IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent v. SHERRY SUE BOROWSKI, Defendant-Appellant	Josephine County Circuit No. 05-0307M **CA A13229 (Control)** (A132130-A132141 Consolidated) **CONSOLIDATED OPENING BRIEF**

APPELLANTS' EXCERPT OF RECORD and APPENDIX

CONSITUTIONAL CHALLENGE TO ORS 164.887

Consolidated Appeal from the Judgments of the Circuit Court for Josephine County;
Honorable Lindi Baker, Circuit Court Judge

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May 2007

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STATEMENT OF THE CASE

Text of Statute at Issue

ORS 164.887 (2005), Interference with Agricultural Operations, provides:

"(1) Except as provided in subsection (3) of this section, a person commits the offense of interference with agricultural operations if the person, while on the property of another person who is engaged in agricultural operations, intentionally or knowingly obstructs, impairs or hinders or attempts to obstruct, impair or hinder agricultural operations.
"(2) Interference with agricultural operations is a Class A misdemeanor.
"(3) The provisions of subsection (1) of this section do not apply to:
"(a) A person who is involved in a labor dispute as defined in ORS 662.010 with the other person; or
"(b) A public employee who is performing official duties.
"(4) As used in this section:
"(a) (A) "Agricultural operations" means the conduct of logging and forest management, mining, farming or ranching of livestock animals or domestic farm animals;
(B) "Domestic farm animal" means an animal used to control or protect livestock animals or used in other related agricultural activities; and
(C) "Livestock animals" has the meaning given that term in ORS 164.055.
"(b) "Domestic farm animal" and "livestock animals" do not include stray animals."

Nature of the Proceeding

This is a criminal case involving citizens engaged in nonviolent protest against the Federal Government's plan to conduct the largest, most controversial post-fire timber sale of old-growth forests on public lands in Josephine County, Oregon. Defendants were charged by information with Interference with Agricultural

Operations, copies attached as Excerpt of Record 1-4 (hereinafter "ER"). [1]

Nature of the Judgment

Prior to trial, Defendants filed Motions to Dismiss charges brought under ORS 164.887, arguing that the statute is facially unconstitutional under Oregon and U.S. Constitutions. Defendants sought dismissals and an order enjoining ORS 164.887 from further enforcement. ER 6. The trial court denied Defendants' Motion to Dismiss, finding the statute constitutional in all respects.[2] ER 64. As a result, Defendants entered conditional no contest pleas to Interference with Agricultural Operations, pursuant to ORS 135.335, in order to seek appellate review of ORS 164.887. The court imposed sentences of two to four days in custody, fines, and bench probation for 18 months. These judgments are attached at ER 67-71.[3] This appeal ensued.

Statement of Appellate Jurisdiction

This Court has jurisdiction pursuant to ORS 138.040.

Timeliness of Appeal

These cases have been consolidated for the purpose of this appeal. Judgments against Defendants were entered on April 13, 2006, except for Nicole Webb and Stacy Williams, whose judgments were entered on April 21, 2006. Defendants filed

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[1] In order to conserve pages, ER1 is a complete copy of the standard information filed in these cases. All defendants were at least charged with these three identical crimes.
[2] The Court also denied Defendants' ability to argue the choice of evils defense and jury nullification. ER 63-64; 65-66. Those issues are not appealed in this case.
[3] In order to conserve pages, a complete copy of a representative judgment is included in full. All defendants were convicted of ORS 164.887.

Notices of Appeal on May 4, 2006, and amended the Notices by request of the Court, pursuant to ORAP 2.40, on May 18, 2006. The appeals are timely.

Question Presented for Review

Did the trial court err when it denied Defendants' Motion to Dismiss charges brought under ORS 164.887 (2005), Interference with Agricultural Operations?

Summary of Argument

In the face of global climate change and clean water concerns, agricultural activities such as clearcut timber operations, subsidized cattle grazing on public lands, and other environmentally destructive actions have become highly controversial issues in Oregon. In response to decades of increasingly disconcerting scientific statistics regarding the health of their forests and watersheds, and sluggish response from the government, citizens have organized public demonstrations, economic boycotts, and other democratic actions in the hopes that these societal and economic pressures would change how agricultural interests conduct their businesses, and thus how they impact the planet.

In response to these public pressures, the Oregon Cattlemen's Association and the Oregon timber industry lobbied the Oregon legislature in 1999 to pass felony criminal legislation, entitled "Interference with Agricultural Operations," in an attempt to silence public demonstrations against agricultural industries.

Despite constitutional concerns that were raised at the time the judicial committees convened, and despite the fact that numerous existing criminal statutes already existed to protect against the agricultural industries' alleged need for

exclusive legal protection, ORS 164.887 was ultimately enacted as a class A misdemeanor crime. The law proscribes any activity, save those engaged in by labor disputants, that intentionally or knowingly "obstructs, impairs or hinders or attempts to obstruct, impair or hinder agricultural operations." ORS 164.887 violates both the U.S. and Oregon constitutions in a multitude of ways and should be enjoined by this Court from further enforcement.

This is a case of first impression on several issues. This is the first time that this Court has been asked to construe ORS 164.887, and determine whether it violates the Oregon and/or U.S. constitutions. Additionally, this is the first time that this Court has been asked to find that a content-based exception to a statute's prohibitions renders the entire statute content-based and subject to the most exacting scrutiny. ORS 164.887(3)(a) contains an exemption for labor disputants—a content-based exception to the law, which, under Ninth Circuit case law, renders the entire statute content-based. Finally, to the best of Defendants' knowledge, this is the first time this Court has reviewed for constitutionality a law with stark discriminatory effect on a particular class of persons. Since 2000, the year ORS 164.887 was enacted, 88 persons have been charged with Interference with Agricultural Operations, 87 of who were forest protesters.

ORS 164.887 violates Article 1, sections 8 and 26 of the Oregon Constitution and the First Amendment to the U.S. Constitution because it is a content-based statute that cannot withstand strict scrutiny. The law contains a wholesale exemption for labor-related speech, regardless of the extent to which the labor speech hinders,

impairs or obstructs or attempts to hinder, impair or obstruct an agricultural operation. Content clearly dictates culpability under ORS 164.887, as law enforcement must read the message on a picketer's sign to determine whether the individual can be charged with Interference with Agricultural Operations. As such, the law creates a class of favored speech in contravention to constitutional guarantees.

ORS 164.887 violates the federal and state constitutional guarantees of equal protection under the law. The law is impermissibly speaker-based in three ways. First, the labor exemption places labor protesters in an exalted position in relation to all other speakers. Second, the law has a stark discriminatory effect on a particular class of persons, in that it has been applied almost exclusively against forest protesters—an astonishing 99% of the time since its enactment in 2000. Third, according to its legislative history, SB 678 (ultimately ORS 164.887) was "drafted to address groups who object to agricultural operations on philosophical grounds[.]"

ORS 164.887 is overbroad in contravention to the U.S. and Oregon constitutions. The statute is not limited to a set of specific conduct such as blocking the entrance to a Forest Service building or obstructing the passage of a logging truck. Instead, the language of ORS 164.887 criminalizes <u>any</u> act that has the <u>effect</u> of obstructing, impairing or hindering an agricultural operation, whether that act is picketing, leafleting, marching, or damaging property. As such, the law proscribes more speech and speech-related activity than is necessary and chills citizen's free speech rights.

ORS 164.887 is void for vagueness under the federal and state constitutions. Specifically, the terms "hinder," "obstruct," and "impair" are far too nebulous to provide a citizen of ordinary intelligence with constitutionally sufficient notice of what activities are proscribed under the law. Instead of prohibiting *objectively* understood physical conduct, it prohibits any activity that causes the *subjectively* determined results of obstruction, impairment, hindrance, or attempts thereof.

Because ORS 164.887 impermissibly restricts Defendants' rights to free speech and assembly, and denies Defendants equal protection of the laws, this Court should strike the law as unconstitutional.

Summary of Facts

In March of 2005, Defendants were on a Josephine County public road within the Siskiyou National Forest, protesting what they believed to be the illegal logging of the Biscuit timber sales on federal public lands. The logging operations were contracted by the United States Forest Service ("USFS") to private timber corporations to cut old-growth trees in fire-scarred roadless areas adjacent to popular wilderness and recreation areas of the Siskiyou National Forest. This timber sale project is the largest and most contentious proposal in the history of USFS, garnering a remarkable 26,000 comments in opposition to the project. ER 6.

Defendants were on the public road with other citizens holding signs, chanting, giving interviews with the media and handing out literature regarding the timber sales, when loggers employed by Silver Creek Timber Company arrived at their

location.[4] ER 7. When Defendants remained on the road to continue their protest, they were told by law enforcement to leave and were subsequently arrested by Josephine County Sheriff's officers and transported to the County jail. ER 7. All persons arrested at the Biscuit timber sales were charged with ORS 164.887, regardless of what they were individually doing at the protest. ER 7.

ASSIGNMENT OF ERROR

The trial court erred in holding that ORS 164.887 does not violate Defendants' rights guaranteed by the Oregon and United States Constitutions.

Preservation of Error

A. Oregon Constitution Article I, Sections 8 & 26

The text of ORS 164.887 is set out in the section entitled "Statute at Issue," above at p. 1.

During pre-trial proceedings, Defendants each submitted Motions to Dismiss, which challenged ORS 164.887 under Article I, sections 8 and 26 of the Oregon constitution because the statute impermissibly restricts the constitutional right to peacefully assemble and engage in speech-related activity on public lands. ER 19-21.

The Josephine County trial court held ORS 164.887 to be constitutional, stating: "the statute is not violative of either the U.S. or Oregon Constitutions." ER

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[4] Defendants were protesting on a road that leads to a popular wilderness trailhead and the Fiddler timber sale—the first sale authorized within this timber sale project. ER 6. The Ninth Circuit Court of Appeals had issued an injunction barring any ground-disturbing activities pursuant to environmental laws. This injunction was scheduled to be lifted on March 7, 2005, which corresponded with the first day of public demonstrations.

64. The Court failed to make any findings or additional rulings specifically pertaining to the Oregon Constitutional challenges raised herein.

B. First Amendment to the U.S. Constitution

During pre-trial proceedings, Defendants submitted Motions to Dismiss, challenging ORS 164.887 as violative of their First Amendment right to peacefully assemble and engage in speech and expressive conduct on public lands. ER 9-18

The trial court held ORS 164.887 to be constitutional, ruling that Defendants had failed to meet their burden of proving the statute unconstitutional. The court ruled that the law is content-neutral, and that it prohibits conduct as opposed to speech or assembly. ER 64.

C. Privileges and Immunities and Equal Protection

During pre-trial proceedings, Defendants submitted Motions to Dismiss, challenging ORS 164.887 as violative of their rights to equal protection of the laws under state and federal constitutions, because the prohibitions of the statute are based upon the identity of the speaker. ER 21-26.

The trial court held the statute to be constitutional, stating:

> "Second, the statute does not violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution or the privileges and immunities clause of the Oregon Constitution. … As such, the statute does not provide any favorable or unequal treatment to those involved in labor disputes as opposed to those protesting logging projects and consequently does not violate equal protection or privileges and immunities requirements." ER 64-65.

Defendants also preserved an additional Equal Protection argument pertaining to the stark discriminatory effect, and thus discriminatory intent, of ORS 164.887. In their Motions to Dismiss, Defendants stated:

> "The statute does not limit its prohibitions to any particular forum on its face and, since its enactment in 1999, appears to have been overwhelmingly, if not exclusively, applied by law enforcement to conservationists on National Forest land, including public roadways. ORS 164.887 is therefore subject to the highest scrutiny." ER 12.
>
> "As a result of numerous public records requests to every county in Oregon and the Oregon Department of Justice, it is undisputed that the only incidents where ORS 164.887 charges have been filed in Oregon to date solely involve forest protesters." ER 12, n. 3.

The trial court ruled:

> "Defendants claim that the statute is unconstitutional because it provides an impermissible speaker-based exception to the labor dispute clause of the statute. …In doing so, the statute does not create classes of favored or disfavored speech." ER 64.

D. Overbreadth

During pre-trial proceedings, Defendants submitted Motions to Dismiss, challenging ORS 164.887 as substantially overbroad under state and federal law as the statute proscribes protected conduct. ER 26-31.

The trial court held the statute to be constitutional, stating:

> "the statute is not facially …. overbroad. … Further, it is not overbroad because it is narrowly drawn to protect the lawful objective of agricultural operations from such disruption that could occur as a result of such prohibited conduct." ER 65.

E. Vagueness

During pre-trial proceedings Defendants submitted Motions to Dismiss, challenging ORS 164.887 as unconstitutionally vague under the Fourteenth

Amendment and Article I, sections 20 and 21 of the Oregon Constitution. ER 31-34. Specifically, the trial court erred in declining to find the statute unconstitutional, stating: "the statute is not facially vague or overbroad." ER 65.

Standard of Review

The Court reviews the trial court's denial of Defendants' Motions to Dismiss on constitutional grounds for errors of law. *See generally State v. Matthews*, 159 Or App 580, 584, 978 P2d 423 (1999); ORAP 5.45 n2; ORS 138.220.

Regulation of speech in a traditional public forum "is subject to the highest scrutiny." *International Society for Krishna Consciousness, Inc. v. Lee,* 505 US 672, 678, 112 S Ct 2701, 120 L Ed 2d 541 (1992). Content-based restrictions that regulate speech in a public forum are presumptively unconstitutional and are subject to strict scrutiny. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 US 819, 828, 115 S Ct 2510, 132 L Ed 2d 700 (1995). The Court should employ vigilant scrutiny in vagueness analysis, as ORS 164.887 imposes criminal penalties and potentially implicates free speech. *Delgado v. Souders*, 334 Or 122, 148, 46 P3d 729 (2002). Pursuant to Oregon law, a governmental decision to offer or deny some advantage to a person must be made by permissible criteria and consistently applied. *Id.* at 145-46.

ARGUMENT

I. ORS 164.887 IS AN UNCONSTITUTIONAL RESTRICTION ON FREEDOM OF SPEECH AND ASSEMBLY UNDER THE OREGON CONSTITUTION[5]

The trial court erred in holding ORS 164.887 constitutional under Article 1,

[5] The Court first addresses state constitutional claims before looking to the federal equivalents. *See State v. Charboneau,* 323 Or 38, 53, 913 P2d 308 (1996).

sections 8 and 26 of the Oregon Constitution.[6] The freedoms that sections 8 and 26 of Article I guarantee are closely associated. The right of assembly guaranteed by section 26 protects an important aspect of the freedom of expression protected by Article I, section 8--it assures that those who speak may have an audience. *State v. Ausmus*, 336 Or 493, 506-507, 85 P3d 864 (2003). Therefore, the two constitutional provisions are subject to the same analytical framework set forth by the Oregon Supreme Court. *Id.*

A law is unconstitutional if it proscribes a constitutionally protected activity. *State v. Robertson,* 293 Or 402, 410, 649 P2d 569 (1982). All speech is constitutionally protected, unless it is a historically excepted form. *Id.* at 412. In *Robertson*, the Oregon Supreme Court ruled that a statute is subject to a facial challenge only if it expressly or obviously proscribes expression. *Id.* at 417. The analysis of the constitutionality of a regulation depends on whether it is aimed at the content of speech or assembly, or if it is aimed at forbidden effects that are caused by speech. *Id.* If the former, then the regulation is unconstitutional unless wholly contained within a well-established historical exception to the protections of Article I,

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[6] In *Ciancanelli*, Article I, section 8 jurisprudence was reaffirmed by the Supreme Court by examining the text of that constitutional provision: "Turning our focus to the first clause of Article I, section 8, one is struck by its sweeping terms, both with respect to the legislative power ('[n]o' law shall be passed restraining* * * or restricting) and the kinds of expression protected ('* * * the free expression of opinion, or* * * the right to speak, write, or print freely on any subject whatever'). In fact, the words are so clear and sweeping that we think that we would not be keeping faith with the framers who wrote them if we were to qualify or water them down[.]" *State v. Ciancanelli*, 339 Or 282, 311, 121 P3d 613 (2005) (*emphases omitted; omissions in Ciancanelli*).

section 8. *Id.* at 412. If the latter, then the regulation is evaluated for overbreadth or on an as-applied basis, depending, respectively, on whether it expressly prohibits speech as a means of regulating the forbidden effect or prohibits the effect caused by speech or otherwise. *Id.* at 417-418.

ORS 164.887 falls within the first prong of the *Robertson* analysis because it is aimed at the content of speech and targets speech based on the content of the expression, in that the statute does not prohibit all speech hindering agricultural operations, but only certain types of speech—that which does not relate to labor disputants. Under ORS 164.887(3), any "person involved in a labor dispute" is exempted from the statute's prohibition on obstructing, impairing or hindering agricultural operations, or attempting to do so, and may assemble and speak freely. The statute exempts labor protesters and their communications and assemblies (such as picketing) from the broad sweep of the law while forbidding "the right to speak, write, or print freely on any subject whatever" by all other groups or individuals, regardless of the harm incurred. *State v. Spencer*, 289 Or 225, 228, 611 P2d 1147 (1980). Because labor issues are particular subjects of communication and ORS 164.887(3) is directed at protecting expression of labor issues,[7] the exemption is

[7] In fact, subsection 3 was enacted because of concerns that the statute without the exemption would violate the rights of laborers seeking to exercise their rights to free speech and assembly. Labor activists do not hold an exalted position when it comes to free speech rights as compared to all other citizens, yet the exemption allegedly was created so that it would not violate an earlier court decision upholding the rights of agricultural workers to protest their working conditions-- rights that they share with all other members of the public. ER 23, n. 6; ER 37.

written in terms directed at the substance of a particular or opinion and is therefore content-based.

If an exemption to a statute is content-based, the entire statute is content-based. *Foti v. City of Menlo Park*, 146 F3d 629, 636 (9th Cir 1998). This is a case of first impression because the Oregon courts have not yet decided whether a content-based exemption in a statute necessarily implicates the statute as a whole. However, this Court only has to look to Ninth Circuit case law, which has clearly so ruled. *Id*. The court in *Foti* ruled that a regulation which contains an exemption based on content, is itself content-based. *Id*. See discussion, *infra*, at p. 15. As a result, ORS 164.887 falls within the first category of *Robertson* analysis and is unconstitutional.

The Oregon courts have ruled that if one opinion is protected from the reach of the law and another is not, the statute violates Article I, section 8. *Moser v. Frohnmayer,* 315 Or 372, 376, 845 P2d 1284 (1993) (statute "restrict[ed] expression because it [was] directed at a specific subject of communication, excluding some speech based on the content of the message," and therefore violated Article I, section 8).

> "There is no basis under the Oregon Constitution to provide more protection to certain nonabusive communication based upon the content of the communication. Speech related to political issues or matters of 'public concern' is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right." *Bank of Oregon v. Independent News, Inc.*, 298 Or 434, 439, 693 P2d 35 (1985).

Thus, the state may not, consistent with Article I, section 8, prohibit some expression, while permitting other expression simply because the latter concerns a different

subject. Regarding ORS 164.887, the legislature's decision to limit some types of expression more stringently than other expression, such as that pertaining to labor, because of its content, is an impermissible restriction on the "subject" of expression under Article I, section 8. ER 38.

ORS 164.887 violates Article I, sections 8 and 26, of the Oregon Constitution because it prohibits a significant amount of constitutionally protected activity. Consequently, unless it is wholly contained within a well-established historical exception to the protections of Article I, section 8, it is unconstitutional. *Robertson*, 293 Or at 412; *see also State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987). In this case there is no well-established historical exception that might apply, and no party to this dispute has argued to the contrary. ORS 164.887 therefore cannot survive constitutional scrutiny under Article I, sections 8 and 26.

Another problem with ORS 164.887 is that it does not forbid 'hindering' an agricultural operation to the point of cessation, property damage, or any other tangible point. Instead, it leaves the person conducting the "agricultural operation" free to decide when a group of people shall be dispersed and/or arrested. The point at which there is harm (or "hindrance") under ORS 164.887 is not readily identifiable and, in fact, reaches to protected conduct of peaceable assembly at sites of agricultural operations. This clearly violates Article I, section 26 of the Oregon Constitution. The constitutional right to publicly assemble in a public forum cannot be proscribed by a statute that is intended to protect commercial interests. Commercial interests do not trump fundamental constitutional rights. *Thornhill v. Alabama*, 310 US 88, 99-100,

60 S Ct 736, 84 L Ed 1093 (1940). Thus, ORS 164.887 is unconstitutional under Article I, section 26 of the Oregon Constitution.

Even if the Court finds that the second prong of statutory analysis is necessary under *Robertson*, ORS 164.887 would still be unconstitutional under Article I section 8 of the Oregon Constitution because the statute is overbroad and directed at more harm than the legislature is entitled to proscribe. *See* Overbreadth discussion, p. 36.

The trial court failed to apply the *Robertson* analysis to this statute, analysis which, if conducted, clearly demonstrates that ORS 164.887 violates Article I, sections 8 and 26 of the Oregon Constitution.

II. ORS 164.887 IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY REGULATES SPEECH ACCORDING TO CONTENT IN CONTRAVENTION OF THE FIRST AMENDMENT

A. *As a Content-Based Statute, ORS 164.887 Clearly Implicates the First Amendment and is Properly the Subject of a Facial Constitutional Challenge*

The Court erred in finding ORS 164.887 facially valid under the U.S. Constitution as a content-neutral statute. ER 64.

Laws that single out certain speech for differential treatment based on the idea expressed are content-based. *Foti*, 146 F3d at 636. A regulation, which contains an exemption based on content, is itself content-based. *Id*. Thus, if law enforcement must read the message on a sign to determine whether a particular speaker is violating the law, the statute is clearly content-based. *Id.*

In *Foti*, the Ninth Circuit found that an ordinance banning <u>all</u> signs on all public property, which at "first blush" appeared to be content-neutral, was actually content-based. *Id*. The Court explained that because the ordinance provided content-

based exemptions for signs conveying messages about select topics, such as real estate and traffic safety, the statute itself must be considered content-based. *Id.; see also Police Department of Chicago v. Mosely*, 408 US 92, 96, 92 S Ct 2286, 33 L Ed 2d 212 (1972); *Carey v. Brown*, 447 US 455, 463, 100 S Ct 2286, 65 L Ed 2d 263 (1980) (striking down, as content-based, regulations containing exemptions for labor picketers).

Like the ordinance at issue in *Foti*, ORS 164.887 initially appears to be content-neutral because it proscribes any activity that hinders, obstructs or impairs an agricultural operation. However, as in *Foti*, ORS 164.887 is actually content-based because it contains a content-based exemption. ORS 164.887(3)(a) provides a wholesale exemption for any labor disputant activity (*e.g.:* labor picketing[8] and other traditional labor-related expressive conduct[9]) which hinders, obstructs or impairs an agricultural operation.

The First Amendment implication of the labor exception is clear: content dictates culpability under ORS 164.887. If law enforcement responded to a complaint of a picketer violating ORS 164.887, and found a labor picketer and an environmental

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[8] Picketing is the hallmark communicative activity of persons engaged in a labor dispute and the precise labor activity that the Legislature sought to exempt from the reach of ORS 164.887. ER 37. As explained by Counsel Taylor in the Senate Judiciary Committee work session of May 26, 1999, proposed amendments to SB 678 (later ORS 164.887), which provided for the exemption of labor disputants' activities, were drafted **"because we were concerned about [labor] picketing."** ER 37.

[9] Historically, labor disputant activity involves communicating grievances to the public through expressive activity such as picketing, in an effort to discourage patronage and strikebreaking and thus place economic pressure on their employers to "come to the table." *Pineros Y Campesinos Unidos del Noroeste (PCUN) v. Goldschmidt,* 790 F Supp 216, 219 (D Or 1990); *see also Thornhill*, 310 US at 99-100.

picketer protesting at the same site, the officer would have to read the messages on each picketer's sign to know which one could be cited under the law. Thus under *Foti*, ORS 164.887 is clearly content-based.

Facial constitutional challenges to a statute are appropriate when the regulation clearly implicates the First Amendment. *California Teacher's Ass'n v. State Bd. of Educ.*, 271 F3d 1141, 1149 (9th Cir 2001). Content-based statutes clearly implicate the First Amendment because they are very likely improper attempts to promote one form of speech over another. *Foti*, 146 F3d at 636. Because ORS 164.887 is content-based, it implicates the First Amendment, and is properly the subject of a facial challenge.

B. *ORS 164.887 Violates the First Amendment by Impermissibly Regulating Speech in Public Fora*

By ruling that ORS 164.887 is content-neutral, the Court erred in finding that the statute permissibly regulated speech in public fora.[10] ER 64.

Regulation of speech in a traditional public forum "is subject to the highest scrutiny." *Lee,* 505 US at 678. The appropriate level of heightened scrutiny depends upon whether the statute regulates speech on the basis of content. *Frisby v. Schultz*, 487 US 474, 481, 108 S Ct 2495, 101 L Ed 2d 420 (1988). A content-based law that applies to public fora is presumptively unconstitutional and subject to strict scrutiny. *Rosenberger*, 515 US at 828.

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[10] While the Court's ruling is silent with respect to whether ORS 164.887 applies to public lands, Petitioners and Respondent concur that the statute is applicable to public fora. ER 8, 40.

For a statute to survive strict scrutiny, the government must demonstrate that the law is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. *Foti*, 146 F3d at 635. As a content-based statute, ORS 164.887 is presumptively unconstitutional and subject to the strictest of scrutiny.

ORS 164.887 does not serve a compelling interest. The danger of injury to a business concern is neither so serious nor imminent as to justify sweeping proscriptions on free speech. *Thornhill,* 310 US at 105.

In *Thornhill*, the US Supreme Court held unconstitutional a statute that prohibited loitering or picketing at a place of business with the intent of persuading others not to patronize, or "hindering, delaying or interfering with or injuring any lawful business…of another." *Id.* at 91. The Court reasoned:

> "The danger of breach of the peace or serious invasion of rights…is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by the statute." *Id.* at 106.

Just like the *Thornhill* statute, ORS 164.887 proscribes hindering or interfering with a lawful business and does so without a compelling state interest to support its sweeping proscriptions. As in *Thornhill*, the danger of injury to Oregon's agricultural industry is neither so serious nor imminent as to justify a law prohibiting a wide range of activities that include expressive conduct, let alone justify a law that is content-based. Absent a compelling state interest, ORS 164.887 fails under strict scrutiny.

ORS 164.887 is not narrowly tailored. A narrowly tailored law under strict scrutiny analysis must employ the least restrictive means to protect a compelling interest. *Foti*, 146 F3d at 637. The ready availability of significantly less restrictive

alternatives clearly demonstrates that a content-based statute is not narrowly tailored. *Boos v. Barry*, 485 US 312, 329, 108 S Ct 1157, 99 L Ed 2d 333 (1988); *see also Foti,* 146 F3d at 642-643 (law unconstitutional as City's aims could be achieved with obvious, preexisting, less burdensome laws).

In *Boos*, the U.S. Supreme Court held that a law that banned the display of signs critical of foreign governments was facially violative of the First Amendment. 485 US 312, 329. The Court held that the law was not narrowly tailored due to the existence of a single, less restrictive law, which amply protected the government's asserted interest without implicating First Amendment concerns. *Id*.

Unlike in *Boos*, the government at present has not just one, but many available alternative methods of protecting agricultural interests that do not implicate free speech. Oregon has a plethora of criminal statutes which already serve to protect agricultural operations from property damage, theft, trespassing, criminal mischief, and so on, which have been in place since long before the enactment of ORS 164.887.[11] In fact, senators such as prosecuting attorney Floyd Prozanski opposed

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[11] Original sponsors had initially sought a felony law, but the legislature ultimately reduced it to a Class A misdemeanor. The sponsors also said SB 678 was needed as it was difficult to prove a dollar damage amount for incidents of cow tipping and other subtle harms specific to agricultural operations. ER 38-39. However, ORS 164.365 (criminal mischief I) specifically addresses this concern and is a Class C felony:

> "(1) A person commits the crime of criminal mischief in the first degree who, with intent to damage property, and having no right to do so nor reasonable ground to believe that the person has such right:
>
> "(a) Damages or destroys property of another:
>
> "(A) In an amount exceeding $750;
>
> "(B) By means of an explosive;
>
> '(C) By starting a fire in an institution while the person is committed to and confined in the institution;

this law because it was entirely redundant with existing criminal laws. ER 37.

If the existence of a single, less-burdensome law renders a content-based statute unable to satisfy the narrowly tailored requirement under *Boos*, then certainly the existence of multiple, less-burdensome Oregon laws renders ORS 164.887 not narrowly tailored and thus unable to survive strict scrutiny.

ORS 164.887 is a content-based statute that is neither necessary to serve a compelling government interest nor narrowly tailored. Thus, it should be stricken as facially unconstitutional.

III. ORS 164.887 VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE IN ARTICLE I, SECTION 20 OF THE OREGON CONSTITUTION

ORS 164.887 violates Article I, section 20 of the Oregon Constitution because it impermissibly grants privileges or immunities to labor protesters under section 3(a) of the statute while denying the same benefits under the law to non-labor protesters including Defendants as forest protesters. Article I, section 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizen privilege, or immunities, which upon the same terms, shall not equally belong to all citizens." ORS 164.887(3)(a) exempts labor disputants, but prohibits the same

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"(D) Which is a **livestock animal** as defined in ORS 164.055."

Further evidence that ORS 164.887 is not necessary is established by even a cursory examination of the Oregon penal code: criminal mischief in the second and third degrees, criminal trespass in the first and second degrees, tree spiking, harassment, theft in first through third degrees, disorderly conduct, and many more—not including federal laws (since these incidents did occur on federal land which could be used to prosecute crimes of this nature).

conduct by non-labor activists, granting greater privileges and immunities under the law to one group of people. Thus, ORS 164.887 violates Article I, section 20 and must be stricken.

Despite differences in state and federal law, a number of cases have noted that compliance with Article I, section 20 will correspond to compliance with the federal Equal Protection Clause. *See e.g. Olsen v. State,* 276 Or 9, 15-16, 554 P2d 139 (1976). ORS 164.887 violates both standards of equal protection.

A. *Labor Protesters' Rights Are Enlarged Compared to Those of Forest Protesters and Others*

Article I, section 20, forbids "inequality of privileges or immunities not available 'upon the same terms,' first, to any citizen, and second, to any class of citizens." *State v. Clark,* 291 Or 231, 237, 630 P2d 810, *cert den,* 454 US (1981). The Privileges and Immunities Clause may be invoked by an individual who demands equality of treatment with other individuals, as well as by a person who demands equal privileges or immunities for a class to which that person belongs. *Id.* at 237. The Clause requires that persons similarly situated be treated equally under the laws, in the absence of a showing of a basis for different treatment. *Id.* at 240-241. A person who is denied what a favored class receives has standing to demand equal treatment. *City of Klamath Falls v. Winters*, 289 Or 757, 775-777, 619 P2d 217 (1980). The court must decide whether to strike down the special privilege or to extend it beyond the favored class. *Hale v. Port of Portland,* 308 Or 508, 524-25, 783 P2d 506 (1989), *overruled on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). Defendants demand equal right to protest and to

potentially hinder agricultural operations as labor protesters.

In order to present an Article I, section 20, equal privileges and immunities challenge to a statute, Defendants must show:

> "(1) that another group has been granted a 'privilege' or 'immunity' which [plaintiff's] group has not been granted, (2) that [the statute at issue] discriminates against a 'true class' on the basis of characteristics which [the class has] apart from that statute * * *, and (3) that the distinction between the classes is either impermissibly based on persons' immutable characteristics, which reflect 'invidious' social or political premises, or has no rational foundation in light of the state's purpose." *Clark,* 291 Or at 240; *see also Jungen v. State*, 94 Or App 101, 105, 764 P2d 938 (1988), *rev den,* 307 Or 658, *cert den,* 493 US 933 (1989).

As used in the Article I, section 20 case law, the term "class" takes on special meaning; only laws that disparately treat a "true class" may violate that section of the constitution. *State ex rel Huddleston v. Sawyer,* 324 Or 597, 610, 932 P2d 1145, *cert den,* 522 US 994 (1997). In attempting to describe precisely what a "true class" means, the cases draw a distinction between classes that are created by the challenged law or government action itself and classes that are defined in terms of characteristics that are shared apart from the challenged law or action. *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998) (summarizing case law). True classes based on personal characteristics[12] are generally subject to a heightened level of scrutiny, *id*. at 521, while other true classes, such as those based on philosophical beliefs or geographical distinctions will survive an Article I, section 20 challenge if

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[12] Cases refer to classification by "*ad hominem* characteristic," *Van Wormer v. City of Salem,* 309 Or 404, 408, 788 P2d 443 (1990), by "personal characteristic," *Zockert v. Fanning,* 310 Or 514, 523, 800 P2d 773 (1990), and by "antecedent personal or social characteristics or societal status such as sexuality, gender, etc…" *Hale,* 308 Or at 525.

the legislature had a rational basis for distinguishing between the classes involved. *Id.* at 521.

B. *Labor Disputants are Provided Immunity from ORS 164.887*

ORS 164.887 creates an exception to the prohibition against hindering agricultural operations for labor disputants. Exemption from regulation is clearly an immunity to which Article I, section 20, analysis applies. *Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour Div.*, 96 Or App 133, 142, 772 P2d 934, *rev den,* 308 Or 315 (1989), *cert den,* 495 US 932 (1990). The Defendants, as forest protesters, did not receive, and are denied, equal treatment under the law as compared to those of the favored class, labor disputants, who may act with impunity under this statute. Labor disputants may hinder, impair, obstruct, or attempt to hinder, any agricultural operation whether exercising their constitutional rights or not; while all other citizens, especially forest protesters like Defendants, could be, and are, arrested and prosecuted for identical conduct. As a result of the exemption, ORS 164.887(3)(a), labor disputants are not subject to the restrictions under ORS 164.887, which apply to all other citizens.

C. *Appellant Forest Protesters Are A True Class*

ORS 164.887 discriminates against a "true class" on the basis of characteristics that the class has apart from the statute. As forest protesters, Defendants are a true class because the characteristics defining them as a discrete group are not contained within ORS 164.887 itself. The standard example of a nontrue class, drawn from *Clark,* is the classification created by a statute that imposes a filing deadline for filing

a petition for review. Such legislation creates two classes of persons: (1) those who timely file petitions for review, and (2) those who do not. Both are "classes" of persons, at least in the sense of groups having something in common. But apart from the law, they have no identity at all. In that instance, legislation may disparately affect a class that the legislation itself creates. *Clark,* 291 Or at 240; *see also Sealey v. Hicks,* 309 Or 387, 397, 788 P2d 435 (1990); *Hale,* 308 Or at 525.

In contrast, Article I, section 20, does protect against disparate treatment of true classes such as environmental or forest protesters as compared to labor protesters; both are groups that have identities apart from ORS 164.887 itself. Defendants are clearly members of a true class, not defined by any statute. Moreover, the class clearly is defined in terms of *ad hominem,* personal and social characteristics. Forest protesters share personal beliefs about environmental sustainability and a lifestyle that includes publicly opposing and criticizing exploitive logging and land management practices by gathering, holding signs and conveying messages. The shared philosophical belief, not unlike traditional religions, brings the group together into an identifiable class.[13] Thus, *ad hominem* characteristics, and not the law, provide the basis for forest protesters' classification. *See Hunter v. State of Oregon,* 306 Or 529, 533, 761 P2d 502 (1988).

D. *Class Distinctions Have No Rational Foundation*

The next issue is whether there is a heightened rational basis for treating the

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[13]This is also evidenced by the fact that Defendants are labeled "forest protesters" by law enforcement and others in police reports, media articles, and so on. Further, as discussed *infra* at p. 31, 99% of all citizens charged with this crime since the law's enactment in 1999 have been forest protesters.

class, of which Defendants are members, in the way that they are treated under the statute as compared to the favored class of labor disputants. When distinctions are based on personal characteristics that are not immutable, a court reviews the classification for whether the legislature had a rational basis for making the distinction. *Seto v. Tri-County Metro. Transportation Dist.*, 311 Or 456, 466-67, 814 P2d 1060 (1991). There is no basis upon which a legislator rationally could believe that labor disputants deserve superior protection under the law as compared to all other disputants—whether environmental, human rights, or other.[14]

The legislature felt compelled to add subsection (3)(a) to the statute due to concerns that the statute would violate binding case law such as *PCUN v. Goldschmidt*, *see* ER 39, which simply reinforced the rights of all farm workers to exercise the right to picket. As a result, the legislature believed that the favored class exception of subsection (3)(a) was necessary. The trial court agreed, ruling that, "[i]f the statute was silent and failed to address ORS 662.010 [the labor exception], then it could result in a conflict of the laws relating to labor disputes." ER 64.

This is a flawed view of constitutional law. Labor disputants have no greater right to assemble and engage in protected expressive conduct that interferes with, or hinders agricultural operations, than anyone else pursuant to constitutional law. There is no lawful basis whatsoever to provide labor disputants with an exalted status regarding the right to picket or protest. Under Article I, section 20, immunities

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[14] Furthermore, there is no rational basis to believe that the agricultural industry is deserving of additional protections against citizens exercising constitutional rights than other industries.

granted to labor disputants and not others render this statute unconstitutional.

The legislative history also reveals that ORS 164.887 was specifically drafted for enforcement against persons with pro-environmental philosophies. ER 38 ("Senator Brown: Was SB 678 drafted to address groups who object to agricultural operations on philosophical grounds?" Glen Stonebrink, Oregon Cattlemen's Association and sponsor of bill: "Yes."). Even more troubling is the open acknowledgement that this law was to be used to chill expressive activity or deter those who "seek to disable the industry." ER 39. As discussed *supra* at p. 19, there are numerous other statutes such as theft, vandalism, and disorderly conduct, that criminalize the exact conduct proscribed by ORS 164.887, but do so in a constitutional manner. *See* ER 14-15; ER 37. Finally, if this statute was based on legitimate "cow tipping" concerns, why is it that only environmentalists have been prosecuted under this statute since its passage in 1999? *See Yick Wo* discussion, *infra*, at p. 30.

Finally, the right of non-labor disputants to engage in free speech for the purpose of protesting environmental devastation cannot be outweighed by the state's alleged goal of protecting certain agricultural industries from petty vandalism-type crimes. *See e.g. Planned Parenthood Ass'n, Inc. v. Department of Human Resources of State of Oregon,* 63 Or App 41, 58, 663 P2d 1247 (1983) ("balancing test is properly employed in analyzing a constitutional claim presented under Article I, section 20, where, as here, important interests are at stake. In that balancing, the detriment to affected members of the class is weighed against the state's ostensible

justification for the disparate treatment."). ORS 164.887 violates Article I, section 20.

IV. ORS 164.887 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. *ORS 164.887 is Facially Unconstitutional as it Impermissibly Creates a Class of Favored Speakers by its Terms*

The trial court erred in finding that ORS 164.887 did not create a class of favored speakers in violation of the United States Constitution. ER 64-65. The law's labor disputant exemption exhibits a naked governmental preference for labor speech-related activities.

The Equal Protection Clause prohibits states from denying to any "person within its jurisdiction the equal protection of the laws." US Const, Amend XIV. If a law discriminates among speech-related activities in public fora, it is subject to strict scrutiny. *Carey*, 447 US at 462; *see also Mosely*, 408 US at 98-99. Strict scrutiny requires that the law be necessary to promote a compelling government interest and be narrowly tailored to that end. *Carey,* 477 US at 461.

In *Carey*, the Supreme Court held that a law prohibiting picketing of residences, which contained an exemption for labor disputants, was facially violative of the Equal Protection Clause. *Id*. at 471. The Court ruled that once a forum is opened up for speech-related activity to some groups, the government is prohibited from excluding others on the basis of their message unless the regulation can withstand strict scrutiny. *Id*. at 463. The Court went on to hold that no compelling government interest existed because:

> "…the generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all…labor picketing notwithstanding all the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict." *Id.* at 465.

Similarly, in *Mosely*, the Court struck down as unconstitutional an ordinance which prohibited picketing of schools except by those engaged in a labor dispute, holding that the law described impermissible speech-related activity not in terms of time, place and manner, but in terms of subject matter. *Mosley*, 408 US at 100. The Court held that because the law could have been more narrowly drawn, "focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter," the law could not survive strict scrutiny. *Id.* at 102.

Like the laws in *Carey* and *Mosely*, ORS 164.887 discriminates between speech-related activities in public fora based on the identity of the speaker. The law contains a wholesale exemption for labor disputants to hinder, obstruct or impair an agricultural operation to any extent, and by any means, while providing criminal penalties for non-labor speakers engaged in the same expressive conduct. While ORS 164.887 does differ from the laws in *Carey* and *Mosely* in that its exemption does not enumerate the precise labor activities that will fall outside its proscriptions, this distinction carries no analytical import; it is clear that the exemption was meant to protect labor disputants while engaged in speech-related activities, especially picketing. As discussed *supra* at p. 16, picketing is the hallmark activity of labor disputants who summarily engage in communicative activities in an effort to call their employers to the bargaining table. *See PCUN*, 790 F Supp at 219. This was well

known by the Oregon legislature, which drafted the law's labor disputant exemption because it was "concerned about [protecting] labor picketing." ER 37. As a speaker-based law, therefore, ORS 164.887 is subject to strict scrutiny under *Mosely* and *Carey*.

ORS 164.887 cannot survive strict scrutiny because it is not necessary to promote a compelling government interest. As in *Mosely* and *Carey*, the existence of the labor exemption in ORS 164.887 suggests that protecting agricultural operations from hindrance, impairment and obstruction may not be transcendent objectives for the State. This idea is solidified by the fact that labor disputants can never be charged with violating ORS 164.887, even if the labor activity engaged in is violent, coercive or otherwise constitutionally unprotected. Furthermore, the Supreme Court has ruled that danger of injury to industry from protesting is not a compelling interest, as discussed *supra* at 26.

ORS 164.887 cannot survive strict scrutiny, as it is not narrowly tailored. Like the law in *Mosely*, ORS 164.887 was not narrowly drawn as it does not deal with picketing evenhandedly, regardless of subject matter, nor does it focus on any concrete abuses. The law's labor exemption is not tempered with provisions for application against labor disputants who engage in activities not constitutionally protected, nor does the law make clear that constitutionally protected non-labor speech and speech-related activities will be exempt from its proscriptions.

Finally, it is no answer to say that the speaker-based exception in ORS 164.887 is necessary to avoid a conflict with ORS 662.010, *et. seq.* ER 64. Those laws are

merely the codification of the holdings expressed in *PCUN* and *Thornhill*: that peaceful picketing of a business is protected speech, that fora open to one must be open to all, and that injury to industry does not serve as a compelling interest which would override those protections of the Equal Protection Clause. What ORS 662.010, et seq. do not—and cannot do—is create an exalted position for labor disputants relative to all other speakers, for this would be a clear violation of equal protection guarantees.

Because ORS 164.887 discriminates amongst speakers in public fora based on the content of their speech, and because the law cannot withstand strict scrutiny, it violates the Equal Protection Clause, and should be stricken as unconstitutional by this Court.

B. *ORS 164.887 is Facially Unconstitutional Because Statistical Evidence Establishes a Stark Pattern of Discriminatory Effect, and Thus Discriminatory Intent, Prohibited by the U.S. Constitution*

Even if the preference given to labor-related speech does not render the law unconstitutional, the trial court erred in finding that ORS 164.887 did not create a disfavored class in violation of the Equal Protection Clause because the law's stark discriminatory effect establishes that it was enacted with discriminatory intent.

Proof of discriminatory intent and effect is required to establish a violation under Equal Protection. *United States v. Armstrong,* 517 US 456, 465, 116 S Ct 1480, 134 L Ed 2d 687 (1996). Demonstration of stark discriminatory effect by itself serves to establish discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 US 252, 266, 97 S Ct 555, 50 L Ed 2d 450 (1977).

The U.S. Supreme Court has invalidated laws where statistical data demonstrated such a stark pattern of discrimination that discriminatory intent could be inferred. *Yick Wo v. Hopkins*, 118 US 356, 6 S Ct 1064, 30 L Ed 220 (1886); *see also Gomillion v. Lightfoot*, 364 US 339, 81 S Ct 125, 5 L Ed 2d 110 (1960).

In *Yick Wo*, the Court held a law violated the Equal Protection Clause because statistical data demonstrated hostility toward a particular class of persons. 118 US at 374. While one hundred percent of Chinese applicants were denied a laundry business permit, ninety-nine percent of non-Chinese applicants similarly situated were granted one. *Id.* Evidence of such stark disproportional effect on the class of Chinese persons demonstrated to the Court unjust and illegal discrimination and rendered the law invalid under the Fourteenth Amendment. *Id.*

In *Gomillion*, the Court held that a twenty-eight-sided redistricting map violated of the Equal Protection Clause, 364 US at 347-348, because the practical effect of the plan was to remove ninety-nine percent of Black voters from the city's limits. *Id.* at 341. The Court inferred discriminatory intent from the stark pattern of disproportionate effect on Black voters and invalidated the law. *Id.* at 348.

As in *Yick Wo* and *Gomillion*, the statistical evidence regarding application of ORS 164.887 demonstrates stark disproportionate effect on one class. Since its enactment, ORS 164.887 has been used to charge 88 persons on or near logging sites, 87 of whom were forest protesters—99% of the time. App 1-61; *see also* Declaration of Misha Dunlap in Support of Motion for Judicial Notice. With respect to criminal activity on all other agricultural lands, the State crime reports demonstrate that

between 2000 and 2004 alone, there were over 1400 incidents involving larceny, vandalism, disorderly conduct, criminal mischief and/or arson, yet there is not one documented instance of ORS 164.887 being applied on those lands. App 62-71. In other words, cow-tippers, crop vandals, and other non-protesters who hinder, impair or obstruct agricultural operations are not being charged under ORS 164.887. Thus, as in *Yick Wo* and *Gomillion*, this evidence of stark disproportionate effect on a particular class of persons—forest protesters—provides the basis whereby discriminatory intent should be inferred, and thus ORS 164.887 should be stricken under the Equal Protection Clause.

C. *ORS 164.887 is Facially Unconstitutional Because It Cannot Survive Even Rational Relation Scrutiny*

Even if this Court finds that the *Yick Wo* and *Gomillion* "stark disproportionate effect" standard is inapplicable to the present case, ORS 164.887 should still be found to facially violate of the Equal Protection Clause because it cannot meet the alternative rational relation test.

Under traditional equal protection analysis, a legislative classification shall be sustained if it is rationally related to a legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 US 528, 533, 93 S Ct 2821, 37 L Ed 2d 782 (1973). The Equal Protection Clause allows the States wide latitude when economic or social laws are at issue. *Cleburne v. Cleburne Living Center*, 473 US 432, 440, 105 S Ct 3249, 87 L Ed 2d 313 (1985). Classifications within criminal laws, however, are subject to greater scrutiny. *Loving v. Virginia*, 388 US 1, 11, 87 S Ct 1817, 18 L Ed 2d 1010 (1967). Additionally, "if the constitutional conception of 'equal protection of

the laws' means anything, it must at the very least mean that a bare…desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno,* 413 US at 534.

In *Moreno*, the US Supreme Court reviewed a law creating two classes of persons for food stamp purposes: those who lived with persons related to them, who were eligible for the program, and those who lived with persons unrelated to them, who were not. *Id.* at 529. Because the latter classification undermined the law's purported goal of reducing hunger, *id.* at 533, the Court questioned its validity under Equal Protection principles, noting also that the legislative history showed the classification was created to prevent "hippies" from receiving food stamps. *Id.* at 534. Using the rational relation test, the Court found that the law created an irrational class unrelated to any legitimate government interest. *Id.* at 538.

Like the law in *Moreno*, ORS 164.887 was enacted and applied with a desire to harm a politically unpopular group, which cannot constitute a legitimate governmental interest. According to its legislative history, ORS 164.887 was drafted "to address groups who object to agricultural operations on philosophical grounds." ER 38. As discussed *infra* at p. 31, it is also consistently applied in accordance with that objective, as 99% of persons charged with ORS 164.887 have been forest protesters. Any other asserted State interests, such as punishing and deterring cow-tipping, crop destruction, animal and farm equipment theft and vandalism, are wholly undercut by the fact that ORS 164.887 has never been applied to those situations even though at least1400 such incidents have occurred on non-forested farmland between

2000 and 2004 (later statistics not yet available). App 62-71; Declaration of Misha Dunlap. Like the law in *Moreno*, ORS 164.887 does not constitute a rational effort to deal with the asserted interests of protecting agricultural land from theft and vandalism, and its drafters' bare desire to harm the politically unpopular class of forest protesters cannot constitute a legitimate governmental interest. Thus, 164.887 fails to withstand rational relation scrutiny.

D. *ORS 164.887 is Unconstitutional As Applied Because the State has Selectively Prosecuted Only Forest Protesters Under the Statute*

The trial court erred in finding that ORS 164.887 did not create a disfavored class in violation of the Equal Protection Clause because, practically speaking, only forest protesters have been prosecuted under the law.

Even if facially impartial, a law which is applied with an "evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances," violates the Equal Protection Clause. *Yick Wo*, 118 US at 373-374. Decisions whether to prosecute may not be based on an unjustifiable standard or arbitrary classification. *Armstrong*, 517 US at 464. To establish a claim of selective prosecution, one must establish the basic elements of an Equal Protection claim by demonstrating that a prosecutorial policy had a discriminatory intent and effect. *Id*. at 466. As discussed *supra*, discriminatory intent can be established by demonstrating a stark pattern of discriminatory effect on one particular class of persons. *Yick Wo,* 118 US at 374. Laws with such patterns are invalid as applied. *Id.*

To demonstrate discriminatory effect, a claimant must show that the activities to which the law is directed are not solely engaged in by his class, or that there exists

other offenders against whom the law was not enforced. *Armstrong*, 517 US at 466.

In *Armstrong*, the US Supreme Court rejected the black claimants' assertion that they were singled out for prosecution based on an arbitrary classification, i.e. their race. *Id.* at 470-471. The Court found that the claimants failed to provide clear evidence that similarly situated persons who were outside of the claimants' class were not prosecuted under the law, and thus could not establish a selective prosecution claim under the Fourteenth Amendment. *Id.* at 470.

Unlike the *Armstrong* claimants, Defendants present clear evidence that the activities to which ORS 164.887 is directed are not solely engaged in by their class, and that there are at least 1400 other offenders against whom the law was not enforced, thereby establishing discriminatory effect.

First, the text of the statute itself indicates that persons other than forest protesters were believed to engage in hindering, impairing, and obstructing agricultural operations. ORS 164.887 specifically proscribes activities harming mining operations, farmland, livestock and domestic farm animals. In addition, legislative history discloses concerns about persons injuring animals and farm equipment for "sport." ER 39. Thus, it is clear that ORS 164.887 seeks to proscribe activities that are not solely perpetrated by Defendants as a forest protester class.

Second, the State's records indicate that there have been well over 1400 criminal incidents on non-forested farmland to which the elements of ORS 164.887 apply. App 62-71. Yet, on those lands not one person has been charged under the

statute. Of the 88 persons charged under the law since its enactment in 1999, all but one were forest protesters. App 1-61; Declaration of Misha Dunlap. It is clear that Defendants have demonstrated discriminatory effect.

With respect to discriminatory intent, Defendants again rely on *Yick Wo*, as the present challenge to ORS 164.887 shows the law

> "…in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are…so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws…" *Id.* at 373.

Because Defendants have met their burden for a selective prosecution claim by demonstrating discriminatory intent and effect, ORS 164.887 should be held unconstitutional as applied to Defendants.

V. ORS 164.887 IS UNCONSTITUTIONAL FOR OVERBREADTH UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 8 OF THE OREGON CONSTITUTION

The trial court erred in holding ORS 164.887 constitutional as not substantially overbroad under the First Amendment to the U.S. Constitution and Article I, Sections 8 and 26 of the Oregon Constitution. ER 65.

A. *A Facial Challenge to ORS 164.887 For Overbreadth Is Proper*

A challenge for facial overbreadth is appropriate whenever a statute proscribes constitutionally "protected conduct." *State v. Hirsch*, 338 Or 622, 628, 114 P 3d 1104 (2005). A successful facial challenge is established if the court finds that the statute in question prohibits constitutionally protected conduct of any kind, even if the

challenger was not personally harmed. *Id.* Thus, courts can address an overbroad statute's potential effects on parties not before them. *See e.g. Lind v. Grimmer*, 30 F3d 1115, 1122 (9th Cir 1994). By allowing this third-party standing, the overbreadth doctrine ensures that lawmakers regulate speech-related activities with great precision. *Massachusetts v. Oakes*, 491 US 576, 586, 109 S Ct 2633, 105 L Ed 2d 493 (1989).

Here, ORS 164.887's overly broad regulation has both directly harmed Defendants and indirectly harmed third parties not before this court by casting a chill on those parties' willingness to exercise their free speech and assembly rights at forest protests. As such, a facial challenge to ORS 164.887's overbreadth is proper.

B. *ORS 164.887 Violates Federal and Oregon Constitutions, Because It Is Substantially Overbroad on Its Face*

Courts may invalidate a statute for facial overbreadth only if the statute proscribes a substantial amount of protected conduct in relation to its legitimate sweep. *State v. Illig-Renn*, 341 Or 228, 238, 142 P3d 62 (2006); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 US 489, 494, 102 S Ct 1186, 71 L Ed 2d 362 (1982).[15] A statute will be struck down as unconstitutionally overbroad if its terms could *hypothetically* prohibit protected speech even if, as in the instance before the court, a more narrowly drawn statute could constitutionally

[15] The court will not ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression. As the Supreme Court acknowledged in *State v. Moyle,* 299 Or 691, 699, 705 P2d 740 (1985), "[t]he constitutional prohibition against laws restraining speech or writing cannot be evaded simply by phrasing statutes so as to prohibit 'causing another person to see' or 'to hear' whatever [speech or expression] the lawmakers wish to suppress."

prohibit a defendant's conduct. *See Robertson,* 293 Or 402*; State v. Woodcock,* 75 Or App 659, 706 P2d 1012 (1985), *rev den,* 300 Or 506 (1986). If a criminal law reaches constitutionally protected conduct, it violates Article I, sections 8 and 26 of the Oregon Constitution.[16] *State v. Blocker*, 291 Or 255, 261, 630 P2d 824 (1981). Where both conduct and speech are involved, the statute's overbreadth must be real and substantial, in relation to its legitimate applications, to trigger invalidation. *Broadrick v. Oklahoma,* 413 US 601, 615, 93 S Ct 2908, 37 L Ed 2d 830 (1973). The range of conduct criminalized by a statute must be tested against the constitutional rights of assembly and speech. *Ausmus,* 336 Or at 506. Courts heavily scrutinize for overbreadth criminal statutes that regulate speech-related activities in a content-based manner. *Broadrick,* 413 US at 614.

Here, ORS 164.887's plain language criminally punishes a person who "intentionally or knowingly obstructs, impairs or hinders or attempts to obstruct, impair or hinder agricultural operations." ORS 164.887(1). By its terms, the statute is not limited to a set of specific conduct—*e.g.*, obstructing or blocking the entrance or exit of a farm or Forest Service building. Instead, the statute's language criminalizes <u>any</u> act that has the <u>effect</u> of obstructing, impairing, hindering an agricultural operation, or attempts to do so, whether that act is picketing, leafleting, marching, performing street theatre, or damaging property. In fact, the State argued below that ORS 164.887 criminalizes, with the proper *mens rea*, any "behaviors that

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[16] This facial overbreadth challenge was brought under both sections 8 and 26 of Article I. In *Ausmus,* a single, undifferentiated overbreadth analysis was applied to both sections. 336 Or at 499-507 (explaining approach).

have a **physical** effect of blocking, slowing and materially damaging the process of logging, forest management, mining, farming or ranching." ER 44 (emphasis in original). With such a broad criminalization of activity, ORS 164.887 runs afoul of the overbreadth doctrine.

Similarly, under ORS 164.887, whether or not an agricultural operation is hindered by speech-related activities may depend on the tolerance of the agricultural operation owner or employee to hear a message he disfavors. Thus, a non-labor protester engaged in <u>any</u> speech-related activity is subject to punishment under ORS 164.887 if agricultural owners or workers find the message offensive and momentarily abandon work to engage the protester in an argument. Thus, this statute serves to codify the "heckler's veto," and in doing so, impermissibly chills free speech. *See Forsyth County v. Nationalist Movement,* 505 US 123, 137, 112 S Ct 2395, 120 L Ed 2d 101 (1992); *see also Terminiello v. City of Chicago*, 337 US 1, 69 S Ct 894, 93 L Ed 1131 (1949).

The First Amendment protects the American tradition of political expression and lawful protest. *See e.g. United States v. Grace*, 461 US 171, 176-177, 103 S Ct 1702, 75 L Ed 2d 736 (1983) (collecting cases). And Article I, sections 8 and 26 together ensure equal, if not greater, free speech and assembly rights. *Hirsch*, 338 Or at 628-629; *Ausmus*, 336 Or at 500. Environmentally-minded citizens, as well as those engaged in labor disputes, have equal constitutional rights to engage in lawful protest activities that, by their very nature, are intended to "obstruct, impair or hinder" controversial timber sales or other controversial agricultural operations. Examples of

such protest activities include leafleting and picketing on public lands in a manner not blocking a roadway or breaking any law or regulation other than ORS 164.887.

ORS 164.887 is substantially overbroad, because it criminalizes otherwise lawful activities. Lawful protest activities are often attempts to "obstruct, impair or hinder" the target of their criticism. At times, these activities do actually succeed in causing obstruction, impairment, or hindrance by causing an employee to quit, slow down, or stop and think about quitting as a result of public pressure. Alternatively, otherwise lawful free speech and assembly acts are intended to "obstruct, impair of hinder" a target simply by shedding light on its activities or policies. Simply put, ORS 164.887's language, on its face, reaches protected free speech and assembly. Any assertion that ORS 164.887 does not reach such conduct is not based on the actual statutory language and is, in effect, a "just trust the State" defense. *See Blocker*, 291 Or at 261.

ORS 164.887's overbreadth is real and substantial. *Broadrick,* 413 US at 615. First, the existence of a substantial amount of free speech and assembly critical of agricultural operations regarding animal cruelty issues, pesticide use, immigrant rights, and forest management practices in Oregon are well-known to all and need no citation. ER 27-28. Second, as discussed *supra* at p. 31, 99% of the time ORS 164.887 has been used to prosecute citizens has been against forest protesters at controversial timber sales sites. Third, the overly broad terms are statutory elements central to the offense and are "substantial … in the context of the statute as a whole."

Broadrick, 413 US at 616. Thus, ORS 164.887 wrongfully chills free speech and assembly under threat of criminal sanction.

In sum, the breadth of ORS 164.887 creates a substantial and real risk of suppression of constitutionally protected speech and expressive conduct. On its face, the statute penalizes substantial amounts of constitutionally protected speech and expressive activity that does not relate to labor issues, and, consequently, chills the rights of peaceful protesters seeking to "obstruct, hinder or impair" the vast expanse of agricultural operations in an otherwise lawful manner. ORS 164.887 should be stricken as unconstitutionally overbroad.

VI. ORS 164.887 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND ARTICLE 1, SECTIONS 20 AND 21 OF THE OREGON CONSTITUTION, BECAUSE IT IS UNCONSTITUTIONALLY VAGUE[17]

The trial court erred in holding ORS 164.887 constitutional and not void for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, sections 20 and 21 of the Oregon Constitution.[18] ER 65. At issue is ORS 164.887's language that criminally punishes a person who "obstructs, impairs or hinders, or attempts to obstruct, impair or hinder agricultural operations." ORS 164.887(1). This language is impermissibly vague under the Due

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[17] "[A] 'void for vagueness' analysis under the federal constitution is much like the Oregon analysis." *State v. Plowman*, 314 Or 157, 162, 838 P2d 558 (1992) (*citing Robertson*, 293 Or at 409.) Thus, this brief discusses both analyses together.

[18] The Due Process Clause of the Fourteenth Amendment provides: "No state shall...deprive any person of life, liberty, or property, without due process of law…" US Const, Amend XIV, Article I, § 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." In relevant part, Article I, § 21 provides: "No ex-post facto law… shall ever be passed."

Process Clause of the Fourteenth Amendment and Article I, sections 20 and 21 of the Oregon Constitution.

A statute is void for vagueness if "its prohibitions are not clearly defined [to] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 US 104, 108, 92 S Ct 2294, 33 L Ed 2d 222 (1972). The vagueness test is applied with varying rigor depending on the nature of the challenged law. *Village of Hoffman Estates*, 455 US at 498. If the statute subjects citizens to criminal penalties, vagueness review is even more exacting. *Forbes v. Napolitano,* 236 F3d 1009, 1011 (9th Cir 2000); *Kolender v. Lawson*, 461 US 352, 357, 103 S Ct 1855, 75 L Ed 2d 903 (1983). Courts tolerate a smaller degree of vagueness for criminal statutes and for laws that implicate free speech rights. *Delgado*, 334 Or at 148; *Foti*, 146 F3d at 639. *See also Kev, Inc. v. Kitsap County*, 793 F2d 1053, 1057 (9th Cir 1986) (so holding and collecting cases for statutes implicating First Amendment)*; Robertson*, 293 Or at 411 n8.

ORS 164.887 is plainly a criminal statute that implicates free speech and, thus, is subject to the most exacting scrutiny on its face for vagueness. ORS 164.887 must fail under the requisite strict analysis for the following well-established reasons:

> "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Foti*, 146 F3d at 638.

A. *ORS 164.887 Does Not Provide Sufficient Notice To Citizens, Law Enforcement, Judges or Jurors Of What Conduct Is Criminalized*

To provide constitutionally sufficient notice, a criminal law must be "sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties." *Plowman*, 314 Or at 160-61; *see also Foti*, 146 F3d at 638. While absolute precision is not required, *Illig-Renn*, 341 Or at 243, a law's provisions must be "clearly defined [to] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 US at 108. A law is void for vagueness if its language does not have a common and accepted meaning, or if that common meaning is itself so broad and indeterminate that there is no indication of what conduct is covered by the law and what is not. *City of Chicago v. Morales*, 527 US 41, 57, 119 S Ct 1849, 144 L Ed 2d 67 (1999); *Plowman*, 314 Or at 162.

In *State v. Robertson*, the Court ruled:

> "In *State v. Hodges*…this court suggested that abdication of the lawmakers' responsibility to define a crime to prosecutors, judges, or jurors in case-by-case adjudication allowed those charged with enforcing the law to make the law after the event:
>
> 'A law that permits the judge and jury to punish or withhold punishment in their uncontrolled discretion is defective as much for its uncertainty of adjudication as for its failure to notify potential defendants of its scope and reach.'
>
> '…A vague statute lends itself to an unconstitutional delegation of legislative power to the judge and jury, and, by permitting the jury to decide what the law will be, it offends the principle, if not the rule, against ex post facto laws. See Oregon Constitution, Art I, s 21.'
>
> "Perhaps the vice of "uncontrolled discretion"…lies as much in inviting standardless and unequal application of penal laws, contrary to article I, section 20." *Robertson,* 293 Or at 408.

In *Morales*, the most recent substantive US Supreme Court case on this issue, the Court reviewed a Chicago ordinance for vagueness that, in part, criminalized the act of "loitering," which was defined as "remaining in any one place with no apparent purpose." *Morales,* 527 US at 56-57. The ordinance was impermissibly vague because a particular set of physical conduct—"standing in a public place with a group of people"—could be criminalized, or not, depending on how that conduct was subjectively interpreted in the differing minds of law enforcement observers. *Id*. at 57. As a result, the *Morales* Court held that "the vagueness that dooms th[e] ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not." *Id*. The law did not sufficiently define what activity was criminalized and what was not.

As in *Morales,* ORS 164.887's language—"obstructs, impairs or hinders or attempts" to do so—have common and accepted general meanings; however, those common meanings do not provide enough guidance to average citizens, law enforcement, judges, or juries to know what *particular* conduct is prohibited or not. According to Merriam Webster's Dictionary (2006),[19] all three terms have a broad and indeterminate spectrum of common meaning. "Impair" can be defined as innocuously as to "tarnish" or "undermine," or defined more seriously as to "injure" or "hurt." "Hinder" ranges from "delay progress" to "get in the way of." "Obstruct" can be defined as "slow progress" or to "block." As such, instead of prohibiting

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[19] Absent statutory definition, courts look at the common everyday dictionary meanings of statutory terminology. *See* ER 41-42.

objectively understood physical conduct—*e.g.*, blocking a roadway used by agricultural operations or damaging agricultural operation equipment—ORS 164.887 prohibits any conduct that causes the *subjective*ly determined results of obstruction, impairment, hindrance or attempts thereof.[20] ORS 164.887's elements are thus *subjective*, as they occur in the mind of the purported victim, law enforcement, or judicial fact-finder, and the terms' meanings will differ among reasonable persons of ordinary intelligence. As a result, ORS 164.887 is impermissibly vague.

In reviewing the subjective definition of the term "loitering"—defined as "remaining in any one place with no apparent purpose"—the *Morales* Court asked itself if a citizen "were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?" 527 US at 57. Those questions are similar within their context to the questions raised in this case by the language of ORS 164.887.

The questions raised by ORS 164.887 are obvious: At what point are agricultural operations impaired, obstructed or hindered? Could *any* otherwise lawful action, speech, or picket critical of an agricultural operation become a crime if that activity results in reduced output by a single board-foot of timber? Many citizens protesting a government action may intend to "attempt" to change the government's decision or plan of action. Are such outcomes sufficient to prosecute someone simply because the subject of the protest happens to be an agricultural operation motivated by

[20] And of course, if the activity is perceived to be labor-related, no violation of this law results.

profit? Would using a cell phone on public lands to call an attorney to seek an injunction against the operation be a crime because the call demonstrates an attempt to impair or hinder the operation? If a person holds a picket sign on public lands expressing opposition to the agricultural operation, must that person fear whether the sign convinces an employee to quit, or even stop for ten minutes to think about quitting? If the sign does not convince an employee to quit, but the picketer hopes for that outcome, has the person "attempted" to impair, obstruct or hinder? The statute's language, on its face, does not answer these questions.

Thus, ORS 164.887 is impermissibly vague, because the average citizen, law enforcement officer, judge and juror of ordinary intelligence are all deprived of sufficient guidance of what conduct is covered by the law and what is not. *Morales*, 527 US at 57.

B. *ORS 164.887's Vague Prohibitions Allow "Arbitrary and Discriminatory" Enforcement By Officers, Courts And Juries*

Vague laws are unconstitutional under both the federal and state constitutions, because they "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 US at 108-109; *Plowman*, 314 Or at 163. As a result, vague laws allow law enforcement, courts and juries "to make the law after the event." *Delgado*, 344 Or at 144; *see also State v. Graves,* 299 Or 189, 195, 700 P2d 244 (1985); *Robertson,* 293 Or at 408. A vague penal statute also violates the constitutional provision of equality of privileges and immunities for

all citizens in that it invites standardless and unequal application of penal laws. *Henry*, 302 Or at 513.

As discussed *supra* p. 41, ORS 164.887's terms, "obstructs, impairs or hinders or attempts" to do so, are so broad and subjective that the statutory language permits arbitrary and/or discriminatory enforcement. Take the case of a citizen protesting a timber sale by holding a sign critical of the timber harvest and another citizen who holds a sign criticizing the loss of work because out of town loggers were hired for the job. Each citizen is acting with the intention of convincing truck operators to quit, slow down, or stop the timber harvest. Does ORS 164.887 criminalize their activities? After a fair reading of the statute's terms, the answer for each citizen will vary based on the whims, biases and histories of the persons enforcing the law (not to mention what your sign says). And if both picketers decide to block the trucks, only one of them may be prosecuted under this statute. On its face, ORS 164.887's language is simply too vague to provide any consistent guidance of what activity is actionable and what activity is not.

C. *The Vague Prohibitions of ORS 164.887 Chill Free Speech*

Courts "are not free to disregard the practical realities." *Healy v. James*, 408 US 169, 183, 92 S Ct 2338, 33 L Ed 2d 266 (1972). Free speech rights are protected not only against "heavy-handed frontal attack," but also from being repressed by more subtle governmental interference. *Id*. As such, vague laws implicating free speech rights are unconstitutional, because the laws chill citizens' willingness to engage in protected expression. *Grayned*, 408 US at 109 (collecting cases). The imprecise

statutory elements of ORS 164.887 discourage citizens from engaging in otherwise legal activity potentially criminalized by the statute.

The point is not hypothetical. ORS 164.887 does not have an exception for constitutionally protected activity, nor does it draw clear lines of what conduct is criminal and what conduct is not. Furthermore, since its passage in 1999, ORS 164.887 has been used almost exclusively to prosecute citizens engaged in acts of public protest against controversial timber sales. See p. 31, supra. Could it really be that the only citizens that have hindered an agricultural operation over the last eight years are those opposed to public lands logging; or is it that the only time law enforcement charges this crime is against individuals expressing environmental opinions because the law is vague enough to permit such unbridled discretion?

It is highly likely that conservation-minded citizens feel intimidated by the statute and deterred from exercising their free speech rights or to engage in otherwise legal acts of protest that by their inherent nature, are intended to obstruct, hinder or impair agricultural timber sales. Avoiding such a consequence is why courts are especially vigilant for vagueness in criminal statutes that implicate free speech rights. *Delgado,* 334 Or at 148.

ORS 164.887 is impermissibly vague because it fails to give proper notice as to what conduct is prohibited, encourages arbitrary and discriminatory enforcement, and thus, chills citizens' exercise of their free speech rights. The trial court erred in holding ORS 164.887 not void for vagueness.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse the trial court decision and find ORS 164.887 unconstitutional, and enjoin the State of Oregon from implementing its provisions hereafter.

DATED: May 31, 2007.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, LAUREN C. REGAN, certify that on June _____, 2007, I filed this Opening Brief and Excerpt of Record by mailing the original in a sealed envelope, with first-class postage prepaid by the US Mails, the envelope was addressed to: State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310. I certify true copies have been served upon:

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Dated this June _____, 2007.

By:_____
Lauren C. Regan, OSB #97087
Civil Liberties Defense Center

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, vs. SHERRY SUE BOROWSKI, et. al. Defendant-Appellants.	Josephine County No. 05-0307M **Appellate Case No. A132129 (Control) (A132130-A132141 Consolidated)** DECLARATION OF COUNSEL IN SUPPORT OF MOTION –TAKE JUDICIAL NOTICE

I, Misha Dunlap, do hereby declare under penalty of perjury:

I am one of the attorneys of record for the Defendants herein. I make this Declaration in support of the Motion to Take Judicial Notice filed herewith.

In October of 2004, I personally sent public records requests to all 36 counties in Oregon requesting any information relating to any arrests and/or convictions under ORS 164.887. Responses were very slow in most instances, with multiple follow-up requests having to be sent out over the next two years. By October of 2006, only half of the 36 counties had reported and it became necessary to send out Final Determination requests, and ultimately, several Notices of Intent to Sue pursuant to the Oregon Public Records Act. Responses quickened, and by January of 2007, our office had received substantive responses from all counties, save Douglas County, which denied its ability to provide the requested information, as it did not keep statistics according to type of crime.

Our office promptly researched this claim and discovered that since 2000, the State of Oregon has required each county to report the number of crimes charged, by type and location, for the purpose of creating the Oregon Report of Criminal Offenses and Arrests. Douglas County was then forthcoming with the requested documentation. Thus, although Defendants made every attempt to provide the trial court with complete records regarding the use of ORS 164.887, Defendants were forced to wait for each Oregon county to be responsive.

For the Court's ease, I have personally extracted the following numbers from the County public records request responses: Since the enactment of ORS 164.887 in 2000, 88 persons have been charged with Interference with Agricultural Operations, 87 of who were identified by police reports, and who self-identify, as forest protesters. All the charges related to incidents occurring on public *forested* agricultural land.

For the Court's ease, I have personally extracted the following numbers from all available Oregon Report(s) of Criminal Offenses and Arrests: Between 2000-2004, over 1400 incidents of larceny, arson, and vandalism occurred on *non-forested* agricultural land[21]. By extrapolation, not one of those persons cited was charged with Interference with Agricultural Operations. Furthermore, no forest protesters charged under ORS 164.887 have been charged with any of the above-mentioned crimes.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to

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[21] In addition, between 2000-2004, over 200 incidents of larceny, arson and vandalism occurred on forested farmland bringing the total to at least 1600 people as of 2004, yet not *one* of those persons was charged with Agricultural Operations.

penalty for perjury.

Respectfully submitted this _____ day of June, 2007.

_____

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