IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

DAVID and GRETCHEN SCHMIDT; PATRICIA and MARK WILSON; TIM and LORI BAUGUS; and CLAUDE and BARBARA CAMBELL, as individuals; Plaintiffs, AMANDA ELYSE SCHEMKES; JUSTIN KAY; JENNIFER MATHISON; TIMOTHY HITCHINS; and TIMOTHY HURWITZ (a/k/a) ANATHA PEARLE HURWITZ, as individuals; and NO NEW ANIMAL LAB, an unincorporated association;	Case No. C160099CV DEFENDANTS' ANTI-SLAPP SPECIAL MOTION TO STRIKE PURSUANT TO ORS 31.150 ORAL ARGUMENT REQUESTED

MOTIONS

Pursuant to ORS 31.150 and ORS 31.152(3), Defendants respectfully move this Court for the following orders:

1. An order striking plaintiffs' complaint in its entirety because this action arises out of statements made in a "public forum in connection with an issue of public interest" and "conduct in furtherance of the exercise of the constitutional right of petition" and "the constitutional right of free speech in connection with a public issue or an issue of public interest." ORS 31.150(2)(c) and (d).

2. An order awarding defendants their attorneys' fees and costs incurred herein.

This motion is supported by the following points and authorities:

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I. INTRODUCTION

Plaintiffs' claims against defendants should be stricken and defendants should be awarded their reasonable costs and attorney fees in this action under Oregon's anti-SLAPP[1] statute, ORS 31.150, *et. seq*. By filing this action, plaintiffs engage in the exact conduct that Oregon's anti-SLAPP statute was meant to discourage: non-meritorious litigation that chills the valid expression of constitutionally protected free speech in connection with a public issue. This court should grant defendants' motion to strike because this action arises from conduct in the furtherance of constitutionally protected speech in connection with a public issue or statements and documents presented in a place open to the public in connection with an issue of public interest, and because plaintiffs cannot show a probability that they will prevail on their claims.

II. FACTUAL BACKGROUND

No New Animal Lab (hereinafter "NNAL") is an international grassroots campaign to stop the construction of an underground animal research facility at the University of Washington ("UW"). This facility would allow the UW to expand the number of animals, including non-human primates, which the UW can use and kill by 30 – 50%. The UW has a track record of citations from the U.S. Department of Agriculture for negligent animal care and has been the subject of decades of public criticism for its animal testing. The NNAL campaign came out of a lawsuit against the UW Board of Regents for violating Washington's Open Public Meetings Act ("OPMA"); the Regents were found guilty of violating the OPMA twenty-four times for having secret meetings—including about the decision to approve construction of the animal research facility—at the UW President's mansion. The lawsuit garnered media attention in *The Seattle Times* as well as other local and national news outlets, and it inspired the No New Animal Lab

[1] "SLAPP is an acronym for "strategic lawsuit against public participation."

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campaign. Due to increasing public interest, the campaign has gone on to garner additional media coverage: *The Seattle Times*, *Al Jazeera*, *Democracy Now!*, distribution by the Associated Press, coverage on every Seattle television news station, as well as popular marches (seen by hundreds of people) at the UW, public involvement in over a dozen U.S. cities as well as in Finland and Sweden, and campaign participants have had numerous invitations to speak at conferences and university classes around the country.

Skanska USA is contracted as the general manager of construction of the underground animal research facility. Because of this contract, Skanska has become a focus of protests that occur under the banner of the NNAL campaign—with the stated goal of asking that Skanska drop the contract so as to bring the construction of the animal research facility to a halt. Skanska USA—headquartered in the Empire State Building—is the U.S. division of Skanska, a multi-billion dollar, international corporation; the construction contract with the UW is for about $90 million. People throughout the U.S. have protested at Skanska offices as well as engaged in residential picketing in the neighborhoods of executives.

In Oregon, people have demonstrated in the neighborhoods of Skanska executives David Schmidt in Beaverton and Tim Baugus in Sherwood. These two executives, their wives, and two neighbors each, constitute the plaintiffs in this case; the defendants are No New Animal Lab as well as individuals who have engaged in the campaign against Skanska. David Schmidt is a Chief Operating Officer of Skanska USA and Tim Baugus is a Senior Vice President of Skanska USA; Schmidt signed the construction contract for the animal research facility on behalf of Skanska. Protests in the neighborhoods of Schmidt and Baugus are intended to discourage Skanska from continuing with plans to build the animal research facility and put the UW in the position of deciding to halt the project, thus saving the lives of thousands of animals. This is a

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nonviolent pressure campaign to halt cruel animal testing and is not intended to threaten either executive.

Plaintiffs describe various events that they argue merit the issuance of a broad sweeping injunction against the campaign itself and individuals who volunteer to participate in it. Not only do defendants disagree with the descriptions of the alleged events, but argue the conduct is protected expression and out of over 60 alleged residential picketing protests, there are perhaps two alleged isolated instances where it is arguable that unknown individuals committed very minor trespassing transgressions, but those two instances cannot be used to censor all of the lawful protected expression that has occurred. However, for the limited purpose of this motion, defendants are required to adopt plaintiffs' facts. The protest events include:

A. SCHMIDT NEIGHBORHOOD

Plaintiffs allege approximately 52 instances of residential picketing that took place over eleven months in their neighborhood.

- February 22, 2015, 6:30pm: Defendant Kay was on the Schmidts' front step and knocked on the door; there were no visible "no trespassing signs[2];" a group of about a dozen unidentified individuals protested using bullhorns in the cul-de-sac outside the house for about fifteen minutes. Declaration of David Schmidt, Page 7; see also Decl. Justin Kay, p. 3.

- March 8, 2015, 8:00am: An unidentified individual knocked on the front door and used a bullhorn on the Schmidts' front step; a group gathered outside of the house, past "No Trespassing" signs. *Id.* Despite a statement by Schmidt that "people" trespassed on his property and were arrested, Decl. David Schmidt, p. 7, in fact no arrests were made. Decl. Justin Kay, p.

[2] Although plaintiff Schmidt later obtained and posted "no trespassing" signs on his property, this was not the case on February 22.

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3. If arrests were made, plaintiff would not have to allege anonymous protestors at his door because police would have provided him with the names of those arrested as they have done on other instances where protestors were detained but not charged. Plaintiffs have not provided any evidence that an arrest was made at Schmidt's house on this date.

- March 24, 2015, 6:00am: An unidentified individual drove past the Schmidts' house and used a bullhorn siren. *Id.*

- March 29, 2015, 10:00am: A group of unidentified individuals gathered in the neighborhood and used bullhorns for sirens and chants. Decl. of Gretchen Schmidt, Page 1.

- April 5, 2015, 7:30pm: Defendant Kay used a bullhorn to chant; a group of about a dozen other unidentified individuals gathered in the neighborhood to chant, use a bullhorn, and hold signs. Chants included, "We will never back down until you stop the killing," "There will be no rest," and "If you want some peace and rest, cut your ties with animal tests." Decl. of David Schmidt, Page 7 – 8.

- April 18, 2015, 8:30pm: Defendant Kay chanted; a group of about ten other unidentified individuals chanted and used bullhorns in the neighborhood. *Id.* at 8.

- May 21, 2015, night: Security system recorded two people looking through a garbage can that was at the street; sidewalk chalk writings were on the street in the morning. Chalk messages included, "David Schmidt kills animals," "Murderer lives here," "Schmidty has blood on his hands," and "Stop the torture." *Id.*

- May 23, 2015, 3:00pm: Defendant Kay and ten others chanted and wrote in sidewalk chalk in the cul-de-sac; Kay used a bullhorn. *Id.* at 9.

- May 25, 2015, 8:15pm: Defendant Kay and five others used bullhorns, yelled, and chanted for about 45 minutes. *Id.*

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- May 31, 2015: Sidewalk chalk writings discovered in cul-de-sac. The chalk messages included, “David, don’t kill animals.” *Id.*

- June 7, 2015: Group of unidentified individuals protested outside house; Defendant Kay wrote in sidewalk chalk in cul-de-sac. *Id.*

- June 14, 2015, 7:00pm: Defendant Kay and 30 – 40 other unidentified individuals protested in cul-de-sac with chants and bullhorns; allegations that Defendant Hitchins trespassed on the Wilsons’ property and that Defendant Mathison had an altercation with Patricia Wilson. Chants included, “David Schmidt has blood on his hands,” “If you want some peace and rest, cut your ties with animal tests,” “Stop the killing,” “There will be no rest,” “It’s your fault,” and “We’ll be back.” *Id*. at 9 – 10; Decl. Patricia Wilson, Page 2 – 4.

- June 16, 2015, 2:00am: Unidentified individuals screaming outside. Decl. Gretchen Schmidt, Page 2.

- June 17, 2015: Sidewalk chalk writings discovered in cul-de-sac and other streets in neighborhood. Chalk messages included, “No rest for animal abusers,” “We will not back down until this lab is stopped,” “David kills 4 money,” “Schmidt murders animals,” “David Schmidt = Murderer,” “Your neighbor kills,” “Schmidty kills,” and “A murderer lives @ 16610 NW Torrey Pines Ct.” *Id.*

- July 16, 2015: Sidewalk chalk writings discovered in cul-de-sac. Chalk messages included, “Killer,” “Murderer,” and “We’ll be back.” *Id.*

- July 17, 2015, 7:00pm: Defendants Schemkes and Kay and six other unidentified individuals chanted and wrote in sidewalk chalk on the sidewalk and in the cul-de-sac. Decl. David Schmidt, Page 10.

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- August 16, 2015: Defendant Kay and about a dozen other unidentified individuals chanted with bullhorns and used sidewalk chalk. *Id.* at 11.

- August 18, 2015, 11:30am: Screaming and bullhorns heard. Decl. Gretchen Schmidt, Page 2.

- October 31, 2015, 6:00pm: Halloween protest with people wearing cat masks; Defendant Schemkes identified as being present based on voice. *Id.* at 11 – 12; Decl. Patricia Wilson, Page 5.

- November 14, 2015: Animal testing footage projected onto the Schmidts' garage; people in cul-de-sac used bullhorns to chant; Defendant Schemkes identified as being present based on voice. *Id.* at 12 – 13; *Id.* at 5.

- November 21, 2015: Unidentified individuals chanted in cul-de-sac and walked around the neighborhood. Decl. Patricia Wilson, Page 5 – 6.

- November 26, 2015, midnight: Unidentified individuals wearing all black and masks protested using bullhorns. Decl. David Schmidt, Page 13; Decl. Patricia Wilson, Page 6.

- November 28, 2015, 9:30pm: Unidentified individuals chanted in the cul-de-sac for about 25 minutes. Decl. David Schmidt at 13 – 14.

- December 5, 2015, noon: Defendants Schemkes and Kay and about five other unidentified individuals chanted and used bullhorns for a short time. *Id.* at 14; Decl. Patricia Wilson, Page 6.

- December 13, 2015, midnight: Unidentified individuals wearing all black and masks protested using bullhorns. Decl. David Schmidt, Page 14; Decl. Patricia Wilson, Page 6.

Additional complaints include of the Schmidts' address being posted on the NNAL website (Decl. David Schmidt, Page 14) and a website post on December 29, 2015, that states,

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"Get ready to take action, and do anything and everything it takes to stop this lab from being built!" (*Id.* at 16); identification of Defendants Schemkes and Kay as "co-organizers" of No New Animal Lab (*Id*. at 15); and No New Animal Lab stickers and flyers about David Schmidt, saying "Your Neighbor Supports Animal Abuse," appearing in the neighborhood. Decl. Patricia Wilson, Page 1 – 2.

B. BAUGUS NEIGHBORHOOD

Plaintiffs allege approximately 20 instances of residential picketing that took place over nine months in their neighborhood.

- April 4, 2015: Defendant Kay knocked on the front door of the Baugus house, briefly spoke with Tim Baugus, was asked to leave, and left. Decl. Tim Baugus, Page 5.

- April 5, 2015: About a dozen unidentified individuals protested on sidewalk at the end of the driveway of the Baugus house; the people chanted and used bullhorns for about twenty minutes. *Id.* at 6.

- May 2, 2015: Defendant Kay identified as being present and about 30 unidentified individuals chanted, used bullhorns, and wrote messages in sidewalk chalk. The chalk messages included, "Puppy killer Tim," "Murderer," and "Kitten killer." *Id.* at 7.

- May 23, 2015: Defendants Schemkes and Kay identified as being present and about sixteen unidentified individuals chanted and used bullhorns. *Id.* at 7 – 8.

- October 25, 2015: Protest; Defendant Kay identified as being present. *Id.* at 8.

- October 31, 2015: Discovered toilet paper strewn in front of doorway and garage and a sign on their outer hedge that read "Skanska House of Horrors" and stuffed animals with stuffing pulled out and red paint on them; a security camera showed an unidentified individual with the toilet paper. *Id.* at 9 – 11; Decl. Lori Baugus, Page 3.

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- November 13, 2015: Unidentified individuals yelling late at night. Decl. Tim Baugus at 11.

- November 15, 2015: Several unidentified individuals chanting and using bullhorns on the sidewalk at the end of the driveway; Defendant Schemkes identified as being present and to have "led." *Id.* at 11 – 12; Decl. Lori Baugus, Page 4.

- November 21, 2015: The Baugus family went to the edge of their driveway where people were protesting and shone a floodlight on people and filmed them; Defendant Kay shone a light from his phone and filmed them; Defendant Schemkes identified as being present; Defendant Mathison misidentified as being present. Chants included, "Your father, and your husband wants to build a lab to torture dogs just like yours. Dogs like yours will be crammed into cages suffering, awaiting nothing but torture and death," "It is your fault," "It is their murder," "It is your hypocrisy." Decl. Tim Baugus, p. 12 – 13; Decl. Lori Baugus, p. 3, 5 – 6.

- December 6, 2015: Bullhorns and yelling; a police officer responded and talked with Defendants Schemkes and Kay. Decl. Tim Baugus, pp. 13 – 14; Decl. Lori Baugus, p. 6.

Tim and Lori Baugus additionally allege that Defendants Schemkes and Kay are the "leaders" of events at their house (Decl. Tim Baugus, p. 16; Decl. Lori Baugus, p. 9), and Tim Baugus points to the same website post as David Schmidt. Decl. Tim Baugus, p. 17.

III. ARGUMENT

A. Oregon's Anti-SLAPP statute, ORS 31.150

Oregon's "anti-SLAPP" statute was adopted in 2001 and like many other states with anti-SLAPP statutes, they were intended "to dismiss at an early stage non-meritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in

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connection with a public issue." *Sipple v. Foundation for Nat. Progress*, 83 Cal. Rptr. 2d 677, 682 (Cal. App. 1999).

ORS 31.150 provides, in part:

> (1) a defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21A but shall not be subject to ORCP 21F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice. If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion.
>
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> > * * * * *
> >
> > (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
> >
> > (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
>
> (3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.
>
> (4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing

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> affidavits stating the facts upon which the liability or defense is based."

Oregon's anti-SLAPP statute is also designed to "permit a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early state." *Mullen v. Meredith Corp.*, 271 Or. App. 698, 700, 353 P.3d 598, 601 (2015) (citing *Staten v. Steel*, 222 Or. App. 17, 27, 191 P.3d 778 (2008), *rev. den.*, 345 Or. 618, 201 P.3d 909 (2009)). ORS 31.150(2)(d) states, "the special motion to strike procedure applies to any civil claim that arises out of conduct 'in furtherance of' the exercise of free speech, not conduct *necessary to* the exercise of free speech." *Mullen* at 604.

Oregon's statute is modeled after California's anti-SLAPP statute and mirrors the language of that statute (California Civil Code section 425.16(e)(4)). *See* Testimony of Dave Heynderickx, Legislative Counsel, to House Committee on Judiciary, Subcommittee on Civil Law, March 19, 2001.[3] Oregon courts treat decisions from other jurisdictions that interpret the identical terms of a "borrowed statute" as persuasive authority[4]. *State v. Langan*, 54 Or. App. 202, 208, 634 P.2d 794 (1981). In California, courts have noted that the purpose of the anti-SLAPP statute is to "protect individuals from meritless, harassing lawsuits whose purpose is to chill protected expression." *Metabolife Int'l Inc. v. Wornick*, 264 F.3d 832, 837 n.7 (9th Cir. 2001).

Anti-SLAPP legislation was passed in many states as a response to developers attempting to silence critics. As one court noted: "The typical mischief that the [anti-SLAPP] legislation

[3] http://www.sos.state.or.us/archives/pages/records/legislative/legislativeminutes/2001/house/judiciary_sub_civil/HJUDC_42.htm

[4] When "borrowing" statutory language from another state, the Oregon Legislature is assumed to adopt the then-existing case law interpreting that statutory language. *Langan* at 208; citing *State v. Sallinger*, 11 Or. App. 592, 504 P.2d 1383 (1972).

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intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." *Duracraft Corp. v. Holmes Products Corp.,* 427 Mass. 156, 161 (1998). In Washington State, for example, anti-SLAPP legislation was introduced as the "The Brenda Hill Bill." A developer sued Brenda Hill after she publicly opposed the developer. In form, SLAPP suits appear to be normal, ordinary lawsuits. In substance, however, SLAPP suits are a tool of censorship and intimidation employed to punish individuals for exercising their constitutional rights. As the New York Supreme Court has noted:

> "The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."

Gordon v. Marrone, 155 Misc. 2d 726, 590 N.Y.S.2d 649 (Sup 1992), aff'd, 202 A.D.2d 104, 616 N.Y.S.2d 98 (2d Dep't 1994).

The facts of the case at hand mirror many of the instances that prompted states to adopt anti-SLAPP statutes: citizens advocating against a massive, publicly funded development project that also happens to be a very contentious proposed animal torture facility at a time when the morality of vivisection is being seriously questioned by people in the U.S., and around the world..

ORS 31.150 requires the court to engage in a two-step burden-shifting process in deciding each Special Motion to Strike. In the first step, the court must decide whether the defendants have shown that the statements and conduct alleged by plaintiffs arise out of instances described in ORS 31.150(2)(c) or (d). Specifically, under ORS 31.150(2)(c), defendants must show that the claims made by plaintiffs arise out of statements made in "a place open to the public or a public forum" and that the statements were made "in connection with an issue of public interest."

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Similarly, under ORS 31.150(d), defendants must show that the claims made by plaintiffs arise out of "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech" and that such conduct is made "in connection with a public issue or an issue of public interest." While Oregon's anti-SLAPP statute was enacted in 2001, the legislature clarified its intent in a 2009 amendment instructing courts to interpret ORS 31.150(2) "liberally…in favor of the exercise of the rights of free expression." ORS 31.152(4) (SB 543 of 2009). If the court finds that defendants have made this showing, the burden of proof shifts to plaintiffs. *Mullen* at 604.

Plaintiffs must then establish that "there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case." ORS 31.150(3). In determining whether there is a probability that plaintiffs will prevail, the court may consider defendants' "opposing evidence 'only to determine if it defeats plaintiff[s] showing as a matter of law.' " *Young v. Davis*, 259 Or. App. 497, 510, 314 P.3d 350 (2013) (quoting *Page v. Parsons*, 249 Or. App. 445, 461, 277 P.3d 609 (2012)). If the plaintiff cannot meet the burden, the court must grant the special motion to strike. ORS 31.150(1).

B. Defendants' Statements and Conduct

(1) Defendants' statements and conduct were made, and arose, in connection with an issue of public interest and, specific to conduct, in connection with a public issue. (2) Defendants statements were made in a place open to the public and public forum. (3) Defendants' conduct was in furtherance of the exercise of the constitutional right of petition and the constitutional right of free speech.

1. Defendants' statements were made in connection with a public issue or an issue of public interest

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Oregon state courts have not yet defined "a public issue" or "an issue of public interest," but the California and federal courts in Oregon have interpreted the scope of this phrase and particular instances that would constitute a public issue or an issue of public interest. Following a string of opinions in which California courts narrowly interpreted the phrase "public issue," the California legislature amended Section 425 in 1997 to require that the statute "shall be construed broadly." C.C.P. § 425.16(a); *Nygard Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1039 (2008). Thus, in *Nygard Inc.*, the court concluded that "the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." *Nygard Inc.* at 1042.

In California, courts have found a variety of speech and conduct to fall within the broad interpretation of "public issue" or "an issue of public interest." In 2006, a California court of appeals granted an anti-SLAPP Motion to Strike filed by an animal rights activist and animal rights organization, Animal Defense League of L.A. The activist and organization were sued by the City of Los Angeles (on behalf of two employees of the City's animal services department) following a "raucous nighttime protest" at the home of one of the employees. While the trial court initially denied defendants' special motions to strike under California's anti-SLAPP suit, the court of appeals reversed and held that the activist and organization's activity "was in furtherance of their right to petition and free speech in connection with a public issue." *City of Los Angeles v. Animal Def. League*, 135 Cal. App. 4th 606, 620, 37 Cal. Rptr. 3d 632, 643 (2006), *as modified on denial of reh'g* (Jan. 30, 2006) ("Demonstrations, leafleting and publication of articles on the Internet to criticize government policy regarding the alleged mistreatment of animals at City-run animal shelters—the activities in which Ferdin and ADL–LA engaged—constitute a classic exercise of the constitutional rights of petition and free speech

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in connection with a public issue or an issue of public interest within the meaning of section 425.16, subdivision (e)(4)").

Just prior to the *City of Los Angeles* decision, another California court held that "the 'public interest' component of section 425.16, subdivision (e)(3) and (4) is met when 'the statement or activity precipitating the claim involved a topic of widespread public interest,' and 'the statement…in some manner itself contribute[s] to the public debate." *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* 129 Cal. App. 4th 1228, 1246, 29 Cal. Rptr. 3d 521, 536 (2005) (citing *Wilbanks v. Wolk,* 121 Cal. App. 4th 883, 898, 17 Cal. Rptr. 3d 497, 506 (2004)). The court went on to remark that "[a]nimal testing is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate." *Huntingdon Life Scis.* at 1246. The court in *Huntingdon* declined to grant the defendants' special motion to strike certain claims because plaintiffs demonstrated a probability of prevailing on their harassment, intentional infliction of emotional distress, and invasion of privacy causes of action because of the groups alleged "background of violent attacks" and other "illegal activity.[5]"

In 2005, a California court of appeals granted an anti-SLAPP motion against a landlord seeking an injunction against planned demonstrations by defendant and a tenants rights group that was assisting the defendant. *Thomas v. Quintero*, 126 Cal. App. 4th 635, 24 Cal. Rptr. 3d

[5] To note, in another California case dealing with Stop Huntingdon Animal Cruelty (SHAC), the court denied SHAC's special motion to strike because the plaintiff's claims arose from conduct that both sides recognized as illegal (e.g., smearing feces on plaintiff's employees' houses, window breaking, and threats alluding to the bombing of one of plaintiff's employees). *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* 143 Cal. App. 4th 1284, 1288, 50 Cal. Rptr. 3d 27, 29 (2006). In stark contrast, there are no allegations made in this case that come close to the illegal conduct described in these California cases nor was there intent to commit illegal acts.

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619, 622 (2005). In *Thomas*, the defendant and others protested and distributed leaflets outside of the plaintiff's home and church that described the eviction practices of the plaintiff. In granting the defendant's special motion to strike, the court held that, "to the extent the subject of Quintero's protest was a private, and not a public, matter, it nevertheless was one of widespread public interest occasioned by the sincere attempt to seek public support for, and resolution of, this dispute." *Thomas* at 661-662.

Oregon federal courts interpreting ORS 31.150 have also adopted a "broad interpretation" of the meaning of "public issue" and "public interest." *Accuardi v. Fredericks*, No. 3:13-CV-01825-ST, 2014 WL 848263, at *3 (D. Or. Mar. 4, 2014) (after describing ORS 31.150(c) and (d), noted "[a]s a general rule, Oregon federal courts broadly interpret the terms in state statutes"). In *Accuardi*, the court held that a blog documenting illegal telemarketing schemes "clearly concerns the public interest."

Of interest to this case, in 2007 Oregon District Court Judge Michael Mosman granted animal rights protestors' anti-SLAPP Motions to Strike. *Schumacher et. al. v. City of Portland, et. al., U.S. District Court Oregon CV No. 07-601-HU*. In *Schumacher*, the plaintiffs, fur store and its owners, brought a number of claims against animal rights protestors including public nuisance, trespass, intentional infliction of emotional distress, interference with business relations, and interference with contract. In the proceeding granting defendants' attorney fees, Judge Mosman restates the facts of the case:

> In November 2005, animal rights advocates began staging weekly protests outside SFO, usually on Saturdays. The protests sometimes involved dozens of people, many of whom blocked the entrance to SFO, displayed signs with anti-fur messages, played videotapes on a portable television depicting animals being skinned alive for their fur, chanted anti-fur slogans, shouted obscenities and threats to passers by and to Plaintiffs and their employees, and followed customers as they exited SFO. Some

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> protestors participated in these activities nude. During this period of time the sidewalks, windows and doors of SFO were occasionally befouled by fecal matter, urine, chalk and red paint. Protestors also allegedly issued death threats to Plaintiffs, appeared outside their personal residence, and communicated with the lessor of the SFO retail store.

Schumacher v. City of Portland, No. CV-07-601-MO, 2008 WL 219603, at *1 (D. Or. Jan. 23, 2008).

While illegal acts are not protected under ORS 31.150, the plaintiffs in *Schumacher* were unable to prove that it was defendants who committed the illegal acts. The court notes that while "Plaintiffs' had photographic and videographic evidence of people clearly violating municipal prohibitions on public nudity and harassment…. I granted the Motions to Strike because Plaintiffs did not produce evidence the prevailing defendants did anything illegal. Thus, I find Plaintiffs claims against the prevailing Defendants were not objectively reasonable." *Schumacher* at 5.

Instead of defining the term public interest or public issue, Oregon state courts have declared particular issues in particular cases to be of public interest. For example, in *Thale v. Business Journal Publications*, Multnomah County Circuit Court Case No. 0402-02160, the court found that statements published in an article by defendant about the plaintiff's resignation were statements on an issue of public interest. Likewise, in *Kurdock v. Electro Scientific Indus., Inc.,* Mult. Co. No. 0406-05889, Order at pp. 1-2 (Oct. 15, 2004), the court held that statements made by defendant (plaintiff's former employer) to shareholders and other employees about the plaintiff were issues of public interest. In *Mullen*, the court held that news reports of a shooting in a neighborhood concerned an issue of public interest. *Mullen v. Meredith Corp*., 271 Or. App. 698 (2015) (plaintiff, a corrections officer, sued defendant TV news station for inadvertently broadcasting footage of plaintiff outside of his house which was adjacent to shooting incident).

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In this case, Defendants' statements were clearly made in connection with a public issue or public interest—opposing a publicly funded, highly controversial proposed animal research laboratory on the UW campus. As already noted above, opposing development is a hallmark of SLAPP suits and "[a]nimal testing is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate." *Huntingdon Life Scis*. at 1246[6].

Further evidence that defendants' statements and conduct meet the public issue and issue of public interest test, include numerous national and regional media outlets have documented the campaign against Skanska's role in building a $123 million animal testing facility for the University of Washington. On June 15, 2015, Al Jazeera America aired a clip of a neighborhood protest and interviewed protestors, including defendant Amanda Schemkes, neighbors, and University of Washington officials[7]. Http://america.aljazeera.com/watch/shows/live-

[6] Further evidence of the public interest of NNAL's campaign is demonstrated as follows: Animal testing is subject to rigorous critique in academic circles dealing with ethics (generally), meta-ethics, bioethics, and medical ethics. Anthropological and sociological debates on the subject often discuss the practice in light of the notion of anthropocentrism, with many arguing that no rational explanation can be provided to privilege the suffering of humans over non-human animals capable of similar suffering. Much of the debate centers on the sentiency of the animals involved in the testing. A survey of the debate can be found in numerous books and articles. *See, e.g.*, Robert Garner, *Political Ideology and the Legal Status of Animals,* 8 Animal L. 77 (2002); Thomas Kelch, *Toward a Non-Property Status for Animals,* 6 N.Y.U. Envtl. L.J. 531 (1998); Shennie Patel, *A Review of Dominion: The Power of Man, the Suffering of Animals, and the Call to Marcy,* 9 Animal L. 299 (2003); Richard Posner, *Rattling the Cage: Towards Legal Rights for Animals By Steven M. Wise,* 110 Yale L.J. 527 (2000) (book review); David Schmahmann, *The Case Against Animal Rights,* 22 B.C. Envtl. Aff. L. Rev. 747 (1995); Cass R. Sunstein, *The Rights of Animals,* 70 U. Chi. L. Rev. 387 (2003); Jacqueline Tresl, *The Broken Window: Laying Down the Law for Animals,* 26 S. Ill. U. L.J. 277 (2002); Steven M. Wise, *Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy,* 22 Vt. L. Rev. 623 (2002).

[7] This news report shows plaintiff Patricia Wilson intentionally assaulting lawful protestors by repeatedly spraying them in the face, groin and buttocks on a public roadway. After Wilson

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news/2015/6/activists-protests-plans-for-a-new-animal-research-lab.html. On July 28, 2015, journalist Glen Greenwald (famous for exclusive initial coverage of the Edward Snowden leaks) documented the protest in an article condemning the characterization of non-violent animal rights activists as "terrorists."[8] Also on July 28, 2015, investigative journalist Will Potter reported on the No New Animal Lab campaign and attendant protests.[9]

2. Defendants' statements were made in a place open to the public and/or a public forum

Under ORS 31.150(2)(c), the defendants must show that statements were made "in a place open to the public or a public forum." All of the residential picketing activity that took place in this case occurred on the public sidwalks and streets near plaintiffs' residences. Streets and sidewalks are "quintessential public for[a]" that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)). The right to assemble and engage in advocacy in a traditional public forum such as a public street or sidewalk is "conduct in the furtherance of constitutionally protected free speech." *See Hill v. Colorado*, 580 U.S. 703, 714-15 (2002) (noting that "the First Amendment interests of petitioners are clear and undisputed" because

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attempts to provoke protestors for several minutes, defendant Timothy Hitchins walks up the Wilsons' driveway and simply attempts to turn off the hose to prevent further escalation and assault. Mr. Hitchins has been charged with trespass for this incident (trial pending), Ms. Wilson has not been charged at this time. As clearly depicted by this video, Ms. Wilson is in no way a victim and is shown maniacally smiling as she assaults lawful protestors and sprays expensive news cameras. See Ex.101; Decl. Tim Hitchins.

[8] Glenn Greenwald, "Dylann Roof Is Not a "Terrorist"—But Animal Rights Activists Who Free Minks From Slaughter Are." *The Intercept*, July 28, 2015. Https://theintercept.com/2015/07/28/dylan-roof-terrorist-animal-rights-activists-free-minks/.

[9] http://www.greenisthenewred.com/blog/animal-activists-arrested-chalking-slogans/8466/

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"their leafleting, sign displays and oral communications are protected by the First Amendment," and that the "public sidewalks, streets and ways" they chose to exercise their rights "are 'quintessential' public forums for free speech."); *NAACP v. State of Alabama,* 357 US 449, 461 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

Plaintiffs cannot argue that the protests fall outside the scope of constitutional protection merely because they are alleged to have been coercive or offensive. *See Organization for a Better Austin v. Keefe*, 402 US 415 (1971); *Hill*, 580 US at 715 ("The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection."). Despite the plaintiffs' understandable discomfort with the protest activity that occurred within their wealthy neighborhood, there is no question that the overwhelming majority of defendants' statements were made in a public forum and any isolated instance to the contrary cannot be a basis for broad punitive action[10].

3. Defendants' conduct was in furtherance of their constitutional right of free speech.

This case centers around a political campaign regarding an issue of clear public interest, and both the Oregon and U.S. constitutions grant such campaigns a great deal of deference in their expressive choices of speech and assembly, even if controversial and intended to influence

[10] Plaintiffs Schmidt and Baugus have made three allegations that defendants or unknown individuals walked up to their front door. Using a walkway to approach the front door of a residence is not trespassing. "Absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of social and legal norms of behavior." *State v. Portrey*, 134 Or. App. 460, 464, 896 P.2d 7 (1995); *State v. Pierce*, 226 Or. App. 336 (2009). And as discussed previously, walking up Ms. Wilson's driveway to turn off her hose in order to prevent further assault to others is justified, and not trespassing either.

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the actions of corporate executives. If a defendant shows that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are *not* protected by the First Amendment." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 165, 1 Cal. Rptr. 3d 536, 542 (2003). As to the second standard, California courts interpreting the identical language of California's anti-SLAPP statute have held that a defendant need not show that its actions were "constitutionally protected under the First Amendment as a matter of law" to satisfy its burden. *See Paul for Council v. Hanyecz,* 85 Cal. App. 4th 1356, 1365 (2001). "Rather, the defendant must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant *taken to further the defendant's rights of free speech* or petition in connection with a public issue." *Id.* (emphasis added); *see also Flatley v. Mauro*, 39 Cal. 4th 299, 314, 139 P.3d 2 (2006) (citing *Paul* with approval). This reading of the "in furtherance" language flows from the plain text of the statute, and is justified because requiring the defendant to show that all its actions were constitutionally protected would render the plaintiffs' subsequent evidentiary burden "superfluous because by definition the plaintiff could not prevail on its claim." *Id.*

Plaintiffs' claims are predicated on allegations of speech and conduct that are protected under ORS 31.150(c) and (d) as well as Article 1, Section 8 and Article 1, Section 26 of the Oregon Constitution and the First Amendment of the U.S. Constitution. Under Article 1 section 8 of the Oregon Constitution, all speech is protected speech unless it falls under a historically excepted form. *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (1993). Some of these historical exceptions include, "perjury, solicitation or verbal assistance in a crime, some forms of theft, forgery and fraud and their contemporary variants." *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982). The protection of Article 1 section 8 "extends to all forms of speech, regardless

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of the social acceptability or offensiveness of the content." *Merrick v. Bd. of Higher Educ*., 116 Or. App. 258, 264, 841 P.2d 646, 650 (1992) (*citing Robertson* at 416). This "sweeping" protection applies "regardless of the context of the communication." *Id.* Furthermore, Art. 1, § 8 applies equally in personal and institutional relations. *State v. Moyle*, 299 Or. 691, 705 P.2d 740 (1985).

Additionally, plaintiffs in this case have asked to preserve the right to claim punitive damages. Under Article 1 section 8 of the Oregon Constitution, such measures are a "form of indirect regulation of speech" and thus "amenable to analysis under the State Constitution's free speech provision." *Huffman and Wright Logging Co. v. Wade*, 317 Or. 445, 857 P.2d 101 (1993).

Both Oregon and U.S. Supreme Courts repeatedly emphasize that speech is worthy of strong protections as a part of this country's political fiber. The U.S. Supreme Court has stated, "Speech does not lose its protected character simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 910 (1982). This dedication to protecting speech is based in "a profound national commitment to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id*. at 913, 102 S.Ct. at 3425 (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As such, "[f]ree trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). The conduct of the Defendants, though disruptive, vitriolic, and offensive to some, is nonetheless protected by the First Amendment.

a. Residential Picketing

Much of Defendants' conduct complained about by Plaintiffs is rooted in residential picketing, with demonstrations and other displays of protest in the neighborhoods of David Schmidt and Tim Baugus. Although Plaintiffs and their neighbors may find the residential

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picketing to be a disturbance in their lives, First Amendment protections are not lost because of discomfort. Residential protests are lawful, a reflection of both the freedom of speech and right to assemble: "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). This protection extends to residential neighborhoods. In *Frisby v. Schultz*, 487 U.S. 474, 480 (1988), the Supreme Court, even while upholding a legislated ban on targeted residential picketing, found: "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." Beaverton and Sherwood have no such ordinances and "the First Amendment protects the right to engage in peaceful targeted residential picketing in the absence of laws to the contrary." *Dean v. Byerley*, 354 F.3d 540, 551 (6th Cir. 2004).

b. Door Knocking

Plaintiffs complain of people knocking at their front doors, but the U.S. has an established history of what it means to trespass on the property of another, and a door knock is not trespassing: "Absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of social and legal norms of behavior." *State v. Portrey*, 134 Or. App. 460, 464, 896 P.2d 7 (1995); *State v. Pierce*, 226 Or. App. 336 (2009). "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 147-48, 63 S. Ct. 862, 865-66, 87 L. Ed. 1313 (1943). This history continues to be reflected in Oregon, which can be seen in *State v. Collins*: "the 'entry or remaining' becomes unlawful only if one fails to leave after having been directed to do so." *State v. Collins*, 179 Or. App. 384, 394, 39 P.3d 925, 930 (2002).

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Furthermore, the U.S. Supreme Court has long recognized the specific importance of disseminating information to people at their homes and upholding the First Amendment right to knock on doors to communicate political messages: "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings." *Martin v. Struthers* at 141.

c. Protest Demeanor—Chants and Chalk

Plaintiffs go to great lengths to describe what they find offensive about the nature of some of the protest activity—angry, loud, at night and early in the morning, disturbing words and images—but protests do not become unprotected because those being protested do not approve of the demeanor. To require so would strip protests of their very essence, and "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Claiborne Hardware* at 928.

Plaintiffs include many examples of protest chants in their complaint, but none of the chants fall outside the range of protected free speech. Rather, much more objectively offensive chants have been found to be protected by the courts. In *Commonwealth v. Gazzola*, 17 Mass. L. Rep. 308 (Mass. Super. Ct. 2004), the court found animal rights protesters chanting "what goes around comes around. Burn his house to the ground" to be political hyperbole and not actionable speech. Additionally, just because a chant is loud or amplified does not mean that its content is not protected.

Plaintiffs also allege that people have written messages in washable sidewalk chalk on the public streets and sidewalks by their houses. Children, street artists, and others often write in

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chalk on sidewalks and streets, and no one would worry they are engaging in an act that would warrant an injunction against them. To punish protesters for engaging in the same conduct would be to punish the content of speech rather than the act of writing in chalk on a public street or sidewalk, which is patently impermissible.

Streets and sidewalks are "quintessential public for[a]" that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)). Considering the nature of these public forums, any restriction must be "necessary to serve a compelling state interest and the exclusion [must be] narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

Plaintiffs' complaints regarding both chanting and chalk must be analyzed through the framework of protected versus unprotected speech—not by what bothers Plaintiffs. In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Supreme Court addressed offensive speech. People protested the funeral of a soldier because of the military's allowance of gay soldiers with signs that read: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* at 448. The Court held:

> Such speech cannot be restricted simply because it is upsetting or arouses contempt. If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Id. at 458.

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In addition to protecting even the most offensive speech, courts distinguish political hyperbole from "true threats," an unprotected form of speech. "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). In the infamous *Watts v. United States*, 394 U.S. 705 (1969), Watts—a Vietnam War protester, said to a rally: "And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Supreme Court held, "The language of the political arena…is often vituperative, abusive, and inexact. We agree with Appellant that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708.

In regard to the chants and chalked slogans at issue in this case, none are true threats; rather they are all criticism of the involvement of Schmidt and Baugus as Skanska executives in the construction of an underground animal research facility. The statements do not threaten any specific physical harm to Plaintiffs, but are clearly the rhetoric of a passionate political campaign.

Additionally, the selection of chanting and chalk messages that Plaintiffs highlight suggest that they do not like being referred to as "puppy killers," "murderers," having "blood on their hands," or any other statements that refer to their involvement in, and profiting from, the construction of a facility that has the sole purpose of being used to experiment on and kill animals. Even if Plaintiffs would prefer that the statements about them only give more detailed explanations, such as "David Schmidt signed a contract for the construction of an animal lab, in which thousands of animals would be tortured and killed, and he makes hundreds of thousands of

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dollars a year for his executive position at Skanska through which he signed the contract"…the law does not require this. Rather, the Supreme Court does not require such specificity in order to avoid defamation; it has held that "imaginative expression" and "rhetorical hyperbole" do not constitute defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

Other unprotected forms of speech include the following. Incitement is speech that "is directed to inciting or producing imminent lawless action and is likely to produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Obscenity is content that the average person, applying contemporary community standards, depicts or describes, in a patently offensive way, sexual conduct. *Miller v. California*, 413 U.S. 15 (1973). Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942). The speech found in the chants and slogans at issue is not unprotected speech.

d. Internet Postings

Plaintiffs complain about the content of internet posts made through No New Animal Lab. Posts on the internet constitute pure speech, are subject to First Amendment protections, and must be evaluated under the same framework of protected versus unprotected speech described above. The NNAL posts do not contain any forms of unprotected speech.

Courts have consistently held that the First Amendment protects the publication of lawfully-acquired, truthful information. Names, addresses, and phone numbers are all publicly available information, and court decisions illustrate that the context of their publication matters. In *Sheehan v. Gregoire*, the operator of a website entitled justicefiles.org challenged a state law which proscribed the publication and distribution of "the residential address, residential telephone number, birthdate, or social security number of any law enforcement-related,

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corrections officer-related, or court-related employee or volunteer, or someone with a similar name" who was categorized as being such an official. 272 F. Supp. 2d 1135, 1139 (W.D.Wash. 2003). The Court found that the statute was overly broad on its face as "the statute does not purport to regulate true threats or any other proscribable mode of speech." *Id*. at 1141-42 (emphasis in original). Rather, the Court found that liability under the statute improperly turned on the speaker's subjective intent to threaten, rather than a reasonable person's objective interpretation of the speech. *Id*. at 1141. As such, "the statute, on its face, simply does not regulate true threats as defined by First Amendment jurisprudence." *Id*. at 1142. The Court also noted that the content of the proscribed speech was "truthful lawfully-obtained, publicly-available personal identifying information." *Id*. at 1142. This information "is precisely the kind of speech that the First Amendment protects." *Id*. (*citing Bartnicki*, 532 U.S. at 527 (2001).

Further, the U.S. Supreme Court has ruled that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 102 (1979). Several cases uphold the right to publish the names and addresses of law enforcement officers pursuant to the First Amendment: if posting the private information of police officers is protected, surely posting the names and addresses of construction company executives is protected as well. *See Brayshaw v. City of Tallahassee, Case* No. 409CV00373, 2010 WL 452894 (N.D. Fla. January 29, 2010)(District Court held that publication of addresses and phone numbers of law enforcement officials protected by First Amendment). The *Brayshaw* Court ruled that the website at issue addressed a matter of public concern—the accountability of public officials—and that the "discussion of matters of public concern includes the publication of names and addresses of police officers or others." According to the Court, the publication of this information "may arguably expose wrongdoers and/or facilitate peaceful picketing of homes or

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worksites and render other communication possible." As the website neither "advocate[d] that the reader do anything with this information" nor constituted a true threat, the personal information published did not fall into one of the categories of unprotected speech. *Id*.

In *Organization for a Better Austin v. Keefe*, the Supreme Court held that leaflets protesting a real estate agent's practices that contained a request for people to call his home number were protected by the First Amendment and could not be enjoined. 402 U.S. 415, 417 (1971). The Court stated that, although "the expressions were intended to exercise a coercive impact on respondent," this did "not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id*. at 419.

As one legal scholar has argued,

> Publishing the names (or even addresses) of people who aren't complying with a boycott may facilitate legal and constitutionally protected shunning, shaming, and persuasion of the noncompliers. Publishing the names and addresses of abortion providers may facilitate legal picketing of their homes.

Eugene Volokh, Crime-Facilitating Speech, 57 Stan. L. Rev. 1095, 1114-15, 1142-43 (2005), *cited in U.S. v. White*, 638 F.Supp.2d 935, 945 (N.D.Ill. 2009). Publication of this personal information thus helps "people evaluate and participate in public debates." Volokh, *supra* at 1114.

In contrast, courts have found that publishing a home address may constitute a true threat[11] if it is published in a form that is particularly threatening. For example, the publication of a home address in connection with a "Wanted" poster is not a true threat, *U.S. v. Carmichael*,

[11] True threats are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343, 359 (2003).

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326 F. Supp. 2d 1267, 1290 (M.D. Ala. 2004), unless individuals targeted by similar posters in the past have been killed, *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 290 F.3d 1058, 1063 (9th Cir. 2002).

The publication of truthful, publicly available names, addresses, and phone numbers in this case is intended to encourage people to engage in an issue of public concern by contacting Schmidt and Baugus to ask them to drop the lab contract or to inform people about protest activity at plaintiffs' houses, and is not intended to threaten the individuals with violence. This context does not constitute a true threat as in *Planned Parenthood*, nor does it fall under any other category of unprotected speech; names, addresses, and phone numbers are publicly available information and are clearly not defamation, fighting words, true threats, or obscenity.

4. Isolated Incidents of Alleged Illegal Activity does not Remove Constitutional Protections for the Vast Majority of Defendants' Conduct

Plaintiffs point to three isolated incidents of alleged illegal activity out of over sixty protests: an unknown individual allegedly putting toilet paper on the Baugus house and a banner on their hedges, and two brief instances of alleged trespass, one of which is the Wilson incident in which Mr. Hitchins justifiably walked up the driveway, attempted to turn off her hose after she repeatedly assaulted lawful protestors, was told to leave, and immediately left. *See* Decl. Timothy Hitchens, Ex. 101. The incidents alleged are very minor violations of the law and in no way suggest that any person would be physically harmed. Additionally, there are legal mechanisms in place for addressing isolated incidences in a much longer pattern of constitutionally protected activity that do not place prior restraint on the constitutional activity of the defendants named in this matter as well as anyone acting under the banner of No New Animal Lab.

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Even within this case, we have examples of other ways of dealing with single incidents, such as the trial for Defendant Hitchins on February 11. Furthermore, Beaverton and Sherwood City Councils are currently considering legislative changes to address the concerns of plaintiffs. Such legislative changes would impact the public equally rather than a small group selected for their political advocacy.

Finally, courts have addressed the issue of weighing isolated incidents against maintaining free speech protections: "And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance." *N.A.A.C.P. v. Claiborne Hardware Co*. at 924.

5. Leadership and Associational Liability

Plaintiffs point to Defendants Schemkes and Kay as being "leaders" and "co-organizers" of NNAL, but such allegations do not instantly make individuals or associations liable for the actions of others. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed criminal acts. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)."" *Carroll v. Princess Anne*, 393 U.S. 175, 183-184; *Claiborne Hardware Co.,* 458 US at 930-31.

The Supreme Court in reviewing a 9th Circuit case ruled:

> The court's rejection of membership per se as a constitutionally sufficient ground of conviction was based upon the recognition, also voiced in *Douds*, 339 U.S. at 393, 70 S.Ct. at 681, that the Communist Party has both legal and illegal aims and carries on both legitimate and illegitimate activities, and the further recognition that there may be members 'for whom the organization is a vehicle for the advancement of legitimate aims

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> and policies' alone. 'If there were a * * * blanket prohibition of association with a group having both legal and illegal aims,' the court reasoned, 'there would indeed be a real danger that legitimate political expression or association would be impaired,' *Scales v. United States, supra,* 367 U.S. at 229, 81 S.Ct. at 1486, for 'one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.' *Noto v. United States, supra*, 367 U.S. at 299-300, 81 S.Ct. at 1522.

Brown v. United States, 334 F.2d 488, 493 (9th Cir. 1964) aff'd, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965); see also *Healy v. James,* 408 U.S. 169 (U.S. 1972)(governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization is impermissible); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S., at 605-610; *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Scales v. United States*, 367 U.S. 203 (1961). These cases clearly establish that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *Robel*, 389 U.S. at 265.

As noted in the Declaration of Amanda Schemkes, NNAL did not possess unlawful goals; their goals included engaging in a successful public advocacy campaign to halt an animal experimentation facility. Their intent is clearly protected by the First Amendment. In addition, none of the individually named defendants held a specific intent to break the law; they intended to lawfully participate in a nonviolent residential picket regarding a contentious public issue pertaining to animal cruelty and suffering.

In *Brandenburg v. Ohio*, 395 U.S. 444, the Supreme Court reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued. The Court relied on "the principle that the constitutional guarantees of free speech

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and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*. at 447. *See Noto v*. *United States*, 367 U.S., at 297-298 ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"); *Whitney v*. *California*, 274 U.S. 357, 372 (Brandeis, J., concurring).

The U.S. Supreme Court has also held that an advocacy organization cannot be held liable for the unlawful conduct of protestors absent proof that the organization specifically authorized or ratified the unlawful conduct. *Claiborne Hardware Co*., 458 US at 930-31. The Court also rejected the leadership theory of liability because "[t]o impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." *Id*. at 931.

Here, as in *Claiborne*, plaintiffs have not introduced any evidence to show that NNAL or any NNAL agent or "leader" authorized or ratified the scant incidents of alleged unlawful conduct cited in their complaint. Nor have plaintiffs introduced evidence that NNAL or the alleged "leaders" ratified or endorsed the alleged inappropriate conduct.

Relatedly, courts have recognized that people engaging with each other—which often includes people in leadership roles—is intertwined with the protections offered by the First Amendment: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v*. *State of Alabama*, 357 U.S. 449, 461(1958).

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C. Plaintiffs' Burden

Under ORS 31.150(3), once defendants satisfy the initial burden of making a prima facie showing, the burden shifts to plaintiffs to establish "a probability" of success as to each claim alleged in their Complaint by presenting "substantial evidence" to support a prima facie case. *See* ORS 31.150(3). While the plaintiff must show a probability to succeed on the claim, "[o]nce the defendant shows that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are *not* protected by the First Amendment." *Lieberman v. KCOP Television, Inc.,* 110 Cal. App. 4th 156, 165, 1 Cal. Rptr. 3d 536, 542 (2003).

If this Court follows the California rule, plaintiffs can prevail upon a "showing that the defendants' purported constitutional defenses are not applicable to the case as a matter of law." *Paul*, 85 Cal. App. 4th at 1367, citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 824 (1994). As guidance, California courts have "consistently held acts a plaintiff alleges are unlawful or illegal are nonetheless protected activity under the anti-SLAPP statute if the acts assist or facilitate the defendant's free speech rights." *Collier v. Harris*, 240 Cal. App. 4th 41, 54, 192 Cal. Rptr. 3d 31, 41 (2015). The only exception to this rule "occurs when the defendant concedes or the evidence conclusively establishes the defendant's conduct is illegal as a matter of law." *Id*. The court in *Collier* clarified that " '[i]llegal' in this context means that the conduct was criminal; merely violating a statute is not sufficient because the broad protection the anti-SLAPP statute provides for constitutional rights would be significantly undermined if all statutory violations were exempt from the statute." *Id* at 42 (citing *Mendoza v. ADP Screening & Selection Services, Inc*., 182 Cal.App.4th 1644, 1654, 107 Cal.Rptr.3d 294 (2010)).

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ORS 31.150(4) governs the evidence that may be used to support or oppose a special motion to strike and provides, "the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Courts interpreting the identical language of California's statute have held that, "the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *Integrated Healthcare Holdings, Inc., v. Fitzgibbons*, 140 Cal. App. 4th 515, 527 (2006). In *Wilcox v. Superior Court*, 27 Ca. App. 4th 809, 824 (1994), the defendants filed a motion to strike when they were sued for defamation by a trade association after soliciting donations to help fund a lawsuit against the association. *Id*. at 814-15. The association argued that the defendants' conduct fell outside the anti-SLAPP statute because the association was not challenging their protected activity, but was instead only challenging statements that were defamatory as a matter of law. *Id*. at 821.

The California Court of Appeals rejected the association's attempt to carve out the protected activity from its suit and granted the motion to strike, noting, "[t]his argument [by the association] points out why traditional pleading-based motions such as demurrers and motions to strike are ineffective in combating SLAPP's and why the Legislature believed there was a need for a special motion to strike***. In a SLAPP complaint, the defendant's [protected activities] are made to appear as defamation, interference with business relations, restraint of trade and the like. For this reason the Legislature provided, in determining a motion under the anti-SLAPP statute, 'The court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" *Id*.

Despite the clear statutory language providing that the plaintiff must establish a "probability" of success on the merits by presenting "substantial evidence," Oregon courts have

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interpreted the plaintiff's burden as a "low bar" to overcome. *Handy v. Lane Cty.,* 274 Or. App. 644, 652, 362 P.3d 867, 874 (2015). The Court in *Handy* relies on the holdings in *Young v. Davis* (supra). The court in *Young* relied on a California case, *Greene v. Bank of Am.*, 216 Cal. App. 4th 454, 156 Cal. Rptr. 3d 901, 905 (2013) ("the plaintiff's burden of establishing a probability of prevailing is not high…"). In *Greene*, the court held that, in meeting it's burden to show a probability of success on the merits, a plaintiff "must set forth evidence that would be admissible at trial." *Greene* at 457 (citing *Overstock.com, Inc. v. Gradient Analytics, Inc.,* 151 Cal. App. 4th 688, 699, 61 Cal. Rptr. 3d 29, 38 (2007)). Under *Young*, "the trial court may not weigh the plaintiff's evidence against the defendant's" and "may consider defendant's evidence only insofar as necessary to determine whether it defeats plaintiff's claim as a mater of law." *Young* at 509-510. However, under *Navellier v. Sletten* (upon which the court in *Greene* relies), the court reasons that "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." 29 Cal. 4th 82, 92, 52 P.3d 703, 711 (2002). Again, ORS 31.150 should be construed "liberally…in favor of the exercise of the rights of free expression." ORS 31.152(4).

Plaintiffs have failed to overcome their burden because defendants' speech and conduct are protected as a matter of law. Each claim and associated allegation in the plaintiffs' complaint arose from activity that is protected under the U.S. and Oregon constitutions.

1. Plaintiffs Cannot Establish a Probability Of Success On their Nuisance Claim Because Defendants' Speech and Conduct Are Privileged As A Matter Of Law Under the U.S. and Oregon Constitutions

Nuisance is an interference with an interest in land where the plaintiff is able to show three elements: (1) substantial and unreasonable interference in the use and enjoyment of land;

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(2) culpable conduct on the part of the defendant; and (3) that the culpable conduct of the defendant was the cause in fact of the interference. *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or. 469, 473, 575 P.2d 164 (1978); *Raymond v. Southern Pacific Co.*, 259 Or. 629, 634, 488 P.2d 460 (1971); *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 348, 198 P.2d 847 (1948). A "general weighing process" is used in determining the existence of a nuisance: the invasion must "result from action to which the law attaches responsibility," and the plaintiff must then link that conduct to the actual harm alleged to have been suffered. *See Gronn et ux v. Rogers Construction, Inc.,* 221 Or. 226, 232–33, 350 P.2d 1086 (1960). "Whether a particular use of property constitutes an actionable nuisance cannot be determined by fixed general rules but depends on the individual facts of a particular case." Jewett at 473. However, constitutionally protected conduct cannot be culpable conduct and thus the nuisance claim fails.

As stated throughout this brief, defendants' conduct was constitutionally protected or engaged in in furtherance of their constitutional expression and thus plaintiffs cannot sustain their burden of proof regarding their nuisance claim.

2. Plaintiffs Cannot Establish A Probability Of Success On their Trespass Claim Because Defendants' Speech And Conduct Are Privileged Under The U.S. and Oregon Constitutions

In Oregon, "trespass arises when there is an intrusion upon the land of another which invades the possessor's interest in the exclusive possession of his land." *Martin v. Union Pacific Railroad*, 256 Or. 563, 565, 474 P.2d 739 (1970). An alleged trespass is not actionable if the owner was not entitled to exclusive use of the property, or if the alleged trespasser's entry was by consent, invitation, or license. Restatement (Second) of Torts, §167 (1979). See also, p. 23, section (b), supra.

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Although Plaintiffs have alleged three isolated incidents of trespass out of over 60 protests at these locations (an unidentified individual on the Baugus property with toilet paper, unidentified individuals passing a "No Trespassing" sign at the Schmidt house to walk to the front door, Defendant Hitchins walking onto the driveway of the Wilsons) such alleged incidents do not give rise to a trespass claim that enjoins the individual Defendants as well as anyone acting under the banner of No New Animal Lab. It is an unreasonable restriction on speech to make such a sweeping provision.

In *Claiborne Hardware*, the U.S. Supreme Court addressed the issue of weighing isolated incidents of illegal behavior against maintaining free speech protections and stated that "the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance." N.A.A.C.P. v. Claiborne Hardware Co. at 924. The facts of that case centered on a boycott by the N.A.A.C.P. of white-owned stores in Mississippi counties that had not agreed to chapter demands. Members watched stores, and people who violated the boycott "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." *Id*. at 904. In four instances, people who violated the boycott were also victims of acts of illegal activity, including having bricks thrown at their windshield and shots fired at their house. *Id*.

While this unprotected conduct against boycott violators was not protected by the First Amendment, this conduct was comprised of isolated incidents. *Id*. at 923. The court found: "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." *Id*. at 933. The court acknowledged that

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"violent conduct is beyond the pale of constitutional protection," but that the boycotters actions were protected because their "ultimate objectives were unquestionably legitimate." *Id*.

In this case, David Schmidt states that he has experienced protest activity in his neighborhood 52 times over the last year (Decl. David Schmidt, p. 4) and about ten to twenty incidents are described as occurring at the Baugus house. Of all of these protests, only three trespasses are alleged, and none nearly so serious as the throwing of bricks and firing of guns at houses as in *Claiborne Hardware*. The toilet-papering in the Baugus yard is akin to the pranks of teenagers. Walking to a front door past a "No Trespassing" sign is an activity that people do all of the time to knock on a door to share a political message. The allegation of Defendant Hitchins' trespass on the Wilsons' driveway to turn off water to a hose that Patricia Wilson was using to spray people in the faces is justified; the Wilsons do not allege that they had a "No Trespassing" sign, Hitchins left immediately upon being asked to do so, and Hitchins was acting in order to prevent Wilson from further assaulting people. None of these trespass allegations are so serious or so frequent as to warrant a prior restraint that would enjoin people from engaging in protected speech.

Defendants' conduct was constitutionally protected or engaged in in furtherance of their constitutional expression and thus plaintiffs cannot sustain their burden of proof regarding their trespass claim.

3. Plaintiffs Cannot Establish A Probability Of Success On Civil Conspiracy

A civil conspiracy is "'a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means.'" *Yanney v. Koehler*, 147 Ore. App. 269, 273, 935 P.2d 1235 (1997) (quoting *Bonds v. Landers*, 279 Ore. 169, 174, 566 P.2d 513 (1977) (citations omitted)). The primary

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purpose of a conspiracy must be to cause injury to another. *Heitkemper v. Central Labor Council*, 99 Or 1, 192 P 765 (1921). However, civil conspiracy is not, itself, a separate tort for which damages may be recovered; rather, it is a "way[ ] in which a person may become jointly liable for another's tortious conduct." *Granewich v. Harding*, 329 Ore 47, 53, 985 P2d 788 (1999); see also *Osborne,* 225 Ore App at 437 (Conspiracy is a "theory of mutual agency under which a conspirator becomes jointly liable for the tortious conduct of his or her coconspirators."). Thus, if the Court properly disposes of plaintiffs' nuisance and trespass claims pursuant to defendants' anti-SLAPP motion, it follows that the court must also dismiss the conspiracy allegations. See *Morasch v. Hood*, 232 Ore. App. 392, 402-403 (2009).

As discussed throughout this brief, the primary purpose of the NNAL campaign is to halt the construction of a publicly funded underground animal experimentation facility, and in line with that purpose, to pressure plaintiffs David Schmidt and Tim Baugus to rescind the Skanska contract to build the facility—not to cause injury to any of the plaintiffs. Further, because the Oregon and U.S. Constitutions protect defendants' expressive conduct, it was not unlawful, it was not intended to accomplish an unlawful purpose, nor did they utilize unlawful means. Plaintiffs fail to satisfy their burden regarding this claim as well.

IV. CONCLUSION

Plaintiffs should not have filed this lawsuit against NNAL and the activists named individually merely because they were the focus of a lawful residential picketing campaign that offended them and their desired quietude. By enacting Oregon's anti-SLAPP statute, the Oregon Legislature mandated that a plaintiff who files a lawsuit that implicates the First Amendment rights of a defendant must have "substantial evidence" to support its claims at the outset of the litigation. This requirement recognizes what Justice

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Brennan described in *New York Times v. Sullivan*, as this country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," by allowing a defendant to promptly expose and seek dismissal of a SLAPP suit unless the plaintiff meets the evidentiary standards set forth in ORS 31.150(3). Plaintiffs' burden includes refuting the constitutional defenses set forth by the defendants in this case. Plaintiffs simply cannot meet that burden because it is clear that the Oregon and U.S. Constitutions protect defendants' conduct: picketing on public streets, leafleting, chanting, chalking, marching, and posting protected content on the internet. For these reasons, this Court should grant defendants' Special Motion to Strike and award them their reasonable costs and attorney fees incurred herein.

Dated this 29th day of January, 2016.

/s/ Lauren C. Regan
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CERTIFICATE OF SERVICE

I, Lauren C. Regan, certify that on January 29, 2016, I caused to be served by U.S. Mail, first-class postage prepaid, to: Washington County Circuit Court, 150 N. 1st Ave. MS37, Hillsboro, OR, 97124, a true copy of the following documents: Defendants Special Motion to Strike and supporting materials. Electronic service was made to Laura Salerno Owens at laurasalerno@markowitzherbold.com.

Dated this January 29, 2016.

By: */s/ Lauren C. Regan*
Lauren C. Regan, Attorney at Law

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