

IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,

Plaintiff-Appellant,  
Respondent on Review,

v.

ARNOLD WELDON NIX,

Defendant-Respondent,  
Petitioner on Review.

Umatilla County Circuit  
Court No. CRH090155

CA A145386

SC S060875

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

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Review of the Decision of the Court of Appeals  
on Appeal from a Judgment  
of the Circuit Court for Umatilla County  
Honorable JEFFREY M. WALLACE, Judge

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Opinion Filed: August 1, 2012  
Author of opinion: BREWER, P. J.  
Before: Brewer, Presiding Judge, and Haselton, Chief Judge.\*

\*Haselton, C. J., *vice* Gillette, S. J.

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*Continued...*

DAVID J. CELUCH #952291  
Attorney at Law  
1318 SW 12th Avenue  
Portland, OR 97201  
Telephone: (503) 224-4045  
Email: davidjceluch@mac.com

Attorneys for Defendant-Respondent/  
Petitioner on Review

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General  
JAMIE K. CONTRERAS #022780  
Assistant Attorney-in-Charge,  
Criminal & Collateral Remedies  
Appeals  
1162 Court St. NE  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402  
Email:  
jamie.k.contreras@doj.state.or.us

Attorneys for Plaintiff-Appellant/  
Respondent on Review

## TABLE OF CONTENTS

INTRODUCTION .....	1
STATEMENT OF THE CASE .....	2
LEGAL QUESTION PRESENTED AND PROPOSED RULE OF LAW .....	3
Question Presented .....	3
Proposed Rule of Law .....	3
Summary of Argument .....	3
ARGUMENT.....	5
A.    ORS 161.067(2) provides that, when a person commits crimes against multiple victims in a single criminal episode, each count is a separately punishable conviction.....	5
B.    Nothing in ORS 161.067(2), its context, or its history indicates that the voters intended to restrict the class of “victims” to persons.....	6
C.    Because individual animals directly suffer the harm central to the crime of animal neglect, they are the “victims” of that crime.....	12
D.    Although the legislature, in creating the crime of animal neglect, did not specifically address whether animals are “victims” for merger purposes, any other conclusion would frustrate the purpose of the animal neglect statute.....	15
CONCLUSION .....	17

## TABLE OF AUTHORITIES

### Cases Cited

<i>Dog Fed’n of Wisconsin v. City of S. Milwaukee</i> , 178 Wis 2d 353, 504 NW2d 375 (Wis Ct App 1993) .....	9
<i>Halperin v. Pitts</i> , 352 Or 482, 287 P3d 1069 (2012) .....	11
<i>People v. Brush</i> , F054346, 2009 WL 1056518 (Cal Ct App 2009) .....	9

<i>People v. Speegle</i> , 53 Cal App 4th 1405 (1997).....	9
<i>People v. Weinhart</i> , E038595, 2007 WL 763187 (Cal Ct App 2007) .....	9
<i>State v. Cloutier</i> , 351 Or 68, 261 P3d 1234 (2011).....	10
<i>State v. Collins</i> , 768 So 2d 674 (La Ct App 2000) .....	9
<i>State v. Davis</i> , M2004-03060-CCA-R3-CD, 2005 WL 2255968 (Ten Crim App 2005).....	9
<i>State v. Glaspey</i> , 184 Or App 170, 55 P3d 562 (2002), rev'd, 337 Or 558, 100 P3d 730 (2004).....	7
<i>State v. Glaspey</i> , 337 Or 558, 100 P3d 730 (2004).....	10
<i>State v. Gulley</i> , 324 Or 57, 921 P2d 396 (1996).....	16
<i>State v. Hamilton</i> , 348 Or 371, 233 P3d 432 (2010).....	12
<i>State v. Hayes</i> , W2010-00309-CCA-R3-CD, 2011 WL 3655130 (Tenn Crim App 2011).....	9
<i>State v. Helmbright</i> , 2013 Ohio 1143, 2013 WL 1200244 (Ohio Ct App 2013).....	14, 15
<i>State v. Hunter</i> , 141 Or App 73, 918 P2d 104, rev den, 324 Or 78 (1996).....	12
<i>State v. Myers</i> , 3078-M, 2001 WL 324397 (Ohio Ct App 2001) .....	9
<i>State v. Nix</i> , 251 Or App 449, 283 P3d 442 (2012), rev allowed, 353 Or 410 (2013) .....	2
<i>State v. Vasquez-Rubio</i> , 323 Or 275, 917 P2d 494 (1996).....	16

<i>State v. White</i> , 341 Or 624, 147 P3d 313 (2006).....	1
--	---

### **Constitutional & Statutory Provisions**

<i>Former</i> ORS 161.062(2) (1985).....	11
Ohio R.C. 959.131(C).....	14
Or Const, Art I, § 44(3).....	6
Or Laws 1987, ch 2, § 13 .....	6
ORS 131.007 .....	6, 7
ORS 135.230 .....	7
ORS 135.406 .....	7
ORS 135.970 .....	7
ORS 137.007 .....	7
ORS 147.417 .....	7
ORS 147.419 .....	7
ORS 147.421 .....	7
ORS 161.067(2).....	1, 2, 3, 4, 5, 6, 8, 10, 11
ORS 163.160 .....	10
ORS 167.310(2).....	15
ORS 167.310(7).....	12
ORS 167.310(7)(e).....	13
ORS 167.315 .....	13
ORS 167.320 .....	13
ORS 167.322 .....	13
ORS 167.325 .....	1, 3, 4, 5, 12, 13, 14
ORS 167.330 .....	13
ORS 40.385 .....	7

## Other Authorities

Exhibit F, House Committee on Judiciary Subcommittee I, SB 508A .....	14
Luis E. Chiesa, <i>Why Is It A Crime To Step On A Goldfish?</i> — <i>Harm, Victimhood and the Structure of Anti-Cruelty Offenses</i> , 78 Miss L.J. 1, 63-64 (Fall 2008) .....	16
<i>Webster’s Third New Int’l Dictionary</i> 2550 (unabridged ed 2002) .....	8

# BRIEF ON THE MERITS OF STATE OF OREGON

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## INTRODUCTION

In Oregon, it is a crime to neglect an animal. ORS 167.325. This case calls upon this court to decide whether a person should be convicted and subject to punishment for each animal he is found guilty of neglecting, or whether he should be found guilty of only one count of neglect without regard to the number of animals he neglects. That determination hinges on whether neglected animals are the “victims” of animal neglect for purposes of merger under ORS 161.067(2)<sup>1</sup>, Oregon’s “so-called anti-merger statute.” *See State v. White*, 341 Or 624, 626, 147 P3d 313 (2006).

The Court of Appeals correctly held that animals are indeed the “victims” of animal neglect for merger purposes. The text of the anti-merger statute, in context, does not indicate that the voters—who enacted the statute through the initiative process—intended to restrict the class of “victim” only to human

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<sup>1</sup> ORS 161.067(2) provides:

“When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims. However, two or more persons owning joint interests in real or personal property shall be considered a single victim for purposes of determining the number of separately punishable offenses if the property is the subject of one of [enumerated property crimes not germane here].”

beings. Instead, they intended for the class to include whatever entity suffers the harm that is the gravamen of a given crime. Although nothing in the history of the ballot measure indicates that the voters who adopted the anti-merger statute ever specifically considered whether animals could be “victims” for purposes of merger, a conclusion that only humans can be victims would frustrate the very reason for the crime of animal neglect—prevention of conduct that causes individual animals to suffer, and punishment of any person who causes that suffering.

### **STATEMENT OF THE CASE**

A jury found defendant guilty of 20 counts of second-degree animal neglect for neglecting his own horses, with each count corresponding to his neglect of a particular animal. At sentencing, the trial court merged all 20 counts into a single conviction, reasoning that defendant’s conduct had only a single “victim”: the State of Oregon. The state appealed and the Court of Appeals reversed, holding that the each neglected animal is a separate victim for purposes of merger under ORS 161.067(2), and therefore the trial court should have entered 20 convictions, not one. *State v. Nix*, 251 Or App 449, 462, 283 P3d 442 (2012), *rev allowed*, 353 Or 410 (2013).



## **LEGAL QUESTION PRESENTED AND PROPOSED RULE OF LAW**

### **Question Presented**

ORS 161.067(2) provides that, when a person is found guilty of committing crimes against multiple “victims,” each guilty verdict is a separately punishable conviction. Who or what is the “victim” of the crime of animal neglect, ORS 167.325, for purposes of merger of convictions under ORS 161.067(2)?

### **Proposed Rule of Law**

Each neglected animal is a “victim” of animal neglect for merger purposes, because it is the animal that suffers the harm that is the gravamen of the crime. Nothing in the text, context, or history of the anti-merger statute indicates that the voters intended to limit the class of “victim” to include only human beings. Instead, they meant for the “victim” of a crime to be the entity that suffers the harm that the legislature sought to prevent by enacting the substantive criminal law. Therefore, when a person is found guilty of neglecting multiple animals during a single criminal episode, each count is a separately punishable conviction under ORS 161.067(2).

### **Summary of Argument**

This case presents the question of whether, for purposes of calculating the number of separately punishable offenses under ORS 161.067(2), a neglected animal is the “victim” of animal neglect, ORS 167.325. As this court

has already held, the term “victim” in the anti-merger statute is a flexible one that derives its meaning from the substantive criminal law at issue in a given case—*i.e.*, the “victim” is the entity that suffers the direct harm that the legislature sought to prevent in creating the crime. When a person commits crimes against multiple victims, there are as many separately punishable convictions as there are victims. ORS 161.067(2).

Defendant asks this court to adopt a rule providing that, no matter how many animals a person neglects during a single criminal episode, he is subject to only one conviction because the word “victim” necessarily refers only to human beings. According to defendant, when a person neglects his own animals, the State of Oregon is the only victim.

This court should reject that interpretation. Nothing in the text, context, or history of the anti-merger statute indicates that the voters intended to restrict the class of “victim” to only human beings. Instead, the “victim” for merger purposes is the entity that suffers the harm contemplated in the underlying substantive law.

In the context of the crime of animal neglect, that entity is the neglected animal. The text of ORS 167.325 requires the state to prove that a defendant caused “an animal” to suffer unnecessarily by withholding minimum care. The degree of the crime increases with the degree of suffering that the animal experiences. And the legislative history reflects that the legislature, in enacting

ORS 167.325 and other statutes regarding crimes against animals, intended to do more than vindicate some nebulous public interest in animal welfare—it intended to protect individual animals as sentient beings. Because the animals suffer the harm that is the very reason for the crime of animal neglect, each individual neglected animal is a separate victim for purposes of determining the number of separately punishable crimes under ORS 161.067(2).

### ARGUMENT

**A. ORS 161.067(2) provides that, when a person commits crimes against multiple victims in a single criminal episode, each count is a separately punishable conviction.**

When a defendant is found guilty of committing multiple crimes during a single criminal episode, the guilty verdicts merge into a single conviction unless they fall within one of three statutory exceptions listed in ORS 161.067, Oregon’s anti-merger statute. Each of the three exceptions endeavors to identify the number of separate crimes that a person has committed. They apply when (1) a defendant violates multiple statutory provisions during a criminal episode; (2) there are multiple “victims”; and (3) the defendant repeatedly violates the same statutory provisions with the same victim, but the violations are separated by a pause sufficient to allow the defendant an opportunity to renounce his or her criminal intent. ORS 161.067.

The second of those exceptions, concerning multiple victims, is at issue in this case. It provides, in pertinent part:

“When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, *there are as many separately punishable offenses as there are victims.*”

ORS 161.067(2) (emphasis added). In other words, each criminal act against a separate “victim” is a separately punishable crime, making the definition of “victim” central to the merger analysis.

**B. Nothing in ORS 161.067(2), its context, or its history indicates that the voters intended to restrict the class of “victims” to persons.**

ORS 161.067 was enacted by the voters in 1986, as part of Ballot Measure 10. Or Laws 1987, ch 2, §13. But nothing in that ballot measure, and nothing in ORS chapter 161—or any other part of the Oregon Revised Statutes or the Oregon Constitution, for that matter—defines the term “victim” for purposes of the anti-merger statute, despite the importance of that term in the merger inquiry.<sup>2</sup> Therefore, to determine the meaning of the term, this court seeks to divine “the people’s understanding and intended meaning” of the provision. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000). “[T]he text and context” of the provision “are the most important clue” to understanding that meaning. *Id.* In addition, “the history of a \* \* \* measure,”

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<sup>2</sup> ORS 131.007 defines “victim” as the term is “used in ORS 40.385 \* \* \* and in ORS chapters 136, 137, and 144[.]” The Oregon Constitution defines the term “victim” as well, but only for purposes of Article I, section 44. *See* Or Const, Art I, §44(3).

including “relevant materials contained in the voters’ pamphlet,” is also relevant evidence of the provision’s meaning. *Flavorland Foods v. Washington Cnty Assessor*, 334 Or 562, 575, 54 P3d 582 (2002).

The absence of a fixed definition of “victim” makes sense, given the breadth of crimes to which ORS 161.067 applies—each of which was enacted to protect against a particular type of harm.<sup>3</sup> Nevertheless, defendant argues that the proponents’ very choice of the word “victim” reflects an intent for

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<sup>3</sup> In his dissenting opinion in *State v. Glaspey*, 184 Or App 170, 55 P3d 562 (2002), *rev’d*, 337 Or 558, 100 P3d 730 (2004), Judge Armstrong noted that both ORS 161.067 and the definition of victim in ORS 137.007 were enacted as part of Ballot Measure 10, and that the structure of that measure “shows a conscious decision *not* to apply ORS 131.007 to the sections to which it does not expressly apply.” 184 Or App at 188 (Armstrong, J., dissenting) (emphasis in original). He noted that the sections to which ORS 137.007 expressly applies are procedural provisions concerning victim notification and the victims’ rights to attend hearings. *Id.* at 188-89.

To the extent that the definition of “victim” in ORS 137.007 is context for what the voters intended the term to mean in ORS 161.067, however, it too indicates that the definition of “victim” is context-dependent:

“As used in ORS 40.385, 135.230, 135.406, 135.970, 147.417, 147.419 and 147.421 and in ORS chapters 136, 137, and 144, except as otherwise provided *or unless the context requires otherwise*, ‘victim’ means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim.”

ORS 137.007 (emphasis added).

ORS 161.067(2) to apply only to persons. That is so, he argues, because “the ordinary meaning of the word ‘victim’ means a person.” (Pet Br 5).

At first blush, defendant’s argument has some appeal because most crimes can, by definition, only be committed against a person. *See generally* ORS chapter 163 (“Offenses Against Persons”). But closer examination reveals that the word “victim” is not susceptible of a single, “plain” definition. As Webster’s definition of “victim” indicates, not all “victims” are human beings:

“ **1 : a living being** sacrificed to some deity or in the performance of a religious rite **2 : someone** put to death, tortured, or mulcted by another : a person subjected to oppression, deprivation, or suffering <a ~ of war> <a ~ of intolerance> <fell a ~ to prohibition era gangsters> **3 : someone** who suffers death, loss, or injury in an undertaking of his own <became a ~ of his own ambition> **4 : someone** tricked, duped, or subjected to hardship : someone badly used or taken advantage of <felt himself the ~ of his brother’s shrewdness—W.F. Davis> <little boys, as well as adolescent girls, became the willing ~s of sailors and marines —R.M. Lovett>

**syn PREY, QUARRY: *VICTIM applies to anyone who suffers either as the result of ruthless design or incidentally or accidentally* <the victim sacrificed on these occasions is a hen, or several hens—J.G. Frazer><was the girl born to be a victim; to be always disliked and crushed as if she were too fine for this world – Joseph Conrad> <lest such a policy precipitate a hot war of which western Europe would be the victim –Quincy Wright> \* \* \*.**<sup>4</sup>

*Webster’s Third New Int’l Dictionary 2550 (unabridged ed 2002) (boldface italics added).*

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<sup>4</sup> The definition continues by describing uses of the synonyms “prey” and “quarry.”

As those definitions indicate, the term “victim” *can* refer to a person—but it does not apply *exclusively* to persons.<sup>5</sup> Rather, the term refers more generally to “anyone who suffers,” with the identity of the sufferer dependent upon the context in which the term is used. *Id.* (“VICTIM applies to anyone who suffers either as the result of ruthless design or incidentally or accidentally”). Because it is susceptible to multiple plausible meanings, the term “victim”—divorced of context—is ambiguous. *See State v. Cloutier*, 351 Or 68, 95, 261

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<sup>5</sup> Considering an animal to be a “victim” of abuse or neglect is hardly an activist notion. *See, e.g., State v. Hayes*, W2010-00309-CCA-R3-CD, 2011 WL 3655130 at \*n 3 (Tenn Crim App 2011) (noting that the legal analysis in cases relevant to human victims “is relevant as to both animal and human victims” and referring to injured canine officer as a “victim”); *People v. Brush*, F054346, 2009 WL 1056518 at \*3 (Cal Ct App 2009) (“The prosecution’s burden is not reduced because the victim was an animal.”); *People v. Weinhart*, E038595, 2007 WL 763187 at \*11 (Cal Ct App 2007) (referring to a tiger named Theo as the “victim” of animal cruelty); *State v. Davis*, M2004-03060-CCA-R3-CD, 2005 WL 2255968 at \*9 (Tenn Crim App 2005) (to warrant seizure of animals, police “did not have to know with certainty that the animals were victims of animal cruelty”); *State v. Myers*, 3078-M, 2001 WL 324397 at \*2 (Ohio Ct App 2001) (allowing state to present as “[v]ictim-impact testimony” at sentencing video of “the circumstances surrounding the crimes against the numerous animal victims”); *State v. Collins*, 768 So 2d 674, 677 (La Ct App 2000) (“[T]he victim of this crime was a cat called ‘Tabby.’”); *People v. Speegle*, 53 Cal App 4th 1405, 1418 (1997) (interpreting a statute regarding removal of animals after cruelty conviction to allow “the removal of all animals in the keeping of a defendant found to be capable of cruelty, regardless of whether the other animals have been victims of a violation of the statute”); *Dog Fed’n of Wisconsin v. City of S. Milwaukee*, 178 Wis 2d 353, 367 n 8, 504 NW2d 375 (Wis Ct App 1993) (referring to dog attacked by another dog as “the victim animal”).

P3d 1234 (2011) (statutory term is ambiguous if it is susceptible to at least two reasonable interpretations, each of which is “not wholly implausible”).

But here, the context in which the term “victim” appears—*viz.*, the wording of the anti-merger statute itself—indicates that the voters intended for the underlying substantive law in a given case to supply the meaning of “victim.” This court recognized as much in *State v. Glaspey*, 337 Or 558, 563, 100 P3d 730 (2004). *Glaspey* required this court to determine whether children who witness fourth-degree assault (a factor that elevates the crime from a misdemeanor to a felony), ORS 163.160, are “victims” of that crime for merger purposes, in addition to the person directly assaulted. This court held that the word “victim,” as it is used in ORS 161.067(2), has no single “broad, ‘ordinary’” meaning. 337 Or at 564-65. Instead,

“[w]hen the statute speaks of criminal conduct that ‘violate[s] only one statutory provision,’ it necessarily refers to, and depends upon, some statute other than itself. That is, it refers to the substantive criminal laws that define particular criminal offenses. It follows that the statutory reference to ‘victims’ in the phrase ‘[w]hen the same conduct \* \* \* involves two or more victims’ also must refer to victims within the meaning of the substantive statute that defines the relevant crime.”



*Id.* at 563 (brackets and omission in original). Applying that analysis in the context of the crime of fourth-degree assault, this court concluded that the crime contemplated only one victim—the person *directly* assaulted. *Id.* at 565.<sup>6</sup>

Nothing in the history of the anti-merger statute contradicts this court’s analysis in *Glaspey*. As noted earlier, the statute was enacted in 1986 as part of Ballot Measure 10, a victims’ rights initiative. Nothing in the voters’ pamphlet for the ballot measure indicates what the proponents intended for “victim” to mean in the context of the measure’s merger provision. The text of the measure itself is the best evidence—indeed, the only evidence—of the voters’ intent in that regard.<sup>7</sup>

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<sup>6</sup> Defendant seizes upon this court’s statement in *Glaspey* “that ORS 161.067(2) uses the term ‘victims’ to describe the category of *persons* who are victims within the meaning of the specific substantive statute defining the relevant offense.” 337 Or at 563 (emphasis defendant’s). To defendant, that statement indicates that this court “has previously recognized that victims are people.” (Pet BOM 9). But defendant reads too much into this court’s choice of words. There was no reason for this court to announce that holding in *Glaspey*. It is therefore *dictum*. See *Halperin v. Pitts*, 352 Or 482, 492, 287 P3d 1069 (2012)(“When the court’s prior construction is mere *dictum*, \* \* \* it has no such precedential effect.”).

<sup>7</sup> The anti-merger provision codified at ORS 161.067(2) is largely identical to the provision in *former* ORS 161.062(2) (1985), which the legislature had enacted a year earlier. The legislative history for ORS *former* 161.062(2) is similarly unenlightening.

**C. Because individual animals directly suffer the harm central to the crime of animal neglect, they are the “victims” of that crime.**

To determine who is the “victim” for merger purposes in the context of an animal-neglect case, this court must determine who or what suffers the harm caused by a defendant’s conduct. *See generally State v. Hamilton*, 348 Or 371, 376-77, 233 P3d 432 (2010) (the “victim” of robbery for merger purposes is anyone defendant threatens or uses physical force against during commission of the crime). Both this court’s statutory construction methodology and common sense compel the conclusion that the animal suffers that harm.

In creating the crime of animal neglect—as well as other crimes against animals—the legislature recognized that the capacity for suffering is not unique to human beings, and made it a crime for a person to engage in conduct that causes an animal to suffer needlessly. A person commits second-degree animal neglect when he, with a culpable mental state, “fails to provide minimum care for an animal” in his custody or control. ORS 167.325.<sup>8</sup> “Minimum care” is “care sufficient to preserve the health and well-being of an animal,” and includes food and water in sufficient quantity to satisfy the animal’s needs and maintain its body weight, and veterinary care necessary “to relieve distress from injury, neglect or disease.” ORS 167.310(7). For domesticated animals,

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<sup>8</sup> The identity of a neglected animal is a material element of animal neglect that must be pleaded and proved at trial. *State v. Hunter*, 141 Or App 73, 918 P2d 104, *rev den*, 324 Or 78 (1996).

“minimum care” also includes sufficient space for exercise, comfortable air temperature, and grooming necessary to ensure an animal’s health.

ORS 167.310(7)(e).

Moreover, the legislature structured the neglect statutes such that the degree of the crime corresponds to the extent of the animal’s suffering. As previously noted, the crime of second-degree animal neglect, ORS 167.325, makes it a crime for a person to fail to provide minimum care to an animal. But when that failure to provide care “results in serious physical injury or death to the animal,” the person commits first-degree animal neglect. ORS 167.330. Similarly, a person commits second-degree animal abuse when he, with a culpable mental state, physically injures an animal; when his conduct causes the animal *serious* physical injury or death, he commits first-degree animal abuse. ORS 167.315; ORS 167.320. And when a person maliciously kills an animal, or tortures that animal—*i.e.*, acts with the primary purpose of inflicting pain on the animal—he commits aggravated animal abuse, a class C felony. ORS 167.322.

Those statutes reflect the legislature’s intent to protect more than a general public interest in animal welfare—they show that the legislature intended to protect individual animals. That intent is underscored by legislative history. The legislature overhauled Oregon’s animal cruelty laws in 1985, creating the distinct crimes of animal neglect, abuse, and abandonment. The

impetus for that change was growing public sentiment that “animals should be given greater protection from cruel treatment and neglect.” Staff Measure Analysis, Senate Judiciary Committee, SB 508, Mar 14, 1985, 1. The Willamette Valley Humane Society, which sponsored SB 508, submitted as an exhibit a pamphlet describing the need for animal cruelty investigations:

“There are people in this world who treat animals as though they can’t feel pain and suffering. Dogs are starved to death, cats tortured, horses left with injuries untreated, and far worse things done out of hostility or ignorance.”

Exhibit F, House Committee on Judiciary Subcommittee I, SB 508A, May 29, 1985 (“Tears and Anger Are Not Enough,” Pamphlet, Humane Society of the Willamette Valley).

In short, the text, context, and legislative history of ORS 167.325 all demonstrate that the legislature’s goal in enacting the animal neglect statute—as well as other crimes against animals in chapter 167—was to prevent and punish conduct that causes individual animals to suffer. Because animals suffer the harm that is the gravamen of the crime of animal neglect, they are the “victims” of that crime for merger purposes.<sup>9</sup>

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<sup>9</sup> The Ohio Court of Appeals recently held that animals are victims for purposes of merger under Ohio’s anti-merger statute. *State v. Helmbright*, 2013 Ohio 1143, 2013 WL 1200244 (Ohio Ct App 2013):

“While companion animals may be considered personal property, R.C. 959.131(C) creates a chargeable offense against any person who negligently commits an act of cruelty against a

*Footnote continued...*

**D. Although the legislature, in creating the crime of animal neglect, did not specifically address whether animals are “victims” for merger purposes, any other conclusion would frustrate the purpose of the animal neglect statute.**

Nothing in the record indicates that the legislature specifically considered whether animals could be considered “victims” for merger purposes. But a conclusion that a person would be convicted of only one crime regardless of how many he neglects would fly in the face of the legislature’s intent to protect individual animals from suffering. The legislature criminalized acts of harm committed against individual animals as sentient beings, with each act of harm constituting a separately punishable crime and the degree of the offense tied to the extent of the animal’s suffering. But if the animal is not the “victim” of animal neglect, a person’s punishment would have no connection to the extent of harm he caused—he would be guilty of one crime whether he neglected one animal or a hundred. That cannot have been what the legislature intended.

For many purposes, animals are property in the eyes of the law. *See, e.g.*, ORS 167.310(2) (defining “domestic animal” as “an animal \* \* \* that is owned

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(...continued)

companion animal. Accordingly, a companion animal is the victim of a defendant’s conduct under RC 959.131, much as a person may be the victim of a defendant’s conduct under [Ohio’s assault and domestic violence statutes].”

*Helmbright*, 2013 Ohio at \*9.

or possessed by a person”). But the criminal law recognizes that animals are, at the very least, a special kind of property—they are sentient beings capable of experiencing pain and suffering. That an animal is someone’s property is irrelevant in determining whether a person is guilty of animal neglect, animal abuse, or any other crime against an animal.<sup>10</sup> Had the legislature specifically considered the question, it would not have intended for that status to play any role in determining the *number* of crimes a person has committed. *See State v. Gulley*, 324 Or 57, 66, 921 P2d 396 (1996) (applying third-level maxim of statutory construction to determine what the legislature would have intended had it considered the problem); *see also State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996) (in construing statute, assume that legislature did not intend an unreasonable result).

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<sup>10</sup> *See* Luis E. Chiesa, *Why Is It A Crime To Step On A Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 Miss L.J. 1, 63-64 (Fall 2008) (“As far as anti-cruelty statutes are concerned, animals are being treated like persons in a very important way—they qualify as victims worthy of being protected by the criminal laws irrespective of their property status in the non-criminal law context.”).

**CONCLUSION**

This court should affirm the decision of the Court of Appeals.

Respectfully submitted,

ELLEN F. ROSENBLUM

Attorney General

ANNA M. JOYCE

Solicitor General

/s/ Jamie K. Contreras

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JAMIE K. CONTRERAS #022780

Assistant Attorney-in-Charge,

Criminal & Collateral Remedies Appeals

jamie.k.contreras@doj.state.or.us

Attorneys for Plaintiff-Appellant/

Respondent on Review

State of Oregon

JKC:mxg/4381305

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on June 26, 2013, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon David J. Celuch, attorney for respondent/petitioner on review, 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 4069 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/ Jamie K. Contreras

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JAMIE K. CONTRERAS #022780  
Assistant Attorney-in-Charge,  
Criminal/Collateral Remedies Appeals  
jamie.k.contreras@doj.state.or.us

Attorney for Plaintiff-Appellant/  
Respondent on Review  
State of Oregon