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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al.	)	
	)	**CASE NO. 1:14-CV-00104-BLW**
Plaintiffs,	)	
	)	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
v.	)	
	)	
C. L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; **LAWRENCE WASDEN**, in his official capacity as Attorney General of Idaho,	)	
	)	
Defendants.	)	

INTRODUCTION

Plaintiffs Animal Legal Defense Fund et al. ("ALDF") oppose Defendants' Motion to Dismiss by showing that: (1) Plaintiffs state an injury under all provisions of I.C. § 18-7042 (the

"ag gag law"); (2) Plaintiffs state a claim that the ag gag law violates the First Amendment because it is overbroad and content-based regulation; (3) Plaintiffs state a claim that the ag gag law violates the Equal Protection Clause because it is predicated on animus; and (4) Plaintiffs state a claim that the Preemption claims are ripe.

A complaint should not be dismissed under FED. R. CIV. P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *See SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 784 (9th Cir. 1996). Moreover, to survive Defendants' facial FED. R. CIV. P. 12(b)(1) standing attack, Plaintiffs need only have made "general factual allegations of injury," as this Court should "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

ARGUMENT

I. PLAINTIFFS ALLEGE SUFFICIENT INJURY AS TO EACH SUBSECTION OF THE AG GAG LAW

Defendants contest standing only as to two subsections of I.C. § 18-7042: (c) and (e). This is a First Amendment case, however, where the standing inquiry "tilts dramatically toward a finding of standing." *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). Plaintiffs need only show that they engage in a "course of conduct arguably affected with a constitutional interest and that there is a credible threat that the provision will be invoked against the plaintiff." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013).

Subsection (c) prohibits "[o]btain[ing] employment with an agricultural production facility by . . . misrepresentation with the intent to cause economic . . . injury to the facility's . . . business interests." Plaintiffs plan to obtain employment at agricultural facilities with the intent to expose illegal, inhumane, or unsafe behavior. Compl. ¶¶ 4, 33, 39, 41, 83, 84, 86, 90–94, 97–

121. Because such conduct and exposure would necessarily hurt these facilities' profits and reputation and economically injure the violators' businesses—albeit legitimately so—Plaintiffs' have alleged an intent to violate subsection (c). *See State v. Ross*, 449 P.2d 369, 377 (Idaho 1968) (noting under Idaho criminal law, "every person of sound mind is presumed to intend the natural and probable consequences of his acts"). Although Defendants are correct that Plaintiffs do not intend to cause any physical injury, the very goal of these investigations is to uncover and expose evidence of illegality or cruelty, which will economically injure the business in the form of boycotts, "food safety recalls, citations for environmental and labor violations, evidence of health code violations, plant closures, criminal convictions, and civil litigation." Compl. ¶ 4. Plaintiffs have pled a desire to engage in the very conduct prohibited by subsection (c): obtaining employment at a facility with the intent to expose unlawful or inhumane behavior. Compl. ¶¶ 33, 39, 41, 83, 84, 86, 90–94, 97–121. The Supreme Court has long recognized that efforts to encourage this type of economic pressure on businesses as protected speech. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 907-12 (1982).

Plaintiffs also intend to violate subsection (e), which prohibits "caus[ing] physical damage or injury to [an] agricultural production facility's operations." Nowhere does the statute define the term "injury," and the word "physical" in subsection (e) only modifies "damage." Thus, it prohibits not only "physical damage," but also *non-physical injuries*, including the injuries to business interests protected in subsection (c).

II. PLAINTIFFS ALLEGE THAT THE AG GAG LAW VIOLATES THE FIRST AMENDMENT

Defendants' only First Amendment argument is that the ag gag law should be exempt from scrutiny because it is a law of "general applicability" aimed at conduct. Although general applicability is a *necessary* condition for the law to be valid, it is *not sufficient* on its own.

Defendants do not show that the law is not content-based or overbroad, and they do not meet their burden of showing that the law can meet any level of First Amendment scrutiny.

A. The Rule of "Generally Applicable Laws" Means Only That the Press Are Not Typically Exempt from General, Non-Content Based Laws

The doctrine of general applicability under the First Amendment is narrow: The press is not entitled to a First Amendment exemption to content-neutral laws that apply equally to the press and others, whether they regulate pure speech or conduct preparatory to speech. For example, the First Amendment does not exempt the press from anti-trust laws, *Associated Press v. United States*, 326 U.S. 1 (1945); federal labor laws, *Associated Press v. NLRB*, 301 U.S. 103 (1937); contract laws, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); or state common law torts, *see, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

All these cases merely stand for the uncontroversial proposition that so long as a law is content-neutral, the First Amendment does not bar its *general application* to the press and the public on equal terms. *See Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014). The cases do not establish that *any law* that is generally applicable is inoculated from First Amendment scrutiny. *See, e.g.*, *Lind v. Grimmer*, 30 F.3d 1115, 1118 (9th Cir. 1994) (characterizing an argument similar to the Defendants' in this case as a "novel argument . . . based upon a dramatic misconception of . . . the import of *Cowles*").

Indeed, under Defendants' argument, a state could suppress *most* speech that is currently constitutionally protected. For example, a law prohibiting all demonstrations, or even a law banning only war protests, would be generally applicable because it applies to everyone. Likewise, a ban on defacing the U.S. flag is a generally applicable law. But each of these examples violates the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 400 (1989). It is

equally well established that generally applicable laws such as tortious interference with business relations, intentional infliction of emotional distress, and breach of the peace can offend the First Amendment. *NAACP*, 458 U.S. at 920–21 (tortious interference); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15 (1971) (breach of the peace). The fact that a law applies to *all* persons and not just the press is a prerequisite to constitutionality, but not the end of the inquiry.

B. The Ag Gag Law is Overbroad

Defendants' Motion to Dismiss Plaintiffs' First Amendment claims does not challenge Plaintiffs' two principal claims under the First Amendment—that the ag gag law is overbroad and that it is an impermissible content-based restriction on speech.

The overbreadth doctrine protects individuals who "may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). A plaintiff may succeed by showing that the law restricts significantly more speech than the First Amendment allows. *New York v. Ferber*, 458 U.S. 747, 773 (1982); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). Criminal statutes must be examined particularly carefully. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

The first step in overbreadth analysis is to assess the breadth of the challenged statute. *United States v. Stevens*, 559 U.S. 460, 474 (2010). The ag gag law criminalizes capturing images or sounds at a facility not open to the public without "express consent or pursuant to judicial process or statutory authorization," even when the person is otherwise lawfully permitted to be there, including in the workplace. I.C. § 18-7042(1)(d). It prohibits employment-based undercover investigations by criminalizing the act of applying for a job and failing to disclose

certain political viewpoints or associational affiliations[1] if the applicant seeks to harm the facility's "business interests"—i.e., its future profits or bottom line. I.C. § 18-7042(1)(c). The statute also criminalizes failing to disclose political viewpoints or associational ties in the act of *entering* an agricultural facility, I.C. § 18-7042(1)(a), or obtaining any "record"—a term left undefined by the statute—from a facility. I.C. § 18-7042(1)(b). The statute defines its scope so broadly that it applies not only to factory farms and slaughterhouses, but also to public parks, restaurants, nursing homes, grocery stores, pet stores, and virtually every public accommodation and private residence in the state. I.C. § 18-7042(2)(a)–(b). To give just one example of the statute's breadth, taking a video of one's own child in the restaurant of a private country club without the owner's permission is punishable by a year imprisonment and a $5,000 fine.

The second step in the overbreadth analysis is to determine whether the challenged statute or ordinance prohibits a substantial amount of protected activity. *See City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S.789, 800–01 (1984). The ag gag law criminalizes a substantial amount of speech in at least two separate categories of protected activity: audiovisual capture and false statements of fact. Because the ag gag law sweeps an alarming amount of protected activity within the ambit of its prohibitions, it is unconstitutionally overbroad. Even if the Defendants can locate *some* legitimate interest in regulating *some* types of audiovisual recording at agricultural facilities, the ag gag law engulfs a substantial amount of protected First Amendment activity within its reach.

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[1] Because an omissions may qualify as a misrepresentation under I.C. § 18-7042(1)(c), *see, e.g.*, *State v. Guzman*, 842 P.2d 660 (Idaho 1992) (finding material omissions qualify as misrepresentations in affidavit supporting search warrant), the misrepresentation provisions are an unconstitutional requirement that all applicants for agricultural employment disclose political affiliations and ideologies. *See, e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 485–89 (1960) (striking down requirement that teachers disclose all group memberships as a First Amendment violation).

i. The ban on audiovisual capture criminalizes protected speech activity

Defendants argue the First Amendment does not apply at all unless a law directly limits *dissemination* of speech, Defs.' Mem. at 13, and suggest that because the regulated behavior is, at least in part, "conduct" it should be regarded as outside the reach of the First Amendment.[2] *Id.* at 9. The U.S. Supreme Court, however, has held that conduct can be an important way of preparing or communicating speech, and such conduct is fully protected by the First Amendment. *See, e.g.*, *United States v. Eichman*, 486 U.S. 310 (1990) (treating a facially content-neutral limit on flag desecration as content-based and subject to strict scrutiny).

If the First Amendment protected only disseminating speech, and not also collecting and preparing for it, then "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," *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). That is exactly what the ag gag law does. But of course, this is not the rule. It is firmly established that "laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). Limits on campaign finance implicate the First Amendment because the money

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[2] The cases the Defendants cite do not address the Plaintiffs' theories. The enforcement of a general law against the press may not offend the First Amendment, but the existence of a *content-based* limit on speech—general or not—is presumptively unconstitutional. The cases relied on by Defendants are not inconsistent with this rule. First, the Ninth Circuit has explicitly limited *Dietemann*, which itself deals with a content-neutral invasion of privacy law, to privacy expectations inside the home with no application to "a workplace interaction with . . . strangers that was purely professional." *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies*, 306 F.3d 806, 818, n.6 (9th Cir. 2002). Moreover, in another case Defendants heavily rely on, *Food Lion*, the investigator-defendants violated a contractual duty of loyalty and were liable as a matter of ordinary contract law. 194 F.3d at 518 ("the reporters committed trespass by breaching their duty of loyalty"). In fact, Plaintiffs are aware of no court upholding criminal penalties for undercover investigations like those provided for in the ag gag law. *See, e.g.*, *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (analogizing undercover investigators to "testers" in discrimination cases); *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1281–83 (Nev. 1995); *Ouderkirk v. PETA*, No. 05-10111, 2007 WL 1035093 (E.D. Mich. Mar. 29, 2007); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607, 613–14 (Mich. App. 2000) (noting misrepresentation did not defeat consent to enter on trespass claim).

at issue enables *subsequent* political speech. *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976) (noting that the finance law there was not an effort to directly "abridge, restrict, or censor speech," but rather was a limit on spending that might produce speech). In short, acts preparatory to speech—such as funding speech—are constitutionally protected no less than the speech itself.

Accordingly, bans on note taking or audiovisual recording, no less than limits on setting type for a printing press or on the sale of printing presses, implicate core First Amendment concerns. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (rejecting a "hard line between the essays John Peter Zenger published and the act of setting the type"); *People v. Clark*, No. 115776, 2014 IL 114852 (Ill. Mar. 20, 2014) (finding Illinois' two-party consent recording statute facially unconstitutional under the First Amendment).

If the State completely bans access to critical information, regulating dissemination becomes irrelevant: the law accomplishes its suppressive goal by utterly controlling information from its inception. The ag gag law implicates protected speech because the "act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech." *ACLU*, 679 F.3d at 595; *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 (2011).

ii. The prohibitions on misrepresentation criminalize pure speech

The misrepresentation provisions of the ag gag law, I.C. § 18-7042(1)(a)–(c), criminalize pure speech. The First Amendment permits content-based restrictions only on speech in "historic and traditional categories long familiar to the bar," such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Stevens*, 559 U.S. at 468 (internal quotation marks omitted). Content-based restrictions outside of those categories are presumptively invalid, *id.*, including general restrictions on false statements of fact that do not involve a legally cognizable harm. *United States v. Alvarez*, 132 S. Ct. 2537, 2544–45 (finding

the Court's precedents "do not support the . . . submission that false statements, as a general rule, are beyond constitutional protection"). The Court in *Alvarez* distinguished between false statements generally and proscribable fraud, which typically requires *reliance*, *causation*, and *injury*, as well as materiality, or defamation, which involves knowingly or recklessly false claims that harm a person's reputation. *Id.* at 2554 (Breyer, J., concurring). Misrepresentations that do not rise to common law fraud, perjury, or defamation are protected speech.[3]

"Saints may always tell the truth, but for mortals living means lying." *United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc). People tell myriad lies to secure employment: "I've always dreamed of working here"; "My greatest weakness is that I work too hard"; "I thrive under pressure." These include lies intended to cause the employer to lose money (i.e., to "injure" the employer's "business interests", I.C. § 18-7042(1)(c)): "I had another company offer me a salary that is $5,000 higher. I was hoping you could match it"; "I plan to stay at my next position for the rest of my career"; "I'm opposed to unions. I think they're a scourge on personal freedom." Such misrepresentations are protected speech, and the State cannot evade this constitutional truth by attempting to equate simple *misrepresentations* (which are protected) with *fraudulent* speech (which is not protected). *Cf. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994)

[3] Although *Alvarez* does permit limits on "false claims . . . made to effect a fraud or secure moneys or other valuable considerations [such as] offers of employment," 132 S. Ct. at 2548, it is clear from context that the Court is not referring to undercover employment-based investigations, the goal of which is not to "secure moneys or other valuable considerations" for the investigator, but rather to expose threats to the public. *Id.* at 2560. These investigations may in some instances require false statements, but there is no causation or injury attributable to the statements because the investigators complete all their assigned tasks in the course of their work, they do not physically damage the property, and they commit no *injurious* fraud. Compl. ¶ 86. Moreover, 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.

(finding speech policy that incorporated one portion of obscenity definition, which was "never intended as a stand-alone criterion," was not sufficient).

Each of the false statements above, and many others, could be the basis for a criminal prosecution under the ag gag law. The ag gag law, then, criminalizes a substantial amount of protected misrepresentations and not merely unprotected fraud.

C. The Ag Gag Law Impermissibly Discriminates Based on Content

In order to be content-neutral, a law must be both viewpoint- and subject-matter-neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A state is prohibited from restricting protected activity based on its content because such laws threaten to "manipulate the public debate through coercion rather than persuasion," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994), and allow government to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). "Content based regulations are presumptively invalid," *even as to unprotected speech*, *id.* at 382, and must meet strict scrutiny. *Turner*, 512 U.S. at 642; *R.A.V.*, 505 U.S. at 395. The "mere assertion of a content neutral purpose" is not "enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642–43. A law is content-based either if it is not neutral in its application, not neutral in its justification, or if the legislature acted with the motive of favoring or disfavoring a particular viewpoint or content. *See ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006). The application, justifications, and legislative history behind the ag gag law all indicate an absence of content neutrality.

i. The ag gag law facially discriminates based on content

A law is content-based if it discriminates against speech based on the topic of the speech. The ag gag law singles out recordings of agricultural activities for criminalization. The law

distinguishes on its face between agricultural content and non-agricultural content. Specifically, the law singles out for criminalization recordings "of the conduct of an *agricultural* [facility]." I.C. § 18-7042(1)(d) (emphasis added). The ag gag law, then, discriminates on its face against recording certain activities depending on their content, and is therefore no less content-based than a law that targeted recording political events, police abuse, or sweatshop conditions.

The ag gag law's restitution provision reinforces the conclusion that it is a content-based restriction. The ag gag law requires a restitution award for double the loss, including "direct out-of-pocket losses or expenses," I.C. § 19-5304(1)(a), related to any violation of the statute. I.C. § 18-7042(4). The most likely loss related to unauthorized image capture at an agricultural facility is the loss of profits generated by public outcry from the conduct depicted in the video. The ag gag law not only criminalizes the gathering of content but, through the restitution provision, also its publication. *See Hustler*, 485 U.S. at 53 (explaining indirect penalties for harms resulting from publication must satisfy defamation standard). Moreover, the State's decision to criminalize the actions of those who expose corruption or crimes in only a single industry—the agricultural industry—evinces an intent to distort the political debate about modern agricultural production.[4]

[4] The ag gag law also discriminates based on viewpoint because it silences critics of certain agricultural practices while permitting speech that promotes the same agricultural practices. A restriction on speech is viewpoint based if it distinguishes between speakers based on the viewpoint expressed or is motivated by the desire to suppress a particular viewpoint. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). If an applicant misrepresents himself on a job application with the intent of praising the husbandry practices of the employer, the ag gag law does not apply. I.C. § 18-7042(1)(c). Similarly, by criminalizing all video recordings except for those made with the express consent of the facility's owner, I.C. § 18-7042(1)(d), the law criminalizes only critical video recording while permitting video recording that would place the facility in a positive light. *See Boos v. Barry*, 485 U.S. 312, 328 (1988) (striking down ordinance prohibiting signs critical of a foreign government).

ii. The State's legislative motive was content-based

The ag gag law is also content-based because it was enacted with a content-based legislative purpose. "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645; *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (noting that even if a law "on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–502 (1996); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "[A] restriction on expressive activity" is only content neutral if it is "based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000); *Johnson*, 491 U.S. at 406; *Eichman*, 496 U.S. at 315 ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression and concerned with the content of such expression.") (citation omitted).

The Complaint is replete with statements from Idaho legislators evidencing the content-based legislative purpose of silencing animal activists. Compl. ¶¶ 61–74. Representative Pence was clear in her intent to prevent animal rights activists' speech, stating that by "releasing the footage to the Internet . . . [and authoring] petitions calling for a boycott . . . the organizations involved [in an undercover investigation of a milk producer] then crossed the ethical line for me." *Id.* ¶ 66. Representative Batt echoed that sentiment, expressing a need to protect the dairy industry from "the court of public opinion." *Id.* ¶ 68. Other legislators referred to animal rights

activists as "terrorists," "extremists," "vigilantes," and "marauding invaders" for investigating and exposing animal agriculture facilities. *Id.* ¶¶ 62–64, 67, 69.

Defendants' Motion to Dismiss must be denied as to Plaintiff's content discrimination claim because the ag gag law is neutral neither in its application nor in its justification and motive. The law is content discriminatory because on its face it singles out speech about agricultural production, and because it was passed with the purpose of stifling such viewpoints.

D. Defendants Fail to Meet Their Burden of Showing the Law Meets Strict or Intermediate Scrutiny

Defendants do not argue that the ag gag law survives any level of First Amendment scrutiny. Because the law criminalizes pure speech, *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001), punishes expressive conduct, *Johnson*, 491 U.S. at 406, and discriminates based on content, *Turner*, 512 U.S. at 642, the Court must apply strict scrutiny. Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (internal quotation marks omitted).

Defendants fail to meet their burden. They make no attempt to show that the ag gag law was motivated by a compelling government interest and they make no argument that the law is narrowly tailored. The Defendants' only characterization of their interests in the law—in the Equal Protection section of their argument—is that they are merely "legitimate." Defs.' Mem. at 14–15. The Motion to Dismiss, then, is facially inadequate as a basis for dismissing the First Amendment claims. *See Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981).

Even if strict scrutiny were not warranted here, Defendants fail to meet their burden of showing the ag gag law survives intermediate scrutiny. Incidental, content-neutral burdens on expressive conduct require the government to bear the burden of showing that the law "furthers an important or substantial government interest . . . unrelated to the suppression of free

expression, and . . . [with a burden] no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Again, Defendants do not argue that there are important government interests, or that the law meets the tailoring requirements, and thus fail to meet their burden of showing that the law passes even intermediate scrutiny. For these reasons, Defendants' Motion to Dismiss must be denied.

III. PLAINTIFFS ADEQUATELY STATE AN EQUAL PROTECTION CLAIM BECAUSE THE AG GAG LAW IS MOTIVATED BY ANIMUS

Laws premised on animus violate the Equal Protection Clause. The most basic definition of animus is "a bare . . . desire to harm a politically unpopular group." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Plaintiffs allege, as a factual matter that must be accepted as true at this stage of the litigation, that the Idaho legislators acted with animus in passing the ag gag law in violation of the Equal Protection Clause. *See* Compl. ¶¶ 18, 21, 56–75, 187–95. The effect of animus on the review of a law has two manifestations: (1) legislation motivated by animus towards politically unpopular groups is per se unconstitutional; and (2) legislation motivated by animus triggers heightened review—that is, "careful consideration." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans,* 517 U.S. 620, 633 (1996)). Plaintiffs are entitled to relief under either approach.

A. Plaintiffs Allege Widespread Legislative Animus Against Animal Protection Groups as a Material Reason for Passing the Ag Gag Law

Because Plaintiffs allege animus against animal protection groups throughout the legislative history, these facts must be taken as true at this stage. *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010). Moreover, the animus alleged in this case is more pervasive than the U.S. Supreme Court relied on in striking down laws in *Moreno*, 413 U.S. at 534 (one legislator's statements), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (a few statements), or

Windsor, 133 S. Ct. at 2675 (a statement in House Report). To the best of counsels' knowledge, there is not a single reported decision with more evidence of animus than in this case.

As Plaintiffs allege, the law was drafted by the Idaho Dairymen's Association "with the express purpose of disadvantaging animal rights and whistleblower speech" and was supported by multiple legislators "specifically because it would silence animal protection organizations." Compl. ¶¶ 72, 74. The *Moreno* Court found animus adequate to render the Food Stamp Act unconstitutional under the Equal Protection Clause where only one senator's comments in the legislative history indicated a purpose to prevent "hippies" from receiving food stamps. 413 U.S. at 534. The record here, in contrast, is replete with evidence that the ag gag law was inspired by animus against animal protection groups. Plaintiffs allege numerous comments from multiple senators, particularly the bill's sponsor, referring to animal protection groups as "extreme activists, " "terrorists," "marauding invaders," and "enemies" who "held hostage" the dairy industry with the "threat[]" of "persecute[ion] in the court of public opinion" that must be "combat[ted]." Compl. ¶¶ 56–75. Plaintiffs further allege open recognition by the representatives that the bill was promulgated by the dairy lobby, *id.* ¶ 68, who "proudly proclaimed" to have drafted the bill to undermine the "vigilante tactics" of animal welfare groups. *Id.* ¶ 69. The Idaho Dairymen's Association supports these allegations, arguing that it drafted the law in response to the "media persecution[] and potential financial ruin" that befell one its members when systematic and egregious animal abuse at its facility was exposed by an animal welfare organization. (*See* Dkt. 16-1 at 2.)

Defendants do not dispute that the law was motivated by animus but only that Plaintiffs fail to state a claim because they were not "singled out" by the text of the regulation, which on its face applies to "*any* person." (Dkt. 12-1 at 17.) As an initial matter, it makes no difference

whether the law makes a facial classification; assuming it does not, then the law is subject to rational basis review, to which the animus doctrine discussed below applies. However, the evidence here of the legislature's intentional effort to target animal rights activists proves the ag gag law is aimed at singling out a particular class of citizens. Moreover, *Moreno* makes clear that a court must determine whether a law contains an unconstitutional classification by looking to the "practical effect" of the statute. 413 U.S. at 529. Specifically, in *Moreno* a prohibition on the receipt of food stamps by *any person* while living with unrelated persons was treated as a classification triggering Equal Protection review. *Id.*; *see also Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (recognizing a facially neutral law as a classification that offended Equal Protection because of the practical effect and purpose of the law). Likewise, the ag gag law applies on its face to all persons, but has the practical effect of burdening only groups who criticize the agriculture industry by recording and publicizing conduct relating to animal welfare or food safety issues. *See generally* I.C. § 18-7042.

B. Laws Motivated by Animus Against Politically Disfavored Groups Fail Under Rational Basis Review

When legislation is "drawn for the purpose of disadvantaging the group burdened by the law," the law is either per se unconstitutional or at least subject to a heightened form of review—"careful consideration." *Romer*, 517 U.S. at 633 (describing traditional rational basis as "confound[ed] when animus is present"). As the U.S. Supreme Court recently held, even when the law in question advances plainly legitimate government interests, animus taints a law with a presumption of unconstitutionality that may not be overcome. *Windsor*, 133 S. Ct. at 2693, 2696.

The precedent Defendants rely on to argue that "animus is irrelevant" is outdated, overruled, or irrelevant when applied to a law targeting politically unpopular groups. In *Windsor* the Supreme Court reaffirmed and enhanced the role of animus in rational basis analysis. After

Windsor the important role of animus is no longer debatable. *See, e.g.*, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1208, 1209 (D. Utah 2013) (recognizing the Supreme Court's animus cases focus "more on the purpose and effect of the [laws] than on a consideration of the purported legitimate interests the State asserted in support of its law" and noting that laws motivated by animus are, per se, outside of constitutional limits); *see also Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 957 (7th Cir. 2002) (Posner, J., concurring) (noting that under equal protection rationality review a plaintiff can demonstrate that government action lacks rational basis by showing that the action was motivated by animus *or* by showing no rational relation to legitimate state policy).

Simply stated, if the principal purpose or effect of a law is to impose inequality on a politically unpopular group, a court need not even consider the proffered government interests because "such laws are not within our constitutional tradition," and violate the Equal Protection Clause. *Romer*, 517 U.S. at 633; *Kitchen*, 961 F. Supp. 2d at 1208. It is equally clear that the constitutional prohibition on animus-based legislation is not limited to sexual orientation. *See, e.g.*, *Moreno*, 413 U.S. at 528; *City of Cleburne*, 473 U.S. at 432; *cf. Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997) ("[T]he principle would be the same if Stemler had been [targeted] based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company.").

Alternatively, Defendants' motion must also be denied because laws that are motivated by animus, if nothing more, warrant "*careful consideration*." *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). A careful or deliberate consideration is one that, at the very least, shifts the burden to the state to prove that but for the hostility towards unpopular groups—in this case animal welfare groups—the law would still have been passed. At this stage of the

litigation it is not appropriate to dismiss the Equal Protection claim because this sort of *careful consideration* is not practicable without additional evidence and factual development.

The Supreme Court cases discussing the relevance of animus confirm the viability of relief under Equal Protection under either of the two approaches identified above. For example, in *Moreno*, plaintiffs challenged a law denying food stamps to cohabitants who were unrelated. 413 U.S at 529. Like Defendants here, Defs.' Mem. at 14–15, the United States had alleged facially legitimate purposes such as preventing fraud, and the class of people harmed—unrelated cohabitants—was not a suspect class. *Moreno*, 413 U.S. at 533–34. Nevertheless, the Court struck the law down upon a finding that it was motivated by animus against "hippies" as evinced from comments in the legislative history. *Id.* Though it used the label "rational basis," the Court applied a form of heightened scrutiny and rejected the view Defendants espouse in this case that "[o]nce plausible grounds [for the law] are asserted, the inquiry is at an end." Defs.' Mem. at 14. Indeed, the Court held that considering "unsubstantiated" hypothetical justifications for the law was unnecessary. *Moreno*, 413 U.S at 534–38. There can be no real doubt that important government interests were proffered and served by the law under review in *Moreno*, but the law was struck down. 413 U.S. at 546 (Rehnquist J., dissenting) (discussing the patently legitimate goals for the law and the rational, if imperfect, relation between them and the law in question).

Similarly, in *Cleburne* and *Romer*, the Court found that laws violated the Equal Protection Clause even though neither involved a suspect class and both were supported by arguably legitimate government interests, because in each case the proffered legitimate purposes were merely masks for "irrational prejudice," *Cleburne*, 473 U.S. at 450, and "animosity," *Romer*, 517 U.S. at 634, towards politically disfavored groups. *Cleburne*, 473 U.S. at 448; *Romer*, 517 U.S. at 633 ("[D]iscriminations of an unusual character especially suggest careful

consideration to determine whether they are obnoxious to the constitutional provision." (citations and internal quotations marks omitted)). Thus, whether viewed as cases of "rational basis with bite"—where a legitimate government interest was not sufficient to save an animus-motivated law—or examples of the principle that laws motivated by animus always offend the Constitution, the cases demonstrate that laws based *primarily*, even if not exclusively, on animus violate Equal Protection. *Cleburne*, 473 U.S. at 450.

Relying on inapposite and dated authority, Defendants contend that animus is irrelevant, (Dkt. 12-1 at 14), but this view is untenable.[5] One of the few Equal Protection cases relied upon by the Defendants that does not predate the 1990s is *Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation*, 919 F.2d 593 (9th Cir. 1990), which is cited for the proposition that *Moreno* did not apply heightened scrutiny. *See* Defs.' Mem. at 16–17. This reading of *Mountain Water* is foreclosed by more a recent Ninth Circuit decision, which expressly recognized that "[*Mountain Water*] acknowledged that *Moreno* applied 'heightened' scrutiny." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (explaining that the plaintiffs in *Mountain Water* merely did not qualify for *Moreno*'s heightened scrutiny because they failed to show animus). More importantly, animus played a critical role in the Supreme Court's decision last term in *Windsor*. Of note, the Court *did not even consider* the state's proffered rationales for the law in question, but instead limited its analysis to "determining whether a law is motivated by an improper animus or purpose." *Windsor*, 133 S. Ct. at 2693. Despite the

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[5] Indeed, the very cases relied on in the Defendants' motion regarding the irrelevance of illicit motive are quoted by Justice Scalia in his *Windsor* dissent. Justice Scalia criticized the *Windsor* majority for adopting the view that laws based in animus fail rational basis review by explaining that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . Or at least it *was* a familiar principle." *Windsor*, 133 S. Ct. at 2707 (emphasis added). Without noting the contrary authority, Defendants rely on the dated dicta suggesting that illicit legislative motive is entirely irrelevant to the Equal Protection inquiry.

existence of legitimate government interests in support of the law, having found animus, the Court held "[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure." *Id.* at 2696. Likewise, in this case the existence of animus cannot be contested at this stage and this Court, therefore, need not even consider the purported legitimate interests in support of the statute offered by the state.

C. The Ag Gag Law's Classification Does Not Serve Legitimate Purposes

Animus alters the core Equal Protection analysis such that post-hoc legitimate government reasons for a law are either entirely irrelevant, as in *Windsor*, or they must meet an exacting standard so as to overcome the proffered animus. Defendant's two principal explanations for the law are "[facilitating] truly consensual employment," (Dkt. 12-1 at 14), and "protect[ing] . . . property interest[s]." *Id.* at 15. Even if these proffered purposes for the ag gag law are considered, because there is a relatively poor fit between the law in question and these purported government interests, the law must be struck down. Specifically, an inadequate fit exists when the law is over- or under-inclusive, *Cleburne*, 473 U.S. at 449, or when the purposes are already met by existing laws. *Moreno*, 413 U.S. at 536–37.

The purported interests of the ag gag law are already served by other state and federal laws. By way of a non-exhaustive list of examples, the goal of consensual employment is already served by contract and fraud laws, *see, e.g.*, I.C. §§ 29-101 and 29-116. *Moreno*, 413 U.S. at 536 (explaining that it was "important to note" that the proffered government interest was already illegal, thus undercutting the claim that a legitimate government interest was served).

In addition, the law is over-inclusive as a protection of consensual employment insofar as it criminalizes *all recordings* without the consent of the property owner (or a visitor), regardless of whether there was deception in the employment (or visitor) process. The fit between the law

and its proffered purpose of enhancing consensual employment is no stronger than the prevention of fraud rationale and the law struck down in *Moreno*. I.C. § 18-7042(1)(d). *See* Compl. ¶ 70 (quoting bill's drafter that the law applies "even if the employee is a 'legitimate' long-term employee and documents non-animal related violations such as blocked fire exits").[6]

Likewise, the goal of protecting private property is not well served by this legislation. Plaintiffs are not claiming a right to infringe *any tangible property right*. Cognizable property interests in access, control, and protection are already safeguarded through state and federal privacy, trespass, employment, and destruction of property laws. The property owners in question retain the absolute right to exclude persons from their property and to control their property. The only conceivable *property right* is a *right* to inoculate the agricultural industry from whistle-blowing regarding criminal conduct or other wrongdoing. Such a property right is unknown in law, just as is a right to use discriminatory hiring or promotion procedures. Neither "testers" ensuring non-discrimination in employment, nor labor organizers, nor investigators of food safety or animal welfare wrongdoing can be prohibited from a single industry in the name of *protecting* private property. There is no cognizable property interest protected by the ag gag law, and even if there were, the fit between the purported property interest and the ag gag law is insufficient for the reasons discussed above.[7]

"[N]othing opens the door to arbitrary action so effectively as to allow those officials to *pick and choose* only a few to whom they will apply legislation and thus to escape the political

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[6] Defendants assert without authority that "truly consensual employment" is always a goal that the legislature can "indisputably" seek to facilitate. Defs.' Mem. at 14. In reality, a wide range of labor, civil rights, and whistle-blowing laws prohibit this purported state interest.

[7] It is worth noting that the proffered governmental interests in this case are in fact interests that only protect one particular set of private parties. Even where only economic regulation is concerned, counsel is unaware of cases where the proffered legitimate interest inures solely to the benefit of a private party without any greater public interest being served or even suggested.

retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (emphasis added). The unpopularity of animal protection groups cannot serve as a legitimate government interest in support of singling out one type of whistle-blowing as criminal. Accordingly, whether the Court treats animus as a dispositive showing, or merely a factual predicate to a heightened requirement of tailoring, because the facts, accepted as true, support a plausible claim that the law violates the Equal Protection Clause, the Motion to Dismiss the claim must be denied.

IV. PLAINTIFFS STATE A CLAIM THAT THE AG GAG LAW IS PREEMPTED

Defendants' argument that Plaintiffs' preemption claims are not ripe until the statute is enforced is equally meritless. First, this argument is predicated on the false assumption that Plaintiffs are challenging the Idaho statute on an "as applied" basis. Plaintiffs are challenging the Idaho statute both facially *and* "as applied." *See* Compl. ¶¶ 21, 196; *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033–34 (9th Cir. 2006) (discussing types of constitutional challenges). Plaintiffs can do so without waiting for the statute to be enforced against them because they have adequately "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Indeed, the U.S. Supreme Court recently made clear that a statute can be preempted as an obstacle to achieving federal objectives even before it goes into effect. *See United States v. Arizona*, 132 S. Ct. 2492, 2505 (2012). In doing so, the Court did not even consider the likelihood of the statute's enforcement. *See id.* at 2503–2305, 2507. That the Court invalidated portions of the statute on a facial challenge, despite the law not yet being in effect, shows that Defendants' characterization of the preemption claim as "necessarily as applied" is

erroneous. The ag gag statute, on its face, criminalizes whistleblowing activity that the federal government unequivocally encourages and protects. It thus stands as an obstacle to federal law irrespective of its enforcement. 21 U.S.C. § 399d; 1 U.S.C. §§ 3729, 3730; 33 U.S.C. § 1367(a).

Second, Defendants' ripeness argument is wrong as a matter of fact because it is predicated on the false notion that Idaho's law does not inflict any cognizable harm on whistleblowers unless or until it is actively enforced. Defendants do not contest that Plaintiffs' First Amendment and Equal Protection claims are ripe, because the complaint makes clear that the ag gag law is already causing harm by, among other things, impeding Plaintiffs' ability to report conditions inside Idaho agricultural facilities. *See, e.g.*, Complaint ¶¶ 78–140. The harm is no more contingent for the preemption claim. It is therefore ripe for review by this Court.[8]

V. THE GOVERNOR IS A PROPER DEFENDANT

The Governor of Idaho has specific enforcement authority over the State's penal code. "In addition to those powers . . . prescribed by the Constitution," the Governor may require the Attorney General or prosecutor to investigate a corporation, require the Attorney General to appear in any legal proceeding or to aid a prosecutor, and "perform such duties respecting fugitives from justice as are prescribed by the penal code." I.C. § 67-802. One of the Governor's duties under the penal code is to issue a warrant to receive a person from another state when that person is charged with a crime in Idaho. I.C. § 19-4522. The Governor's power to issue warrants

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[8] To hold otherwise is to suggest that a state statute that unconstitutionally conflicts with federal law can nonetheless be enforced. The existence of a "factual contingency" does not defeat ripeness. *See Educ. Credit Mgmt. Corp. v. Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009). Defendants have not disputed, nor can they at this stage of litigation, that some of the agricultural operations covered by the ag gag law are subject to the whistleblower provisions of the False Claims Act, Clean Water Act, and Food Safety Modernization Act, or that some of these agricultural operations are operating in violation of federal law.

personally for the detention of a person charged with a violation of the Idaho penal code is a sufficient connection with its enforcement to warrant an *Ex parte Young* claim.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

DATED this 28th day of April 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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