No. 15-35960

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, *et al*.,

Plaintiffs-Appellees,

v.

LAWRENCE WASDEN, in his official capacity as Attorney General of Idaho,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
Case No. 1:14-cv-00104-BLW

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, incorporated Plaintiffs-Appellees Animal Legal Defense Fund, People for the Ethical Treatment of Animals, American Civil Liberties Union of Idaho, Center for Food Safety, Farm Sanctuary, River's Wish Animal Sanctuary, Western Watersheds Project, Idaho Concerned Area Residents for the Environment, Counterpunch, and Farm Forward hereby certify that they have no parent corporations, and that no publicly held corporation owns more than ten percent of any of the Plaintiff-Appellee organizations.

Dated: June 20, 2016

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JURISDICTIONAL STATEMENT

Because this is a civil rights case arising under the U.S. Constitution, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On November 12, 2015, the district court entered a final judgment declaring Idaho's Ag-Gag Law, I.C. § 18-7042(1)(a)–(d), unconstitutional and permanently enjoining its enforcement. The district court also dismissed without prejudice the remaining preemption claim as moot, but only because relief was granted on the other claims. ER 34–35.

A timely notice of appeal was filed in the district court on December 10, 2015. ER 30–31. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This case challenges the constitutionality of Idaho's Ag-Gag Law, a statute that criminalizes investigative journalism and whistleblowing at factory farms and slaughterhouses. The law's purpose was to suppress exposés of the agricultural industry, and its effect is to turn whistleblowers into criminals. This appeal concerns whether the district court correctly concluded that the Ag-Gag Law violates the First and Fourteenth Amendments of the Constitution. Specifically:

(1) Whether the First Amendment protects misrepresentations that merely conceal a journalistic purpose, fail to announce political or ideological affiliations, or understate credentials and experience.

(2) Whether I.C. § 18-7042(1)(d)'s ban on all audiovisual recordings of particular conduct of public concern—the "conduct of an agricultural

production facility"—is inconsistent with the First Amendment protections for recording as either pure speech or conduct preparatory to speech.

(3) Whether the ample legislative record of hostility towards Plaintiffs supports the district court's finding that the law was motivated at least in part by animus. And if so, whether the existence of animus as one of the motivations for the law triggers a more careful scrutiny under the Equal Protection Clause that this law cannot survive.

INTRODUCTION

It is difficult to imagine that a state would criminalize efforts to expose wrongdoing on matters of public concern. It almost goes without saying that laws that criminalize recording child abuse at a daycare facility, or prohibit documenting and exposing elder abuse at private nursing homes, would violate the First Amendment because they directly restrict expressive activity.

Idaho's Ag-Gag Law stands on no better constitutional footing. A long-time employee can be convicted for videotaping life-threatening safety violations such as a blocked fire escape. Moreover, it severely chills the vital American tradition of undercover reporting by journalists who investigate wrongdoing, criminalizing the "misrepresentations" (including omissions) of media or political affiliations.

The State disputes the characterization of these laws as impinging on whistleblowing, or even speech. But it is beyond dispute that animal rights and

food safety groups responsible for exposing inhumane and unsanitary conditions,[1] award-winning journalists documenting misconduct,[2] academics studying agricultural abuse,[3] and historical icons like Upton Sinclair[4] are all criminals under this law. The law would criminalize some of the most famous undercover journalistic and activist exposés in American history.

Undercover investigations in industrial agricultural facilities are of tremendous political and public concern. In recent years, undercover investigations of animal agriculture facilities have revealed systematic and horrific animal abuse, led to food safety recalls and citations for environmental and labor violations, and

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[1] *See, e.g.*, *Cruelty Investigation Prompts Massive Recall of Beef*, J. Am. Vet. Med. Ass'n News (Mar. 1, 2008), https://www.avma.org/News/JAVMANews/Pages/080315e.aspx [https://perma.cc/K5S5-XRKA]; Humane Society of the United States, *Slaughterhouse Investigation: Cruel and Unhealthy Practices* (Jan. 30, 2008), https://www.youtube.com/watch?v=zhlhSQ5z4V4; Mercy for Animals, Undercover Video of Bettencourt Dairies in Idaho (Oct. 10, 2012), https://www.youtube.com/watch?v=zhlhSQ5z4V4; Animal Legal Def. Fund, ALDF Investigation Exposes Tyson Cruelty (Sept. 14, 2015), https://www.youtube.com/watch?v=d8PO3MQaDts.

[2] Brooke Kroeger, *Undercover Reporting: An American Tradition*, IRE J. 20 (2014) (documenting that Pulitzer Prize winners over the years engaged in agricultural investigations).

[3] Timothy Pachirat, Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight (2011).

[4] ER 7 (citing William A. Bloodworth, Jr., Upton Sinclair 45–48 (1977)) (posing as an employee at a meat-packing plant in Chicago near the turn of the century, Sinclair documented atrocious working conditions and food safety and animal welfare issues).

contributed to plant closures and criminal convictions. ER 70, 309–10. For example, surreptitious video recordings made by undercover investigators employed at a California slaughterhouse precipitated the largest federal recall of beef in U.S. history. ER 309. The safety of our food and the well-being of the animals used for food are issues of increasing public concern.

Not surprisingly, many agricultural operations are eager to hide their practices from public scrutiny.[5] To this end, powerful animal agriculture industry groups like the Idaho Dairymen's Association (IDA) have made enacting farm-secrecy statutes a top legislative priority. Indeed, at IDA's behest, Idaho's legislature enacted one of the broadest Ag-Gag statutes in the country to shield Idaho dairy operators and other farmers from undercover investigations and whistleblowers who expose the agricultural industry to regulators and the public.

In its opening brief, the State attempts to paint the statute as nothing more than a benign, content-neutral effort to protect agricultural facility owners' private property rights. The State's efforts at camouflaging this blatantly unconstitutional law are unavailing; in reality, the statute is an unprecedented restriction on speech

[5] "One of the best things modern animal agriculture has going for it," an animal husbandry textbook explains, "is that most people in the developed countries are several generations removed from the farm and haven't a clue how animals are raised and processed." Peter Cheeke, Contemporary Issues in Animal Agriculture 248 (2d ed. 1999).

that that is subject to—and fails—strict scrutiny. This Court should affirm the district court's order.

STATEMENT OF THE CASE

I. The Origins of Idaho's Ag-Gag Law.

In 2012, during an undercover investigation at an Idaho dairy, an animal rights group captured "a video of workers using a moving tractor to drag a cow on the floor by a chain attached to her neck and workers repeatedly beating, kicking, and jumping on cows." ER 1. The district court found that "the Idaho Dairymen's Association ... responded to the negative publicity by drafting and sponsoring a bill that became Idaho Code § 18-7042." ER 2.

The legislative history for I.C. § 18-7042 is replete with evidence that the law's purpose was to suppress the speech of an unpopular group: animal rights activists. ER 42–301. During the legislative debates, Idaho's lawmakers compared animal rights investigators to "marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission." ER 4. The same senator compared undercover animal welfare investigations to "terrorism, [which] has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety" and, referring to the bill, said "[t]his is the way you combat your enemies." *Id.* The president of IDA testified that the law was necessary because of the animal rights groups' use of media: "you

don't stand up on a soapbox and broadcast [complaints about environmental or animal cruelty violations on Idaho farms]." ER 124. Members of the State's House of Representatives made similar remarks, including describing animal welfare activists as "extreme activists who want to contrive issues simply to bring in the donations." ER 4. Another legislator accused animal rights workers of taking the dairy industry "hostage" and seeking to "persecute[]" its members "in the court of public opinion." *Id.* Similarly, the drafter of the legislation, Dan Steenson, said the law's goal was to shield Idaho dairymen from undercover investigators who seek to expose the agricultural industry to the "court of public opinion." ER 5. He accused animal welfare investigators of "implement[ing] vigilante tactics" in the hope of exposing animal abuse. *Id.* Another supporter of the bill called the groups "terrorists" who "*use media* and sensationalism to attempt to steal the integrity of the producer and their reputation, and their ability to conduct business in Idaho by declaring him guilty in the court of public opinion." *Id.* (emphasis added).

II. The Scope of Idaho's Ag-Gag Law.

Motivated by these sentiments, Idaho's legislature enacted I.C. § 18-7042, which makes it a crime to conduct an undercover investigation at an Idaho agricultural facility, punishable by as much as a year in prison. The Ag-Gag Law also criminalizes whistleblowing activity that involves any videography at an

animal agricultural facility that is not pre-approved by the owner. I.C. § 18-7042(1)(a)–(d).

Specifically, the Ag-Gag Law creates a crime labeled "interference with agricultural production." The first three subsections criminalize conduct related to "misrepresentation": (a) "enter[ing]" an agricultural production facility by misrepresentation; (b) obtaining records of an agricultural production facility by misrepresentation; and (c) obtaining employment with an agricultural production facility by misrepresentation with "the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers." A fourth provision, subsection (d), makes it a crime for any person to enter an agricultural production facility that is not "open to the public" and make an audio or video recording of "the conduct of an agricultural production facility's operations" without the owner's consent.

In addition to authorizing the government to lock up investigators and whistleblowers in jail, the Ag-Gag Law punishes investigators and whistleblowers by requiring them to pay publication damages for harm to the business's reputation flowing from the investigation and subsequent publication. I.C. § 18-7042(4). This "restitution" clause allows the industry to recover twice the actual damages for the harm caused by an undercover investigation, including the harm caused by publication of an exposé. *Id.* Under the law, the most effective acts of

whistleblowing—those revealing particularly egregious misconduct by industry—are potentially subject to severe financial penalty in addition to criminal liability.

The Ag-Gag Law defines "agricultural production facility" so broadly that the ban on whistleblowing applies not only to industrial factory farms and slaughterhouses, but to any facility, "without limitation," that is involved in agricultural production, including "construction" or maintenance of a facility; the "handling or applying [of] pesticides [or] herbicides"; any "planting, growing, fertilizing or harvesting" of crops; the breeding or raising of any animals; and even the "processing and packaging of agricultural products into food." *Id.* § 18-7042(2)(a)(i)–(vii).[6]

In short, Idaho's Ag-Gag Law places any investigation strategy that would reveal the conditions inside an Idaho agricultural facility at risk of criminal prosecution, and thus undermines Plaintiffs' speech activities—organizations and

[6] I.C. § 18-7042(1)(a)–(c) apply to any agricultural facility. This means that an effort to engage in an undercover investigation of 4-H programs through a public park system would be covered, *id.* § (2)(a)(iv), as would applying for employment at a puppy breeding facility, or even pretending to be interested in the wares of a pet store in order to document the conditions of the animals, *id.* § (2)(a)(v). Only § 18-7042(1)(d) limits its application (bans on recording) to places "not open to the public." But even as to subsection (d), this means, among other things, that any place that is not open to the public and that "process[es] and pack[ages]" food, including a country club, a Costco butcher's department, or a nursing home, are fairly within the sweep of this statute. *Id.* § (2)(d)(vi).

individuals who conduct investigations or rely on them for their advocacy, reporting, and research.

III. Proceedings Below.

Plaintiffs—the Animal Legal Defense Fund and other animal and human rights organizations, journalists, and workers' associations—challenged this law on the ground that it violates constitutional guarantees of freedom of speech, freedom of the press, and equal protection, and because federal laws protecting whistleblowers preempt the State's law under the Supremacy Clause. After prevailing at the motion to dismiss stage, Plaintiffs moved for summary judgment. The record includes the complete legislative transcripts of the debate surrounding the Ag-Gag Law and affidavits from the individual Plaintiffs. The State did not offer any factual evidence.

The district court granted summary judgment in Plaintiffs' favor and permanently enjoined the enforcement of the Ag-Gag Law, I.C. § 18-7042(1)(a)–(d). ER 34–35. Recognizing that a contrary conclusion would undermine the entire field of undercover journalism, thwart whistleblowing, and deliberately chill speech on matters of public concern, the district court concluded that the recording and misrepresentations criminalized by the law enjoy First Amendment protection. ER 6–7, 9–12, 18–23. The district court also found that the law was content-based because its purpose and effect were to insulate a single industry from media

scrutiny, or what the law's supporters repeatedly referred to as being tried "in the court of public opinion." ER 4–5, 8–18. Accordingly, the court applied strict scrutiny and struck the law down. The court also granted summary judgment to Plaintiffs on the ground that the Ag-Gag Law violated the Fourteenth Amendment's Equal Protection Clause because it was substantially motivated by animus against animal rights activists. ER 23–28.

SUMMARY OF THE ARGUMENT

This nation has a long and proud history of whistleblowing.[7] The sort of whistleblowing pursued by Plaintiffs lies at the heart of the First Amendment. Undercover exposés on matters of public concern serve the core purposes of free speech—facilitating the search for truth and promoting democratic self-governance—and thus a limit on such activities, particularly a content-based limit, "must survive the highest level of scrutiny to pass constitutional muster." ER 354.

1. Lies that do not cause material harm are a form of pure, protected speech. The Ag-Gag Law criminalizes a vast swath of lies that serve as the

[7] *See, e.g.*, Undercover Reporting, http://dlib.nyu.edu/undercover/ (last visited June 15, 2016) (cataloguing undercover investigations); Brooke Kroeger, Undercover Reporting: The Truth About Deception (2012) (the much maligned field of undercover or surreptitious journalism has yielded some of the most important stories in the history of journalism).

time-honored tools of the trade for undercover investigations by political activists and investigative journalists alike. Simply put, if a gratuitous lie about winning military honors in order to secure credibility among the community is protected speech, *United States v. Alvarez*, 132 S. Ct. 2537 (2012), then the techniques at issue in this case—omissions[8] and other misrepresentations offered in order to document non-intimate matters of considerable public concern—are protected by the First Amendment. Unlike lies that cause material harm or impede the truth, the misrepresentations prohibited by the Ag-Gag Law actually *facilitate* the discovery of truth on matters of public concern and inform public discourse.

2. Recording matters of public concern is also a form of protected expression, and a content-based limit on such recordings triggers strict scrutiny. Moreover, this case does not require a holding that all recording is equal in the eyes of the First Amendment. Quite the contrary, this Court need only recognize

[8] In its opening brief, the State defines "misrepresentation" as including only overt lies, but its selective quotation of Black's Law Dictionary betrays its argument. Misrepresentations—as opposed to a distinct term of art, "affirmative misrepresentations"—are understood to "include[] [c]oncealment or even non-disclosure." Black's Law Dictionary (10th ed. 2014). It is well established that misrepresentations can take the form of either affirmative misrepresentations or concealed omissions. *See Universal Health Servs. v. United States ex rel. Escobar*, No. 15-7, 2016 WL 3317565 (U.S. June 16, 2016) (recognizing liability for statutory misrepresentations based on a failure to disclose material details); *Bethlahmy v. Bechtel*, 415 P.2d 698, 702–05 (Idaho 1966); *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1027 (Idaho 1987).

First Amendment protections for recordings made for political purposes on matters of public concern in industrial facilities that have greatly reduced expectations of privacy.[9]

3. The recording and misrepresentation restrictions in the Ag-Gag Law are content-based in multiple ways. The restriction on misrepresentations distinguishes between the subject matter or the form of the speech (truth and falsity), and does so to protect a single industry. The ban on recording is also facially content-based insofar as it applies only to recording agricultural-related conduct. Far from a "semantics" game, Appellants' Opening Br. at 29, ECF No. 11, the ban on recording certain activities is a quintessential content-based restriction, *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (recognizing a law as content-based if it "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed'"). Moreover, both the recording and misrepresentation provisions were enacted "'because of disagreement with the message' [the speech] convey[s]," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222

[9] Unlike the Ag-Gag Law, regulations banning voyeurism in bathrooms or peeping-tom behavior do not address matters of public concern and do implicate legitimate, tangible privacy concerns. Likewise, the home enjoys unique legal protections based on its primary role in individuals' lives that are inapplicable to industrial facilities. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 818 n.6 (9th Cir. 2002); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995).

(2015), and a desire to avoid the industry being persecuted in the "court of public opinion," ER 4, and thus must be deemed content-based.

4. The statute cannot withstand strict scrutiny, because it is not narrowly tailored to achieve a compelling government interest. At the outset, the State has failed to identify a compelling government interest at stake. The State cannot simply invoke "privacy" and "property" as talismans when the true purpose of the statute—as evidenced by its context and legislative history—is simply the suppression of speech. Certainly the State has no compelling interest in protecting factory farms' privacy to harm animals, compromise food safety, and abuse workers, just as it has no compelling interest in consecrating a type of private property that substantially and pervasively affects the public interest.

5. Even if the State had compelling interests, the law is not narrowly tailored to achieve those interests, nor is it the least restrictive means of doing so. The status quo, through laws prohibiting trespass, theft, property damage, defamation, and fraud, as well as laws ensuring employers' right to hire and fire at will, already use the least restrictive means of protecting privacy and property rights. Adding to those laws a statute that criminalizes undercover investigations on matters of great public importance does little, if anything, to promote those interests.

6. The presence of animus is sufficient to trigger heightened review under both the First and Fourteenth Amendments. Idaho's law cannot withstand either strict scrutiny under the First Amendment or careful scrutiny under heightened rational basis review because the law is not carefully tailored, much less narrowly tailored, to the asserted government interests.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo," *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011), and "may affirm summary judgment on any ground supported by the record." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) (internal quotation omitted). Summary judgment is appropriate where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also* Fed. R. Civ. P. 56(c). Here, there are no disputes regarding any material facts in connection with Plaintiffs' motion for summary judgment.

ARGUMENT

I. The Journalistic and Investigative Misrepresentations Targeted by the Ag-Gag Law Are Speech Protected by the First Amendment.

The Ag-Gag Law indiscriminately criminalizes misrepresentations used to gain access to agricultural facilities to investigate matters of public concern, including the sort of misrepresentations (by act or omission) frequently used by

investigators to conceal their journalistic purpose, such as failing to announce political or journalistic affiliations, or understating credentials, education, and experience. These techniques fall squarely within the existing protections of the Court's First Amendment doctrine, as the district court recognized.

The State makes two primary arguments about the misrepresentation provisions. First, it claims that the Ag-Gag Law regulates conduct rather than speech, and thus that the misrepresentations at issue are unprotected. Opening Br. at 13–15. Second, it argues that the district court was wrong to conclude that the misrepresentations regulated by the Ag-Gag Law cause no material harm. *Id.* at 15–22. These arguments both conflict with well-established First Amendment doctrine and understate the scope of the Ag-Gag Law.

A. The Ag-Gag Law's Criminalization of Investigative Misrepresentations is a Prohibition of Speech Protected by the First Amendment.

Contrary to the State's claims, the misrepresentation provisions of the Ag-Gag Law, I.C. § 18-7042(1)(a)–(c), criminalize pure speech. As the district court found in denying the State's motion to dismiss, "it is a fallacy to suggest, as the State does, that the misrepresentation provisions prohibit only conduct and not speech. Under no reading of the statute does a prohibition against telling lies become a prohibition of conduct. False speech is still speech—period." ER 347.

Although the State argues that these provisions regulate conduct, the statute makes plain that the key is the speech attendant to undercover investigative techniques itself. Subsection (a), for example, criminalizes the speech of misrepresenting oneself in order to enter an agricultural production facility. Similarly, subsections (b) and (c) prohibit misrepresentations used to gain access to records or obtain employment at an agricultural production facility. The Ag-Gag Law is readily distinguishable from laws regulating non-speech related to access to property, such as laws prohibiting breaking and entering, trespass, or theft of records, or indeed from the other provisions of the statute, such as the ones prohibiting gaining access by force and destruction of property. I.C. § 18-7042(1)(b), (e). The linchpin for criminal liability is pure speech in the form of a misrepresentation. As the district court found in rejecting the State's motion to dismiss, the conduct that the State focuses on, where it is a crime at all, amounts to trespass or conversion, which are already prohibited by law. ER 348. Thus, the distinguishing feature of the Ag-Gag Law is the prohibition of investigative misrepresentations to facilitate access to a facility, a form of pure speech.

Moreover, the investigative misrepresentations at issue in this case promote, rather than detract from, First Amendment values. The rationale for the notion that some lies are not protected by the First Amendment is that lies generally distort rather than facilitate the search for truth. It has generally been assumed that lies are

protected as a means to an end, as a way of providing "breathing space" for speech that actually serves a valuable role in society. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964). However, lies used to reveal and disclose information of great public concern—high-value lies—warrant rigorous First Amendment protection. These lies facilitate rather than impede truthful discourse and transparency on matters of public concern.

B. Under *Alvarez*, the Ag-Gag Law's Misrepresentation Provisions Are Unconstitutional Because the False Speech at Issue Does Not Cause Any Legally Cognizable Harm and Is Not Made for Material Gain.

In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court relied on the First Amendment to invalidate the conviction of a man who lied about having been awarded the Medal of Honor. In striking down the Stolen Valor Act, the majority fractured into a plurality; however, all six justices concurring in the result agreed there is no "general exception to the First Amendment for false statements." *Id.* at 2544; *id.* ("[s]ome false statements are inevitable if there is to be an open and vigorous expression of views"); *id.* at 2551 (Breyer, J., concurring in the judgment).

The lie at issue in *Alvarez* was valueless to society—"a pathetic attempt to gain respect that eluded [Alvarez]," *id.* at 2542—and the government had identified a variety of harms to the military community when its honors are "dilut[ed]" by those who falsely claim to hold them, *id.* at 2549. Nonetheless, six

justices in *Alvarez* recognized that even a worthless, truth-impeding lie is protected by the First Amendment unless it causes legally cognizable harm to the deceived party. *Id.* at 2547; *id.* at 2551 (Breyer, J., concurring in the judgment).

1. The Only "Harm" Flowing from the Misrepresentations at Issue Derives Not from the False Speech Itself, but Rather from Subsequent Publication of Truthful Information on Matters of Public Concern.

Alvarez articulated a limiting principle for prohibiting lies: the government may restrict false statements of fact only when those statements cause a "legally cognizable harm." 132 S. Ct. at 2545; *id.* at 2551 (Breyer, J., concurring in the judgment). On this point six of the justices were in agreement. *See United States v. Davis*, No. 13-30133, 2016 WL 3245043, at *5 (9th Cir. June 13, 2016) (en banc) (identifying shared reasoning as the hallmark of plurality precedent). Thus, for example, it does not violate free speech guarantees when a state prohibits lies that directly cause concrete financial losses, as in cases of true fraud, or injury to the court's truth-seeking function, as with perjury. *Id.* at 2546 ("Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'"). It is this type of harm that the State refers to in its heavy reliance on *Illinois ex rel. Madigan v. Telemarking Associates, Inc.*, 538 U.S. 600 (2003). *See* Opening Br. at 18 (Illinois law "was designed to protect people *from parting with their money* based on misrepresentations" (emphasis added)). But the Ag-Gag Law

addresses no such cognizable harm. The investigative techniques at issue in this case do not cause cognizable legal injury.

In an effort to elude the requirement of concrete harm as a precondition of considering lies as potentially outside the scope of the First Amendment, the State attempts to carve out what it calls a "less tangible" harm. Opening Br. at 10. What the State calls a "less tangible" harm, however, is not a cognizable harm at all. The State devotes significant energy to making the mundane and uncontested point that property owners enjoy rights of dominion and "control" over their property. *Id.* at 8–12 (conflating the right to engage in speech by one lawfully present, such as an employee, a customer, or a job applicant, with general rights of "access"). The Ag-Gag Law, however, has nothing to do with a private owner's ability to control her property. She can exclude persons because she does not trust them, or she does not like their attitude, or even if she simply finds their speech annoying or boring. It is one thing for a property owner to have control of his property; it generally does not implicate the Constitution. It is another matter altogether for the State to criminalize pure speech, including political or journalistic misrepresentations that are made by persons who are lawfully present at the time they make the misrepresentation. To be sure, a property owner has the right to exclude liars from her property. But the State errs in assuming (without authority) that entry gained

by political misrepresentations, of the sort alleged in this case, is effectively a trespass—an encroachment on one's right to control and exclude.

Entry gained by misrepresentations, whether affirmative or by omission, is not a trespass and the State cites no authority to suggest otherwise. In the lower court the State argued that a single out-of-circuit decision, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), supported the claim that entry by deception was a trespass. At most, *Food Lion* recognized that "generally applicable" common law torts, such as an action for breach of the "duty of loyalty," did not violate the First Amendment. *Id.* at 521. That court did not and *could not* authorize a new statute like the Ag-Gag Law at issue in this case, where the text and legislative history establish the law is targeted at certain types of speech (such as recording and deception at agricultural facilities), because this language and purpose demonstrate the law is not generally applicable and thus mandates strict scrutiny. The nominal damages of a few dollars that were awarded against the investigator defendants in that case were purely and exclusively the result of a breach of a contractually agreed-upon term, and thus gave rise to a cause of action for a breach of the employees' duty of loyalty. *Id.* at 518 ("the reporters committed trespass by breaching their duty of loyalty").

More generally, Plaintiffs are aware of no court upholding criminal penalties for undercover investigations. The case that comes closest (in the civil realm) is

Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971)[10], but this case provides no support for the proposition that deception used to gain access falls outside the protection of the First Amendment. Despite the journalists' lies in inducing Mr. Dietemann to invite them into his home, the Ninth Circuit held that Time Magazine's detailed written account of everything that was observed by the reporters received full speech protection. *Id.* at 249 ("One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves."). Thus, far from holding that deception-based entries are unlawful or tantamount to trespass, *Dietemann* actually supports the view that persons assume the risk that an invited guest may be a false friend and publish an account of what he observes.

The State's proffered approach would effectively strip First Amendment protection from nearly all lies. Nearly every misrepresentation causes at least some nominal or symbolic harm, but that alone does not preclude First Amendment protection. For instance, lies might cause purely emotional or psychic harms, such as when one pretends to be friends with another to curry favor or advantage (or an invitation to dinner), or when one falsely claims to enjoy the company of another, including a coworker or boss. But these are not the types of cognizable harms that

[10] *See infra* note 18 noting that the recording limit implied by *Dietemann* has been overruled.

Alvarez recognizes as justifying criminal prohibition. To read *Alvarez* as stripping protection when a lie causes nominal harm is to deprive the decision of any meaning. The specific examples that the plurality identified in *Alvarez* of unprotected lies involve damage caused by the lie that is more than nominal or symbolic: defamation involves concrete injury to reputation and fraud causes its victims to part with money because of the lie. *See Alvarez*, 132 S. Ct. at 2545. Even some false statements that cause more than nominal injury enjoy a degree of constitutional protection. *See, e.g.*, *N.Y. Times Co.*, 376 U.S. at 271 (holding that published false statements that cause reputational injury are entitled to constitutional protection, except in certain cases).

If the harm involved here is really what the State now argues it is—some impact on a property owner's right to ownership and control—then the Ag-Gag Law is an unconstitutionally poor vehicle for solving that problem. Preexisting and generally applicable trespass laws already protect property rights without chilling protected speech and other First Amendment rights. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (compelled disclosure of group membership—which is what the Ag-Gag Law does here—infringes freedom of association). And if the State wants to expand the scope of its generally applicable trespass laws by, for example, not requiring proof that the property is posted with no trespassing signs, *see* Opening Br. at 40 n.6, the State is free to do so in a

content-neutral, generally applicable manner. Likewise, the State could provide more rigorous protections for trade secrets in a manner that is narrowly tailored to address a legally cognizable harm. But such laws are vastly different than codifying a new, industry-specific prohibition on certain forms of speech in the guise of protecting property owners from a "trespass." The scope of the Ag-Gag Law belies the claim that the law does not trigger First Amendment scrutiny. *See McCullen*, 134 S. Ct. at 2532 (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451–452 (1996) (noting that the scope of a statute is one useful data point in divining an improper legislative motive to "burden a narrower category of disfavored speech.")).

The reason for the over-inclusivity of the Ag-Gag Law is transparent. The harm that Idaho's legislature sought to avoid was having Idaho's agricultural practices tried in the court of "public opinion." The legislative history is replete with references to this concern. ER 111, 125, 137, 187, 203, 208, 219, 266. But it is also clear from the text of the statute. That is, the harm the State sought to avoid was *publication damages*. *See* I.C. § 18-7042(4). However, non-defamatory reputational injuries are not the type of cognizable harm that justify speech restrictions under *Alvarez*. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52

(1988) (holding that harm from reputational injury is not cognizable outside of the limits imposed by defamation). As the district court explained:

> [T]he most likely harm that would stem from an undercover investigator using deception to gain access to an agricultural facility would arise, say, from the publication of a story about the facility, and not the misrepresentations made to gain access to the facility.

ER 11 (internal citations omitted).

The desire to avoid publication-related harms was the predominant purpose articulated for the law and the State cannot now pivot to a new justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975))); *Califano v. Goldfarb*, 430 U.S. 199, 223–224 (1977) (Stevens, J., concurring in the judgment). The very purpose of strict scrutiny is to smoke out improper motives couched between otherwise perfectly proper and compelling government interests. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

2. The Lies at Issue Are Not Made for the Type of "Material Gain" Contemplated by Dicta in *Alvarez.*

The State argues that section (1)(c)[11] limits lies to gain employment, and emphasizes dicta from *Alvarez* noting that generally "false claims . . . made to effect a fraud or secure moneys or other valuable considerations [such as] offers of employment" do not enjoy First Amendment protection. Opening Br. at 18–21 (citing *Alvarez*, 132 S. Ct. at 2547). Of course this is true in the sense that lies that are best classified as fraud—such as overstating one's qualifications for a job, which Plaintiffs' investigators do not do—can be punished. However, when read in the context of the broad protection for lies announced in *Alvarez*, it is clear that the Court's dicta, even if it were somehow construed to announce a rule, is not intended to apply to undercover investigations (employment-based or otherwise). The "offers of employment" example from *Alvarez* is irrelevant to the case at hand.

The goal of undercover employment-based investigations is not to "secure moneys or other valuable considerations" for the investigator, as it would be for a run-of-the-mill job applicant, but rather to expose threats to the public. *Alvarez*, 132 S. Ct. at 2547. These investigations may in some instances require false statements, but there is no causation or injury attributable to the statements because

[11] Any argument that section 1(a)—gaining access by misrepresentation—gives rise to the sort of harm (or gain) contemplated by *Alvarez* as falling outside the First Amendment is even more strained. *See supra* Section I.B.1.

the investigators are qualified (or over-qualified) for all the work they apply to do, complete all their assigned tasks in the course of their work, do not physically damage the property, and commit no injurious fraud.[12] There is no cognizable legal injury to the interests of a large industry that is subjected to a truthful whistleblowing campaign, and nothing in *Alvarez* suggests that the government has any legitimate interest in (perversely) restricting freedom of speech and the press to shield wrongdoers and their dangerous conduct from public exposure.

Second, the law's employment provision, I.C. § 18-7042(1)(c), criminalized far more than lies made for material gain. The record in this case does not contain any evidence that the investigations Plaintiffs conduct involve any actionable fraud for money or valuable consideration. ER 12 ("[T]he State has submitted no evidence that the lies an undercover investigator might tell or the omissions an investigator might make to gain access or secure employment at an agricultural production facility are made for the purpose of material gain."). At most, *Alvarez* confirms that the State could sanction a person who overstates her education or experience to get a job for which she otherwise would not have qualified, whether the person is an undercover investigator or not. But the Ag-Gag Law here criminalizes even reporters who are fully qualified for the job they get, but merely

[12] The State did not allege a material question of fact on these issues below, and does not (and could not) do so for the first time in this Court.

fail to disclose their political or journalistic associations on a job application (or interview) that asks for them. The prohibition of such lies simply insulates wrongdoers from accountability by allowing them to hide their dangerous conduct from public scrutiny.

Gleaning a rule from the "material harm" dicta in *Alvarez*, and finding that it justifies the Ag-Gag Law here, would reduce the requirement of harm to a meaningless limiting principle; every trivial, psychological harm, including suffering the presence in commercial facilities of someone who does not necessarily like his boss, would constitute a material harm. Courts have not been willing to define harm so broadly; indeed, not even the wages paid to an undercover investigator constitute harm to the employer so long as the person fulfills his employment responsibilities. *See, e.g.*, *Food Lion*, 194 F.3d at 514. Of course, employers are free to remove anyone from their property or to fire persons they do not trust or who are not doing their job safely or effectively. But an industry-specific, content-based restriction on speech is not the appropriate legislative vehicle for targeting inefficient or ineffective employees.

Moreover, the undisputed factual record in this case established that Plaintiffs' investigators complete all their assigned tasks in the course of their work and do not physically damage the property. *See* ER 416–17 at ¶ 86. The district court explicitly found that the State submitted no evidence "to show the lies it

seeks to prohibit cause any legally cognizable harm." ER 11. The State did not contest the factual evidence establishing these investigations are not injurious. Accordingly, summary judgment was warranted in this case as a matter of law, but alternatively because the State failed to demonstrate a genuine dispute of material fact.

In sum, *Alvarez* recognizes that most lies enjoy First Amendment protection. Only those lies that cause direct, cognizable harm—not the non-defamatory public exposure that follows when inhumane and unsafe industrial practices are caught on tape—fall outside the First Amendment's protection. It would be perverse to protect one's gratuitous and valueless lies about winning the Medal of Honor, while leaving unprotected the sort of lie that made the investigative journalism tradition famous, and which has spurred food safety and animal welfare reforms repeatedly in the past century. In the context of a highly regulated, federally subsidized industry that produces food for school lunch programs and the nation at large, misrepresentations about one's press and political affiliations, for example, necessarily fall within the ambit of *Alvarez*'s protections.[13]

[13] Even if the false statements are found to be unprotected speech, if the Ag-Gag Law is content-based it is still invalid under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (noting that an ordinance, even when limiting

Moreover, not all lies are created equal. Even assuming *arguendo* that *Alvarez* could be read so as not to fully protect the lies at issue in this case, the misrepresentation provisions of the Ag-Gag Law are still unconstitutional. The lies protected in cases like *Alvarez* are low-value lies that have at best a tangential or more likely adversarial relationship with the underlying goals of the First Amendment in facilitating truth and a marketplace of ideas. These lies are protected so that there is "breathing space" for persons who attempt to tell the truth. But the misrepresentations criminalized by the Ag-Gag statute directly serve the core purposes of the First Amendment by exposing truth and facilitating debate on issues of considerable public interest.[14] Thus, the *high-value* lies at issue in this case are uniquely valuable and not subject to whatever limiting principles the State attempts to glean from the fractured opinion in *Alvarez*. No case to date has explicitly considered the First Amendment protection for lies that facilitate truth

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only unprotected "fighting words," would be struck down if it was a content-based proscription).

[14] Similarly, this case does not raise the distinct concerns that might arise if a law criminalized access or recording relating only to purely private or intimate details, as opposed to commercial interests. To be sure, the First Amendment provides heightened protection for speech-related activities that relate to matters of public concern. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *Dunn & Bradstreet v. Green Moss Builders, Inc.*, 472 U.S 749, 759 (1985).

through investigative journalism, but presumably the protection afforded such lies would be greater than that provided in *Alvarez*.

II. Electronic Image Capture Is a Form of Speech Protected by the First Amendment.

The district court held that the Ag-Gag Law's ban on recording certain conduct is both a restriction on speech and a content-based restriction. The State argues that the court was wrong on both counts. For the reasons set forth in this section, the district court was correct and the State's arguments to the contrary are unavailing.

In a society where cameras are everywhere and video has become the dominant vehicle of our culture's memes,[15] to control what the society can record is to control what it can communicate. Though paper, pencil, and film were the tools we used to interpret our experiences and process our thoughts in the last century, those have all been supplanted by the smartphone, each equipped with advanced videorecording technology. *See Riley v. California*, 134 S. Ct. 2473,

[15] A "meme" is "an idea, behavior, style, or usage that spreads from person to person within a culture." Merriam-Webster, "meme," www.merriam-webster.com/dictionary/meme [https://perma.cc/5NQY-5TES]; *see also Richard Dawkins explains the real meaning of the word "meme,"* YouTube, https://www.youtube.com/watch?v=6iHZi-z7H4o (last visited June 15, 2016). This Court has recently noted, for instance, that YouTube, just one video sharing service, "boasts a global audience of more than one billion visitors per month." *Garcia v. Google, Inc.*, 786 F.3d 733, 737–38 (9th Cir. 2015) (en banc).

2484 (2014) ("[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). To control how we use these devices is not just to control how we communicate. It is to limit how we think.

In these times, more than ever before, audiovisual recording is pure speech because it is how we have come to express ourselves. Recording images and sounds also requires First Amendment protection because it is both necessary and preparatory to pure speech. Just like buying and using pens and paper must be protected in order to safeguard written speech, the protection of recording is a necessary precursor to video dissemination, which is unquestionably speech. As the district court correctly held, the restrictions on recording are content-based regulations of expression, and because they apply even to those who are lawfully present on the premises of agricultural production facilities, they violate the First Amendment. ER 13–18.

A. Audiovisual Recording is a Form of Expression.

Audiovisual recording *is* speech. While "[t]he First Amendment literally forbids the abridgment only of speech," courts "have long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). For example, movies and television are a well-recognized form of speech protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S.

495, 502 (1952); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1113 (W.D. Wash. 2010) (finding that a documentary film criticizing the contemporary healthcare crisis was an expressive work regarding a matter of public interest and thus covered by the First Amendment); *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (finding that a reality television series was an expressive work protected by the First Amendment); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (noting that the Constitution is not frozen in time and protections extend to activities that "were unknown to the First Congress," including "electronic communications").

The very act of making an audiovisual recording has expressive qualities that make it a form of speech covered by the First Amendment. This is so even if that recording is never broadcast to others. In the same way that writing down one's thoughts in a diary or taking notes about personal observations is fundamentally speech and fundamental to speech, the act of recording memorializes what a person has seen and experienced, which is an essential component of expressive autonomy because it allows one to formulate ideas and thoughts. Taking a video in 2016 is a critical manner of gathering information that amounts to the "creation of knowledge" itself. *See* Jane Bambauer, *Is Data Speech?*, 66 Stan. L. Rev. 57, 63 (2014). Even basic smartphones and cheap consumer video devices now allow users to add sophisticated filters and complex

video editing techniques, integrated with communication platforms like Twitter and Snapchat.[16] "So much of what we mean lies not just in what we say, or in the exact words we choose, but also in the light that animates our eyes (or doesn't) when we deliver them and the sharpness (or softness) of the tone we use."[17] The "right to speech requires, and assumes, a right to learn new things" and recording limits impede this goal in a way that triggers First Amendment scrutiny. Bambauer, *Is Data Speech?*, 66 Stan. L. Rev. at 63.

Audiovisual recording, in this way, is just a more reliable and verifiable form of note-taking. Not even the State goes so far as to argue that note-taking, which has been a central component of producing speech since at least the invention of the newspaper, is outside the purview of the First Amendment. Today, the reporter's pocket notebook has been replaced by the video-enabled cellphone. *See Riley*, 134 S. Ct. at 2489 ("The term 'cell phone' is itself misleading shorthand

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[16] *See* Snapchat, *What is Snapchat?*, YouTube, https://www.youtube.com/watch?v=ykGXIQAHLnA ("Today, with the advent of the mobile phone and this idea of a 'connected camera,' pictures are being used for talking.") (last visited June 15, 2016); Cornell Computing and Information Science, *Cornell Research Study Shows How Snapchat is Changing the Way We Share Information*, http://www.cis.cornell.edu/cornell-research-study-shows-how-snapchat-changing-way-we-share-information [https://perma.cc/3EQ8-M8YG].

[17] Jenna Wortham, *How I Learned to Love Snapchat*, N.Y. Times (May 18, 2016), http://www.nytimes.com/2016/05/22/magazine/how-i-learned-to-love-snapchat.html [https://perma.cc/QSR2-D673].

. . . . They could just as easily be called cameras, video players, . . . tape recorders, libraries, diaries, [or] albums.").

Videorecording also advances the central values underlying free speech, including promotion of democratic self-governance and facilitating the search for truth. For example, videos can be used to hold public officials accountable for their words and actions as well as allowing citizens to meaningfully participate in public dialogue. *See Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011) ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, . . . but also may have a salutary effect on the functioning of government more generally." (citations omitted)); *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory. Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 341 (2011).

Video has become the currency of communication in the 21st century, and videorecording a nearly instinctive extension of our eyes and experience of the world around us. Criminalizing the camera is today no different than criminalizing the notepad or pocket journal. The videorecording that the Ag-Gag Law targets is pure speech under the First Amendment.

B. Audiovisual Recording Is a Form of Conduct Both Necessary and Preparatory to Expression.

Videorecording is also covered by the First Amendment because it is conduct preparatory to acts of pure expression. Both the Supreme Court and lower

federal courts have routinely analyzed laws that prohibit conduct preparatory to speech under the First Amendment. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (determining that restrictions on campaign spending implicate the First Amendment because they "necessarily reduce[] the quantity of expression"), *superseded by statute as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). First Amendment scrutiny of conduct preparatory to speech is necessary because "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Moreover, the State's suggestion that the protection of pre-speech conduct that facilitates speech is limited to the "unique context" of campaign finance, Opening Br. at 27, ignores the basic reality that all speech can be disaggregated into critical, technically non-speech acts. As this Court has previously recognized, "[a]lthough writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010).

In other words, courts cannot "disaggregate Picasso from his brushes and canvas" or "value Beethoven without the benefit of strings and woodwinds." *Id.* at 1062. In this same vein, audiovisual recording has rapidly emerged in the last thirty years as an invaluable tool for reporters and citizens to capture events that they

witness. Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 Stan. L. Rev. 1, 49 (2016) (recognizing that lower federal courts have often recognized a constitutional right to record as speech-facilitating conduct); *id.* at 4 n.10 (noting the importance of protecting pre-speech acts that facilitate speech "is hardly [a] novel" insight to courts or limited to campaign finance).

It is well established in this circuit that there is a "First Amendment right to film matters of public interest." *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). A more recent Ninth Circuit decision, relying in part on *Fordyce*, recognized the breadth of that ruling by finding that there is a clearly established constitutional right to photograph an accident scene during a public investigation. *Adkins v. Limtiaco*, 537 Fed. Appx. 721, 722 (9th Cir. 2013) (citing *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) and *Fordyce*, 55 F.3d at 439).

Moreover, several other courts have held that recording and photography constitute fully protected speech. *See, e.g.*, *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]hotographs . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."). A particularly notable sister circuit ruling is *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), in which the Seventh Circuit held that "recording is entitled to First Amendment protection." *Id.* at 597. In that case, the court upheld a First Amendment challenge to an Illinois law "banning *all* audio recording of *any*

oral communication absent consent of the parties." *Id.* at 595. The court rejected the argument that recording was simply conduct rather than speech, and held that "[r]estricting the use of an . . . audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id.* at 596 (analogizing to a law banning the taking of notes and holding that "making an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."). Most importantly, the Seventh Circuit recognized that if conduct preparatory to speech, such as audiovisual recording, was not protected by the First Amendment "the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." *Id.* at 597.

In this case, the Ag-Gag Law broadly prohibits all recording of the "conduct of an agricultural production facility." I.C. § 18-7042(1)(d). Thus, it criminalizes the act of audiovisual recording by persons who are lawfully present on the premises of an agricultural production facility, including customers, inspectors, and even long-time employees.[18] The district court correctly found that I.C.

[18] At the early outset of the proceedings below, the State briefly tried to rely on a case from the 1970s, *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), to argue that this Court once blessed restrictions on recording on private property because it is not a public forum. In the 21st century, however, this Court has made

§ 18-7042(1)(d)'s prohibition on audiovisual recording restricts speech and is subject to First Amendment scrutiny because "[p]rohibiting undercover investigators or whistleblowers from recording an agricultural facility's operations inevitably suppresses a key type of speech because it limits the information that might later be published or broadcast." ER 13. In other words, prohibiting an undercover investigator from using his camera is equivalent to taking away Picasso's brushes or Beethoven's instruments. *See* ER 13–14 (quoting *Anderson*, 621 F.3d at 1061–62).

The State also argues unconvincingly that the Ag-Gag Law is not subject to First Amendment scrutiny because it is a generally applicable law that only regulates conduct.[19] The State relies primarily on *United States v. O'Brien*, 391

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plain that even if *Dietemann* remains good law at all, it does not apply outside the context of purely private, non-business hobbies in the home. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 818 n.6 (9th Cir. 2002); *see also Desnick*, 44 F.3d at 1352–53 (Posner, J.) (distinguishing a public clinic from the private home at issue in *Dietemann*).

[19] Below, the State also relied on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). However, *Cohen* only held that members of the press cannot be insulated from accountability when they violate generally applicable, content-neutral laws, such as breaking and entering, when investigating news stories. *Id.* at 669. For example, *Cohen* can be applied to the recent Planned Parenthood case against the Center for Medical Progress. Complaint, *Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress*, No. 3:16-cv-00236-WHO (N.D. Cal. Jan. 14, 2016), where the defendants allegedly set up a fake corporation, trespassed, and deceivingly manipulated video footage to defame members of Planned Parenthood.

U.S. 367 (1968). The State's reading of *O'Brien*, that generally applicable laws cannot offend the First Amendment, is wrong. First, unlike the statute at issue in *O'Brien*, the Ag-Gag Law is not facially content-neutral, so the law is not generally applicable. Moreover, if truly generally applicable laws could not implicate the First Amendment, state governments could constitutionally enact laws that categorically prohibit protesting, political rallies, showing movies, publishing books, or any other speech activity so long as the prohibitions apply to everyone. This of course is not the law.

This Court should affirm the district court's determination that audiovisual recording is a form of speech that is entitled to First Amendment scrutiny.

III. The Ag-Gag Law's Recording and Misrepresentation Prohibitions Are Content- and Viewpoint-Based and Thus Subject to Strict Scrutiny, Which They Cannot Satisfy.

The Ag-Gag Law is content-based, and it cannot survive strict scrutiny. In assessing whether a law is content-based, the Supreme Court recently reiterated a two-tiered approach in *Reed*: "strict scrutiny applies *either* when a law is content based on its face or when the purpose and justification for the law are content based." 135 S. Ct. at 2228 (emphasis added). The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on

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Id. at 14–39. These actions allegedly violated generally applicable, content-neutral statutes like trespass, defamation, and breach of contract. *Id.* at 49–53.

its face." *Id.* at 2222. The second step, if necessary, requires a court to examine the legislative justifications for the law. *Id.* at 2228 ("[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose."). Each section of the Ag-Gag Law is content-based both on its face and by reference to the justification and purpose of the law.

A. The Prohibitions on Misrepresentations Are Facially Content-Based and Therefore Subject to Strict Scrutiny.

The three sections criminalizing misrepresentations, I.C. § 18-7042(1)(a)–(c), are facially content-based in two distinct ways. First, each section discriminates between truthful and false speech, thus imposing a limit applicable only to a specific category of speech based on its content. Second, the law criminalizes misrepresentations only in the context of a single industry: agriculture. It is also viewpoint-based because it singles out speech critical of a single industry for special, disfavored treatment. Such discrimination among the content and viewpoint of speech places the restrictions within the category of facially content-based laws. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–66 (2011) (law that, on its face, was content- and speaker-based restriction is subject to strict scrutiny).

The *Alvarez* plurality applied strict scrutiny, *United States v. Swisher*, 811 F.3d 299, 317 (9th Cir. 2016) (en banc), and strict scrutiny is also warranted here because the lies at issue in this case—*high-value lies*—are uniquely valuable to

free speech. Insofar as a worthless lie of self-promotion that impedes truth may be entitled to strict scrutiny against a law punishing its speaker,[20] then certainly a lie of political or truth-seeking value is entitled to strict scrutiny because of its ties to core First Amendment values of truth-seeking and self-governance. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 635 n.3 (8th Cir. 2011) (applying strict scrutiny because the lie in question was of a political nature); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 14-5335, 2014 WL 6676517, at *3–4 (E.D. Pa. Nov. 25, 2014); *O'Neill v. Crawford*, 970 N.E.2d 973, 973 (Ohio 2012) ("The *Alvarez* court . . . recognized that not only must the restriction meet the 'compelling interest test,' but the restriction must be 'actually necessary' to achieve its interest."); *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 517 (W. Va. 2012) (quoting the plurality opinion from *Alvarez* for the view that "when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives"); *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114, 1123 (Ohio 2014) (assuming the application of strict scrutiny and observing "*Alvarez* does not consider whether the state can ever have

[20] There is no reason to believe that the concurrence, which suggested intermediate scrutiny, has any precedential force. *Alvarez*, 132 S. Ct. at 2551–52 (Breyer, J., concurring). Where no common rationale commands a majority of the Justices, such as disagreement between two significantly different tiers of scrutiny (strict and intermediate), only the result is binding on lower courts. *See Davis*, 2016 WL 3245043 at *5 (clarifying application of the *Marks* rule in this Circuit).

a compelling interest in restricting false speech solely on the basis that it is false so that such prohibition could withstand strict scrutiny").

B. The Prohibition on Recording, I.C. § 18-7042(1)(d), Is Facially Content-Based and Is Therefore Subject to Strict Scrutiny.

Under the Supreme Court's recently reiterated test, a law is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2531. Subsection (d) criminalizes recording the "conduct of an agricultural production facility's operations," thus requiring authorities to view the content of a recording in order to determine whether the law was violated.

For example, the Ag-Gag Law permits an agricultural facility employee to make an unauthorized recording of a staff birthday celebration but makes it a crime for that same employee to make an unauthorized recording of animals being abused by his co-workers as part of the facility's operations. Only the latter recording is of the "conduct of an agricultural facility's operation" as prohibited by subsection (d). As the lower court recognized, "[t]he operative distinction is the message the employee or undercover journalist wishes to convey," ER 27, and only by viewing the recording can an assessment of criminal liability be determined. The recording prohibition is facially content-based.

The State argues in the alternative that even if acts of recording are covered by the First Amendment generally, the First Amendment offers no protection

because the Ag-Gag Law prohibits recording on private property. This argument conflates the *private* right to exclude speech (by request or by contract, for example) with the *government* power to punish speech (by legislation) because it happens to occur on private land. For example, a business like Walmart might prohibit protests or disparaging statements within its stores without implicating the First Amendment. But if the State criminalizes criticizing Walmart on store property, the First Amendment applies with full force. Likewise, the Ag-Gag Law is unconstitutional not because it allows a slaughterhouse owner to have policies on recording, but because the State can imprison someone for recording something that the slaughterhouse owner does not like. *Cf. Alvarez*, 132 S. Ct. at 2551 (plurality) (applying least-restrictive means scrutiny to a criminal ban on false claims in all locations, public and private). Cases refusing to allow property owners to be forced to tolerate speech on their property are entirely consistent with this rule—the Ag-Gag law is a content-based restriction on expression, and the lower court ruling in no way requires owners to suffer expression against their will.

Similarly, viewpoint-based speech restrictions are unconstitutional on private land just as on public land. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). Unbridled discretion to allow or prohibit speech is a form of unconstitutional viewpoint discrimination, even if there is no evidence that the discretion has been used to favor some over others. *Kaahumanu v. Hawaii*, 682

F.3d 789, 807 (9th Cir. 2012). Here, the Ag-Gag Law turns each agricultural facility owner into a government censor with unbridled discretion to prohibit speech he dislikes, backed by the full force of the State's police, prosecutors, and jails. *See* ER 18 ("The recording prohibition gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavorable speech about their facilities."). No matter how private the property, this chilling power over the camera, the press, and the mind is unconstitutional. *See Kaahumanu*, 682 F.3d at 807.

C. The Entire Law Was Motivated by a Desire to Limit Speech Critical of Industrial Agriculture and Is Therefore Content-Based and Subject to Strict Scrutiny.

Even if a law is facially neutral, *Reed* leaves no doubt that a law is also content-based "when the purpose and justification for the law are content based." *Reed*, 135 S. Ct. at 2228; *see also id.* at 2227 (recognizing as content-based laws adopted by the government "because of disagreement with the message [the speech] conveys" (internal quotation marks omitted) (alteration in original)). In other words, legislative motive matters. *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) ("A regulation is content-based if . . . the underlying purpose of the regulation is to suppress particular ideas."); *Valle Del Sol Inc. v.*

Whiting, 709 F.3d 808, 819 (9th Cir. 2013) (examining legislative history that revealed "hostility to day laborer solicitation").

Conclusively determining legislative purpose can be elusive, and thus an improper motive assessment does not have to look for unanimity of legislative purpose "or even that a particular purpose was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The existence of a substantial, improper motive suffices to taint an otherwise valid law. Improper motive can be gleaned from "circumstantial" evidence, including the "historical background" and context for the decision as well as the "impact" of the law. *Id.* at 267–69. The circumstances surrounding the enactment of this law—a reaction to a recent undercover exposé—as well as the impact of the law strongly support the conclusion that the law is content-based. The restitution provision alone, which imposes double damages for publishing the truth, I.C. § 18-7042(4), makes it clear that the point of the law is to chill, suppress, and punish speech based on its content and its viewpoint. It is bad enough to capture the truth on tape, the law says, but the State will punish you doubly if you publish it.

Improper legislative motive can also be identified by reviewing the "contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Arlington Heights*, 429 U.S. at 265). In this case, the legislative

record directly confirms that suppressing speech was "a motivating factor in the decision," *Arlington Heights*, 429 U.S. at 266. ER 16 ("A review of § 18-7042's legislative history leads to the inevitable conclusion that the law's primary purpose is to protect agricultural facility owners by, in effect, suppressing speech critical of animal-agriculture practices."). This finding is confirmed by the entirety of the legislative transcripts. For example:

- "The problem we have here is you can be tried and convicted in the press and on YouTube because everything is so available nowadays." Senate Sponsor, Jim Patrick. ER 169.

- "The dairy industry decided they could no longer be held hostage by such threats. They could not allow fellow members of the industry to be persecuted in the court of public opinion." Representative Gayle Batt. ER 284.

- "These farm terrorists use media and sensationalism to attempt to steal the integrity of the producer and their reputation, and their ability to conduct business in Idaho by declaring him guilty in the court of public opinion." Tony VanderHulst, President of IDA. ER 208.

- "By releasing the footage to the internet, with petitions calling for a boycott of products of any company that bought meat or milk from Bettencourt Dairy, the organizations involved then crossed the ethical line for me." Representative Donna Pence. ER 38. (Rep. Pence also noted that if the boycott and media efforts had not been pursued following the last undercover investigation, "I don't think this bill would ever have surfaced." *Id.*)

The district court cited plenty more in reaching its finding. *See* ER 4–5. This Court should affirm the district court's finding.

D. The Ag-Gag Law Cannot Survive Strict Scrutiny Because It Is Not Narrowly Tailored, nor Is It Necessary to Serve Any Compelling Government Interest.

In *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court stated that "content-based restrictions on speech [are] presumed invalid . . . and that the Government bears the burden of showing their constitutionality." *Id.* at 660. The State has made no factual or legal case in support of a claim that this law could survive strict scrutiny. And for good reason, as strict scrutiny cannot be satisfied in this case.

First, strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994). It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id.* This law's purpose of stifling debate on issues of public concern is not a legitimate, much less a compelling, interest.

Second, a content-based law only survives strict scrutiny if the law is "the least restrictive means" of serving the State's compelling government interest. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 827 (2000). There is no plausible claim that the "content discrimination is necessary to achieve the compelling interest," because a law is not narrowly tailored if a narrower law (such as one targeting employment fraud or trade secrets), or a content-neutral law (such

as a generally applicable trespass law) "would have precisely the same beneficial effect." *R.A.V.*, 505 U.S. at 396; *see also Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (recognizing when existing laws already serve the government's interest, a new law purporting to serve those same interests cannot be considered the least restrictive means). The Ag-Gag Law fails under this scrutiny.

E. Even If Intermediate Scrutiny Applies, the Ban on Investigative Misrepresentations and Recordings Is Unconstitutional.

The Ag-Gag Law also fails even intermediate scrutiny. Under intermediate scrutiny, laws restricting speech must be "narrowly tailored to serve a significant governmental interest," and they must "leave open ample alternative channels for communication of the information." *McCullen*, 134 S. Ct. at 2529, 2534. The prohibitions on misrepresentations and recording cannot survive this level of review. An interest in curbing whistleblowing or preventing journalists and workers from "stand[ing] up on a soapbox," ER 124, is not a legitimate, much less a significant, government interest.

Post-hoc rationalizations for the Ag-Gag Law also fail intermediate scrutiny. For example, supposing the State has a sufficiently significant interest in preventing people from fraudulently obtaining employment and thereby performing jobs they are not qualified to perform, the Ag-Gag Law is not narrowly tailored to that interest because it bars all access, employment and otherwise, and

does so even if the misrepresentations used to gain employment understate credentials or merely omit political affiliations. As this Court en banc recently remarked in a related context in *Swisher*, the criminalized conduct is not "limited to false statements that 'are particularly likely to cause harm.'" 811 F.3d at 315. Or, supposing instead that there are significant government interests in barring recordings of intimate images from the home, or of valuable trade secrets, the Ag-Gag Law is not narrowly tailored to serve those interests either, because it bans all recordings of commercial agricultural operations.

Even if the Ag-Gag Law could be construed as narrowly tailored, it still fails intermediate scrutiny because it does not "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). There is no meaningful "alternative" to videos, which are self-authenticating and have a much more powerful communicative impact. *Compare Kovacs v. Cooper*, 336 U.S. 77, 86–89 (1949) (upholding ban on sound amplification because message could still be delivered via alternative channels with equal effect) *with Anderson*, 621 F.3d at 1067 (rejecting argument that alternative channels of expression were available because a permanent tattoo confers a more powerful message inherent in that form of art).

It is possible to draft a narrowly tailored law to protect employers from unqualified employees or private citizens from peeping-toms. But the Ag-Gag Law

is not remotely tailored, much less narrowly tailored, to accomplish any goal other than preventing undercover whistleblowing, and preventing truthful exposés.

IV. The Recording and Misrepresentation Provisions Are Unconstitutionally Overbroad.

The Ag-Gag Law also violates the First Amendment because I.C. § 18-7042 is unconstitutionally overbroad. The Supreme Court has differentiated between two distinct kinds of overbreadth: "a technical 'overbreadth' claim—*i.e.*, a claim that the ordinance violated the rights of too many third parties"—and a modified facial challenge form of overbreadth, "in the sense of restricting more speech than the Constitution permits." *R.A.V.*, 505 U.S. at 381 n.3. The Ag-Gag Law suffers from both constitutional infirmities.

As an initial matter, "agricultural production facility" is defined so broadly, the prohibitions on lying and recording can apply not only to factory farms and slaughterhouses, but also to public parks, restaurants, nursing homes, grocery stores, pet stores, community gardens, and virtually every public accommodation and private residence in the state, I.C. § 18-7042(2)(a)–(b), thus increasing the risk that the Ag-Gag Law restricts a significant amount of protected speech. *See New York v. Ferber*, 458 U.S. 747, 772 (1982).

Second, the misrepresentation provisions of the law criminalize protected union-organizing activity, including salting, ER 349 (describing protecting union activity of paying organizers to obtain employment by lying about or omitting

union affiliation), and certainly most journalistic endeavors that involve deception to gain access (or the clandestine use of recording devices). This chilling effect on the speech of journalists and unions suffices to render the Ag-Gag Law unconstitutionally overbroad.[21]

Third, the Ag-Gag Law restricts significantly more speech than the First Amendment allows, even if not every application is unconstitutional. *Ferber*, 458 U.S. at 769, 772–73; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002); 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure. § 3531.9 (3d ed. 2016) ("Ordinary severability analysis is in effect modified to hold the regulation invalid 'on its face' even though not every application is unconstitutional."). Criminal statutes must be examined particularly carefully for overbreadth, *City of Houston v. Hill*, 482 U.S. 451, 459 (1987), and the Ag-Gag Law targets a vast range of protected recording and false statements, thus sweeping within its reach a substantial amount of protected speech.

For example, the Ag-Gag Law criminalizes asking to use an agricultural facility's restroom when the motive for the request is investigative, or not mentioning all of one's political affiliations on an employment application. Such

[21] Overbreadth doctrine requires that the law be struck down in order to prevent "an invalid statute from inhibiting the speech of third parties who are not before the Court." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984).

lies are protected speech. *Alvarez*, 132 S. Ct. at 2542–43. Taking a video of a cake being frosted at a birthday party at a private country club is punishable by a year of imprisonment and a $5,000 fine. Taking a short cellphone video of the butcher working at a members-only store like Costco is a criminal act. Thus the Ag-Gag Law regulates a substantial amount of protected speech and is therefore overbroad. *See Taxpayers for Vincent*, 466 U.S. at 800.

The Ag-Gag Law is content-based, viewpoint-based, and overbroad. It is a criminal restriction on multiple forms of protected First Amendment activities, targeted specifically at suppressing people who would capture the public's trust away from the agriculture industry and punishing them doubly if they expose it. The Court can affirm the district court based on the First Amendment analysis alone.

V. The Ag-Gag Law Violates the Equal Protection Clause of the Fourteenth Amendment.

As the district court also reasoned, because the Ag-Gag Law was "animated by an improper animus toward animal welfare groups and other undercover investigators in the agriculture industry," the law is subject to and cannot withstand heightened rational basis review under the Equal Protection Clause. ER 26. "When a law exhibits . . . a desire to harm a politically unpopular group, [courts apply] a more searching form of rational basis review to strike down such laws under the

Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

The existence of animus makes a crucial, generally dispositive, difference in the level of scrutiny applied to a statute. Under traditional rational basis review, a court will uphold a challenged law "if there is any reasonably conceivable [set] of facts that could provide a rational basis for the classification." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). But the existence of animus fundamentally changes the inquiry into a far more rigorous form of review. *See Bishop v. Smith*, 760 F.3d 1070, 1097–1103 (10th Cir. 2014) (Holmes, J., concurring) (discussing impact of animus on rational basis review and collecting cases).

A. The Ag-Gag Law Is Substantially Based on Animus Against an Unpopular Group: Animal Welfare Activists.

The Ag-Gag Law is substantially based on animus. As the district court found, the bill was drafted by an industry trade association in direct response to the negative publicity generated by an undercover investigation by an animal welfare organization that exposed animal abuse at an Idaho dairy. ER 1–2. The legislation was explicitly designed to undermine animal rights groups by ensuring that such an investigation would never happen again in Idaho. *See* ER 26.

Impermissible animus need not take the form of repeated statements of overt bias or malice to the disadvantaged group. *See Arlington Heights*, 429 U.S. at 266.

The Supreme Court's animus cases demonstrate that very little actual evidence of malice towards the group in question is required in order to trigger heightened rational basis review. *See, e.g.*, *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (treating a single legislator's comment about "hippies" as tainting the legislation and triggering heightened rational basis review). Indeed, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court found animus sufficient to invalidate DOMA based on just three statements in a House Report. *Id.* at 2693.

The evidence of animus in this case is considerably more extensive. As detailed above, *see supra* Section III.C., legislators compared animal rights investigators to "terroris[ts]," "vigilante[s]," and "marauding invaders," tarred them as "extrem[ists]" seeking to take the dairy industry "hostage," and admitted their goal was to protect the industry from "the court of public opinion." ER 4–5.

As the district court recognized, the legislative history of the law is replete with evidence of animus of the most extreme kind. ER 26. Indeed, counsel has not located any state or federal cases with more evidence of overt animus in the record.

B. The Ag-Gag Law Cannot Withstand Heightened Rational Basis Scrutiny Because There Is an Exceedingly Poor Fit Between the Law and Its Purported Purpose and Effects.

The legislative animus in this record requires, at a minimum, a skeptical, heightened form of rational basis review. *Windsor*, 133 S. Ct. at 2692

(recognizing the need for "careful consideration" of laws motivated in part by animus); *Moreno*, 413 U.S. at 534, 538; *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (recognizing that *Moreno* "applied heightened scrutiny"); *Mountain Water Co. v. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 599 (9th Cir. 1990) (same).

Under this heightened form of rational basis review, a law must be invalidated if the State cannot prove both that the law would have passed but for the existence of animus, and that the fit between the enacted law and the government interest is sufficiently close. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985). Stated differently, once animus is established through the legislative record or impact of the law, the classification must uniquely serve the proffered government interest.

The Supreme Court's discussion in *Cleburne* is illustrative, because it shows that the mere presence of government interests that would otherwise satisfy traditional rational basis review cannot salvage a law that is tainted by animus. *Id.* There, the Court struck down a zoning ordinance that required a special use permit for homes for the developmentally disabled on equal protection grounds, despite the fact that the law was justified by the city on the type of concerns—reducing parking, traffic, flood plain issues—that would undoubtedly justify upholding a law under traditional rational basis review. *Id.*;

cf. Ry. Exp. Agency v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of [traditional] equal protection that all evils of the same genus be eradicated or none at all.").

In *Cleburne*, the Court held that because the presence of animus against the developmentally disabled tainted the government action in question, merely offering some plausible connection between the stated government interests and the classification in question was inadequate. *See* 473 U.S. at 446, 448–50. Specifically, the Court concluded that the development of a home for those with developmental disabilities did not pose demonstrably greater risks to the stated government interests than, for example, allowing the construction of a fraternity or apartment building. *Id.* at 450. The *Cleburne* holding calls for a meaningful inquiry into the fit between the law and the stated purpose of the law when animus is present.

The Court in *Moreno*, 413 U.S. at 528, similarly held that a provision motivated in part by animus violates equal protection, even where it is also supported by the sort of legitimate governmental interest that would have satisfied traditional rational basis review. The law at issue in *Moreno* denied food stamps to any household containing one or more people unrelated by blood or marriage. In striking down the provision at issue, *Moreno* closely scrutinized and ultimately rejected the government's asserted interest in "minimiz[ing] fraud in

the administration of the food stamp program." *Id.* at 535. In dissent, Justice Rehnquist argued that the government's anti-fraud justification for the law would have easily passed muster under traditional rational basis review. *See id.* at 546–47 (Rehnquist, J., dissenting) (arguing that "[t]raditional equal protection analysis does not require that every classification be drawn with precise mathematical nicety" (citation and internal quotation marks omitted)).

There is no doubt that the classifications in question in both *Cleburne* and *Moreno* would have survived traditional rational basis review, but a much more searching review is required when animus is present. Animus, particularly animus towards a politically disfavored group, changes the inquiry. When animus is present, there must not be attenuation in the connection between the proffered government interest and the classification in question. *See, e.g.*, *Cleburne*, 473 U.S. at 448–50. Rather, the presence of animus triggers the need for a review of the law for over- and under-inclusivity far beyond traditional rational basis review. *Id.*

The Ag-Gag Law cannot survive that review. The State contends that the law's principal purpose was to protect the private property of agricultural facility owners by guarding against such dangers as trespass, conversion, and fraud. But as the district court correctly found, "existing laws against trespass, conversion, and fraud . . . already serve this purpose. The existence of these laws 'necessarily

casts considerable doubt upon the proposition that [the Ag-Gag law] could rationally have been intended to prevent those very same abuses.'" ER 24 (quoting *Moreno*, 413 U.S. at 536–37).

Likewise, as the district court correctly found, the State failed to provide a sufficient explanation for why agricultural production facilities deserve more protection from these crimes than other private businesses that are also at risk of undercover whistleblowing. ER 24. On this point, the State argued below that "(1) powerful industries deserve more government protection than smaller industries, and (2) the more attention and criticism an industry draws, the more the government should protect that industry from negative publicity or other harms." *See id.* As the district court aptly put it, "[t]he State's logic is perverse." *Id.* The lower court was correct to conclude that "[p]rotecting the private interests of a powerful industry, which produces the public's food supply, against public scrutiny is not a legitimate government interest." *Id.*

Accordingly, the Ag-Gag Law is motivated by animus, and thus subject to heightened rational basis review; like the laws in *Cleburne* and *Moreno*, it cannot survive such scrutiny.

CONCLUSION

This Court should affirm the district court's decision.

Respectfully submitted on the 20th day of June, 2016.

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ADDENDUM

RELATING TO AGRICULTURE; AMENDING CHAPTER 70, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-7042, IDAHO CODE, TO PROVIDE FOR THE CRIME OF INTERFERENCE WITH AGRICULTURAL PRODUCTION, TO DEFINE TERMS, TO PROVIDE FOR VIOLATIONS AND PENALTIES AND TO PROVIDE FOR RESTITUTION; PROVIDING SEVERABILITY; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 70, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 18-7042, Idaho Code, and to read as follows:

18-7042. INTERFERENCE WITH AGRICULTURAL PRODUCTION.

(1) A person commits the crime of interference with agricultural production if the person knowingly:

(a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;

(b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;

(c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;

(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or

(e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.

(2) For purposes of this section:

(a) "Agricultural production" means activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses and includes without limitation:

(i) Construction, expansion, use, maintenance and repair of an agricultural production facility;

(ii) Preparing land for agricultural production;

(iii) Handling or applying pesticides, herbicides or other chemicals, compounds or substances labeled for insects, pests, crops, weeds, water or soil;

(iv) Planting, irrigating, growing, fertilizing, harvesting or producing agricultural, horticultural, floricultural and viticultural crops, fruits and vegetable products, field grains, seeds, hay, sod and nursery stock, and other plants, plant products, plant byproducts, plant waste and plant compost;

(v) Breeding, hatching, raising, producing, feeding and keeping livestock, dairy animals, swine, furbearing animals, poultry, eggs, fish and other aquatic species, and other animals, animal products and animal byproducts, animal waste, animal compost, and bees, bee products and bee byproducts;

(vi) Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities;

(vii) Manufacturing animal feed.

(b) "Agricultural production facility" means any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production.

(3) A person found guilty of committing the crime of interference with agricultural production shall be guilty of a misdemeanor and shall be punished by a term of imprisonment of not more than one (1) year or by a fine not in excess of five thousand dollars ($5,000), or by both such fine and imprisonment (4) In addition to any other penalty imposed for a violation of this section, the court shall require any person convicted, found guilty or who pleads guilty to a violation of this section to make restitution to the victim of the offense in accordance with the terms of section 19–5304, Idaho Code. Provided however, that such award shall be in an amount equal to twice the value of the damage resulting from the violation of this section.

SECTION 2. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

STATEMENT OF RELATED CASES

Plaintiffs-Appellees' counsel are not aware of any related cases pending in this Court or any other court.

Dated: June 20, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 20, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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