IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review v. AMANDA L. NEWCOMB, Defendant-Appellant, Respondent on Review	Multnomah County Circuit Court Case No. 110443303 Court of Appeals No. A149495 Supreme Court No. S062387

BRIEF OF AMICUS CURIAE

Animal Legal Defense Fund, Association of Prosecuting Attorneys, National District Attorneys Association, Oregon Humane Society, Oregon Veterinary Medical Association

Review of the Decision of the Court of Appeals
Opinion Filed: April 16, 2014
Author of Opinion: Sercombe, Judge
Before: Ortega, Presiding Judge, Sercombe, Judge, and Hadlock, Judge

Appeal from a Judgment of the Circuit Court for Multnomah County,
The Honorable Eric J. Bergstrom, Judge

Filed: October 2014

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STATEMENT OF INTEREST

Founded in 1979, the Animal Legal Defense Fund ("ALDF") is a national nonprofit organization of attorneys specializing in the protection of animals and working to ensure the enforcement of animal protection laws throughout the United States. Toward this end, ALDF's Criminal Justice Program, based in Portland, Oregon, provides free prosecution assistance in animal abuse and neglect cases nationwide, both independently and in partnership with the National District Attorneys Association and the Association of Prosecuting Attorneys. ALDF staff attorneys work out of offices in five states, helped by over 1,000 volunteer attorneys nationwide who are ALDF members and who work on a pro bono basis. Total contributing membership of the ALDF is over 100,000. ALDF, with the depth of its expertise on the entire spectrum of search and seizure issues (under both State and Federal Constitutions) that arise in cases of animal abuse and neglect, is uniquely able to assist the Court in deciding the issue presented by the instant case.

The Association of Prosecuting Attorneys ("APA") was founded as a national organization to represent all prosecutors and to further the prevention of crime and the attainment of equal justice and community safety. The APA's board of directors includes current and former prosecutors from states

throughout the nation. As such, the APA acts as a forum for the exchange of ideas, which allows prosecutors to collaborate with each other, along with other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including the submission of briefs as *amicus curiae* in appropriate cases.

Founded over sixty years ago, the National District Attorneys Association ("NDAA") boasts approximately 6,000 members and is both the largest and primary association of prosecuting attorneys in the United States. The NDAA's mission is "[t]o be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." In practice, the NDAA provides professional guidance and support to its members, serves as a resource and education center, and follows and addresses public policy issues involving criminal justice and law enforcement, including the protection of animals.

The Oregon Humane Society ("OHS") is the Northwest's oldest and largest humane society. Celebrating 145 years of service to animals in this community, OHS is dedicated to helping animals and people. Last year, OHS facilitated more than 11,000 animal adoptions, investigated over 1,200 reports of animal abuse and neglect, taught humane education to more than 12,000 children, and visited hundreds of nursing home residents with the help of its animal-assisted therapy volunteers and their animals. OHS pursues its mission

with the support of over 18,000 members and receives no tax dollars to fund its programs.

The Oregon Veterinary Medical Association ("OVMA") was founded as a nonprofit organization to represent veterinarians and to help advance their medical knowledge for the care and treatment of animals. This includes the protection of animal health and welfare, the prevention and relief of animal suffering, and the promotion of public health. Dating back to 1911 with 26 charter members, OVMA now includes approximately 1,000 members—about 75% of all practicing veterinarians in Oregon. OVMA regularly provides lawmakers at the local and state level with a veterinary perspective on proposed legislation affecting animals. OVMA is uniquely able to assist this Court in its understanding of the practical and legal implications of the Court of Appeals' decision for practicing veterinarians throughout Oregon.

STATEMENT OF THE CASE

The *amici curiae* ALDF, APA, NDAA, OHS, and OVMA adopt the statement of the case as recited by the Court of Appeals.

QUESTION PRESENTED

Does testing the blood of a dog that has been lawfully seized based on probable cause of neglect constitute a search under either Article I, section 9 of the Oregon Constitution or the Fourth Amendment to the United States Constitution?

SUMMARY OF THE ARGUMENT

The blood testing that was done on the dog Juno after he had been lawfully seized did not constitute a search under either Article I, section 9 of the Oregon Constitution or the Fourth Amendment to the United States Constitution. The court below erred in failing to recognize the novel nature of the issue presented and relying on inapposite case law. Under applicable Oregon statutes, all persons owning or having custody of an animal, including in particular the facility to which Juno was taken, are obligated to provide minimum care, including veterinary care. That mandate reflects a policy choice and a value judgment that Oregon has made and repeatedly reaffirmed. This Court's determination of the scope of the defendant's constitutionally protected privacy right in Juno after he had been lawfully seized—a matter that has not previously been before the courts—should conform to that judgment, not gratuitously create a conflict with it. It follows that once Juno had been lawfully seized, the defendant had no privacy right under Article I, section 9 of the Oregon Constitution, and *a fortiori* no legitimate expectation of privacy under the Fourth Amendment, in the information required to return the dog to health.

To the extent the blood testing was also an investigational tool, it did not require a warrant even if considered a search because the lawful seizure of the

dog on probable cause of criminal neglect necessarily implicitly authorized testing that was probative as to the cause of the dog's condition. Finally, under the inevitable discovery exception to the exclusionary rule, inasmuch as the blood testing was an investigational tool that was not just proper and predictable but also mandated and thus inevitable after Juno was seized, the results of the testing were properly admissible as evidence even if acquired through an unlawful search.

ARGUMENT

I. The performance of blood tests on Juno for the purpose of determining the course of medical treatment for his emaciated condition was not a search under Article I, Section 9 of the Oregon Constitution.

The prohibition against unreasonable searches in Article I, section 9 of the Oregon Constitution protects an individual's privacy interest. *State v. Wacker*, 317 Or 419, 425, 856 P2d 1029 (1993); *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986).[1] If that interest is not implicated by the particular governmental action, it presents no constitutional infirmity. *State v. Meredith*, 337 Or 299, 303, 96 P3d 342 (2004). This case presents such a situation. It is a matter of first impression, involving a unique "personal effect," as the Court of

[1] The court below held that the seizure of the dog Juno was lawful under Article I, section 9 under the plain view exception to the warrant requirement. Thus, the prohibition against unreasonable seizures is not involved in this appeal.

Appeals characterized the dog Juno,[2] and this fact is paramount to a reasoned analysis. In ignoring this crucial distinction, and treating Juno as if he were a container like a pocket knife or a metal cylinder, the Court of Appeals came to a conclusion that is fundamentally wrong.

A "container," as the term is used in the cases relied on by the Court of Appeals, is "an inanimate object." *State v. Heckathorne*, 347 Or 474, 484 n 11, 223 P3d 1034, 1040 n 11 (2009). The owner of a container, or of any other inanimate object, may freely stomp on it, smash it to pieces, or throw it against the wall. The owner may fill up a container with anything it can hold, discard the contents, and fill it up again.

A dog is not an inanimate object; no one, owner or otherwise, may freely stomp on it, smash it to pieces, or throw it against the wall. A dog cannot be filled up, nor may its "contents"—blood, tissue, bones and the like—be discarded and replaced. Although, as noted by the Court of Appeals below, ORS Chapter 167, containing offenses against animals, speaks of an "owner" or person in possession of a domestic animal (ORS 167.310(4)), and defines the concept of possession in terms of "property" (ORS 167.310(12), referencing ORS 161.015(9)), it does not follow that the constitutionally protected privacy interest of an owner in his or her dog or other companion animal must be coterminous with the constitutionally protected privacy interest of an owner in

[2] *State v. Newcomb*, 262 Or App 256, 258, 268, 324 P3d 557 (2014).

his or her inanimate possessions.[3] Similarly, the fact that animal life does not enjoy the level of legislative protections as does human life, as this Court noted

[3] ORS 609.020 ("Dogs are hereby declared to be personal property"), also cited by the court below, dates back to 1907 (Section 9357, Ore. L.) and, as explained in prior decisions of this Court, was intended at the time to clarify that Oregon espoused the then modern conception of the dog as personal property, with all the rights attendant thereto, as opposed to "property . . . of an inferior sort" or even not property at all "by reason of the baseness of its nature." *McCallister v. Springfield*, 72 Or 422, 425-426, 144 P 432 (1914) (noting that at common law it was not larceny to steal a dog but it was larceny to steal the hide of a dead dog). *See also Hofer v. Carson*, 102 Or 545, 552, 203 P 323 (1922) ("[T]he enactment of this section did not create a new right but was a legislative recognition of a right which existed at and prior to its passage."); *Rose v. Salem*, 77 Or 77, 82, 150 P 276 (1915) ("Whatever may be the law in other jurisdictions, in this state dogs are regarded as being just as important a class of personal property as any other domestic animal and equally entitled to the protection of the law."). In the century since, as this Court has recently noted, "the legal status of animals has changed and is changing still." *State v. Fessenden/Dicke*, 355 Or 759, 770, __ P3d __ (2014). The future evolution of the legal status of animals, an issue with deep philosophical implications and almost infinite variations, cannot be predicted and need not be addressed by this Court in order to decide the instant case. What is required is merely a recognition, as modern courts have done in other contexts, that "pets generally do not fit neatly within traditional property law principles." *Morgan v. Kroupa*, 167 Vt 99, 103, 702 A2d 630 (1997) (action of replevin to recover dog lost by plaintiff and found by defendant; Court on appeal held lost property statute inapplicable). *See also Bueckner v. Hamel*, 886 SW2d 368, 377-378 (Tex App Ct 1994), Andell, J. concurring (case affirming an award of damages against a hunter who killed the plaintiff's dogs: "The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property."); *Feger v. Warwick Animal Shelter*, 59 AD3d 68, 71-72 (NY App Div. 2008) (upholding right of animal shelter defendant not to disclose identity of adopter of cat in order to encourage adoptions: "This State has a longstanding history of protecting animals. In recent years these laws have been expanded and strengthened . . . The reach of our laws has been extended to animals in areas which were once reserved only for people. . . . These laws

in *State v. Fessenden/Dicke*, 355 Or 759, 768, __ P3d __ (2014) does not require the conclusion that animals, and domestic animals in particular such as the dog Juno, are the equivalent of a pencil sharpener under Article I, section 9.

Whether an individual has a protected privacy interest must be assessed "in light of the particular context in which the government conduct occurred." *Meredith*, 337 Or at 305. The particular context in this case was that the governmental action was performed on a lawfully seized, emaciated dog for the purpose of providing medical care that was mandated by applicable state law. The defendant did not have a protected privacy interest in preventing the type of observation—the cause of Juno's medical condition—that the blood draw and tests performed on it were designed to reveal and did in fact reveal. *See Meredith*, 337 Or at 307 (holding that attachment of a transmitter to employer's truck used by defendant to perform her duties was not a search because "defendant did not have a protected privacy interest in keeping her location and

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indicate that companion animals are treated differently from other forms of property. Recognizing companion animals as a special category of property is consistent with the laws of this State and the underlying policy inherent in these laws to protect the welfare of animals."); *Travis v. Murray*, 42 Misc 3d 447, 456 (NY Sup Ct 2013) (Divorce case in which the primary bone of contention was a miniature dachshund named Joey: "[A] strict property analysis is neither desirable nor appropriate. Although Joey . . . is not a human being and cannot be treated as such, he is decidedly more than a piece of property, marital or otherwise.") *See also Wolf v. Taylor*, 224 Or App 245, 250, 197 P3d 585 (2008) (describing the legal status of a dog visitation provision in a marital settlement agreement as "an interesting question," without deciding it).

work-related activities concealed from the type of observation by her employer that the transmitter revealed.")

Such a conclusion is not tantamount to holding that Oregon's laws criminalizing animal cruelty and neglect supersede what would otherwise be a constitutionally protected right; the court below was correct that statutes are necessarily subordinate to constitutional mandates. *State v. Newcomb*, 262 Or App 256, 267, 324 P3d 557 (2014). When the scope of the constitutionally protected right in the context before the Court *has not been determined*, however, statutes are demonstrative of the social values and norms that necessarily must inform a reasoned resolution of the issue. *See State v. Cromb*, 220 Or App 315, 322, 185 P3d 1120, *rev den,* 345 Or 381 (2008) ("[S]ocietal norms are enmeshed with the determination whether privacy exists under Article I, section 9"). It *is* therefore relevant, as this Court recently concluded after an extensive review of the development of the "comprehensive scheme of animal cruelty laws" in this state, that

> the principal purpose of adopting the legislation that became ORS 167.325 [second-degree animal neglect for failure to provide "minimum care"] was to prevent the suffering of animals. Although early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality, Oregon's animal cruelty laws have been rooted—for nearly a century—in a different legislative tradition of protecting individual animals themselves from suffering.

State v. Nix, 355 Or 777, 796-7, __ P3d __(2014). *See also Fessenden*, 355 Or at 767 (acknowledging that "Oregon's animal welfare statutes impose one of the nation's most protective statutory schemes"). Most significantly, given the nature of the action that is alleged to have been a "search" in this case (blood draw and testing), it is relevant that the Legislature has authorized precisely the chain of events that occurred here: the impoundment of a likely neglected animal and the provision to the animal of food, water, and medical care as needed. *See* ORS 167.345(2) ("If there is probable cause to believe that any animal is being subjected to treatment in violation of ORS 167.315 to ORS 167.333 . . . a peace officer, after obtaining a warrant or in any other manner authorized by law, may enter the premises where the animal is located to provide the animal with food, water and emergency medical treatment and may impound the animal.");[4] ORS 167.345(4) ("A facility receiving [an animal impounded under subsection (2) of this section] shall provide adequate food and water and may provide veterinary care."). Indeed, had the Oregon Humane Society, upon taking custody of Juno, *not* provided the medical care at issue in this case, it would itself have been potentially

[4] Although the humane officer here did not obtain a warrant, in seizing the dog under the plain view exception he acted "in any other manner authorized by law." ORS 167.345(2).

guilty of violating ORS 167.325—ironically the very offense for which the defendant Newcomb was convicted.[5] It would be utterly inconsistent with the concern for animals evidenced generally by the people of Oregon acting through their Legislature (and by referendum[6]), and more specifically with the statutory mandate in ORS 167.325 to provide minimum care (itself defined in ORS 167.310(9) as including veterinary care), to hold that the putative owner of a companion animal retains a constitutionally protected privacy interest in the animal after it has been lawfully seized that is paramount to the animal's own welfare and to the legal obligation of the custodial facility to provide medical care.

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[5] It is thus apparent that although ORS 167.345(4) speaks of "*may* provide veterinary care" (emphasis added), the Legislature could not possibly have intended to give a facility receiving an abused or neglected animal discretion to further victimize the animal, contrary to the mandate of ORS 167.325, by withholding medical care at its discretion. Rather, the only circumstance in which the facility could lawfully not provide medical care, consistent with the overarching requirement of all owners or custodians to provide minimum care, would be where the animal could not be saved and had to be euthanized.

[6] *See* Article XV, Section 10, as amended by the passage of Measure 53 on May 20, 2008, where voters amended the Oregon Constitution to ensure, in part, that pre-conviction forfeiture of neglected animals was no longer subjected to any of the restrictions found in the "Oregon Property Protection Act" (Measure 3, enacted in 2000 to limit drug asset forfeitures).

II. To the extent the blood tests yielded information relevant to the criminal prosecution, no warrant was required because the lawful seizure of the dog upon probable cause of criminal neglect inherently authorized the medical testing to confirm the existence of neglect.

The blood testing at issue in the instant case was performed primarily in order to determine the proper course of treatment for the dog's emaciated condition, and for the reasons stated above the defendant had no constitutionally protected privacy interest in concealing that information. Of necessity, however, in ruling out any medical cause for the condition other than lack of food, the blood test results also provided evidence of the defendant's criminal neglect. We submit this additional fact is irrelevant to the foregoing constitutional analysis so long as the blood testing was medically necessary, and no suggestion to the contrary has been made. However, the fact that the testing also was evidentiary provides an additional basis to hold that, in the circumstances presented by this case, a warrant for the testing was not required: The lawful seizure of the dog upon probable cause of neglect inherently authorized the blood testing that provided evidence of neglect beyond what was apparent from an observation of the dog.

This conclusion is supported by decisions of this Court arising in contexts quite different from this one but which can readily be extrapolated to the instant case. The most frequent fact pattern is the testing of a substance that

has been lawfully seized, where there is probable cause to believe that it is a controlled substance. Such testing, this Court has held,

> is neither a "search" nor a "seizure" under Article I, section 9. It is not a "search" if the purpose of the test of a lawfully seized item is to confirm the presence of whatever the police have probable cause to believe is present in that item. A test for such a limited purpose does not infringe any privacy interest protected by the Oregon Constitution. Likewise a test for this limited purpose is not a "seizure."

Owens, 302 Or at 206-207 (testing of contents of lawfully seized transparent container); *accord State v. Pidcock*, 306 Or 335, 342, 759 P2d 1092 (1988) (testing of contents of manila envelopes that were lawfully opened); *Heckathorne*, 347 Or at 485 (testing of contents of a lawfully seized opaque container that smelled of ammonia). A similar analysis has been used in the testing for blood alcohol content of human blood that was lawfully drawn as part of a search incident to arrest; the testing did not involve an additional seizure "because the blood already had been seized," nor was it a search, "because it was done to confirm the presence of alcohol, which the police had probable cause to believe was present." *State v. Langevin*, 84 Or App 376, 383-84, 733 P2d 1383 (1986).

In this case the item that had been lawfully seized was the dog Juno. The crime involving Juno for which there was probable cause was neglect; Juno was the victim (*see Nix*, 355 Or 777), the embodiment of the crime. Medical testing—specifically blood testing—that helped law enforcement to determine

whether Juno had in fact been neglected, i.e. suffered solely from inadequate feeding as opposed to other causes, was no more a search or a seizure separate from the lawful seizure of the dog upon probable cause of neglect than was the testing of the powdery substance thought to be a controlled substance in *Owens* and subsequent cases, or the testing of lawfully seized blood thought to have a high alcohol content in *Langevin*.

This Court has also held in a different context, the viewing of a videotape, that the lawful seizure of a videotape can inherently encompass the viewing of the videotape as well. *State v. Luman*, 347 Or 487, 223 P3d 1041 (2009), *recons den,* 2010 Ore LEXIS 93 (2010) (explaining and following *State v. Munro*, 339 Or 545, 124 P3d 1221 (2005)). Although a dog is very far removed from a videotape, we submit that the rationale of those cases is instructive here as well. In *Munro*, videotapes belonging to a suspected drug dealer were seized pursuant to a warrant authorizing their seizure. Upon initial examination, the tape appeared to be blank. Subsequently, the police received information that the videotape had images of child pornography, and upon a second viewing such images were revealed, leading to a separate charge against the defendant of encouraging child abuse. This Court held that the viewing of the videotape was not a "search":

> Here, the warrant lawfully authorized the seizure of the videotape and the invasion of the defendant's privacy interest in its contents. Once the police seized the videotape under the authority of the warrant, any privacy interest that the defendant had in the content of the videotape was destroyed by the authority of the warrant permitting the examination and exhibition of the contents of the videotape. Until such time as defendant regained lawful possession of the videotape, he had no remaining privacy interest in its contents that he could assert. . . . [O]nce the videotape was lawfully seized under the authority of the warrant, any images stored on the videotape, no matter how hidden, private, or secret, were no longer protected by Article I, section 9.

339 Or at 552, 553.

The warrant in *Munro*, relevant portions of which were quoted in the opinion of the Court, by its terms spoke only of a "search" for the videotapes and other listed property and was silent as to viewing them. Although this fact was not pointed out as such in the *Munro* opinion, in which the Court asserted without discussion that the warrant authorized the viewing of the videotape, the Court stressed this fact in *Luman*, which built upon its holding in *Munro*:

> The warrant in *Munro* provided, "You are hereby commanded to search . . . For the following described property . . . videotapes . . ." Thus, when the *Munro* court referred to 'the authority of the warrant permitting the examination and exhibition of the contents of the videotape,' the court clearly was speaking of the right to play and view the videotape that *inhered* in the lawful seizure of the videotape (which was all that the warrant expressly permitted)."

347 Or at 501 (internal citation omitted, emphasis original).[7]

[7] The court below in the instant case cited in support of its holding its own decision in *Munro* (194 Or App 538, 96 P3d 348 (2004)), which was reversed

In *Luman*, the videotape in question was likewise lawfully in the possession of the police, not because it was seized pursuant to a warrant but rather because it was brought in by private parties who had viewed it and found its contents disturbing. This Court held that in these circumstances as well, since the videotape was lawfully in their possession, law enforcement did not require a warrant to view it:

> In this case, as already discussed, the sheriff's office gained lawful possession of the videotape for criminal investigatory purposes when defendant's employee brought the videotape in to the sheriff's office, told the deputy sheriff what was on the videotape and the circumstances surrounding its discovery, and handed it over. That set of circumstances is the functional equivalent of the lawful "seizure" in *Munro* under the authority of the warrant, which also gave the police lawful possession of the videotape. And, as in *Munro*, *because the sheriff's office's possession of the videotape for criminal investigatory purposes was lawful, any protected possessory or privacy interest defendant might have had in the videotape was lost*, at least to the extent that the employees had already viewed it, and the deputy's subsequent confirmatory viewing of the videotape was not a constitutionally impermissible search.

347 Or at 501-502 (emphasis added).

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on appeal by this Court. The reversal was explained on the basis that the Court accepted the State's concession that viewing the videotape was a search, but concluded that the search was authorized by a warrant. The Court in its opinion does note and accept the State's concession that the examination of the videotape was a search. 339 Or at 550. However, the holding of the Court, especially as explained in *Luman*, is that the lawful seizure of the videotape *in and of itself* destroyed the defendant's privacy interest in the videotape so long as it was in the possession of law enforcement. It follows that to the extent the subsequent viewing was a search, the requisite authorization for that search was encompassed in the lawful seizure.

Here again the foregoing reasoning may readily be applied to the instant case. The seizure of the dog Juno under the plain view exception was the "functional equivalent," as in *Luman*, of a seizure pursuant to a warrant. Once lawfully seized, despite their obvious differences, the videotape and the dog shared a crucial commonality; both were evidence of a potential crime, the existence of which would be revealed or supported by further examination of the object itself—in the case of the videotape by viewing it, and in the case of the dog by performing blood testing necessary to determine the cause of the dog's emaciated condition, which was the reason for the seizure.

Accordingly, once the seizure had lawfully occurred, the defendant in the instant case, like the owner of the videotape in *Munro* and *Luman*, had no remaining privacy interest in further activity with respect to the object seized, here the dog Juno, that was evidentiary as to whether the suspected crime had in fact occurred. Indeed, *Munro* represents an even broader application of this principle than is required in this case, inasmuch as the crime eventually implicated by the videotape was not the one for which the videotape had been seized. In this case, by contrast, there was no such variation. The dog Juno was seized upon probable cause of criminal neglect by the defendant, and the testing supported the conclusion that there had in fact been criminal neglect.

III. Even if the blood testing of the dog Juno was a search under Article I, Section 9 for which a warrant was required, the evidence it yielded was admissible under the inevitable discovery exception to the exclusionary rule because once Juno had been impounded the testing would inevitably have been done.

Even if the testing of Juno's blood were to be treated as an unauthorized search under Article I, section 9, the information revealed by the testing was in all events admissible evidence under the "inevitable discovery doctrine" recognized by the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, 104 S Ct 2501, 81 L Ed 2d 377 (1984) and applied by this Court in *State v. Miller*, 300 Or 203, 709 P2d 225 (1981) and *State v. Johnson*, 340 Or 319, 327-328, 131 P3d 173, *recons den,* 2006 Or LEXIS 508, *cert den* 127 S Ct 724 (2006). Under this doctrine, the exclusionary rule will not apply to evidence unlawfully acquired if it is shown "'by a preponderance of the evidence (1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question.'" *State v. Johnson*, 340 Or at 327, *citing Miller*, 300 Or at 226. Indeed, this case would appear to be a per se application of the doctrine given that medical testing was mandatory under applicable state law.

As discussed *infra*, once the dog Juno was lawfully seized and taken to the Oregon Humane Society, OHS, like any other facility in possession or control of the dog, was under a legal obligation to provide "minimum care,"

including "veterinary care deemed necessary by a reasonably prudent person to prevent injury, neglect or disease." ORS 167.325 (failure to provide "minimum care" is second degree animal neglect); ORS 167.310(9) (definition of "minimum care"). It was also separately obligated, given that the seizure was upon probable cause of neglect, to "provide veterinary care." ORS 167.345(4). To be sure, the primary purpose of the blood testing was to determine an appropriate course of treatment for the dog. However, as state action it was also inherently investigatory because it revealed to law enforcement that there was no underlying medical cause for the dog's emaciated condition. Thus the blood testing constituted an "investigatory procedure" that was not just "proper and predictable" but mandated and thus inevitable.

IV. The blood testing done on Juno was not a search under the Fourth Amendment to the United States Constitution because after the lawful seizure of the dog Juno the defendant had no legitimate expectation that appropriate medical treatment would not be given.

Under Fourth Amendment jurisprudence, the prohibition against unreasonable searches protects an individual's "legitimate expectation of privacy" as opposed to the "right" to privacy that is safeguarded by Article I, section 9. *Compare Oliver v. United States*, 466 US 170, 177-78, 104 S Ct 1735, 1740-1742, 80 L Ed2d 214 (1984), *Katz v. United States*, 389 U.S. 347, 361, 88 S Ct 507, 516, 19 L Ed2d 576 (1967) (Harlan, J., concurring) (articulating the standard under the Fourth Amendment); and *State v. Campbell*,

306 Or 157, 164, 759 P2d 1040, 1044 (1988), *State v. Tanner*, 304 Or 312, 321-22 n 7, 745 P2d 757 (1987) (articulating the standard under Article I, section 9). For the reasons stated in Part I *infra*, once the dog Juno had been lawfully seized on probable cause of criminal neglect, the defendant had no privacy right in the information as to the cause of his emaciated condition that was revealed by the blood testing. It follows *a fortiori* that the defendant had no legitimate expectation of privacy in this information. The defendant could not reasonably have thought after Juno had been seized based on probable cause of neglect that appropriate treatment of his emaciation would not be provided—indeed that was a primary reason for the seizure. If she did think Juno was simply going to be put into a cage and allowed to languish, that expectation was not legitimate, i.e. not "an expectation of privacy that society is prepared to consider reasonable" such as is required for Fourth Amendment protection. *United States v. Jacobsen*, 466 US 109, 113, 104 S Ct 1652, 1656, 80 L Ed2d 85 (1984). Appropriate treatment for Juno involved more than an adequate diet; it also involved ascertaining if there were any other causes for his condition, which was the purpose of the blood testing.[8]

[8] We note that the veterinary care that under state law must be provided as a component of "minimum care" is that which would be deemed necessary by a "reasonably prudent person," not that with which the actual owner in any given case may have been comfortable. ORS 167.310(9).

The instant case appears to be one of first impression under the Fourth Amendment as well as under Article I, section 9, although the basic fact pattern of seizure followed by medical intervention by a state actor presented by this case is a very common dynamic in animal cruelty and neglect cases.[9] This very absence of case law, although hardly per se determinative, is, we submit, telling. *See Morgan v. Kroupa*, 167 Vt at 102, 702 A2d at 632 (noting that the absence of case law over 170 years applying the lost property statute to domestic animals "strongly supports the inference that the statute was not designed to govern" such situations). It would mark a drastic step backward in the evolving jurisprudence to now apply traditional property concepts woodenly for constitutional purposes: to treat an abused or neglected companion animal as a "personal effect" indistinguishable from a plastic bag or a wallet. And it would turn reason on its head to hold that, absent a warrant (or applicable exception), information revealed by legally mandated medical care of a lawfully seized animal not only could not be admitted in a criminal proceeding against the party responsible for the animal's condition, but also of necessity expose the

[9] In many instances, as in this case, the "state actor" providing medical treatment is not a government employee but rather a veterinarian employed by a recognized humane organization, in this case the Oregon Humane Society. In Oregon, as in a number of other states (*see*, e.g., Cal Corp Code §14502; Mass Gen Laws ch 22, § 57), designated employees of the state Humane Society or other established animal welfare organizations operating in the state by law have the powers of "peace officers" to investigate and act on reports of animal abuse or neglect. ORS 133.005(3)(e); 131.805; 181.433(1),(5); 181.435.

medical provider to potential federal liability at the hands of the party whose inadequate care had given rise to the seizure. *See* 42 USC § 1983. Nothing in federal or state case law even suggests such an entirely unnecessary and disruptive result. Rather, the values manifested by the strong legal protections afforded animals in this State, and particularly domestic animals, mandate that upon the lawful seizure of the dog Juno, the defendant Newcomb had no protected privacy interest, or legitimate expectation of privacy, in information revealed by the blood testing of the dog that was done in accordance with applicable law.

CONCLUSION

For the foregoing reasons, *amici curiae* ALDF, APA, NDAA, OHS, and OVMA respectfully request this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/ Lora Dunn

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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 5,874 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(4)(g).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 30, 2014, I directed the Brief of *Amicus Curiae* to be electronically filed with the Appellate Court Administrator, Appellate Records Section. I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the electronic filing system, this Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Jamie Contreras, #022780, Assistant Attorney-in-Charge, attorney for Plaintiff-Respondent; and Andrew Robinson, #064861, attorney for Defendant-Appellant.

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