INTRODUCTION

COMES NOW the Defendants, by and through their attorney, Lauren C. Regan, and moves this Court for an order dismissing the pending charge of Interference with Agricultural Operations on the grounds that the statute, ORS 164.887, is unconstitutional under the U.S. and Oregon Constitutions. This statute violates Defendants' constitutional rights to free speech and assembly under the First Amendment, as well as the guarantees of equal protection and due process under the Fourteenth Amendment. A motion to dismiss is appropriate when issues of fact beyond the pleadings are at issue. *State v. Kurtz,* 46 Or App 617,624 (1980); *State v. Bishop*, 46 Or App 607, 614 (1980).

STATEMENT OF FACTS

In March 2005, Defendants were on Eight Dollar Road, a public road within Josephine County, protesting what they believed to be the illegal logging of the Biscuit timber sales conducted by the United States Forest Service (USFS) on federal public lands. The logging operations were contracted to private timber corporations to log old-growth trees in fire-scarred roadless areas adjacent to popular wilderness and recreation areas in the Siskiyou National Forest. This timber sale project is the largest and most contentious proposal in the history of the Forest Service—garnering over 26,000 comments in opposition to the project. Eight Dollar Road, on which defendant and others were protesting, leads to a popular wilderness boundary trailhead and the Fiddler timber sale—the first sale authorized within late-successional reserves ("LSRs"), which are protected from commercial logging by the Northwest Forest Plan. Notwithstanding the laws, the USFS continued to plan and implement such contentious and

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scientifically risky sales.[1]

On or about March, 2005, Defendants were on the public road with other citizen protesters 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. When Defendants remained on the road to continue their protest, they were told by law enforcement to leave and then were subsequently arrested by Josephine County Sheriff's officers and transported to the county jail. All Defendants arrested at the Biscuit timber sales were charged with ORS 164.887, Interference with Agricultural Operations (a class A misdemeanor) regardless of where they were or what they were doing.[2] All individuals charged under this statute were on a public road, exercising their rights to peaceably assemble and protest what they believe to be an illegal logging operation on public lands.

SUMMARY OF ARGUMENT

Interference with Agricultural Operations, ORS 164.887, states in pertinent part:

> (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;

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[1] Additional details shall be provided in conjunction with Defendants' Choice of Evils briefing to be filed subsequently. Defendants have already filed notice of this defense.

[2] Over 60 persons were arrested in total—every single person was charged with Interfering with Agricultural Operations.

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(B) “Domestic farm animal”...
(C) ”Livestock animals”...

First, ORS 164.887 violates Defendant’s rights to free speech and assembly guaranteed by the First Amendment to the United States Constitution because it impermissibly restricts citizens' rights to peacefully assemble and engage in speech and expressive conduct on public lands.

Second, ORS 164.887 similarly violates Defendants’ rights to free speech and assembly guaranteed under Article 1 Section 8 of the Oregon Constitution.

Third, ORS 164.887 violates Defendants’ rights to equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution and analogous provisions of the Oregon Constitution because the prohibitions of the statute are based upon the identity of the speaker, and the content of the message expressed. Those engaged in labor disputes are free to picket on that subject without fear of prosecution under this statute, while non-labor picketers seeking to convey a different message have no such immunity.

Fourth, ORS 164.887 is overbroad because the sanctions may be applied to constitutionally protected conduct. There is a real and substantial danger that the statute prohibits an individual's right to enter upon public land and exercise rights of free speech, expression, and assembly that are protected by the Federal and State constitutions. The state must protect its substantial interests by more narrowly tailored means that do not unnecessarily restrict protected conduct.

Fifth, ORS 164.887 is void for vagueness and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as analogous provisions contained in the Oregon Constitution. The prohibitions of this statute are not clearly defined. They do not give citizens’ adequate notice of the law’s scope nor do they give law enforcement sufficient guidance for their application.

Defendants therefore respectfully request that this Court grant their motion to dismiss, declare this statute to be unconstitutional, and enjoin the State of Oregon from implementing its provisions hereafter.

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ARGUMENT

I. ORS 164.887 VIOLATES DEFENDANTS' RIGHTS TO FREE SPEECH AND ASSEMBLY UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. ORS 164.887 is Properly the Subject of a Facial Constitutional Challenge Because it Regulates Speech and Expressive Activity and Therefore Implicates the First Amendment

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 F.3d 1141, 1149 (9th Cir. 2001); see also, *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). A statute that seeks to regulate by its terms spoken words or patently expressive conduct such as picketing implicates the First Amendment. *Broadrick v. Oklahoma*, 413 US 601, 612-613. As ORS 164.887 clearly regulates speech and expressive conduct on its face, it implicates the First Amendment and is appropriately the subject of a constitutional challenge.

By its terms, ORS 164.887(3)(a) exempts from the statute's proscription any activity engaged in by any person who is involved in a labor dispute. This would, of course, include constitutionally protected expressive conduct such as picketing--the hallmark communicative activity of persons engaged in a labor dispute and the precise labor activity that the Oregon Legislature sought to exempt from the reach of ORS 164.887. Ex. 1, Transcription of SB 678 Work Session, 5/26/99, Senate Judiciary Committee. As explained by Counsel Taylor in Senate Judiciary Committee work session of May 26, 1999, proposed amendments to SB 678 (later ORS 164.887), which provided for the exemption of "particular activity" with respect to labor disputants, were drafted "because we were concerned about picketing." *Id.*

Labor picketing is the original "speech plus" pursuant to constitutional analysis, and as with all other peaceful picketing, is protected speech under the First Amendment. Laurence H.

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Tribe, *American Constitutional Law* 12-7, at 826 (2d ed. 1988); see also, *United States v. Grace*, 461 US 171,177 (1983). Historically, those engaged in labor disputes have communicated their grievances to the public through picketing, in an effort to discourage patronage and strikebreaking and thereby place economic pressure on their employers to "come to the table." *Pineros y Campesinos Unidos del Noroeste v. Neil Goldschmidt ("PCUN"),* 790 FSupp 216, 219 (D Or 1990); see also, *Thornhill v. Alabama*, 310 US 88, 99-100 (1940). Thus, a long-standing practice of labor disputants is to picket a business, such as an agricultural operation, in an effort to hinder, impair or obstruct that business, for the purpose of advancing their labor interests. *Thornhill* at 91; see also, *PCUN* at 219. Yet labor picketing is not subject to the proscriptions of ORS 164.887, as the statute exempts any labor dispute activity that interferes with agricultural operations. ORS 164.887(3)(a). The statute does, however, provide for a class A criminal misdemeanor for any non-labor activity, including picketing or other communicative activity, that produces the same effects. ORS 164.887(1). Necessarily then, ORS 164.887 dictates on its face what expressive activities will or will not be tolerated, according to the particular speaker and message, and in doing so regulates speech. Because ORS 164.887 regulates speech on its face, it is properly the subject of a constitutional challenge under the First Amendment.

B. ORS 164.887 is Unconstitutional Under the First Amendment

ORS 164.887 violates the First Amendment because it prohibits constitutionally protected speech in a public forum based on the content of the speech. Furthermore, even if ORS 164.887 were to be construed by this court as content-neutral, it is still violative of the First Amendment in that it fails to meet the requirements of a valid time, place and manner restriction.

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1. ORS 164.887 Regulates Speech in Traditional Public Forums and is Therefore Subject to Strict Scrutiny

The rights of free speech and assembly are fundamental freedoms protected by the First Amendment of the U.S. Constitution. *Buckley v. Valeo*, 424 US 1, 25 (1976) (*per curiam*). The government's power to regulate speech, and the level of judicial scrutiny the action will receive, depends upon whether the forum is deemed traditional public, designated public, or non-public. See *International Society for Krishna Consciousness, Inc. v. Lee,* 505 US 672, 678-79 (1992). Accessible public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Grace*, 461 US at 177. Public streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 US 474, 480 (1988). The frequency of public travel on a roadway is irrelevant to forum analysis; rural roads are considered traditional public forums. *PCUN* at 220. National Forests are also traditional public forums, as it "cannot reasonably be disputed that the public Forest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to a maximal extent." *US v. Rainbow Family*, 695 F.Supp. 294, 308 (1988).

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*, 487 US at 481. 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 (1995). Content-neutral time, place and manner regulations, by contrast, are permissible so long as they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators'*

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Ass'n, 460 US 37, 45 (1983).

ORS 164.887 regulates speech in traditional public forums. 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.[3] ORS 164.887 is therefore subject to the highest scrutiny.

2. ORS 164.887 Violates the First Amendment by Impermissibly Regulating Speech According to Content

A restriction on the content of speech in public fora is presumptively unconstitutional. *Rosenberger,* 515 US 819 at 828. "Government may not select which issues are worth discussing or debating in public facilities." *Carey v. Brown*, 447 US 455, 463 (1980) (striking down, as a content-based regulation, a statute that banned the picketing of residences but exempted from its prohibition the picketing of any residence that also served as a place of employment involved in a labor dispute); see also, *Police Department of Chicago v. Mosely*, 408 US 92, 96 (1972) (striking down, as a content-based regulation, an ordinance that prohibited picketing within 150 feet of a school, except for the picketing of schools involved in a labor dispute).

Laws that facially distinguish favored speech from disfavored speech based on the ideas

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[3] 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. To the best of our knowledge, thus far there has only been one conviction pursuant to this statute—a female forest protester that did not have the assistance of an attorney (no further information has been obtained at the time of filing). There is no caselaw addressing ORS 164.887 at this time. Curry County Circuit Court ruled that the statute was unconstitutional pursuant to the Equal Protection Clause in 2004, *State v. Sabol*, Curry County Case no. 04CR0711, the State did not appeal; and Douglas County Circuit Court denied Defendant's motion to dismiss without any written opinion in *State v. Roselle*, 03CR-2054 MI, appeal forthcoming.

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or views expressed are content-based. *Turner Broad. Sys. v. F.C.C.,* 512 US 622, 643 (1994). Furthermore, a regulation that contains an exception based on content is itself content-based. *National Advertising Co. v. City of Orange*, 861 F2d 246, 249 (9th Cir. 1988). Thus, if a law enforcement officer must read the message on a sign to determine whether a speaker's activity is exempted from prohibition, the statute is content-based. *Foti*, 146 F.3d at 636. In order for the government to enforce a statute with a content-based exclusion, it must demonstrate that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. *Id*. at 635. A content-based regulation is narrowly tailored only if it uses the least restrictive means available to further the government's asserted interest. *Id.* at 636.

In *Carey* and *Mosely*, the Court found both statutes at issue to have a central problem: they both described permissible expressive activity in terms of its subject matter. *Carey*, 447 US at 462. In *Carey*, the Court stated:

> On its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Act is thus dependent solely on the nature of the message being conveyed. *Id*. at 460-61.

This analysis strongly echoed the *Mosely* opinion of eight years earlier, in which the Court quoted Justice Black from his concurrence in *Cox*:

> 'In this case, the ordinance itself describes impermissible picketing not in terms of time, place and manner, but in terms of subject matter. The regulation 'thus ship(s) from the neutrality of time, place and circumstance into a concern about content.' *Mosely*, 408 US at 99.

Like the statutes in *Carey* and *Mosely*, ORS 164.887 is clearly content-based as it contains a wholesale exemption for labor speech. Under ORS 164.887(3)(a), a person involved in a labor dispute is categorically exempted from the statute's prohibition while engaged in <u>any</u> activity, including speech or expressive conduct, which interferes with agricultural operations.

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This exclusion allows those with a labor message to speak or engage in expressive activity without offending the statute, even if they intentionally or knowingly hinder or attempt to hinder agricultural operations, while all non-labor speakers, whose expressive activities net the same result, violate the statute because their speech or expressive conduct is not related to a labor dispute. Although it is true that ORS 164.887 differs somewhat from the statutes in *Carey* and *Mosely* in that its exception does not specifically state the precise labor activities that will fall outside its proscriptions (for example, labor picketing), this distinction carries no analytical import. ORS 164.887, in exempting all activities engaged in by a labor disputant, necessarily exempts labor picketing and all other speech-related activities that serve to relay a labor message (leafleting, chanting, etc.), and in doing so regulates expression on the basis of content. The only question that remains, therefore, is whether the government can demonstrate that ORS 164.887 is necessary to serve a compelling state interest and that it is narrowly-tailored in that the least restrictive means have been used to achieve that end. Under this strictest of scrutiny, the statute must fail.

First, ORS 164.887 does not serve a compelling government interest. The agricultural interests that the statute seeks to protect are not of such significance that they should trump the interest of protecting First Amendment rights. See *PCUN,* 790 F.Supp. 216, 222 (1990) (additional protections afforded to "agricultural" interests do not serve a compelling governmental interest).

Second, ORS 164.887 is not narrowly tailored, as it is not the least restrictive means by which to achieve the legislature's goals. 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 (1988); see also, *Foti,* 146 F.3d at 642-643. At present, the State has

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many available alternative methods of protecting its articulated interests that do not burden First Amendment guarantees of freedom of speech and assembly. Oregon has a multitude of criminal statutes, which serve to protect agricultural operations from property damage, theft, trespassing, harassment, etc., that have been in place since long before the 1999 passage of ORS 164.887.[4] In fact, senators such as prosecuting attorney Floyd Prozanski opposed this law because it was wholly redundant with existing criminal laws and seemed only to serve particular special interest groups. See Ex. 2, 3 pp 7-8. Thus, the sweeping proscription of ORS 164.887 against all activities, constitutionally protected or not, that are interpreted as hindrances to an agricultural operation, is not narrowly tailored as required by strict scrutiny analysis.

ORS 164.887 is a content-based statute that is not necessary to serve compelling government interest and is not narrowly tailored. Thus, it should be struck as unconstitutional.

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[4] During the legislative hearings on SB 678, several senators and representatives commented on the fact that there were numerous statutes already in existence that addressed all of the issues raised by the sponsors of the bill and that this proposed law was completely unnecessary. Ex. 2 and 3, pp 7-8. In fact, there is not a single reason that ORS 164.887 is required. Originally sponsors demanded a felony level crime bill to deter the damage done to crops and cows as a result of vandals. The legislature rejected that attempt, and the bill was reduced to an A misdemeanor. The sponsors also said they needed this new law because it was too difficult to prove a dollar damage amount for incidents of cow tipping and other subtle harms specific to agricultural operations; this is patently false. ORS 164.365 criminal mischief I, is already a Class C felony and specifically addresses this concern:

> (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;
>
> **(D) Which is a livestock animal as defined in ORS 164.055;**

Further evidence that ORS 164.887 is not necessary can be 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 law applicability (since these incidents did occur on federal land) could be used to prosecute crimes of this nature.

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3. ORS 164.887 Fails to Meet the Requirements of a Valid Time, Place and Manner Regulation

If, contrary to the plain language of the statute and controlling precedent, ORS 164.887 were to be construed as content-neutral, the statute still fails as it does not meet the requirements of a valid time, place and manner regulation. The government may regulate speech in a public forum as to time, place and manner, if the regulation (1) is content-neutral; (2) is narrowly tailored to serve a significant governmental interest; and (3) leaves open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 US 781, 791 (1989). Because ORS 164.887 is not narrowly tailored and does not leave open alternative channels of communication, it must fail.

In *Thornhill*, 310 US at 106, the 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:

> No clear and present danger of destruction of life or property…or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a dispute… [The statute] does not aim specifically at serious encroachments of these interests and does not evidence any such care in balancing these interest against the interest of the community and that of the individual in freedom of discussion on matters of public concern. *Id.* at 105.

The Court went on to explain that the statute's proscription of a wide range of communicative activities was not narrowly tailored to serve governmental interests of avoiding a breach of the peace or invasion of privacy and was therefore unconstitutional:

> The range of activities proscribed by [the statute]…embraces nearly every practicable, effective means whereby those interested…may enlighten the public on the nature and causes of a…dispute…The safeguarding of these means is essential to the

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> securing of an informed and educated public opinion with respect to a matter which is of public concern. *Id.* at 104.

Like the *Thornhill* statute, ORS 164.887 is not narrowly tailored because it sweeps into its ambit all non-labor activity, including protected speech and expressive conduct, which might be interpreted as hindering, impairing or obstructing an agricultural operation. ORS 164.887 is similarly not aimed specifically at a governmental interest, such as prevention of property damage, for it does not limit by definition the terms "hinder," "impair" or "obstruct" to effects resulting from physical conduct (such as property destruction or blocking ingress/egress). The statute does not evidence any care in balancing governmental interests with the interests of the community and individuals in freedom of discussion on matters of public concern, for it does not make any exceptions for constitutionally protected speech or expressive conduct.[5] Instead, the terms of the statute are such that any non-labor activity, including protected speech and expressive conduct, may be deemed to hinder, impair or obstruct an agricultural operation, and thus trigger criminal prosecution under the law.

Second, ORS 164.887 effectively eradicates the intended messages of non-labor protesters, such as human rights and forest activists, and therefore does not meet the requirements of the third prong of a valid time, place or manner regulation. To be a valid restriction on free speech in a public forum, ORS 164.887 must "leave open ample alternative channels for communicating" the speaker's message. *Ward*, 491 US at 791; *PCUN*, 790 F Supp at 222. The test for gauging the sufficiency of alternative channels is whether the speaker is

[5] Interestingly, in 2003, Representatives Anderson and Kitts sponsored HB 3518 which sought to amend ORS 164.887 by adding a third exception to the law's proscriptions for "a person who is engaged in activities that are protected by the Constitution of the United States or this state." See http://www.leg.state.or.us/03reg/measures/hb3500.dir/hb3518.intro.html.

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afforded an accessible forum where the intended audience is expected to pass. *PCUN,* 790 F Supp at 220-221.

The courts in *PCUN* and *Mosely* recognized that labor protesters need to protest at the rural site where their conflict exists because they have limited channels for dissemination of their message to their intended audience. *Id* at 222; see *Mosely* at 100-102. As the *PCUN* court explained, "picketing at a park or along a roadway in a more urban area makes it more unlikely that the intended communication will reach its intended audience." *PCUN, 790 F Supp* at 220.

Forest protesters, like labor protesters, also have limited channels for dissemination of the information they seek to convey as they need to protest at the rural site of their conflict where the intended audience, including loggers and federal officials implementing the decisions of the government, can hear their message. There is no other adequate alternative channel for communication of the information they seek to convey. No other location contributes to the message of these protesters like the site of the dispute. No other location affords the protesters with a forum that is accessible, where the intended audience is expected to pass and is the situs of the dispute.

The state may argue that an alternative forum may exist, such as outside the offices of the USFS or the BLM. However, this argument fails. These forums are also unavailable to forest protesters under the statute because they are places where forest management is conducted and, as such, are considered agricultural operation sites under the statute as well. ORS 164.887(4)(a)(A). Thus, ORS 164.887 impermissibly restricts protesters from protesting at federal agency offices and other logical protest sites where their intended communication would reach their intended audience, and in doing so, fails to leave open ample alternative channels for communicating.

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ORS 164.887 cannot meet the requirements of a valid time, place, or manner regulation. This statute is not narrowly tailored to serve a significant governmental interest and it fails to leave open ample alternative channels for communication of information. Thus, ORS 164.887 is unconstitutional under the First Amendment.

II. ORS 164.887 IS AN UNCONSTITUTIONAL RESTRICTION ON FREEDOM OF EXPRESSION AND PUBLIC ASSEMBLY UNDER THE OREGON CONSTITUTION

A. ORS 164.887 is an Unconstitutional Restriction on Freedom of Speech Under the Oregon Constitution

ORS 164.887 violates Article I, section 8 of the Oregon Constitution because the statute restrains the free expression of non-labor protesters on public lands. Article I, Section 8 of the Oregon Constitution reads:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right.

The right of citizens to assemble, voice opinions, and debate the issues of the day, has long held historical significance in this country.

The Oregon Supreme Court has developed a method for analyzing a statute on its face to determine whether it violates Article I, section 8. *State v. Robertson*, 293 Or 402 (1982). First, the court must determine whether the challenged statute is, on its face, "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Id* at 412. The second level of analysis, if required, looks at whether the statute is directed at a harm the legislature is entitled to proscribe. *Id* at 414-417.

ORS 164.887(3) fails the first step of the constitutional analysis set forth in *Robertson*. The statute, on its face, is written in terms that are directed at the substance of the opinions of

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protesters at agricultural operations and the subject matter of their message. 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. The statute exempts labor protesters from the broad sweep of the law while forbidding expression with the same effect by all other groups or individuals. Because labor issues are a particular subject of communication and ORS 164.887(3) is directed at protecting communication on labor issues, the statute is written in terms directed at the substance of a particular subject and the substance of any opinion. Therefore, ORS 164.887, on its face, violates Article I, section 8, of the Oregon Constitution.

Assuming that the second level of statutory analysis is reached, ORS 164.887 would 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. ORS 164.887 prohibits constitutionally protected expression and has a chilling effect on protected forms of expression. By proscribing "obstructing, hindering or impairing" or attempting to "obstruct, impair or hinder" the vast expanse of agricultural operations, the legislature proscribes acts that could constitute protected expression under Article I, section 8. Because the legislature is not entitled to proscribe constitutionally protected speech, the statute fails the second level of constitutional analysis under *Robertson, supra.*

The legislature was not entitled to proscribe such constitutionally protected expression under Article I section 8 of the Oregon Constitution. The statute thus fails under the constitutional analysis set forth by the Oregon Supreme Court in *Robertson, supra*.

B. ORS 164.887 is an Unconstitutional Restriction on Freedom of Assembly Under the Oregon Constitution

ORS 164.887 unconstitutionally infringes upon the rights of Oregonians to gather and voice their opposition at the site of an agricultural operation, in violation of Article I, section 26

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of the Oregon Constitution. Article I, section 26 of the Oregon Constitution provides, in pertinent part: "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good...." An ordinance which regulates the conduct of expression, rather than the accomplishment of a forbidden result, is unconstitutional "unless the scope of the restraint is wholly confined within some historical exception that was well established when the First Amendment guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. No such historical exception exists in this instance.

Problematically, ORS 164.887 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 of harm (or "hindrance") under ORS 164.887 is not identifiable. Thus, the statute's prohibition on certain conduct includes the protected conduct of peaceably assembling at sites of agricultural operations. ORS 164.887 unconstitutionally infringes upon the right of Oregonians to peaceably assemble in a public forum by restricting that right where an 'agricultural operation' may be taking place. This clearly violates Article I, section 26 of the Oregon Constitution. The constitutional rights of Oregonians 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. ORS 164.887 is unconstitutional under Article I, section 26 of the Oregon Constitution.

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

The labor disputant clause within ORS 164.887 is an impermissible speaker-based exception in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S.

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Constitution. ORS 164.887(3)(a) permits labor disputants to hinder, obstruct or impair an agricultural operation to any extent, and by any means, including via communicative activity and speech. However, the statute provides criminal penalties for any non-labor speakers who hinder, impair or obstruct an agricultural operation to any extent, and by any means, including via communicative activity and speech. Because ORS 164.887, by its terms, gives preference to one category of speaker over all others, it clearly violates the Equal Protection Clause of the Fourteenth Amendment and should therefore be struck as unconstitutional.

The Equal Protection Clause prohibits any state from denying to any "person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Sect. 2. When a government regulation discriminates among speakers in a public forum, the Equal Protection Clause mandates that the law be finely tailored to serve substantial state interests, and that the justifications offered for any distinctions be carefully scrutinized. *Carey*, 447 US at 462; see also *Mosley*, 408 US at 98-99, 101.

In *Carey*, discussed *supra*, the Supreme Court held that a statute prohibiting all picketing of residences except those conducted by labor disputants was facially violative of the Equal Protection Clause. *Carey*, 447 US at 471. The Court explained that under the Fourteenth Amendment, once a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or speaking on the basis of what message they intend to convey unless the regulation was finely tailored to serve a substantial interest. *Id.* at 463. Of critical importance, the Court went on to find that the law could not survive this scrutiny:

> …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

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nonlabor picketing on the basis of the harms they would inflict. *Id.* at 465.

Similarly, the Court in *Mosely* struck down as unconstitutional a statute which prohibited picketing of schools except by those engaged in a labor dispute. *Mosley*, 408 US at 100. The Court stated:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

Finally, in *PCUN*, the U.S. District Court of Oregon held unconstitutional a statute that prohibited picketing of farms by a laborer during harvesting, unless the laborer was a "regular" employee (had worked on the farm at least 6 days prior to the picket). 790 F Supp at 222 . The Court concluded that ORS 662.805 was violative of the Equal Protection Clause because the law classified "regular" laborers and short-term laborers or third-party protesters differently with regard to First Amendment activity. *Id*[6]

Similar to the statutes at issue in *Carey*, *Mosely*, and *PCUN,* ORS 164.887 distinguishes permissible communicative activity from impermissible communicative activity based on the identity of the speaker. Furthermore, as it is not finely tailored to serve a substantial government interest, it should be struck as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

A hypothetical example of unequal treatment of protesters based on their association with a particular group underscores ORS 164.887's fatal flaw. If labor protesters stood near the entrance of a timber mill, holding signs with content clearly expressing their displeasure with

[6] Interestingly, the legislative history of ORS 164.887 indicates that subsection (3)(a) was added to the statute to address the ruling of the Oregon District Court in *PCUN*. Ex. 1, Transcription of SB 678 Work Session, 5/26/99, Senate Judiciary Committee.

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"scabs" entering the workplace, they could not, pursuant to ORS 164.887(3)(a), be prosecuted for interfering with agricultural operations, no matter how much this activity hindered the business. However, if environmental protesters then arrived and stood next to the labor protesters, holding signs that indicated their concern about the impacts of logging on endangered species, they could be prosecuted under ORS 164.887 if a mill manager or employee claimed that the signs were distracting to the work force and thus hindered the agricultural operation. This is precisely the kind of unequal treatment in the First Amendment context that the Equal Protection Clause seeks to prevent.

Furthermore, the discrimination sanctioned by ORS 164.887 cannot survive the scrutiny required under the Equal Protection Clause. Like the statutes in *Mosely*, *Carey* and *PCUN*, ORS 164.887 is not finely tailored because it broadly permits all speech-related activities engaged in by labor disputants, regardless of the disturbances they would undoubtedly engender, while making no distinction between various non-labor speech-related activities based on the harms they could inflict. In addition, the breadth of the statute's proscription, and the inclusion of a labor disputant exception, suggest that the protection of agricultural operations from hindrance, impairment and obstruction may not be transcendent objectives for the State. As the Court explained in *City of Ladue v. Gilleo*: "…exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy…[because] they may diminish the credibility of the government's rationale for restricting speech in the first place." 512 US 43, 52 (1994).

ORS 164.887 affords special protection to the speech of labor protesters while denying the same protection to every other category of citizen protester. Because ORS 164.887 provides for this unequal treatment in its proscription of the fundamental right of free speech, it violates

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the Fourteenth Amendment's guarantee of equal protection of the laws, and should be struck as unconstitutional by this court.

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

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 violates Article I, section 20 of the Oregon Constitution because it impermissibly grants privileges to labor protesters under section 3(a) of the statute while denying the same privileges under the law to non-labor protesters.

Any governmental decision to offer or deny some advantage to a person must be made by permissible criteria and consistently applied. *Delgado v. Souders,* 344 Or 122,145-46, P3d 729 (2002) (*quoting City of Salem v. Bruner*, 299 Or 262, 268-69, 702 P2d 70 (1985)). ORS 164.887(3)(a) exempts labor disputants , but prohibits the same conduct by non-labor activists, granting greater privileges under the law to one group of people in violation of Article I, section 20. Moreover, ORS 164.887 encourages a "standardless administration of law" because the terms of the statue offer no guidance as to exactly what conduct is prohibited, thereby creating "a serious danger of unequal application" of the law. *State v. Cornell/Pinnell,* 304 Or 27, 32-33, 741 P2d 501 (1987); *See also* vagueness discussion below.

In *State v. Freeland*, the Oregon Supreme court discussed how Article I, section 20 of the Oregon Constitution protects unequal treatment of groups of individuals:

> [T]his section is a guarantee against unjustified denial of equal privileges or immunities to individual citizens at least as much as against unjustified differentiation among classes of citizens. It also was early established that the guarantee reached forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments . . . One branch of article I, section 20, and decisions under it thus call for analysis whether the government has made or applied a law so as to grant or deny privileges or

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> immunities to an individual person without legitimate reasons related to that person's individual situation.

295 Or 367, 370 (1982) (internal cites omitted). As discussed above, ORS 164.887(3)(a) was enacted by the Oregon Legislature with the intent to bestow privileges and immunities upon labor protesters that they did not grant to other protesters. The decision to bestow privileges on one group and deny them to all others without any legitimate reason is unconstitutional under Article I, section 20 of the Oregon Constitution.

V. ORS 164.887 IS FACIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT

A facial overbreadth challenge is an exception to general standing requirements in that a defendant, whose speech-related activity may properly be prohibited under the statute, can nonetheless challenge the statute based on its potential chilling effects on the protected speech of third parties. *Members of City Council v. Taxpayers for Vincent*, 466 US 789, 796 (1984). The overbreadth doctrine was developed to ensure that lawmakers regulate speech-related activities with great precision. See *Massachusetts v. Oakes*, 491 US 576, 586 (1989). The doctrine is used to lessen concerns about (1) selective enforcement of laws by government officials and (2) the chilling of protected speech. *City of Houston v. Hill,* 482 US 451, 466-67 (1987); *NAACP v. Button,* 371 US 415, 433 (1963).

A statute is unconstitutionally overbroad if it implicates a substantial amount of constitutionally protected activity. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 US 489, 494 (1982). Where both conduct and speech are involved, the overbreadth of a statute must be real and substantial, when judged in relation to its legitimate applications, to trigger invalidation under the First Amendment. *Broadrick v. Oklahoma,* 413 US 601, 615 (1973). In other words, statutory invalidation under the overbreadth doctrine is appropriate

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"when the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616. A higher level of overbreadth scrutiny must be applied when the statute regulates speech-related activities in a non content-neutral manner. *Id.*

In *Coates v. City of Cincinnati,* the Court held as unconstitutionally overbroad an ordinance that made it an offense for "three or more persons to assemble...on any of the sidewalks...and there conduct themselves in a manner annoying to persons passing by..." 402 US 611 (1971). The Court explained:

> It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed. *Id.* at 614.

In *Broadrick*, the Court held that a statute's overbreadth was not real and substantial and therefore declined to invalidate the law on constitutional grounds. 413 US at 618. The Court applied less exacting scrutiny, noting that the milder inquiry was appropriate where a statute regulated speech-related activities in an even-handed and neutral manner. *Id.* at 616. In declining to strike the statute as unconstitutionally overbroad, the Court explained that it did "…not believe that [the statute] must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Id.* at 618.

Like the statute in *Coates*, ORS 164.887 is not directed with reasonable specificity toward the conduct prohibited. Both statutes punish an indefinitely broad range of speech-related activities because the permissibility of the activity is dependant on the sensitivity of the listener. Under the *Coates* statute, whether or not a sidewalk pedestrian was annoyed by speech-

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related activities would depend on his tolerance to hear a message he disfavors. 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 employee to hear a message he disfavors. Thus, a non-labor protester engaged in any speech-related activity is subject to punishment under ORS 164.887 if agricultural workers find the message offensive and momentarily abandon their work to engage the protester in debate. It is clear that both statutes, by their imprecise terms, serve to codify the "heckler's veto" and in doing so, impermissibly chill free speech. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); ORS 164.887.

Unlike the statute at issue in *Broadrick*, ORS 164.887 should be found substantially overbroad and therefore struck as unconstitutional. As an initial matter, ORS 164.887 must be reviewed with greater scrutiny than was applied to the *Broadrick* statute, as ORS 164.887 regulates speech-related activities in a non-neutral manner (discussed in Sections I and III, *supra*). ORS 164.887 is further distinguishable from the *Broadrick* statute, in that while the latter proscribed a narrow set of activities, the former proscribes all activities (included protected speech and speech-related activities) that are perceived to interfere with an agricultural operation to any extent. Thus, unlike the *Broadrick* statute, the overbreadth of ORS 164.887 is substantial. In addition, the overbreadth of ORS 164.887 is real. Two examples from pending Josephine County Biscuit co-defendant protest cases are illustrative: In case no. 050307M, defendant Sherry Borowski is alleged in count 1 to have intentionally attempted to obstruct an agricultural operation in violation of ORS 164.887. Borowski was present at the site of the protest and stood to the side of the road watching the events. According to the police report,

> After LEO Masiel handcuffed and walked Jacobs [friend and co-defendant of Borowski] toward LEO Masiel's patrol vehicle, a female later identified as Sheri Berowsksi (unknown spelling) walked up behind Masiel and started yelling shame on you. LEO Dan Dalke walked up to Berowsksi and told her to stay back. Berowski

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> continued to shout, telling LEO Dalke that she could get as close as she wanted [these factual assertions will be challenged at trial, but for purposes of this discussion we include them]. Concerned for his safety, Masiel kept walking with Jacobs and looking back. LEO Dalke kept telling Berowski to stand back. Masiel, heard Berowski pushing against LE Dalke's jacket and arguing with Dalke. Masiel turned around and saw Berowsksi shove Dalke in the back. Masiel saw Dalke turn Berowsksi around and handcuff her. Berowski was arrested by LEO for Interfering with an Agricultural Operation and Harassment." Supplemental Incident Report, p. 3 of 3 (Inc. Report No. 7438698).

Even observing these facts in the light most favorable to the police, Ms. Borowski may have been interfering with an arrest or an officer, but she certainly was not obstructing an agricultural operation, nor did she intend to do so. Similarly, Borowski's co-defendant Charles Jacobs, at age 72, was standing on the side of a bridge watching the events and waiting for his wife Betsey, who no longer drives a car. As another elderly woman, Joan Norman was being carried in a lawn chair after being arrested for refusing to leave the bridge, Jacobs, who is hard of hearing, stood amongst the noisy crowd with his back to the officers and did not respond when police ordered him to move out of the way. The police report again alleges that

> LEO Masiel had to physically move Jacobs out of the way for LEO's Ross and Thomas to carry Norman of the road. Jacobs continued to push and try to stand in front of LEO's Ross and Thomas [which the defendant adamantly denies]. Officer Masiel moved Norman out of Ross and Thomas's [sic] way then placed Jacobs under arrest for Interfering with an Agriculture Operation and Disorderly Conduct at approximately 0645HRS."

Again, based upon the LEO's own version of the story, Mr. Jacobs was in no way obstructing an agricultural operation. At worst, he failed to hear or comprehend a police order.

The sheer breadth of ORS 164.887 creates a substantial and real risk of suppression of constitutionally protected speech and expressive conduct. The statute delegates unbridled discretion to law enforcement, chills the rights of peaceful protesters, and penalizes substantial amounts of constitutionally protected speech and expressive activity. Therefore, ORS 164.887 should be struck as unconstitutionally overbroad.

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VI. ORS 164.887 VIOLATES ARTICLE I SECTION 8 OF THE OREGON CONSTITUTION AS IT IS FACIALLY OVERBROAD

ORS 164.887 does not preclude its application to persons permissibly exercising their rights to free expression under Article I, section 8, their rights to congregate in peaceable assembly under Article I, section 26, and their rights to free speech and peaceable assembly under the First Amendment. A statute is unconstitutionally overbroad if it purports to prohibit conduct that is constitutionally protected. *State v. Ausmus, 336 Or. 493,* 504 *85 P.3d 864*; *State v. Robertson,* 293 Or. 402, 410, 649 P.2d 569 (1982). In *Robertson*, the Court found that in construing the statute at issue, the court may conclude that the legislature did not intend its terms to operate with the breadth for which the defendants contend. *Id.*

ORS 164.887 pertains to constitutionally protected conduct, and further, the statutory culpable mental state does not preclude the application of this statute when a person intends to exercise constitutionally protected rights. Under the statute, any expressive activity that "hinders" agricultural operations is prohibited (unless that expression relates to the subject of labor). This statute applies to a substantial amount of protected expression such as picketing, boycotting, leafleting, assembling and voicing opinions as to environmental protection, or other concerns. Citizens like the defendants in these cases, "may intend to exercise a constitutionally protected right such as peaceable assembly or expression and coincidently may possess an intent to" impair or hinder or attempt to obstruct, impair or hinder agricultural operations. "In fact, individuals often undertake the exercise of protected rights such as assembly or expression with the intent of causing public inconvenience, annoyance, or alarm [or causing a hindrance to an agricultural operation] to those, such as government leaders [or loggers on public lands], who are exposed to the assembly or expression." *Id.* at 506-507. The Oregon Supreme Court recently

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ruled, "It is the range of the conduct that the statute criminalizes that must be tested against the constitutional rights of assembly and speech." *Ausmus,* 336 Or at 506.

ORS 164.887 reaches and regulates conduct that is constitutionally protected and therefore the legislature has stepped beyond the permissible regulation of damaging conduct or the harmful effects that may result from assembly or speech. *See, e.g.,* Spencer, 289 Or. 225, 611 P.2d 1147 (holding variant of former disorderly conduct unconstitutional as direct restraint on speech rather than regulation or prevention of specified harm). This case is akin to Ausmus, where the Court found:

> There is nothing in the description of the elements of the statute that would permit this court faithfully to narrow the application of the statute to only conduct that the constitution does not protect. *See, e.g., Robertson*, 293 Or. at 434-36, 649 P.2d 569 (examining whether statute is overbroad because it reaches areas of constitutionally privileged expression and whether narrowing construction possible to save state from unconstitutional overbreadth); *City of Hillsboro v. Purcell*, 306 Or. 547, 555-56, 761 P.2d 510 (1988) (same). Simply put, congregating with others in a manner that does not cause harm, even when coupled with one of the mental states proscribed in the statute, is conduct that Article I, sections 8 and 26, protects.
> *Id*. at 507.

The statute delegates unbridled discretion to law enforcement, chills the rights of peaceful protesters, and penalizes substantial amounts of constitutionally protected speech and expressive conduct.

VII. ORS 164.887 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS IT IS UNCONSTITUTIONALLY VAGUE

A facial challenge under the vagueness doctrine is permissible when the statute in question clearly implicates free speech rights. *Foti*, 146 F3d at 639. Statutes that do not clearly delineate the conduct they proscribe run afoul of the Due Process Clause of the Fourteenth Amendment and are unconstitutionally vague. *Id.* at 638. The Due Process Clause provides: "No state shall...deprive any person of life, liberty, or property, without due process of law . . ."

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U.S. Const. amend. XIV, Sect. 2. "Statutes that are insufficiently clear are void for three 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. Thus, the Constitution commands that a statute be clear enough such that persons of ordinary intelligence are afforded a reasonable opportunity to know what is prohibited. *Id.*

It is a fundamental tenet of due process that "[no] one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 US 451, 453 (1939). If a statute subjects transgressors to criminal penalties . . . vagueness review is even more exacting. *Forbes v. Napolitano,* 236 F3d 1009, 1011 (2001); *Kolender v. Lawson*, 461 US 352, 357 (1983) (holding that penal statutes must define criminal offense with "sufficient definiteness," and "in a manner that does not encourage arbitrary and discriminatory enforcement"). Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. *City of Chicago v. Morales*, 527 US 41, 52 (1999). Regardless of what type of conduct a criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the constitutional due process guarantee. *Smith v. Goguen,* 415 US 566, 575 (1972). A state must always provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech." *Broadrick*, 413 US at 628.

The degree of vagueness that the Constitution tolerates and the level of judicial scrutiny applied to a vagueness challenge depend on the nature of the statute. Courts are more tolerant of possible vagueness in laws that impose civil penalties compared to those that impose criminal

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penalties or implicate free speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 US 489, 498 (1982); see also *Planned Parenthood of Central & Northern Arizona v. Arizona*, 718 F2d 938, 948 (9th Cir. 1983). When First Amendment freedoms are at stake, and where political protests may be impacted, an even greater degree of specificity and clarity of laws is required. See *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression....Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *Kev ,* 793 F.2d at 1057; see also *Hoffman Estates*, 455 US at 498 (laws that threaten to inhibit exercise of right to free speech demand higher level of clarity).

ORS 164.887 implicates free speech and provides for criminal penalties, and therefore is subject to the most exacting scrutiny under vagueness doctrine. Because ORS 164.887 fails to indicate what kind of activities are prohibited under the statute, it fails to give proper notice to the public, allows for discriminatory application by government officials and chills free speech. Thus, ORS 164.887 must fail under the requisite strict analysis.

First, ORS 164.887 provides no definitional guidance to key terms in its text. The statute simply prohibits any non-labor activity that is deemed to hinder, obstruct or impair an agricultural operation. Thus, a plain reading of the statute indicates that any activity, even protected speech, is punishable under the statute so long as someone states that the speech somehow hindered, obstructed or impaired an agricultural operation. This is proscription by effect and not by action, which renders the statute extremely vague.

Second, ORS 164.887, by its terms, fails to limit its prohibitions to activities that include some sort of physical conduct (such as blocking ingress/egress or property damage). ORS 164.887 does not provide any context for the terms “hinder,” “obstruct” or “impair” that would

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assist an individual in determining whether speech alone could trigger prosecution under the law. For example, the statute would be much clearer if it prohibited "hindering, impairing or obstructing an agricultural operation by: (1) blocking any roadway used by agricultural operations or (2) damaging any agricultural operation equipment." This terminological guidance would put the public, government officials and the courts on notice that ORS 164.887 only prohibited those activities which created a physical impediment to an agricultural operation and did not proscribe constitutionally protected activities.

Third, ORS 164.887 fails in that the vast range of ordinary meanings for the key terms "obstruct," "impair" and "hinder" again leaves the ordinary person guessing as to exactly what activities the statute seeks to proscribe. According to Merriam Webster's Dictionary (2006), all three of these terms have significant spectrums of meaning. "Impair" can be as innocuously defined as to "tarnish" or "undermine," or to "injure" or "hurt." "Hinder" ranges from "delay progress" up to "get in the way of." And finally, "Obstruct" can be defined as "slow progress" on up to "block." It is clear from these definitions that the ordinary non-labor person could believe that constitutionally protected speech or picketing could net them prosecution under the law. It is also clear how easily ORS 164.887 encourages arbitrary and discriminatory enforcement. These are precisely the effects that the vagueness doctrine seeks to protect against.

Finally, ORS 164.887 contains no constitutionally protected activity exception. As discussed supra, just such an amendment was contained in a 2003 legislative bill, but failed to make it out of committee.

ORS 164.887 is impermissibly vague because it fails to give proper notice as to what conduct is prohibited and encourages arbitrary and discriminatory enforcement. Thus, ORS 164.887 should be struck as void for vagueness under the First Amendment to the Constitution.

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VIII. ORS 164.887 IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF ARTICLE I, SECTION 21 OF THE OREGON CONSTITUTION

The vagueness of ORS 164.887 delegates to prosecutors, judges, juries or law enforcement, unbridled discretion to determine what conduct is unlawful after that conduct has occurred. This delegation violates the Due Process Clause because it "fails to give fair notice of what it prohibits, *State v. Illig- Renn*, 189 Or App 47, 50, 73 P3d 307 (2003), and further violates the prohibition against ex post facto lawmaking in Article I, section 21 of the Oregon Constitution[7]. This provision prevents those charged with enforcing and applying criminal laws "to make the law after the event." *Delgado v. Souders*, 344 Or 122,144, 46 P3d 729 (2002) (*quoting State v. Robertson*, 293 Or at 408) ("vagueness challenge under Article I, section 21, concerns the argument that the particulars of a criminal law are determined after the fact.").

In Oregon, the case law indicates that a vague statute specifies "no meaningful standard of conduct" that is reasonably capable of determination. *Robertson*, 293 Or at 411 n. 8 (*quoting Coates*, 402 US at 614.); *State v. Illig-Renn,* at 52. Under ORS 164.887 there is no standard for what conduct rises to the level of obstructing, hindering, or impairing a person engaged in an agricultural operation. The statute allows law enforcement and others to determine who has hindered an agricultural operation after the fact based on a subjective interpretation of the terms of the statute.

Often, law enforcement is called to a protest area by private corporations. Based on the corporation's allegation of a "hindrance," law enforcement and prosecutors may choose to apply the statute to any given set of facts-- as we have observed in these related Biscuit protest cases. Under the statute, a person commits the offense "while on the property of another person who is

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engaged in agricultural operations," if they "intentionally or knowingly" obstruct, impair, or hinder or attempt to obstruct, impair or hinder agricultural operation. ORS 164.887(1). The statute is impermissibly vague because no legal standard defining these terms exists and therefore, a jury has no consistent standard to apply to the particular conduct at issue, creating the threat of inconsistent verdicts based upon the same conduct. Thus, ORS 164.887 is unconstitutional under Article I, section 21 of the Oregon Constitution.

As discussed infra, as a result of the content-based restriction on the exercise of non-labor expressive activity, this statute is not capable of constitutional application in any of its possible applications and therefore meets the facial vagueness tests discussed in many Oregon cases. *State v. Chakerian*, 325 Or. 370, 381, 938 P2d 756 (1997); *State v. Compton*, 333 Or. 274, 280, 39 P3d 833 (2002); *Illig-Renn* at 50-51; and *Ausmus* at 326. As discussed in the *Illig-Renn* vagueness analysis, since defendants' vagueness challenges relate to both Due Process and Article I, sections 20 and 21, both the *Chakerian* and *Delgado* tests apply and are satisfied in this instance. *Illig-Renn* at 51; *see Delgado v. Souders*, 334 OR 122, 144 n. 12, 46 P3d 729 (2002). ORS 164.887 is vague under State analysis and must be struck.

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[7] Article I, section 21 of the Oregon Constitution provides in part, "No ex-post facto law...shall ever be passed...."

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CONCLUSION

For the foregoing reasons, Defendants ask that their motion for summary judgment be granted. Defendants ask that this Court declare 164.887 violative of the Oregon and U.S. constitutions and permanently enjoin the State of Oregon from enforcing its unconstitutional provisions.

Respectfully submitted this date, January 8, 2006.

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CERTIFICATE OF SERVICE

I, Lauren C. Regan, certify that on January 9, 2006, I caused to be personally served upon the Josephine County District Attorney's Office, Grants Pass, OR, a true copy of the following documents: Defendant's Motion to Dismiss and associated documents.

Dated this 9th day of January, 2006.

_____

Lauren C. Regan, OSB#97087

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