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Appellate Court Records

Case No. N011359

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff–Respondent, Respondent on Review, v. MICHAEL HENRY FORKER, Defendant–Appellant, Petitioner on Review.	Washington County Circuit Court Case No. 17CR69999 Court of Appeals Case No. A169208 Supreme Court Case No. N011359

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OREGON FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANT–APPELLANT FORKER IN THE EVENT REVIEW IS ALLOWED

Amici curiae the American Civil Liberties Union and the American Civil Liberties Union of Oregon, pursuant to Rule 8.15(5)(b) of the Oregon Rules of Appellate Procedure, respectfully move this Court for leave to file a brief in support of Defendant–Appellant Forker's Petition for Review, as well as on the merits in the event that review is granted. Amici have conferred with

counsel for both parties and neither party objects to this motion. In support of this motion, amici state the following:

INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Oregon ("ACLU of Oregon") is the Oregon state affiliate of the national ACLU.

Since its founding in 1920, the ACLU has frequently appeared before the U.S. Supreme Court and other state and federal courts in numerous cases implicating Americans' right to privacy in the digital age, including as counsel in *Carpenter v. United States*, 138 S Ct 2206 (2018), and as amicus in *State v. Turay*, No. S068894 (Or argued May 3, 2022); *State v. Pittman*, 367 Or 498, 479 P3d 1028 (2021) (en banc); *People v. Hughes*, 506 Mich 512, 958 NW2d 98 (2020); *United States v. Ganias*, 824 F3d 199 (2d Cir) (en banc), *cert den*, 137 S Ct 569 (2016); *United States v. Hasbajrami*, 945 F3d 641 (2d Cir 2019); and *United States v. Warshak*, 631 F3d 266 (6th Cir 2010). The ACLU of Oregon has appeared frequently before this Court and federal courts advocating for the right to privacy and free speech in digital media and the right to privacy generally under the Fourth Amendment to the U.S.

Constitution and Article 1, section 9 of the Oregon Constitution, including in both *Turay* and *Pittman* in this Court, and in *United States v. Mohamud*, 843 F3d 420 (9th Cir 2016), *cert den*, 138 S Ct 636 (2018), and *United States v. Pineda-Moreno*, 688 F3d 1087 (9th Cir 2012), *cert den*, 133 S Ct 994 (2013).

WHY REVIEW SHOULD BE ALLOWED WITH AMICI'S PARTICIPATION ON THE MERITS

This case involves a question that has long lingered in both federal and state courts: how the Fourth Amendment (and its state constitutional analogues) regulates the government's continued retention of data obtained pursuant to a warrant *after* the warrant has been fully executed. *See* Pet. at 7, 9–13. In this case, the state seized the defendant's property (including nonresponsive data that had no link to any crime), held onto it for more than a decade, and later searched it in pursuit of new evidence. *State v. Forker*, 323 Or App 323, 329, 523 P3d 670 (2022). At least two state supreme courts, and one federal appeals court, have found this question worthy of consideration. *See, e.g.*, *Ganias*, 824 F3d 199 (vacating, on good-faith grounds, a panel decision holding that the Fourth Amendment prohibited the government from retaining nonresponsive data for more than two years); *Nelson v. State*, 312 Ga 375, 863 SE2d 61 (2021) (no Fourth Amendment violation for retention of data for two years where defendant made no affirmative effort to reclaim property); *People v. McCavitt*, 2021 IL 125550,

185 NE3d 1192, 1209 (Ill 2021) (no Fourth Amendment violation for retention of data after acquittal on prior charge where defendant did not timely "press his rights" concerning the government's retention). As a leading court on matters related to the interaction between constitutional privacy and digital data, this Court should allow review to resolve this case and contribute to the emerging national legal discussion surrounding the issue.

In cases like this one, amici have consistently aided courts by presenting arguments that federal and state constitutions protect people from prosecutors retaining their data "just in case" and subsequently exploiting it, even after searches have been fully executed and the criminal process has completely played out. *See, e.g.*, Brief for Amici Curiae Center for Democracy & Technology et al. in Support of Defendant–Appellant, *United States v. Ganias*, 824 F3d 199 (2d Cir 2016) (No. 12-240) (en banc);[1] Motion of the American Civil Liberties Union and American Civil Liberties Union of Illinois for Leave to File Brief Amici Curiae in Support of Defendant–Appellee, *People v. McCavitt*, 2021 IL 125550 (Ill 2021) (No. 125550).[2]

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[1] *available at* https://www.eff.org/files/2015/07/29/eff_ganias_amicus_brief.pdf.

[2] *available at* https://www.aclu.org/wp-content/uploads/legal-documents/2021-03-03_motion_and_brief_of_amici_aclu_and_aclu-il_-_filed.pdf.

In order to comply with the Fourth Amendment and Article I, section 9, a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Amend IV; Or Const Art 1, § 9. The particularity requirement of the Fourth Amendment is designed to ensure that those "searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 US 443, 467 (1971). Constitutional searches must not consist of "a general, exploratory rummaging in a person's belongings." *United States v. Robinson*, 275 F3d 371, 381 (4th Cir 2001) (citing *Andresen v. Maryland*, 427 US 463, 480 (1976)).

Searches of digital information differ from physical-world searches in critical ways. *See Riley v. California*, 573 US 373, 394–95 (2014); *Carpenter*, 138 S Ct at 2217–18. Such searches threaten to intrude on protected privacy and property interests even more severely than electronic eavesdropping or searches of books and other written materials. Modern cell phones and computers store for millions "the privacies of life." *Riley*, 573 US at 403 (quoting *Boyd v. United States*, 116 US 616, 630 (1886)); *see also State v. Mansor*, 363 Or 185, 200–01, 421 P3d 323 (2018) (discussing *Riley*). Indeed, today's searches of computers and cell phones can expose to the government a "broad array" of records and sensitive information "never found in a home

in any form," *Riley*, 573 US at 396–97, making the need for courts to limit the scope of a digital search especially important, *see Mansor*, 363 Or at 218.

In the digital context, courts have often permitted the government to over-seize data—that is, to seize data beyond the scope of its warrant—in order to facilitate more targeted searches. Courts have permitted over-seizure as a prophylactic to accommodate the government's claim that on-site review of digital data would be infeasible in certain circumstances. *See, e.g.*, *United States v. Comprehensive Drug Testing*, 621 F3d 1162, 1177 (9th Cir 2010) (en banc) (per curiam) (recognizing "the reality that over-seizing is an inherent part of the electronic search process and [it will] proceed on the assumption that, when it comes to the seizure of electronic records, this will be far more common than in the days of paper records"), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F3d 870, 876 (9th Cir 2018) (per curiam); *see also Andresen*, 427 at 482 n.11 (recognizing that over-seizure is sometimes appropriate, but cautioning against unwarranted intrusions into an individual's privacy). Even if the constitutional requirement of particularity permits over-seizure as a prophylactic, it does not permit the government to profit from it. The government may not convert that accommodation into a free license to retain

data which it does not independently have probable cause to collect and search in the first place.

This case raises this important question. While the majority below did not address the merits of the Fourth Amendment question identified here, the dissent compellingly argues that the question is unavoidable. *See Forker*, 323 Or App at 354–59 (James, P.J., dissenting). Amici respectfully urge the Court to allow review here, and to permit amici's participation in the proceeding in this Court on the merits.

Dated: March 23, 2023

Respectfully submitted,

/s/ Rachel S.D. Gale

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