCt 1492, 94 LEd2d 714 (1987) (employee had expectation of privacy in office desk and file cabinets he did not share with other workers and in which he stored personal items). However, an employer (public or private) also undoubtedly has the right to examine its own telephone records and computer records to insure that its employees are using business phones and computers solely for authorized work purposes, not for making private unauthorized long-distance phone calls or visiting gambling or pornographic websites.

Employee use of employer-owned equipment is subject to the control of the employer, who may arbitrarily decide which typewriter, desk, or company vehicle a particular employee may use for work purposes. As the record here shows, defendant's employer assigned her different vehicles to use that summer, and it had the authority to reassign the vehicle she customarily used at any time – including in the middle of her shift if, for example, firefighters needed it. (Tr 24, 94, 108-09).

Defendant does not and cannot claim that any cognizable privacy right would have been violated here if she had been a non-governmental employee working for a private employer. That being so, she necessarily is asking here that governmental employees be granted *greater* privacy rights than their private-sector counterparts. She cites no authority to support this request or any reason why a government employee is entitled to greater privacy rights.

Indeed, government employees in several significant ways have lesser privacy rights than private-sector employees. For example, public employees' job descriptions, salaries, and pension payouts are matters of public record, whereas those

of private-sector employees are not. Certain personnel matters, such as disciplinary actions taken against public employees, also are matters of public record, unlike those taken against private-sector employees. Contrary to defendant's contention, public employees are not entitled to greater privacy rights than private-sector employees.

EVEN IF THE GOVERNMENT'S CONDUCT WAS A SEARCH, IT WAS NOT UNREASONABLE

This court has "never suggested that the use of *any* device or enhancement – no matter where that device or enhancement was used" – would qualify as a "constitutionally significant" search. *Smith*, 327 Or at 371. Contrary to defendant's assertion, *Campbell* does not hold that every police use of tracking devices is unconstitutional or even that every warrantless use is unconstitutional. The *Campbell* holding is narrow and is limited to the surreptitious, nonconsensual warrantless use of tracking devices on private vehicles. It did not hold or suggest that the police constitutionally would be precluded from obtaining a warrant to use a tracking device or that they could not rely on a well-accepted exception to the warrant requirement that would permit their use without a warrant. It certainly did not hold that an owner of a vehicle could not consent to have a tracking device placed on his or her own vehicle or that an owner could not further consent to allow law enforcement agents to track that vehicle's location.

Campbell was decided just as this court was breaking away from a lock-step application of Fourth Amendment analysis as establishing the meaning of Oregon Constitutional provisions. It also was one of the early cases focusing on the issue of "technological enhancement" and its effect on interpretation of constitutional

provisions written, in many instances, long before such modern devices even were imagined. In particular, that court particularly appeared to be concerned about the role of technology as affecting privacy rights. In the sixteen years since *Campbell* was decided, technology has advanced at a swift pace. Wireless technologies such as cell phones have become ubiquitous. Global positioning devices – if operational in *Campbell's* time – were the exclusive domain of the military; today these devices are available for individual purchase at department stores, and many cars even have them included as factory-installed standard equipment. As technology has become more a part of modern daily life, some of the *Campbell*-era concerns about pervasive "Big Brother" applications have lessened.[2]

In the years after *Campbell* was decided, this court has dealt with a number of technological enhancement cases ranging from flashlights and use of canines for their enhanced olifactory powers to starlight scopes and camera equipment. Since *Campbell* was decided, this court has had occasion to discuss that holding and has explained that it was the trespassory nature of placing the tracking device on a private vehicle that was central to the holding in *Campbell*. Specifically, in *Ainsworth* this court relied on *Campbell* in noting that the search determination depends on whether the officers "had a right to be where they were," thus stressing the importance of the

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[2] For example, as amicus notes in its brief, current federal cell phone regulations require providers to install equipment in cell phones to allow location of cell phone calls to within 50 meters for 67 percent of calls and to within 150 meters for 95 percent of calls. (Amicus Br 20). The public – by its ever growing purchase and use of cell phones – apparently does not view this tracking capability as a threat to privacy but most likely welcomes it as an aid for providing emergency services from 911 dispatchers or allowing lost hikers to be found.

observation being from a lawful vantage point. 310 Or at 617. In *Wacker*, this court explicitly rejected the defendant's argument "that using *any* technological enhancement *automatically* violates Article I, section 9, regardless of whether the conduct that the officers observed was open to public view." 317 Or at 426 n 12. (Emphasis in original). Rather, it explained that *Campbell* "did not purport to establish a *per se* rule against the warrantless use by police of any technologically enhanced observation regardless of the circumstances." *Id.* More recently, in *Smith* this court described *Campbell* as holding that the "trespassory act of attaching [a] tracking device to [a] car was a search," 327 Or at 372, and further held that *Campbell* "involved a clear form of invasion, a *trespass*. The tracking device at issue was attached without permission to the defendant's privately owned vehicle." *Id.* at 373 n 5. (Emphasis in original).

The common theme in *Louis* (plain view observation from neighbor's house where police had permission to be), *Wacker* (plain view observation with starlight scope from upstairs location of private business where police had permission to be), *Ainsworth* (plain view observation from lawful airspace), and *Smith* (plain smell observation from lawful vantage point) is that in all these cases the police did not trespass and were in a lawful vantage point when they observed evidence of crime. In *Campbell*, although the police were in a lawful vantage point when they observed the evidence, they reached that vantage point only because of their unlawful trespass of attaching a transmitter to the defendant's car without consent or any other

exception to the warrant requirement that allowed them to locate defendant when they otherwise had been unable to follow him.

The real issue here appears to narrow to the *use* of the tracking device to locate defendant. The mere use of an electronic device on a chattel with permission from its owner does not render it a search any more than the placement of a video camera on forest land with the land-owner's permission did in *State v. Goodman*, 328 Or 318, 975 P2d 458 (1999). If the law enforcement agents here had visually tracked defendant from the time she drove off, or if they had used a bloodhound to find her, or if they independently had spotted her from lawful airspace, she could have no privacy claim inasmuch as her truck's location could be seen from a lawful vantage point at all times. The key is how the police got to that lawful vantage point. *See Ainsworth*, 310 Or 618 (lawfulness of plain view aerial observation dependent on type of aircraft and height at which it operated). In *Campbell*, they reached it by virtue of an unlawful trespass, which constituted the unconstitutional invasion of that defendant's privacy. In contrast, here they were directed to it by lawful consent from the vehicle's owner allowing placement of the tracking device.

Existence of this consent, from someone with a superior ownership right to the vehicle than defendant, renders the police action reasonable even if it is deemed to be a search. As *Tanner* held, someone with inferior rights takes the risk that another with a superior right will allow an intrusion into those rights. For example, a guest who stores items within the privacy of another's house has a privacy interest "only as extensive as [the owner's] explicit or implied permission to store the effect." 304 Or

at 322. Thus, the guest's privacy interest would *not* be violated if the homeowner "allows the police to enter the house and discover the effects *** because [the homeowner] controls access to the house, not because [the guest] does not have a privacy interest against the state. *Id.* The employer here is in the same position as the homeowner in the *Tanner* example: defendant's "privacy" as to her location in the vehicle was subject to the limitation of any such right that her employer might put on her use of its vehicle by allowing, for example, a tracking device to be attached to it. Because the employer allowed law enforcement agents to attach a transmitter to its vehicle, it allowed access to the vehicle's location; defendant's privacy interests were subject to the possibility that her employer – or others with the employer's consent –would monitor her location.

Defendant argues that the employer here could not give consent to attach a tracking device because it was used for a law enforcement purpose instead of an employment-related one. Her focus on police motivation is misplaced. If her privacy right was violated, it was violated regardless of the officer's motivation. *Campbell* directs the focus to the nature of the governmental act asserted to be a search, not on its purpose. *See Campbell*, 306 Or at 166-67. "Article I, section 9, prohibits certain governmental action, not certain governmental states of mind. The Oregon Constitution does not require an inquiry into the observing officer's thoughts to determine whether the officer's conduct unconstitutionally violates a defendant's Article I, section 9, rights." *Ainsworth*, 310 Or at 621. "It is the location and

behavior of the police officer, not the officer's motivations, that determine the existence of a search for Article I, section 9, purposes." *Id.* at 620.

Unlike a private employer, a public employer has a duty to report illegal conduct by its employees. Therefore, investigation of possible criminal activity by its employees is a work-related matter – particularly here, where the issue involved setting fires in this national forest (as opposed to an investigation of whether defendant had robbed a store in Portland during her off-work time). It cannot be said that this public employer had no work-related reasons to determine whether one of its own employees was setting arson fires during working hours to the forest it was responsible for protecting.

Under defendant's theory, the government would conduct an unlawful search if a thief stole a government car with a global tracking device in it that the authorities then used (with permission of the owner) to track down this stolen vehicle. Similarly, a government agency that placed a tracking device in a money pouch could not track it if it were stolen without violating the thief's privacy rights. The Fourth Amendment would not condone such absurd results. *See United States v. Jones,* 31 F3d 1304 (4th Cir 1994) (federal postal inspectors' placement of electronic tracking device in registered mail envelope, following defendant as he drove US mail truck containing this mail, and tracking signal after he transferred envelope into his personal vehicle and drove off held not to be intrusion into defendant's expectation of privacy). Neither should Article I, section 9. The government's placement of a tracking device on its own vehicle that it allowed its employee to use for work

purposes – and its later tracking of the location of that vehicle – did not violate any of defendant's privacy rights and was entirely reasonable.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on March 17, 2004.

I further certify that I directed the to be served upon Peter A. Ozanne and Rebecca Duncan, attorneys for appellant, Julia E. Markley, Michael S. Simon and Chin See Ming, attorneys for *Amicus Curiae*, on March 17, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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