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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. LAWRENCE WASDEN, in his official capacity as Attorney General of Idaho, Defendant.	Case No. 1:14-cv-00104-BLW MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Idaho's "Ag Gag" law, I.C. § 18-7042, makes it a crime to conduct an undercover investigation at an Idaho agricultural facility, punishable by as much as a whole year in jail. Its scope is so broad that a journalist or animal rights investigator can be convicted for not disclosing her media or political affiliations when requesting a tour of a massive industrial feedlot, or applying for employment at a slaughterhouse. *Id.* § 18-7042(1)(a), (c). A worker can be convicted for videotaping life-threatening safety violations at an agricultural facility, unless he first gets the owner's permission. *Id.* § 18-7042(1)(d). In addition to facing incarceration, an investigator or whistleblower can be forced to pay publication damages—damages for harm to the business's reputation flowing from the investigation and subsequent publication—in the form of a "restitution" provision that allows for treble damages for the harm caused by the exposé. *Id.* § 18-7042(4).

Plaintiffs, the Animal Legal Defense Fund (ALDF) 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 and the press, equal protection, and that federal laws protecting whistleblowers preempt the State's law under the Supremacy Clause. The defendant ("State") moved to dismiss the First Amendment and Equal Protection claims, arguing that they are not cognizable as a matter of law, and arguing that the preemption claims were not ripe.

On September 4, 2014, this Court denied the State's motion to dismiss these claims, holding that the Ag Gag law is not exempt from constitutional scrutiny. With regard to the First Amendment claim, this Court held the statute *does* regulate speech and that, "[o]n its face," the law "targets one type of speech – speech concerning 'the conduct of an agricultural production facility's operations,'. . . but leaves unburdened other types of speech at an agricultural

production facility." (Dkt. 68 at 22.) The Court further held that the Ag Gag law is facially content-based and viewpoint-discriminatory, and so "must survive the highest level of scrutiny to pass constitutional muster . . . " (*Id.* at 24.)

With regard to Plaintiffs' equal protection challenges, the Court agreed that "[l]aws based on bare animus violate the Equal Protection Clause." (*Id.* at 3.) This Court observed that "ALDF alleges, as a factual matter, that the Idaho legislators acted with animus against animal-rights activists in passing" the Ag Gag law. (*Id.*) "If ALDF's allegations of animus prove true," this Court concluded, it must "skeptically scrutinize any offered justifications . . . to determine whether bare animus motivated the legislation or whether the [Ag Gag] law truly furthers the offered purposes." (*Id*. at 3; *see also id.* at 28.)

Plaintiffs move for summary judgment on their First Amendment and Equal Protection Clause claims—their first, second, and fourth causes of action. (Dkt. 1 at 42–46, 48–49). Under the legal reasoning contained in this Court's order denying the State's motion to dismiss, (Dkt. 68), and with the legislative history now in the record, summary judgment on these claims is appropriate at this time.[1]

STATEMENT OF FACTS

In 2012, an undercover investigator working at Bettencourt Dairies' Dry Creek Dairy in Hansen, Idaho captured audiovisual recordings of horrific abuse of dairy cows, including 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. Plaintiffs' Separate Statement of

1. The Plaintiffs' Supremacy Clause claims, which survived the motion to dismiss, turn on factual issues yet to be developed and thus are not encompassed in this motion. If this motion is denied in whole or in part, however, Plaintiffs will develop facts in support of their claim that the Ag Gag law violates the Supremacy Clause. With regard to their First Amendment and Equal Protection claims, Plaintiffs believe that no further factual development is needed to warrant summary judgment, but reserve their rights to further develop the factual record to the extent necessary.

Undisputed Material Facts in Support of Motion for Partial Summary Judgment ("SUMF") ¶ 1. The video, released by an animal rights organization, led to widespread public condemnation. SUMF ¶ 2. Five of the workers exposed in the video were charged and convicted of animal cruelty. SUMF ¶ 3.

In response to the negative publicity generated by the release of the Bettencourt Dairies' videos, the Idaho Dairymen's Association—a trade industry organization which represents every dairy farmer and dairy producer in the state—drafted and sponsored a bill aimed at protecting animal agriculture from public scrutiny by criminalizing the type of undercover investigation that exposed the animal abuse at Bettencourt's Dry Creek Dairy. Mr. Dan Steenson, Declaration of Jo Ann Wall submitted in Support of Plaintiffs' Motion for Summary Judgment ("Wall Decl."), Ex. A, p. 4, lns. 1-14.

In considering the bill, the Idaho legislature was transparent about its intent to punish and silence animal rights organizations. One Senator justified the legislation by comparing animal rights investigators to marauding invaders who swarm into foreign territory and destroyed crops to starve foes into submission. SUMF ¶ 8. The Senator also compared undercover 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." Senator Patrick, Wall Decl., Ex. A, p. 81, lns. 1-8. Other Senators echoed these sentiments. Senator Bair, Wall Decl., Ex. B, p. 29, lns. 23-28.

Similar rhetoric prevailed in the House, including statements evidencing an intent to create a civil cause of action for reputational damage resulting from criticism of animal agricultural facilities—i.e., an impermissible end-run around the First Amendment limitations on defamation. The bill's co-sponsor stated that the motivation behind the bill was to protect the

economic interests of factory farms from investigations by animal rights organizations. Representative Batt, Wall Decl., Ex. D, p. 1, lns. 9-26. Another representative revealed that she supported the law due to her opposition to the core political advocacy involved in the Bettencourt investigation: "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." SUMF ¶ 11. Another stressed the need to protect "members of the [dairy] industry [from] persecut[ion] in the court of public opinion." Representative Batt, Wall Decl., Ex. D, p. 2, lns. 17-19. Other representatives echoed the need to protect the dairy industry from public disapproval, including one representative explaining that "[i]t's [a problem] when groups take that information and then publicly crucify a company." Representative Erpelding, Wall Decl., Ex. C, p. 14, lns. 7-10.

Unsurprisingly, the members of dairy and other animal agriculture trade groups expressed similar hostility toward animal rights activists in urging the bill's passage. Mr. Olmstead, Wall Decl., Ex. C, p. 37, lns. 19-26; Mr. Lowe, Wall Decl., Ex. C, p. 40, lns. 8-16; Mr. Prescott, Wall Decl., Ex. C, p. 43, lns. 2-19. Bob Naerebout, Executive Director of the Idaho Dairymen's Association, was clear that he intended for the bill to silence critics of animal agriculture, stating that "[t]his impacts our industry. So, you have to look and say, you know, you don't stand up on a soapbox and broadcast that." Mr. Naerebout, Wall Decl., Ex. A, p. 75, lns. 9-11.

The bill sped through the Idaho legislature and, on February 28, 2014, Governor Otter signed it into law as Section 18-7042. SUMF ¶¶ 23-25.

The bill that became Section 18-7042 was part of a nation-wide trend. In recent years, undercover investigations of animal agriculture facilities have revealed systematic and horrific animal abuse and led to food safety recalls, citations for environmental and labor violations,

plant closures, and criminal convictions. SUMF ¶¶ 29-33. Surreptitious video recordings made by undercover investigators employed at a California slaughterhouse precipitated the largest federal recall of beef in United States history and a subsequent False Claims Act lawsuit settled for $155 million in reimbursements to the federal government related to fraudulent certifications and representations regarding the handling and care of the animals in the facility. SUMF ¶¶ 29-30.

Animal agriculture industry groups made the enactment of farm-secrecy statutes a top legislative priority. Laws seeking to criminalize undercover investigations have been proposed in over a dozen states. SUMF ¶¶ 33-34.

Idaho's is the most sweeping legislation that the industry has been able to enact. Section 18-7042 criminalizes both employment-based investigations where employment is obtained through misrepresentation or omission and other forms of investigation that involve any videography at an animal agricultural facility that is not pre-approved by the owner (even by traditional whistleblowing by employees). I.C. § 18-7042(1)(a–d). The statute defines "agricultural production facility" 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. *Id.* § 18-7042(2)(b).

Private party media investigations, including investigative features such as NBC's infamous "To Catch a Predator," are a common form of politically salient speech. In Idaho, a review of media reports in recent years reveals a range of undercover investigations from life on the streets, to wolf hunting contests, to family planning services, to public school safety. SUMF ¶¶ 35-38. Investigations into private matters, both by government and private actors, are routinely reported and celebrated as important political speech in Idaho. SUMF ¶¶ 35-48.

Section 18-7042 effectively criminalizes any investigation strategy that would reveal the conditions inside an animal production facility and silences Plaintiffs—organizations and individuals who conduct these investigations or rely on them for their advocacy, reporting, and research. Plaintiffs ALDF, People for the Ethical Treatment of Animals, and Idaho Concerned Area Residents for the Environment conduct undercover investigations at animal agriculture facilities in furtherance of their missions and wish to conduct an investigation in Idaho but have been prevented from doing so by the enactment of Section 18-7042. Declaration of Stephen Wells in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 6-10; Declaration of Tracy Reiman in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 8-10; Declaration of Alma Hasse in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 5-14. Plaintiff Western Watersheds conducts investigations related to environmental issues that have also been criminalized by Section 18-7042. Declaration of Travis Bruner in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 7-9. Plaintiffs Koch and Hauff have conducted or coordinated undercover investigations in the past and wish to do so in Idaho but are unable to as a result of the enactment of the law. Declaration of Blair Koch in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 3-8; Declaration of Daniel Hauff in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 3-8. Plaintiff Hickman would like to conduct an undercover investigation in Idaho and is similarly prevented from doing so by operation of Section 18-7042. Declaration of Monte Hickman in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 2-9. Section 18-7042 injures three other Plaintiffs because it prevents them from obtaining material that they rely on in their journalistic and academic work. Declaration of Joshua Frank in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 4-8; Declaration of Will Potter in Support of Plaintiffs' Partial Motion for

Summary Judgment at ¶¶ 6-9; Declaration of James McWilliams in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 6-9. Other Plaintiffs rely on undercover investigation for their advocacy work on a variety of issues including not only animal welfare, but food safety, civil liberties, workers' rights, as well as social and economic justice issues. Declaration of Leo Morales in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 4-13; Declaration of Bruce Friedrich in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 6-10; Declaration of Andrew Kimbrell in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 9-10; Declaration of Kathleen Jagoda in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 8-16; Declaration of Eric Ridgway in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 6-8; Declaration of Aaron Gross in Support of Plaintiffs' Partial Motion for Summary Judgment at ¶¶ 5-11.

STANDARD OF DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). It is "not a disfavored procedural shortcut"; to the contrary, summary judgment is the "principal tool[] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247–48 (1986). There must be a genuine dispute as to any *material* fact—a fact "that might affect the outcome of the suit." *Id.* at 248. The court must view the evidence in the light most favorable to the non-moving party; however, a scintilla of evidence in favor of the non-moving party is not enough to preclude summary judgment. *Id*. at 252. The moving party

bears the initial burden of demonstrating the absence of a genuine dispute as to material fact. *Devereaux v. Abbey,* 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). When the moving party would have the burden of persuasion at trial, it "must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party. . . If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, 'comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'" *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc) (citations omitted).

However, when the only issue that needs to be decided is a question of law, as in this case, summary judgment is especially appropriate, and this is no less true when the parties contest the legal conclusions that flow from certain facts. *Zweig v. Hearst Corp*., 521 F.2d 1129 (9th Cir. 1975).

ARGUMENT

Plaintiffs are entitled to summary judgment as a matter of law because the Ag Gag law violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Ag Gag law violates the First Amendment for two distinct reasons. First, as a content-based and viewpoint-discriminatory restriction on speech subject to strict scrutiny, the law is invalid because it does not advance a compelling interest and is not the least restrictive intrusion on speech. Second, because it restricts significantly more speech than the First Amendment allows, the law is unconstitutionally overbroad.

The law is also invalid under the Equal Protection Clause, because it was motivated in substantial part by animus towards animal welfare groups, who the Idaho General Assembly likened to "terrorists" (among other things). Because the Ag Gag law was openly and expressly intended to punish and suppress the speech of a politically unpopular group, it is per se

unconstitutional. But even if evidence of an improper legislative purpose were not sufficient, standing alone, to render the law constitutionally infirm, the Ag Gag law would still violate the Equal Protection Clause because of the insufficiently close fit between the proffered governmental interest (the protection of property and employment related rights) and the classification in question (the criminalization, in one select industry, of a wide range of activities already addressed by existing state laws on trespass and defamation).

I. THE AG GAG LAW VIOLATES THE FIRST AMENDMENT

A. The Ag Gag Law Offends the First Amendment because it is a Content-Based Restriction that Does Not Withstand Strict Scrutiny.

1. Under this Court's Prior Ruling, this Ag Gag Law is Subject to Strict Scrutiny.

This Court has already held that the Ag Gag law "is a content-based restriction" as to which strict scrutiny applies. (Dkt. 68 at 23–24.) It is well established that content-based restrictions on pure speech or conduct preparatory to speech are subject to strict scrutiny. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010) (recognizing that strict scrutiny applied to a statute regulating the conduct of materially supporting a terrorist organization).

As a content-based impingement on speech, the Ag Gag law must "survive the highest level of scrutiny to pass constitutional muster." (Dkt. 68 at 24); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). The "mere assertion of a content-neutral purpose" is not "enough to save a law which, on its face, discriminates based on content." *Id.* at 642–43.

It is equally well established that a content-based restriction on speech "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Grp.,*

Inc., 529 U.S. 803, 813 (2000). Such a restriction can survive the strict scrutiny standard only if it is "the least restrictive means to further a compelling interest." (Dkt. 68 at 22) (citing *Hoye v. City of Oakland*, 653 F.3d 835, 853 (9th Cir. 2011)). "If a less restrictive alternative would serve the Government's purpose, the legislature *must* use that alternative." *Playboy Entm't Grp.*, 529 U.S. at 813 (emphasis added). Otherwise, the Legislature could "restrict speech without an adequate justification, a course the First Amendment does not permit." *Id*. Accordingly, the only valid content-based restrictions on speech are a handful of "historic and traditional categories [of expression] long familiar to the bar," like obscenity, "fighting words," defamation, and child pornography. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). Journalistic and whistleblower speech hardly fall in any of these categories.

2. The Ag Gag Law Fails Strict Scrutiny Because it is Not Narrowly Tailored to Advance a Compelling State Interest.

The Ag Gag law cannot withstand strict scrutiny for two equally important reasons: (1) it does not advance a compelling state interest; and (2) even if the State's interest were compelling, the law is not narrowly tailored to advance that interest.

a. The Ag Gag Law does not advance a compelling state interest.

Strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner Broad. Sys.*, 512 U.S. at 680. It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id.* And the interest served by the law can never be one that inures primarily to a private rather than a truly public good. *Id.*; *see also Navajo Nation v. United States Forest Service,* 479 F.3d 1024, 1061 (9th Cir. 2007) (recognizing a compelling interest as "only those interests of the highest order" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

When assessing whether a law is justified by a compelling government interest, a court must look at the actual motive or purpose behind the law. As the Ninth Circuit has explained, the very purpose of strict scrutiny as initially conceived was to "smoke out" improper motives through the most exacting form of scrutiny known to constitutional analysis. *Johnson v. California*, 336 F.3d 1117, 1118 (9th Cir. 2003) (noting in the context of alleged racial discrimination, the very purpose of strict scrutiny is to "'smoke out' illegitimate [motives]").

On this point, the legislative record is clear and unequivocal. The sponsors and supporters of the Ag Gag law made no effort to hide the fact that a substantial motivation for the law was to prevent the agricultural industry from being tried "in the court of public opinion." Representative Batt, Ex. D, Wall Decl., p. 2, lns. 17-19; *see also infra* Part II.B (discussing extensive evidence of animus in legislative record). Repeatedly, the bill's sponsors and supporters expressed an overriding concern about the ability of investigators and whistleblowers to "publicly crucify a company" in the media. Representative Erpelding, Ex. C, Wall Decl., p. 14, lns. 7-9.

These statements—and the myriad others along these lines—reveal that a desire to protect the entire agricultural industry from public speech and political debate was the main "motivating factor" behind the law. *Village of Arlington Heights v. Metro. Hous. Corp*., 429 U.S. 252, 265–66 (1977). Because the Ag Gag law was motivated, at least in substantial part, by illegitimate motives, it cannot pass the compelling-interest test. *Id.*

The State's arguments to the contrary do not help its cause. Arguing in support of its motion to dismiss, the State defended the Ag Gag law on the ground that it was really animated, at least in part, by a desire to protect property rights. Putting aside the fact that the State's existing laws on trespass and defamation already do just that (more on this point, below), the

whole point of strict scrutiny is to "smoke out" illegitimate governmental classifications. *Johnson*, 336 F.3d at 1118. Accepting the State at its word—especially in light of the numerous angry statements in the legislative record—would convert strict scrutiny into the bluntest of tools, a tool that would require a court to ignore blatant evidence of improper purpose simply because the State is also able to articulate a different, arguably proper motive. That is not, and cannot be, the law. A compelling government interest must be the actual legislative basis for the law and not some after the fact rationalization. *Cf. Shaw v. Hunt*, 517 U.S. 899, 908 n. 4 (1996) (holding that a "classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose""); *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (distinguishing a legitimate government interest from a compelling interest and noting that an interest will be treated as legitimate if there is any conceivable basis for the law, "whether or not the basis has a foundation in the record").

The State's compelling-interest argument also does not withstand scrutiny as a matter of common sense. To the State, the protection of private property rights trumps all. But the Ag Gag law blocks public access to crucially important information about a large, federally-subsidized industry whose practices have an immense impact on the health of our animals, the integrity of our food supply, the safety of our workers, and the cleanliness of our environment. The undercover investigations that gave rise to the Ag Gag law were designed to shed light on the practices of this industry—practices that, in turn, have a direct and profound impact on public health and safety. Seen in this light, the most—and, arguably, only—compelling interest at stake here is the public's compelling need to know the truth about its food supply. Quelling public debate can never qualify as a legitimate government interest, much less

a compelling one. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (recognizing that a law serves a compelling interest only if it prevents or reflects a response to the "gravest abuses, endangering paramount interest.").

The fact that the animal agriculture industry has been the subject of numerous investigations and exposés only serves to underscore the lack of any compelling State interest justifying the Ag Gag law. Earlier in this case, the State relied on the extensive whistleblowing in this sector as proof of the legitimacy of the Ag Gag law, but the State got it exactly backwards. That the animal industry is a subject of intense controversy and public debate only underscores the pressing public interest in allowing vigorous and open debate about the industry's practices—an interest that the law directly thwarts. It would be perverse to suggest that speech can be regulated to the greatest extent in those fields where the issues are of the greatest public concern. *See Snyder v. Phelps,* 131 S. Ct. 1207, 1215 (2011) (recognizing that whether speech is of "public or private concern" is critical to the First Amendment analysis) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 758–759 (1985)).

Nor could the State possibly justify the Ag Gag law on the ground that it is a valid measure to protect against reputational injuries in the agriculture industry. Rather, the State must comply with a specific and demanding set of constitutional requirements that limit the imposition of liability for defamation and similar torts. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). These conditions, which include falsity and malice, ensure that protected First Amendment expression is not unduly chilled or deterred by excessive liability. By passing the Ag Gag law, the State of Idaho wiped all these requirements off the books in one narrow area—the agriculture industry—and, making matters worse, imposed criminal liability without any of the safeguards mandated by the Supreme Court.

Under no circumstances would the First Amendment tolerate this approach in a straightforward defamation statute. It cannot be a compelling state interest to make an end run around constitutional limitations on defamation law. Any attempt on the State's part to defend the Ag Gag law on this ground would only underscore the extent to which the State has failed to comply with its constitutional obligations.

b. The Ag Gag Law is not Narrowly Tailored.

Even if the state interests underlying the Ag Gag law could be characterized as "compelling" for strict scrutiny purposes (they cannot), the law violates the First Amendment because it is not narrowly tailored to serve those interests. A law that discriminates against speech based on its content may only survive First Amendment scrutiny if it is the least restrictive means of serving the State's compelling government interest. *Playboy Entm't Grp.*, 529 U.S. at 823*; Hoye*, 653 F.3d at 853; *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) (recognizing that when the government seeks to regulate protected speech on content-based grounds the restriction must be "the least restrictive means among available, effective alternatives"); (Dkt. 68 at 22) ("Content-based exemptions may pass constitutional muster only if they are the least restrictive means to further a compelling interest."). Thus, to the extent the Ag Gag law can be justified by a compelling government interest, such as some general protection of property rights, the law nonetheless fails strict scrutiny because it restricts vastly more speech than is necessary in order to protect tangible property interests.

A new law cannot be the least restrictive means of serving the State's interest where existing laws already serve those interests. *See Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc). In *Comite de Jornaleros*, the en banc Ninth Circuit held that a law banning some forms of roadside solicitation was unconstitutional, even under intermediate scrutiny, because the government already had "various other laws at its disposal that

would allow it to achieve its stated interests while burdening little or no speech." *Id.* The Court held that the existence of other generally applicable laws that would serve the stated purpose for a new, speech-inhibiting law means that latter law is not narrowly tailored to the government interest. *Id*. at 950 ("Even under the intermediate scrutiny . . . we cannot ignore the existence of these readily available alternatives," and thus holding the ordinance unconstitutional); *see also Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) ("If it is said that these [fraud and trespass laws] are less efficient and convenient . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.").

Here, the State of Idaho has long had laws against trespass, fraud, and defamation that already adequately protect the State's proffered interests. *See, e.g.*, I.C. §§ 18-7008, 18-7011, 18-4801; *cf. Country Cove Dev., Inc. v. May*, 143 Idaho 595, 600 (2006) (setting forth elements of fraud). It is also already illegal in Idaho, not surprisingly, to misrepresent oneself as a doctor, veterinarian, lawyer, or other licensed professional, or to practice those professions without a license. *See, e.g.*, I.C. §§ 54-1804(3), 54-2114(1), 3-420. Likewise, federal and state laws already make it illegal to engage in efforts to steal trade secrets. 18 U.S.C. §§ 1831-1839; I.C. §§ 48-801 to -807. Whether these and other related laws serve compelling interests is beyond the scope of this case, but it is certain that these various laws—trespass, fraud, trade secret protection, and lying regarding professional licenses—represent examples of less restrictive alternatives to the sweeping limitations on speech imposed by the Ag Gag law. The Ag Gag law criminalizes *all* misrepresentations to gain access for any reason and *all* audiovisual recordings of *any* agricultural activity. As in *Comite de Jornaleros*, the existence of other, general laws that serve many of the purported interests of the Ag Gag law means that this law is not narrowly tailored. 657 F.3d at 949-50.

Such breadth is incompatible with strict scrutiny. Narrow tailoring requires legislators take a scalpel to excise a precise evil, but the Idaho General Assembly instead took a hatchet to the First Amendment rights of whistleblowers in the agricultural industry. *See Playboy Entm't Grp.*, 529 U.S. at 813; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 n.6 (1989) (recognizing strict scrutiny as "the most exacting scrutiny").

B. The Ag Gag Law Also Offends the First Amendment because it is Unconstitutionally Overbroad.

The Ag Gag law also offends the First Amendment because Section 18-7042 is unconstitutionally overbroad. The overbreadth doctrine requires that laws be invalidated when they restrict significantly more speech than the First Amendment allows. *New York v. Ferber*, 458 U.S. 747, 769, 772–73 (1982); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002). Criminal statutes must be examined particularly carefully for overbreadth. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). Such laws are especially dangerous from a First Amendment perspective because of their potential to chill important expression. *Id.* Overbreadth law 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). Moreover, when the criminalized conduct implicates the core concerns of the First Amendment, it is more likely to be deemed overbroad. *See generally* Richard Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 894 (1991).

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). By its plain terms, while the Ag Gag statute criminalizes some conduct that is not governed by the First Amendment, it also sweeps within its scope a broad swath of expression protected by the First Amendment.

First, the law is substantially overbroad because it forbids *all* misrepresentations to gain access to agricultural facilities, without regard to whether that access is for something illegitimate like theft, or instead for a legitimate, federally-protected activity like labor union salting or whistleblowing. Thus, the law criminalizes a considerable amount of statements that, while misrepresentative in some way, are nonetheless fully protected speech. *See* (Dkt. 68 at 16) ("False statements that do not constitute defamation, fraud, or perjury are fully protected speech."). For example, the Ag Gag law criminalizes asking to use a restroom when the motive for the request is investigative, or not mentioning all of one's political affiliations on a visitor questionnaire or employment application, among many other protected misrepresentations. Such lies are protected speech, *Alvarez*, 132 S. Ct. at 2542–43, and thus the Ag Gag law regulates a substantial amount of protected speech and is therefore overbroad. *See City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Second, the law is overbroad because it criminalizes *any* audiovisual recording of the conduct of an agricultural production facility. Image capture and recording is protected speech. (Dkt. 68 at 15) (holding that audiovisual recordings are an "expressive activity" and "protected speech"). By criminalizing all non-consensual recordings of agricultural conduct, the law restricts a significant amount of protected speech and is therefore overbroad.

Moreover, because "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. *See* I.C. § 18-7042(2)(a–b). Any misrepresentation used to access any of these locations is a crime under the Ag Gag law, and any recording made without express consent at such locations, if they are

not open to the public, is likewise criminalized, thus further confirming the conclusion that the Ag Gag law restricts a significant amount of protected speech. *Ferber*, 458 U.S. at 772. To give but three examples 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. Telling a white lie about intending to buy a coffee in order to use the bathroom at a restaurant would be a crime. And likewise, using one's phone or camera to record the butcher at Costco—a member's only, private store—is a criminal act unless the "facility owner" expressly consents to the recording.

In sum, the statute is so sweeping that it criminalizes countless forms of protected speech, both in the form of pure speech and conduct preparatory to speech. Because the law is overbroad, it is invalid on its face. *See id.*

II. THE AG GAG LAW ALSO VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Laws Substantially Motivated by Animus Towards an Unpopular Group Violate the Equal Protection Clause.

As this Court has recognized, when a law is substantially motivated by impermissible animus towards a group, the law is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. (*See* Dkt. 68 at 25); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996); *USDA v. Moreno*, 413 U.S. 528, 534 (1973). Simply put, "[w]hen a law exhibits such 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); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013).

Under traditional rational basis review, a law that tries, though imperfectly, to solve a problem will almost always be upheld. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). Likewise, a law that merely solves part of a larger problem by singling out some persons or industries for more protection than others is tolerated. *Id.* But the existence of animus as a substantial motivating factor behind a law fundamentally changes the inquiry.

Many commentators and courts have argued that legislation motivated in substantial part by animus towards politically unpopular groups is per se unconstitutional. (*see* II(B)). But all agree that, at the very least, legislation motivated by animus triggers heightened review—that is, "careful consideration" of the fit between the classification and the proffered government interest. (*see* II(C)). *See Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). As a matter of law, Plaintiffs are entitled to relief under either approach.

B. The Ag Gag Law Violates the Equal Protection Clause Because it Was Substantially Motivated by Animus.

Under the first approach to heightened rational basis review, animus standing alone justifies invalidating an otherwise constitutional law. *See Bishop v. Smith*, 760 F.3d 1070, 1103 (10th Cir. 2014) (Holmes, J., concurring) (noting that animus is "most aptly" described as "a doctrinal silver bullet" such that a showing of animus requires the invalidation of the statute in question) (citing Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 889 (2012)); *see also* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, Sup. Ct. Rev. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424743 ("a legislative process impelled by animus is a poisoned [one]"); ("If animus was present, moreover, it taints the law. The act is unconstitutional even if legitimate reasons might now be offered to justify it."). Notably, animus

will invalidate a law in this way even if it is not be the sole motivation for the law. The Supreme Court has recognized that, "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington*, 429 U.S. at 265. Accordingly, so long as an improper, animus-based purpose is a motivating factor in the decision, the law must be struck down, or, at the very least, heightened rational basis in the form of "careful consideration" applies. *Windsor*, 133 S. Ct. at 2692.

Impermissible animus need not take only the form of repeated statements of overt bias or malice to the disadvantaged group. The Supreme Court's animus cases reflect very little actual evidence of malice or ill will towards the group in question, demonstrating that the slightest evidence of hostility to a group indelibly alters the equal protection inquiry. *See, e.g.*, *Moreno*, 413 U.S. at 534 (treating a single legislator's comment about "hippies" as tainting the legislation and triggering heightened rational basis review). Moreover, the Supreme Court's decisions make clear that animus may be gleaned both from the statements of legislators and from the testimony of constituents who testify in favor of a government action. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985). In *Cleburne*, for example, the Court explicitly considered the testimony of community members that was part of the legislative record and treated it as relevant in understanding the atmosphere of animus surrounding the governmental action in question. *Id.*

There is more evidence of animus in the legislative record of the Ag Gag law than there is in any other case Plaintiffs know about:

- Senator Jim Patrick, sponsor of the Senate bill, justified the legislation by claiming that animal activists were comparable to marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission. SUMF ¶ 8. During a committee

hearing on the statute, Senator Patrick likened animal activists to "terrorists" and stated that: "[T]errorism has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety. This is clear back in the 6th century B.C." Senator Patrick, Wall Decl., Ex. A, p. 81, lns. 4-8. Defending the legislation, Senator Patrick said, "This is the way you combat your enemies." Senator Patrick, Wall Decl., Ex. A, p. 81, lns. 7-8.

- Representative Linden Bateman similarly referred to animal protection organizations that encourage undercover whistleblowing as "extreme activists who want to contrive issues simply to bring in the donations." Representative Bateman, Wall Decl., Ex. D, p. 4, lns. 5-7.
- Representative Donna Pence also indicated that the bill was necessary to prevent animal rights groups from engaging in their investigative activities: "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." Rep. Donna Pence, *Pence Legislative 2014 Update Week 7*, Donna Pence Legislative Updates & news (Feb. 21, 2014), https://representativepence.wordpress.com/2014/02/21/pence-legislative-2014-update-week-7/, *archived at* http://perma.cc/K4BB-F9GS; *see also id.* (explaining that without the previous investigation in Idaho and without the efforts to stir boycotts and gain publicity for the investigation "I don't think this bill would ever have surfaced.").
- Representative Gayle Batt, speaking of the Idaho Dairymen's Association involvement in the legislation, noted: "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*. It was then that th[e]y were convinced that *they* had to go forward with this legislation." Representative Batt, Wall Decl., Ex. D, p. 2, lns. 17-19. (emphasis added).

- The drafter of the legislation, Dan Steenson, testified that, "The most extreme conduct that we see threatening Idaho dairymen and other farmers occurs under the cover of false identities and purposes, extremist groups implement vigilante tactics to deploy self-appointed so-called investigators who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse." Mr. Steenson, Wall Decl., Ex. C, p. 8, lns. 25-26, p. 9, lns. 1-3. Steenson emphasized that "After the infiltrator's work is done, the vigilante operation assumes the role of *prosecutor in the court of public opinion* by publishing edited recordings and advocating that the farmer's customers go elsewhere." Mr. Steenson, Wall Decl., Ex. C, p. 9, lns. 4-6 (emphasis added).
- Insinuating that the publication and investigative activities of animal welfare groups is morally corrupt and constitutes an independent crime, Representative Erpelding testified that "It's when groups take that information and then publicly crucify a company, apologize for the language, publicly crucify a company and then, you know, use it as a blackmail tool." Representative Erpelding, Wall Decl., Ex. C, p. 14, lns. 7-9.
- Tony VanderHulst, President of Idaho Dairymen's Association, went so far as to call the groups "terrorists" and inaccurately maligned the investigations as defamatory: "This is about exposing the real agenda of these radical groups that are engaging in farm terrorism. Activists use intimidating tactics to damage the business of the producers and their customers. 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." Mr. VanderHulst, Wall Decl., Ex. C, p. 30, lns. 3-8.

In sum, this legislative history leaves no doubt that overt hostility towards animal welfare groups, and moral disapproval of their operations, were substantial motivating factors for the Ag

Gag law. Indeed, the United States Supreme Court has overturned regulations and statutes under the Equal Protection Clause in cases where there was far less evidence of animus than there is here. As noted above, in *Moreno*, the Court found animus based on a lone comment from a single legislator. 413 U.S. at 534 (finding animus where Congress denied food stamps to "hippie communes."). More recently, in *Windsor*, the Court found animus sufficient to invalidate the federal Defense of Marriage Act based on just three statements in a House Report. 133 S. Ct. at 2693 (finding animus where Congress denied any federal recognition to married same-sex couples). Indeed, there do not appear to be any state or federal cases with more evidence of overt animus in the record.[2] This alone is sufficient to find the Ag Gag law unconstitutional based on the presence of animus as a motivating factor for the law. *See Bishop*, 760 F.3d at 1103 (Holmes, J., concurring).

C. Section 18-7042 Cannot Survive Careful Consideration because there is an Exceedingly Poor Fit between the Law and its Purported Purpose and Effects.

Even if this Court were to decline to treat animus as dispositively fatal here, the legislative animus in the record requires a highly skeptical, non-deferential form of rational basis review. *Windsor*, 133 S. Ct. at 2692 (recognizing that where animus is one of the motivations for a law, the law is, at the very least, subject to heightened, "careful consideration"). As this Court explained, if animus is present, "the Court must skeptically scrutinize any offered justifications for section 18-7042 . . . " (Dkt. 68 at 27). Under this more skeptical rational basis

[2] Moreover, leading constitutional experts have observed that even a "facially neutral law may nonetheless violate equal protection if the disparate impact reflects a purpose to discriminate." Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm,"* 64 Case W. Res. L. Rev. 1, 7 (2014) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492543; *see also id.* at 8 n.41. The majority of undercover journalistic investigations in agricultural facilities are funded and facilitated by animal welfare groups.

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 strong. 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. 473 U.S. at 448–50. The Court recognized that, among other things, reducing parking concerns, traffic, and the risks associated with high-density housing within flood plains were entirely legitimate and proper government interests. *Id.* These were the type of concerns that would justify upholding a law without question under traditional rational basis review. *Id.* However, the Court held that because the presence of animus tainted the government action in question, merely offering some plausible connection between the stated government interests and the classification in question was inadequate. *See id.* 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. *Cleburne*, then, reflects the rule that an otherwise constitutional law must be struck down under "careful scrutiny" when the relationship between the government interest and the classification in question is not sufficiently close. There is no doubt that the classification in question in *Cleburne* would survive traditional rational basis review, but a much more searching review is required when animus is present.

Stated differently, 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.*, *id.* at

448–50. The presence of animus triggers the need for a review of the law for over-and-under inclusivity that is entirely foreign to traditional rational basis review. *Id.*

Such a review of the Ag Gag law is fatal to the enforcement of the statute. Even if the protection of property and employment related rights asserted by the State of Idaho in this case could be regarded as entirely legitimate government interests, a variety of existing laws serve these very objectives. The asserted goals of reducing traffic and public safety were legitimate government objectives in *Cleburne*. However, *Cleburne* instructs that the existence of animus as a motivating factor in this case means that there must be a distinct and uniquely close relationship between the stated government interest and the classification created by the law. Here, however, there is nothing unique about agricultural property interests that justify the targeting of whistleblowers in this industry. Certainly many if not all businesses would enjoy the benefit of being statutorily insulated from undercover investigations. Just as there is nothing to explain in *Cleburne* why housing for those with developmental disabilities should be treated differently from other high-density housing, there is nothing in this case, other than animus, that justifies distinguishing between whistleblowing in the agricultural industry and whistleblowing in all other industries.[3] A general prohibition on investigative efforts in a single industry like

3. The State and its supporting Amici have also argued that the law is rationally targeted to protect the industry most likely to be the subject of undercover investigations. *See* Mr. Brackett, Wall Decl., Ex. A, p. 59, lns. 25-27; Mr. Hendricks, Wall Decl., Ex. A, p. 61, lns. 25-28; Senator Patrick, Wall Decl., Ex. A, p. 81, lns. 10-19; Senator Rice, Wall Decl., Ex. A, p. 84, lns. 1-4; Senator Guthrie, Wall Decl., Ex. A, p. 84, lns. 8-14; *see also* Senator Patrick, Wall Decl., Ex. B, p. 2, lns. 4-22; Senator Rice, Wall Decl., Ex. B, p.s 35-36; Mr. VanderHulst, Wall Decl., Ex. C, p. 30, lns. 15-17; Mr. Mallet, Wall Decl., Ex. C, p. 32, lns. 1-7; Representative Vander Woude, Wall Decl., Ex. D, p. 5, lns. 21-25; Representative VanOrden, Wall Decl., Ex. D, p. 14, lns. 22-23; Representative Batt, Wall Decl., Ex. D, p. 18, lns. 18-24. Such reasoning is perverse because it suggests that the more public interest and safety is implicated by an industry, the more effort the state will take to prevent exposure and whistleblowing of wrongdoing in that industry. Moreover, post hoc rationalizations like those find no home in heightened rational basis review.

that codified by Idaho's Ag Gag law cannot withstand equal protection scrutiny. Even when the law in question advances plainly legitimate government interests, animus taints a law with a presumption of unconstitutionality. *See Windsor*, 133 S. Ct. at 2693, 2696.

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As a matter of law, the record demonstrates that Idaho legislators were motivated in substantial part by animus in passing the Ag Gag law, and because the law is drastically over and under inclusive, it violates the Equal Protection Clause of the Fourteenth Amendment. Accordingly, as a matter of law, summary judgment for the Plaintiffs on their Equal Protection claim is proper.

CONCLUSION

For the reasons set out above, Plaintiffs respectfully request that this Court grant summary judgment on Plaintiffs' First Amendment and Equal Protection claims.

Respectfully submitted this 18th day of November, 2014.

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See SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480–81 (9th Cir. 2014); *see also Windsor*, 133 S. Ct. at 2693 (refusing to even consider the state's proffered rationales for the law in question, but instead limiting its analysis to "determining whether a law is motivated by an improper animus or purpose"). Moreover, under the State's and its Amici's reasoning, if undercover investigations become more common in childcare facilities, then the State would be justified in targeting journalists or activists who seek to expose abuse or mistreatment of the State's children. Animal welfare groups may be less politically popular than children's rights advocates, but the effort to curb their investigative and reporting efforts are no less deserving of protection from impermissible animus.

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