IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. LINDA DIANE FESSENDEN, Defendant-Appellant Petitioner on Review.	Douglas County Circuit Court Case No. 10CR2252MI Court of Appeals No. A150065 Supreme Court No. S061740

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Douglas County
Honorable George William Ambrosini, Judge

Opinion Filed: September 25, 2013
Author of Opinion: Hadlock, Judge
Before: Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW

STATEMENT OF THE CASE

Nature of the Proceeding

The state charged defendant with animal neglect in the second degree, ORS 167.325, based on evidence derived from an officer's warrantless entry onto her co-defendant's private property and seizure of their jointly owned horse.[1] The trial court denied defendant's motion to suppress evidence derived from the warrantless entry, concluding that the horse's condition justified a warrantless search. A jury found defendant guilty.

The Court of Appeals affirmed defendant's conviction in a written opinion. *State v. Fessenden*, 258 Or App 639, 310 P3d 1163 (2013). This court allowed her petition for review to resolve whether aiding a malnourished horse justifies an exception to the warrant requirement under Article I, section 9, and the Fourth Amendment.

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[1] The state charged co-defendant, Teresa Dicke, with animal neglect in the first degree, ORS 167.330, and animal abuse in the first degree, ORS 167.320. The Court of Appeals affirmed her conviction in a separate written opinion, *State v. Dicke*, 258 Or App 678, 310 P3d 1170 (2013). This court allowed review and consolidated the cases for argument.

Historical Facts

In August 2010, defendant and Dicke owned an older horse that they kept on Dicke's property. Tr 133-34. In late July, Deputy Ryan Cross responded to a report of possible animal neglect on Dicke's property. Tr 170. He observed several animals on the property that all "looked like they were in decent shape," but one of the horses was "significantly thinner than the rest." Tr 172. Cross spoke to Dicke about the thinner horse, and she told him that "it was an old horse and was on a special diet" to help it gain weight. Tr 176. Cross "felt based on what [he] had seen at the time that [the horse] was being taken care of." Tr 176.

Two weeks later, Douglas County animal control Deputy Leamon Bartholomew responded to a report of a "very skinny horse" on Dicke's property.[2] Tr 55, 103. Bartholomew spotted the horse as he drove down a shared driveway toward Dicke's residence. Tr 107. It was standing underneath a tree in a fenced enclosure about 100 feet from the residence, an area that would not have been visible from the public road. Tr 105, 107-09, 111. From his car, Bartholomew could see that the horse was severely emaciated: "This literally was the thinnest horse I've seen that was still on its feet." Tr 114.

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[2] The evidence established that Bartholomew is the sole officer in the animal control unit, that he has 22 years of experience in that position, and that he is an expert in horse care. Tr 100-103.

The horse was "swaying a little bit," which concerned Bartholomew, because if the horse fell it might suffer an injury or other complication that could result in the horse "having to be put down." Tr 111, 114, 162-63. Bartholomew also saw that the horse had difficulty urinating, which can be a sign of kidney failure: "[A]nytime you get a horse this skinny, internal organs start shutting down." Tr 113-14, 128. Bartholomew gave the horse a Henneke body score of one out of nine.[3] Tr 114. Bartholomew believed that the horse was suffering from a "medical emergency." Tr 113.

At that point, Bartholomew felt that he had probable cause of the crime of animal neglect in the first degree, and he decided to seize the horse to take it to a veterinarian. Tr 115-16. As the horse was being loaded into a trailer, Bartholomew spoke to Dicke on the phone and informed her that he was taking the horse to Bailey's Veterinary Hospital, which was the closest animal hospital that contracted with the county. Tr 124. Dicke told Bartholomew that she did not want the horse to go to Bailey's, but that he "could take it somewhere else." Tr 124. Dicke was "nervous-sounding." Tr 126.

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[3] The Henneke scoring method is a method for evaluating a horse's body condition based on the amount of fatty tissue in various areas of its body. Tr 102-03. Bartholmew explained the scale: "one is emaciated, two is very thin, three is thin, four, five and six are medium, moderate and then seven, eight and nine can actually be neglect too if you get them too fat." Tr 115.

At the veterinary hospital, Dr. Giri examined the horse and concluded that it was "in need of immediate medical attention and a very careful re-feeding regimen to avoid death by starvation." TCF (Ex 10, letter).

Bartholomew did not attempt to obtain a warrant before entering the enclosure or seizing the horse. Tr 122.

After its seizure, Bartholomew took the horse to an equine rehabilitation center, where it was fed a "simple, normal diet for older horses" and gained 120 pounds within the first month. Tr 129, 131. By the end of the year, the heart murmur had disappeared and the horse ranked a five or six on the Henneke scale, which represented a healthy weight. Tr 131-133.

Procedural Facts

The state charged defendant with animal neglect in the second degree. ORS 167.325. She moved to suppress evidence derived from the officer's warrantless entry onto Dicke's property and his seizure of the horse. That evidence included the results of the medical examination and testimony regarding the horse's subsequent recovery, among other things.

The trial court ruled that the exigent circumstances exception justified the officer's warrantless entry onto the property and his seizure of the horse, because the officer had probable cause to believe that the animal had been criminally neglected and that swift action was necessary to save the horse's life.

Tr 269, 274-77. The trial court ruled in the alternative that the emergency aid exception applied, because "the search was not primarily motivated by an attempt to arrest or seize evidence." Tr 277-79. Rather, the officer's "primary concern was the welfare of the horse and the urgency of the situation." Tr 278. *See* App Br at ER-9-22 (trial court ruling).

Defendant appealed, arguing that a risk to an animal's life is not the kind of emergency necessary to justify a warrant exception. App Br at 20-26. The state argued that the risk to the horse's life triggered both the exigent circumstances exception and the emergency aid exception. Resp Br at 14-18.

The Court of Appeals affirmed and held that the officer's actions were justified by the emergency aid exception to the warrant requirement. *Fessenden*, 258 Or App at 649-50. The court reasoned that society has an interest in protecting animals "from unnecessary pain, trauma, and suffering, even when they are killed in an otherwise lawful manner." *Id.* at 648. From that premise, the court concluded that the emergency aid exception applies,

> "when law enforcement officers have an objectively reasonable belief, based on articulable facts, that the search or seizure is necessary to render immediate aid or assistance to animals that have suffered, or which are imminently threatened with suffering, serious physical injury or cruel death, unless that injury or death is being inflicted lawfully."

Id. at 649.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

To date, the emergency aid exception to the warrant requirement under Article I, section 9, permits a state actor to enter private property without a warrant only when it is necessary to render immediate aid to a person who has suffered or who is imminently threatened with suffering serious physical injury or harm.

Does the emergency aid exception permit (or should it be extended to permit) a warrantless entry to attend to a malnourished horse?

Proposed Rule of Law

The emergency aid exception to the Article I, section 9, warrant requirement applies only when human life is in peril.

Second Question Presented.

Does the emergency aid exception permit (or should it be extended to permit) a warrantless entry to attend to a malnourished horse under the Fourth Amendment to the United States Constitution?

Proposed Rule of Law

The emergency aid exception to Fourth Amendment warrant requirement applies only when human life is in peril.

SUMMARY OF THE ARGUMENT

Under Article I, section 9, warrantless searches and seizures are *per se* unreasonable unless falling within one of the few, well-established warrant exceptions. The officer's warrantless entry onto private property and seizure of defendant's horse implicated defendant's Article I, section 9, interests, and only the emergency aid exception to the warrant requirement could arguably permit those actions.

To date, the court has applied the emergency exception to permit a warrantless intrusion only when it is necessary to render aid to a person who has suffered or is imminently threatened with suffering serious physical injury or harm. If the emergency aid exception extends to property, then it requires circumstances involving an interest that is equally as compelling as the interest in avoiding serious physical harm.

Society's interest in protecting animals from cruelty is not sufficiently compelling to justify warrantless privacy intrusions. The evolution of animal protection laws establishes that, both historically and currently, animals occupy a distinct and lesser status than humans under the law. In Oregon, the animal protection laws retain a human-centric focus and demonstrate only a moderate interest in protecting animals; they provide coverage only to certain animals, they treat offenses primarily as misdemeanors, and they permit mistreatment of animals with negligible justification.

Other jurisdictions have recognized a warrant exception to protect animals under the Fourth Amendment, but those cases have not provided persuasive reasons to extend the emergency aid exception to animals under Article I, section 9, and they should not weigh heavily in this court's consideration.

Society's moderate interest in protecting animals from mistreatment is best served by adhering to the bright-line warrant requirement. Warrant exceptions must be capable of objective application in order to provide clear, workable, and consistent guidelines for officers and predictability for citizens. As the Court of Appeals acknowledged, any exception for animals in distress will necessarily require officers to exercise their discretion on a case-specific basis regarding the types of animals and the types of mistreatment that justify warrantless action. Those discretionary determinations are better left to neutral magistrates than to officers in the field. Refusing to extend the emergency aid exception to animals does not prevent the legislature from enacting an administrative scheme for animal protection that has a legitimate, noncriminal purpose and involves no exercise of discretion by law enforcement. Absent such a scheme, the officer's actions Article I, section 9.

The officers' actions also violated the Fourth Amendment to the United States Constitution, because they were not justified by a warrant or any established warrant exception.

ARGUMENT

The emergency aid exception to the Article I, section 9, warrant requirement permits a warrantless privacy intrusion when a person is at risk of serious physical injury or harm. That exception does not extend and should not be extended to providing aid to a single, malnourished animal, because society's interest in protecting animals from abuse and neglect is not sufficiently compelling to justify a warrantless search. Society's interest in protecting animals is best served by the bright-line warrant requirement, because that rule provides clear, workable and consistent guidelines for police conduct.

I. The officer's entry onto private property and seizure of defendant's horse implicated defendant's Article I, section 9, interests; only the emergency aid exception could arguably permit those actions.

Article I, section 9, of the Oregon Constitution provides:

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

Article I, section 9, protects an individual's privacy and possessory rights. *State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998); *State v. Dixson/Digby*, 307 Or 195, 206, 766 P2d 1015 (1988). The provision is most protective of the privacy surrounding individuals in their homes. *State v. Fair*,

353 Or 588, 600, 302 P3d 417 (2013) (noting that an ultimate objective of Article I, section 9, is the protection of individuals in the sanctity of their homes; thus, the degree of intrusion is "significantly affected" by whether police conduct occurs in the home or in public).

The governing principles of Article I, section 9, are well established: "[w]arrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement." *State v. Snow*, 337 Or 219, 223, 94 P3d 872 (2004) (internal quotation marks omitted, brackets in *Snow*). The state has the burden to prove that the circumstances existing at the time of the search fell within a recognized warrant exception. *State v. Baker*, 350 Or 641, 647, 260 P3d 476 (2011).

Article I, section 9, applies when a state actor invades a protected privacy or possessory interest. *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988) (holding that Article I, section 9, protects "the privacy to which one has a *right*" (emphasis in original)). There is no dispute in this case that Article I, section 9, applies: the officer invaded defendant's protected privacy and possessory rights when he reached over the fence to touch the horse and when he entered the fenced enclosure to seize it. *See State v. Tanner*, 304 Or 312, 323, 745 P2d 757 (1987) (holding that an individual may have a protected privacy interest in the property of another).

Those actions were not justified by an exigency relating to the criminal investigation. The exigent circumstances exception permits a warrantless entry when officers have "both probable cause and an exigency." *Snow*, 337 Or at 223. Typically, an exigent circumstance is a situation requiring swift police action (1) to prevent danger to life or serious damage to property, (2) to forestall a suspect's escape, or (3) to prevent the disappearance, dissipation, or destruction of evidence.[4] *State v. Peller*, 287 Or 255, 262, 598 P2d 684 (1979).

In the present case, the officer's entry onto the property could not have been justified by any type of exigency relating to the criminal investigation. It did not forestall a suspect's escape, because no suspects were present on the property. At trial, the prosecutor argued that the entry was necessary to preserve evidence, because one of the defendants may have hidden or destroyed the horse, but nothing in the record suggests more than a mere possibility of that scenario occurring. And a "mere possibility" is insufficient to create an

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[4] The first type of exigency—a risk to life or serious damage to property—should be considered under the emergency aid exception, because in those circumstances the presence or absence of a crime is immaterial, and thus probable cause of a *crime* is not required. *See State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054 (1988) (holding that the "emergency aid doctrine" does not require probable cause of a crime); *State v. Davis*, 295 Or 227, 237-38, 666 P2d 802 (1983) (listing "emergency aid" as a type of exigent circumstance that demands "prompt responsive action by police officers"). The officer must still have probable cause that an emergency requiring swift action exists. *See Baker*, 350 Or at 649 (holding that emergency aid for protection of human health and safety requires a "reasonable belief" that the emergency exists.

exigency; there must be a reason to believe that the possibility will come to pass. *Peller*, 287 Or at 264 ("We do not agree, however, that *the mere possibility* that defendant could make a break if he were so inclined gives rise to exigent circumstances when there is no indication that he is, in fact, so inclined." (Emphasis added.)). Here, neither defendant attempted to, threatened to, or gave any other indication that she was disposed to move or harm the horse, and the state did not establish that doing so would have been feasible. Indeed, neither defendant was even present on the property at the time of the search. Nor did the state prove that any pertinent evidence would have dissipated or deteriorated if the officer delayed the search.[5] *Cf. State v. Machuca*, 347 Or 644, 653, 227 P3d 729 (2010) (explaining that the dissipation of blood alcohol evidence establishes an exigency justifying a warrantless blood draw).

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[5] The warrantless entry also cannot be justified by either consent or by the plain view exception. The officer never sought consent before entering or seizing the horse, and the prosecutor conceded at trial that Dicke's statements which came after the officer's intrusion did not constitute consent. Tr 193. With respect to plain view, that exception can only permit a warrantless *seizure*; the *entry* be justified by a warrant or another warrant exception. *State v. Sargent*, 323 Or 455, 463 n 5, 918 P2d 819 (1996) (explaining that the plain view exception permits police to seize items when their intrusion into the location is otherwise lawful and when the incriminating nature of the item is immediately apparent). In this case, the officer did not have a warrant and was not otherwise lawfully on the premises.

Only the emergency aid exception could arguably permit the warrantless entry and seizure of the horse.

II. The emergency aid exception did not justify the entry, because that exception is limited to circumstances involving a serious risk to human health and safety or an equally compelling human interest in property.

This court has alternately treated the need to render emergency aid as a type of exigent circumstance, *Davis*, 295 Or at 237-38 (listing "emergency aid" as a type of exigent circumstance that demands "prompt responsive action by police officers"), and an independent exception, "distinct from the emergency/exigent circumstances exception[.]" *See Bridewell*, 306 Or at 236. In either event, the need to render emergency aid is a "carefully and narrowly drawn" warrant exception that requires "a strong showing that exceptional emergency circumstances truly existed." *Miller*, 300 Or at 229. To date, the exception applies only when the circumstances establish a serious risk to human health and safety. If the exception extends to property, then it would apply only when the circumstances establish an equally compelling human interest. As will be discussed in the following section (III), the interest in protecting animals from neglect and abuse is not sufficiently compelling to justify a warrantless entry.

A. The emergency aid exception applies only to circumstances involving a serious risk to human health and safety.

In *Baker*, this court articulated the boundaries of the emergency aid exception when a person is at risk of physical harm:

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

350 Or at 649.

This court limited the rule to the protection of "persons" at risk of "serious physical injury or harm" and has applied it only in those circumstances. In *Miller*, for example, the defendant reported to a psychiatrist that he had "just killed a man." 300 Or at 205. The defendant later told the police that he had "hurt someone" in his hotel room and "couldn't wake him up." *Id.* at 206. This court held that the emergency aid exception justified the officer's warrantless entry into the defendant's hotel room, because the officer had a reasonable belief "that he might be able to render lifesaving medical assistance to the victim." *Id.* at 229; *see also Davis*, 295 Or at 238-39 (recognizing that the emergency aid exception may have permitted the police to enter a motel room based upon a report that a woman "might be being raped" inside by a man with a gun, but concluding that any emergency dissipated when the woman walked out of the room fully clothed and unfrightened); *Bridewell*,

306 Or at 236-37 (stating that officers may enter property to provide an individual with emergency assistance, but concluding that a report that the defendant had been missing for several days and that his house was disheveled did not establish the existence of an emergency).

In *Baker*, this court applied the emergency aid exception to a case involving a neighbor's report of a domestic disturbance. 350 Or at 643. The neighbor "could hear yelling and screaming coming from inside the residence" and "thought there might be a child inside." *Id.* A resident of the house indicated that she needed police assistance. This court held that those facts supported "the officers' objective reasonable belief that * * * an emergency existed in which there was a threat of serious physical injury or harm to a person or persons inside the house." *Id.*

The need to protect human health and safety is a compelling interest that justifies several search warrant exceptions. As this court noted in *Baker*, both the school safety and the officer safety exceptions permit warrantless privacy intrusions when the circumstances demonstrate that a person is at imminent risk of harm. *See* 350 Or at 649 (citing *State ex rel Juv. Dept. v. M.A.D.*, 348 Or 381, 233 P3d 437 (2010) (school safety searches) and *State v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987) (officer safety searches)). The emergency aid exception protects a "similar kind of societal interest—the need to immediately

render aid to a person or to prevent the immediate threat of serious personal injury or harm[.]" *Id.*

B. If the emergency aid exception extends to the protection of property, it would apply only when the circumstances involve a compelling human interest equivalent to the interest in avoiding serious physical harm.

This court has never considered whether the emergency aid exception extends to the protection of property, although it has sometimes included the risk of "serious damage to property" in its recitation of the exigent circumstances rule. *See, e.g.*, *Stevens*, 311 Or at 126. At trial, the prosecutor argued that because animals are "considered property under the law," the risk of the horse's death was a risk of damage to property sufficient to establish an exigency. Tr 194. The state did not repeat that contention on appeal, and the Court of Appeals did not address it.

If a risk to property can ever justify a warrant exception, the risk must involve a compelling human interest equivalent to the interest in avoiding serious physical harm. Other jurisdictions have invoked the emergency aid doctrine when protecting property serves an underlying *human* interest. *See, e.g.*, *Michigan v. Tyler*, 436 US 499, 509-10, 98 S Ct 1942, 56 L Ed 2d 486 (1978) (holding that extinguishing and promptly investigating the cause of a fire justifies a warrantless entry); *Coffey v. State*, 2004 OK CR 30, 99 P3d 249, 252 (Okla Crim App 2004) (holding that shutting down an active methamphetamine

laboratory at risk of exploding justifies a warrantless entry); *see Leaf v. Shelnutt*, 400 F3d 1070, 1081-82 (7th Cir 2005) (holding that an ongoing person felony, specifically a burglary in progress, justifies a warrantless entry). But in each of those scenarios, the search involved protecting a *person's* interest; it was not aimed solely at preserving property.

If this case involved inanimate property, then it would be straightforward that no warrant exception would apply, because a person may destroy his or her own property at will. So long as the act does not affect another person, it does not create an emergency, regardless of the value of the property. *See*, *e.g.*, *State v. Chapman*, 107 Or App 325, 333 n 5, 813 P2d 557 (1991) (noting that an active methamphetamine lab "in a rural location miles from another neighbor" likely would not present an exigent circumstance because it would not create an immediate danger to the public if it exploded).

In the present case, it was the animal's status as a sentient life, and not its status as property that was at risk. As will be set out in the following section, society's interest in protecting animals from abuse and neglect is not sufficiently compelling to invoke the emergency aid exception.

III. Society's interest in protecting animals is not sufficiently compelling to justify a warrant exception.

A. Animals have a distinct and lesser status than humans under the law.

The common law did not protect animals aside from their status as the property of their owners. M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 Wis Envtl LJ 3, 4 (2002). The common law offense of malicious mischief, for example, required proof that the offender injured an animal out of malice to its owner. Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L Rev 721, 750 (1994).

Anticruelty statutes became widespread in the mid-to-late nineteenth century. *Id.* Those statutes represented a shift from the common law property-based view of animals to a more modern belief that animals deserve protection from mistreatment, regardless of ownership. *Id.* at 751.

But the early laws reflected human-centered values. For example, many of the laws protected only those animals considered commercially valuable to humans. Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 Marq L Rev 47, 83 (2002). Other statutes, though broadly worded, were limited by court interpretation. As recently as 1973, to provide one example, the Supreme Court of Kansas held

that a state law which prohibited "[s]ubjecting any animal to cruel mistreatment" did not prohibit cockfighting, because "in the common everyday experience of mankind, chickens are seldom thought of as animals[.]" *State ex rel Miller v. Claiborne*, 211 Kan 264, 267, 505 P2d 732, 735 (1973); *see also Commonwealth v. Massini*, 200 Pa Super 257, 259, 188 A2d 816, 817 (1963) (holding that cats do not fall within the statutory definition of "domestic animals" for purposes of a statute prohibiting the poisoning of domestic animals).

Advocates of anticruelty statutes argued that animal cruelty should be prohibited because it detrimentally affects human morals. *See Bland v. People*, 32 Colo 319, 326, 76 P 359, 361 (1904) (noting the state attorney general's defense of anticruelty legislation on that basis); *see also* Huss, 86 Marq L Rev at 83-84. Treating animals inhumanely was thought to "harden the minds" of men and reduce their compassion towards other humans. Francione, 46 Rutgers L Rev at 736; Chandola, 8 Wis Envtl LJ at 6-7.

Contemporary courts viewed anticruelty statutes as hortatory moral pronouncements of limited application. *Grise v. State*, 37 Ark 456, 458-59 (1881). The issue in *Grise* was whether the defendant had justifiably killed a pig after he had repeatedly found it in his field eating his corn and wheat. The Supreme Court of Arkansas noted that anticruelty statutes derived from "tentative efforts of the New England colonists to enforce imperfect but well

recognized moral obligations" on the populace. *Id.* at 458. The court opined that such laws "may be found useful in elevating humanity, by enlargement of its sympathy with all God's creatures, and thus society may be improved." *Id.* at 459. But it held that that construing those statutes literally would result in "absurdities":

> "Society, for instance, could not long tolerate a system of laws, which might drag to the criminal bar every lady who might impale a butterfly, or every man who might drown a litter of kittens, to answer there, and show that the act was needful."

Id. at 459.

Current animal protection laws retain a human-centric focus. For example, federal law treats eagles differently than other animals threatened with extinction because of the bald eagle's status as a national symbol. Huss, 86 Marq L Rev at 85 (making similar observations about the Endangered Species Act and the Marine Mammal Protection Act). Animals considered to be "less charismatic" receive less protection. *Id.* at 86. Laws that mete out protection based on the human interest in an animal species detract from any argument that society desires to protect animals because of their inherent qualities such as intelligence or ability to perceive pain. *See* Chandola, 8 Wis Envtl LJ at 6 (stating "The law does not recognize that animals have any intrinsic worth which warrants protection independent of how humans may feel about them.").

B. Oregon's anticruelty laws demonstrate only a moderate interest in protecting animals, because they provide limited protection, minimal punishment for offenders, and numerous exceptions.

Oregon passed its first animal cruelty statute in 1864. That statute punished anyone who "cruelly beat, or torture[d] any animal, whether belonging to himself or another[.]" L. 1864, § 643. The law permitted punishment by imprisonment for 10 to 30 days or by a fine of $5 to $50. *Id.* The prohibition against animal cruelty was included within the chapter enumerating "crimes against morality and decency," along with many offenses that no longer exist, such as adultery, lewd cohabitation, and seduction of a chaste female. L. 1864, §§ 626-643. In 1885, the legislature expanded the prohibition against animal cruelty, to include overwork, neglect, and animal abandonment. L. 1885, p. 45, §§ 1-2.

The early statutes did not define "cruelty," but then Attorney General I. H. Van Wink concluded that that the word connoted "unjustifiable" pain and suffering, and did not apply "[w]here the end or object in view is reasonable and adequate[.]" 15 Op Atty Gen 109 (1931) (quoting 3 CJ §§ 203 and 204). The attorney general concluded that the state's anticruelty statute did not prohibit vivisection, the practice of dissecting or operating on a live animal for physiological or pathological investigation, because the pain and suffering that results is justifiable. *Id.* at 109-10.

The Oregon legislature overhauled the anticruelty laws in 1971 and 1985. 1971 Or Laws, ch 743, § 226; 1985 Or Laws, ch 662. Those revisions expanded the protections for certain animals but retained numerous exceptions and only misdemeanor offenses. *Id.*

Since 1985, the Oregon legislature has extended the reach of the state's animal cruelty laws and marginally increased the maximum punishment for offenders. But even today, the most serious crimes against animals are only low-level felonies or misdemeanors. For example, the most serious animal-related crime is aggravated animal abuse, which requires the malicious killing or intentional or knowing torture of an animal. ORS 167.332. That offense is only a Class C felony, whereas less culpable conduct toward a human is punishable by death. *See* ORS 163.095 (defining aggravated murder); ORS 163.105 (permitting punishment of aggravated murder by death). All other forms of animal abuse and neglect are classified as misdemeanors unless certain aggravating circumstances are present.[6] ORS 167.315 to ORS 167.330.

Oregon law retains eleven statutory exemptions to the prohibition against

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[6] One circumstance that raises first-degree animal abuse to a felony is the presence of a minor, demonstrating the law's focus on human rather than animal welfare. ORS 167.320(4)(b).

animal cruelty.[7] Those exemptions relate to livestock, hunting, fishing, and trapping, wildlife "management" practices, rodeo animals, and animals used for scientific and educational purposes. Based on those exemptions, it would not

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[7] ORS 167.335 provides:

> "Unless gross negligence can be shown, the provisions of ORS 167.315 to 167.333 do not apply to:
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> "(1) The treatment of livestock being transported by owner or common carrier;
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> "(2) Animals involved in rodeos or similar exhibitions;
>
> "(3) Commercially grown poultry;
>
> "(4) Animals subject to good animal husbandry practices;
>
> "(5) The killing of livestock according to the provisions of ORS 603.065;
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> "(6) Animals subject to good veterinary practices as described in ORS 686.030;
>
> "(7) Lawful fishing, hunting and trapping activities;
>
> "(8) Wildlife management practices under color of law;
>
> "(9) Lawful scientific or agricultural research or teaching that involves the use of animals;
>
> "(10) Reasonable activities undertaken in connection with the control of vermin or pests; and
>
> "(11) Reasonable handling and training techniques."

be a crime to intentionally kill or torture an animal if, for example, the animal was "involved in rodeos[.]."

Additionally, Oregon's anticruelty laws apply only to "nonhuman mammal[s], bird[s], reptile[s], amphibian[s and] fish." ORS 167.310. Thus, invertebrates receive no protection. Arguably, that distinction does not derive from differences in the animal's inherent qualities. For example, cockroaches are not protected, even though recent research indicates that the animals have rich social lives, use sophisticated means of communication, possess strong spatial memory, and have individual personalities. Colin Schultz, *If Cockroaches Are Conscious, Would That Stop You From Smushing Them?*, http://www.smithsonianmag.com/smart-news/if-cockroaches-are-conscious-would-that-stop-you-from-smushing-them-180947876/ (November 29, 2013).

The "humane" slaughter law likewise reflects a lukewarm rather than stringent desire for animal protection. The method of slaughter must only "[r]ender each such animal insensible to pain * * * before the animal is shackled, hoisted, thrown, cast or cut[.]" ORS 603.065(1)(a). And even that minimal protection does not apply to kosher slaughter methods. ORS 603.065(1)(b). The statute does not prohibit methods of slaughter that instill fear and stress before killing. Furthermore, the statute applies only to "[c]attle, equines, sheep or swine." It notably excludes poultry and fish from protection. ORS 603.065(1). Certainly one can imagine a statute that permits animal

slaughter and yet contains significantly greater protections for animal interests than ORS 603.065.

C. The lawful mistreatment of animals demonstrates that society's interest in protecting animals does not justify a warrant exception.

Legislative enactments do not dictate the scope of constitutional protections. *See State v. Stoneman*, 323 Or 536, 542, 920 P2d 535 (1996) (stating that "the interests represented by the state constitution are paramount to legislative ones. Consequently, a state legislative interest, no matter how important, cannot trump a state constitutional command"); Hans Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, Public Values in Constitutional Law 219 (Stephen E. Gottlieb ed, 1993) ("The Constitution does not say that a government may act contrary to [its] directives if judges believe that the government has good enough reasons to do so."). But to the extent that legislative enactments reflect the value that society places on protecting animals from mistreatment, Oregon's laws do not demonstrate an interest that is sufficiently compelling to trump individual constitutional rights. *Cf. M.A.D.*, 348 Or at 391 (noting statutes that "emphasize the responsibility of school districts" to provide for student safety and recognizing a "special duty arising from the relationship between educators and the children entrusted to their care").

The lawful mistreatment of animals provides a relevant perspective on society's interest in animal protection. Each year, nine billion farm animals[8] are slaughtered in the United States. *Farm Animal Statistics: Slaughter Totals*, http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html (June 27, 2013). Those deaths are lawful without any justification or showing of "need."[9] Pets and other animals may be bred for desirable characteristics, like being hypoallergenic or being of a particular breed, even while millions of less desirable animals are put down. *Pets by the Numbers*, www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html (September 27, 2013) (noting that animal shelters euthanize 2.7 million *adoptable* dogs and cats annually). Killing wild animals (through hunting, fishing, and trapping) is a popular pastime referred to as a "sport." Genetic modification of animals is now prevalent even for relatively trivial

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[8] That statistic does not include fish, crustaceans, rabbits, equines, and some other farmed animals.

[9] The lawful killing of animals without justification contrasts sharply with the absolute prohibition against killing a human, regardless of need. In the famous case of *Regina v. Dudley and Stephens* (1884), 14 QBD 273, All Eng L Rpt 61 (Rep 1881 to 1885), *available at* http://cyber.law.harvard.edu/eon/ei/elabs/majesty/stephens.html, the defendants were convicted of murder when, after a shipwreck, they killed and ate a third man without his consent in order to save their own lives. The court held that the need to preserve one's life is not a sufficient justification for unprovoked murder, and pointed to the "awful danger" of balancing one human life against another.

reasons.[10] Conversely, rescuing animals from scientific research facilities is a crime equal in degree to first-degree animal abuse. ORS 167.312. In that light, society's interest in protecting animals—companion animals, livestock, and wild animals alike—cannot be deemed equivalent or even comparable to the interest in protecting humans from harm.

The United States Supreme Court has recognized that the governmental interest in animal welfare does not trump other constitutional rights. *See United States v. Stevens*, 559 US 460, 472, 481-82, 130 S Ct 1577, 176 L Ed 2d 435 (2010) (holding that depictions of animal cruelty do not fall within a historically recognized exception to first amendment speech protections, and striking down a content-based federal law criminalizing the possession of animal cruelty depictions); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 546, 113 S Ct 2217, 124 L Ed 2d 472 (1993) (striking down local ordinance prohibiting religious animal sacrifice).

Likewise, animal protection is not a sufficiently compelling interest to justify a warrant exception. Instead, the general warrant requirement provides

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[10] *See, e.g.*, *Genetically Engineered Pigs, Earth-Friendly Poop*, http://www.cbsnews.com/news/genetically-engineered-pigs-earth-friendly-poop/ (April 5, 2010) (announcing genetic modification of pigs that produce urine and feces containing less environmentally hazardous phosphorous); *Bald Chicken 'Needs No Plucking'*, http://news.bbc.co.uk/2/hi/science/nature/2000003.stm (May 21, 2002) (announcing the breeding of a new "featherless chicken" that will save money for farmers and meat processing plants).

protection commensurate with animals' legal status. *See* ORS 167.345 (providing that officers with probable cause of an animal cruelty offense may enter private property to aid an animal in distress "after obtaining a search warrant or in any other manner authorized by law").

IV. Courts in other jurisdictions have not provided persuasive reasons to expand the emergency aid exception under Article I, section 9, to animal emergencies.

Other jurisdictions have concluded that an exception to the Fourth Amendment warrant requirement exists to protect animals in emergency circumstances. However, none of those courts has provided persuasive reasons to recognize such an exception under Article I, section 9.

Many of the opinions contain little or no reasoning. *Pine v. State*, 889 SW2d 625, 632 (Tex App 1994), is typical. In that case, the defendant challenged the seizure of an emaciated colt from his property. *Id.* at 631. A veterinarian had examined the horse and determined that it required immediate, off-site lifesaving treatment. *Id.* at 632. The Texas Court of Appeals recognized that no precedent existed for applying the emergency aid doctrine to animals and that warrant exceptions must be "specifically established and well-delineated." *Id.* Yet the court concluded, without discussion, that "the 'concrete factual situation' presented to us by this case compels us to find that [the officer] was presented with an emergency situation which made the warrantless seizure reasonable." *Id. See also State v. Goulet*, 21 A3d 302, 314

(RI 2011) (holding that officers had authority to enter the defendant's property after he reportedly shot his dog, because "the police had an interest in preserving the life of the animal or anyone else who happened to be present on the premises"); *Brinkley v. County of Flagler*, 25 Fla L Weekly D2446, 769 So 2d 468, 471-72 (Fla Dist Ct App 2000) (holding that "any reasonable person" would have concluded that animals held in extreme hoarding conditions warranted "an urgent and immediate need for protective action").

In cases where the courts have given the issue greater consideration, they have simply noted a societal interest in animal protection. For example, in *Tuck v. United States*, 477 A2d 1115, 1117 (DC 1984), the District of Columbia Court of Appeals held that the police did not violate the Fourth Amendment when they seized a rabbit from an unventilated and overheated pet store window based on an emergency "need to protect or preserve life[.]" The court explained:

> "Although the exigency in the present case involved the protection of animal life rather than human life, we believe that the 'public interest' in the preservation of life in general and in the prevention of cruelty to animals in particular * * * 'require[s] some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search.' * * * Indeed, given the inherent delay in obtaining a warrant, procurement of one under the 'exigent circumstances' of this case would most likely have frustrated the effective fulfillment of these public interests.
>
> * * * [W]e conclude that the exigencies of the situation militated against delay and were of a sufficient proportion to justify proceeding without a warrant."

Id. at 1120 (footnote and citations omitted, first bracket in original).

The Illinois appellate court relied on similar reasoning. *People v. Thornton*, 286 Ill App 3d 624, 630, 676 NE2d 1024, 1028 (1997). In *Thornton*, the court first noted that other jurisdictions had applied a Fourth Amendment emergency warrant exception to protect animals. *Id.* at 630. In addition, the court noted that its guiding principle for Fourth Amendment cases was "reasonableness." *Id.* From those premises, the court concluded that the emergency exception justified the officer's entry into the defendant's apartment to aid a neglected and injured dog. *Id.* at 631.

Those cases fail to provide persuasive reasons for expanding the emergency aid exception under Article I, section 9, to animals. First, all of the cases involve the Fourth Amendment. This court interprets Article I, section 9, independently of the federal constitution. *State v. Caraher*, 293 Or 741, 750, 653 P2d 942 (1982). Thus, federal opinions are persuasive with respect to Article I, section 9, only to the extent that this court agrees with their reasoning. *Campbell*, 306 Or at 164 n 7. There are important substantive differences between the state and federal provisions. *Id.* Unlike the Fourth Amendment, Article I, section 9, protects "the privacy to which one has a *right*," not that which one reasonably expects, and it does not rely on a balancing of interests. *Id.* at 164 (emphasis in original).

Here, none of the opinions provides persuasive reasoning with respect to the principles underlying Article I, section 9. The opinions rely on a generalized concept of reasonableness and a vaguely identified societal interest in protecting animals. The opinions do not thoroughly assess the nature of that interest or compare it to the interests that justify other search warrant exceptions. Moreover, none of the courts has grappled with the difficult questions raised by extending the emergency aid exception to animals, as set out below.

Additionally, the United States Supreme Court has not yet ruled on whether the emergency aid exception under the Fourth Amendment extends to animals. *See Michigan v. Fisher*, 558 US 45, 47, 130 S Ct 546, 175 L Ed 2d 410 (2009) (holding that officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"). Therefore, the opinions of state courts and federal district courts are not the settled rule for Fourth Amendment purposes.

In sum, the fact that mid-level courts in other jurisdictions have created an animal emergency aid exception based upon a cursory analysis of Fourth Amendment principles should not weigh heavily in this court's full consideration of the privacy protections afforded by Article I, section 9.

V. Society's interest in protecting animals is better served by the bright-line warrant requirement than by an ill-defined warrant exception that is incapable of objective application.

The warrant requirement is "more than an inconvenient formality." *State v. Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979). It does not exist to stand in the way of effective law enforcement. *Id.* Rather, it recognizes that a neutral determination of probable cause by a magistrate is preferred over an on-the-scene determination made by an officer "'engaged in the often competitive enterprise of ferreting out crime.'" *Id.* (quoting *Johnson v. United States*, 333 US 10, 13-14, 68 S Ct 367, 92 L Ed 436 (1948)); *see also State v. Kurokawa-Lasciak*, 351 Or 179, 188, 263 P3d 336 (2011) (same). Accordingly, exceptions to the warrant requirement are few in number and limited in scope. *State v. Miller*, 300 Or 203, 225, 709 P2d 225 (1985) (describing warrant exceptions as "few" and "carefully circumscribed"); *Davis*, 295 Or at 243 (holding that warrant exceptions should be "narrowly and carefully drawn").

This court has repeatedly emphasized that warrant exceptions should be capable of objective application. In *Fair*, for example, this court noted that the privacy protections of Article I, section 9, are "'not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.'" 353 Or at 613 (quoting *Atwater v. City of Lago-Vista*, 532 US 318, 347, 121 S Ct 1536, 149 L Ed 2d 549 (2001)). Police interests call

for "clear guidelines" by which officers can "gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts[.]" *State v. Brown*, 301 Or 268, 277, 721 P2d 1357 (1986).

Citizens, likewise "need to have their constitutional rights spelled out as clearly as possible." *State v. Kock*, 302 Or 27, 33, 725 P2d 1285 (1986). In *Kock*, this court refused to expand the automobile warrant exception, as the United States Supreme Court had, even while acknowledging good arguments for doing so. *Id.* This court concluded that the greater benefit derived from adhering to the "clear, workable and consistent" exception that it had previously announced. *Id.* at 33-34.

For the same reason that bright-line rules are preferred, courts must exercise caution when modifying existing warrant exceptions. As one justice of this court warned:

> "A constitution is not a document of convenience. Its terms are to be enforced without regard to the mood of the times, else it is no constitution at all. At the same time, a constitution is not a document of unreason. It was created in a context and should be read and interpreted with the odd touch of deference for experience, history and reason."

State v. Owens, 302 Or 196, 214, 729 P2d 524 (1986) (Gillette, J., concurring). In a similar vein, the United States Supreme Court has stated that constitutional protections should not be easily set aside: "The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'"

United States v. Stevens, 559 US 460, 470, 130 S Ct 1577, 176 L Ed 2d 435 (2010) (quoting *Marbury v. Madison*, 1 Cranch 137, 178, 2 L Ed 60 (1803)).

Even if society has a compelling interest in protecting *certain* animals from *certain* kinds of mistreatment, it is impossible to translate that interest into a "clear, workable and consistent" warrant exception. Instead, this court should adhere to the bright-line rule that a warrant is required.

The Court of Appeals recognized that extending the emergency aid exception to animals would require officers to make numerous discretionary determinations on a case-by-case basis:

> "We do not pretend to describe, in this opinion, the universe of circumstances in which the officer's belief that a warrantless search or seizure is necessary will be deemed reasonable. Even with respect to the imminent death of an animal, the reasonableness of an officer's belief and actions will have to be determined on a case-specific basis, taking into account the totality of the circumstances, including the species of animal involved."

Fessenden, 258 Or at 649.

Indeed, clear guidelines for applying the exception do not come easily to mind. Presumably, the exception would not extend to *all* animals protected from abuse and neglect, *i.e.*, all "nonhuman mammal[s], bird[s], reptile[s], amphibian[s and] fish." ORS 167.310. If that were the case, a tadpole adoption gone awry would be a basis for a warrantless home invasion. Limiting the

exception to companion animals—animals commonly kept as pets[11]—would be equally unavailing, because it would present the same risk of overbreadth. If the exception applies only to certain species of companion animals, it would require officers to apply their own judgment to determine which species deserve protection. In that scenario, an officer who keeps a pet boa constrictor may be more sensitive to the plight of a neglected reptile than one who has a deathly fear of snakes.

Presuming the exception extends to livestock, a single species might receive differing protection depending on its circumstances. A chicken kept in a Portland backyard may be considered neglected if it is not cooped for the night, leaving it at imminent risk of predators, escape, or cold weather. *See* ORS 167.310 (defining standards of "minimum care" for animals). A chicken owned by a poultry farm, on the other hand, might be subjected to considerably greater harm from overcrowding and disease, among other things, and even if that treatment is unlawful, it likely would not garner more than mild societal reprobation.

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[11] According to the American Society for Prevention of Cruelty to Animals (ASPCA), "Species suitable to be companion animals include dogs, cats, horses, rabbits, ferrets, birds, guinea pigs and select other small mammals, small reptiles and fish," and in certain cases "domestic-bred farm animals." *Species Suitable to be Companion Animals*, http://www.aspca.org/about-us/aspca-policy-and-position-statements/species-suitable-to-be-companion-animals (accessed January 25, 2014).

Even assuming that the exception is limited to particular species, it still confounds the desire for clear guidelines. Given the expansive exceptions in animal protection laws, many types of mistreatment can be lawful under certain circumstances. Conversely, lawful mistreatment like hunting can be unlawful if the person does not possess a proper license or permit. Officers attempting to unravel the ins and outs of the laws will confront more than the average amount of uncertainty. And extending the emergency aid exception now will certainly lead down a path to even more difficult questions in the future, such as whether the exception applies to the protection of nonsentient life like endangered flora.

The bright-line warrant requirement better serves society's interests, because it leaves discretionary determinations to neutral magistrates rather than to officers in the field. Under ordinary circumstances, obtaining a warrant should not entail undue delay or prevent timely police action. *See Missouri v. McNeely*, ___ US ___, ___, 133 S Ct 1552, 1562-63, 185 L Ed 2d 696 (2013) (noting that, although some delay is inherent in the warrant process, "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency"); *Brown*, 301 Or 278 n 6 (predicting that police will not often rely on warrant exceptions "when advances in technology permit[] quick and efficient electronic issuance of warrants"). ORS 133.545 allows officers to apply for a

search warrant telephonically and receive the warrant back from the court electronically. Cell phones and wireless internet make that process accessible even from the field. Thus, officers should be able to comply with the warrant requirement while still providing prompt assistance to animals in distress. *See State v. Wise*, 305 Or 78, 82 n 3, 749 P2d 1179 (1988) (stating that the availability of a telephonic warrant is "[o]ne relevant consideration with regard to exigencies," because warrants need not take hours to obtain).

Moreover, adhering to the bright-line warrant requirement in animal-exigency cases would not prevent the legislature from enacting an administrative scheme for animal protection that permits officers to enter property for noncriminal purposes. *See State v. Atkinson*, 298 Or 1, 7, 688 P2d 832 (1984) (holding that administrative inventory provisions do not violate the constitution); *Nelson v. Lane County*, 304 Or 97, 104, 743 P2d 692 (1987) (explaining that administrative searches may be conducted pursuant to a properly promulgated law or ordinance). An administrative scheme is constitutional if it furthers a legitimate, noninvestigatory purpose, *Nelson*, 304 Or at 106, is limited to meet that purpose, and is "designed and systematically administered" so that it involves "no exercise of discretion by the law enforcement person" conducting the entry. *Atkinson*, 298 Or at 10.

Absent an administrative scheme, the entry and seizure in this case did not fall within an established warrant exception, and this court should decline

the state's invitation to extend any exception to reach animals in distress. Accordingly, the entry and seizure violated Article I, section 9.

VI. The officer's warrantless entry and seizure of the horse violated defendant's rights under the Fourth Amendment, because it was not justified by an existing warrant exception.[12]

The Fourth Amendment to the United States Constitution provides,

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Under that provision, searches conducted without prior approval by a judge or magistrate are *per se* unreasonable, "subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 US 443, 454-55, 91 S Ct 2022, 29 L Ed 2d 564 (1971). Evidence seized in violation of the Fourth Amendment must be suppressed. *Mapp v. Ohio*, 367 US 643, 655, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

Like this court, the United States Supreme Court has applied the emergency aid exception only to situations involving a risk of injury to persons. *See Fisher*, 558 US at 47 (holding that officers "may enter a home without a

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[12] Defendant challenged the constitutionality of the search on Fourth Amendment grounds in her motion to suppress and at the suppression hearing. App Br at ER-4; Tr 50. Although defendant focused on the state constitutional argument in the Court of Appeals, she did not specifically abandon her reliance on the federal constitution.

warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"); *Brigham City v. Stuart*, 547 US 398, 403, 126 S Ct 1943, 164 L Ed 2d 650 (2006) (same). Therefore, it is still an open question whether there is an exception to the Fourth Amendment warrant requirement for animal protection.

For the same reasons outlined with respect to Article I, section 9, the officer's warrantless entry into the fenced enclosure and seizure of the horse were not justified by an established warrant exception, and were consequently unreasonable in violation of the Fourth Amendment.

CONCLUSION

This court should reverse the decision of the Court of Appeals and remand the case to the trial court for further proceedings.

Respectfully submitted,

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

Brief length

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 9,032 words.

Type size

I 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)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 31, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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