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**IN THE 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 1:14-cv-00104-BLW

**Brief of Amicus Curiae Erwin Chemerinsky,
Founding Dean and Distinguished Professor of Law and
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INTRODUCTION AND INTEREST OF AMICUS CURIAE

In late 2012, an undercover video taken at Idaho’s Dry Creek Dairy drew widespread national attention. It showed dairy workers repeatedly beating, kicking, and jumping on cows and, in one instance, using a moving tractor to drag a cow by a chain attached to her neck. Idaho’s Legislature reacted swiftly. But rather than crack down on animal abuse at factory farms, the Legislature took its cue directly from industry lobbyists: it sought to obstruct the type of undercover investigation that exposed the abuse in the first place. Idaho’s “Ag Gag” law creates a new crime, “interference with agricultural production,” under which journalists, investigators, and animal welfare advocates may face up to a year in jail for mounting undercover investigations or recording video at agricultural facilities.

Amicus Erwin Chemerinsky files this brief to assist the Court with two questions arising from this constitutional challenge to the Ag Gag law (Idaho Code § 18-70429(1)(a)-(d)). *First*, what is the status under the First Amendment of misrepresentations used to facilitate undercover investigations, and what level of scrutiny applies to attempts to restrict them? This brief explains why the misrepresentation prohibition is subject to, and fails, strict scrutiny under Justice Kennedy’s plurality opinion in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). To facilitate appellate review, the brief also urges this Court to hold, in the alternative, that the statute would fail even if analyzed under the intermediate-scrutiny or “proportionality” approach suggested by Justice Breyer’s concurring opinion. Both the plurality and concurring opinions make clear that false speech is not deprived of constitutional protection simply because it is false. That is especially so where, as here, the misrepresentations—like those made by “testers” in antidiscrimination cases and by some of the finest journalists in our nation’s history—cause no cognizable injury in their own right and are aimed solely at uncovering the truth on matters of public concern.

Second, what is the relationship between the speech and equal-protection principles implicated in this case? Because the misrepresentation and recording prohibitions of Idaho’s Ag Gag law both single out the speech of one group (those who advocate for animal welfare), these distinct constitutional principles are “closely intertwined” in this case. *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972). This brief explains that Idaho’s Ag Gag law, even apart from an animus-based rationale, independently violates the Equal Protection Clause because it unjustifiably discriminates on the basis of speakers’ fundamental right to engage in speech.

Amicus Erwin Chemerinsky is well positioned to assist the Court in these matters. He is the founding Dean and Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. He previously taught at Duke Law School for four years and at the University of Southern California for 21 years. Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of eight books—including his treatise CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES and the casebook CONSTITUTIONAL LAW—and more than 200 articles in top law reviews. He frequently argues cases before the nation’s highest courts, including the United States Supreme Court, and also serves as a commentator on legal issues for national and local media. In January 2014, *National Jurist* magazine named Dean Chemerinsky the most influential person in legal education in the United States.

ARGUMENT

A. The Ag Gag law’s misrepresentation prohibition is subject to, and fails, strict scrutiny under the First Amendment and would fail even under an alternative “proportionality” analysis.

This Court has already concluded, at the pleadings stage, that the misrepresentation prohibition of Idaho’s Ag Gag law is a content- and viewpoint-based restriction on false speech, subject to the most exacting form of First Amendment scrutiny. *Animal Legal Def. Fund v. Otter*,

2014 WL 4388158, at *9 (D. Idaho Sept. 4, 2014) (“*ALDF*”). As the Court noted, Idaho’s Ag Gag law “allows job applicants who make misrepresentations to secure employment with the goal of praising the agricultural facility to skate unpunished while punishing job applicants who misrepresent themselves with the intent of exposing abusive or unsafe conditions at the facility.” *Id.* at 11. This brief provides additional reasons why the Court’s holding was correct and should be reaffirmed at summary judgment.

1. As an initial matter, there should no question that the speech at issue here, though false, is fully entitled to First Amendment protection. In *Alvarez*, six Justices—that is, both the four-Justice plurality and the two-Justice concurrence—rejected the notion that there is “any general exception to the First Amendment for false statements.” 132 S. Ct. at 2544. Instead, as the plurality explained, First Amendment protection for false statements only gives way where there is “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as invasion of privacy or the costs of vexatious litigation.” *Id.* at 2545. Absent such “legally cognizable harm,” a statute “that targets falsity and nothing more” is subject to exacting First-Amendment scrutiny. *Id.* The six Justices, to put it plainly, “were clear that speech cannot be punished just because it is false.” Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA Journal, Sept. 5, 2012.

Idaho’s law, as applied to the speech at issue, does not target any cognizable harm. As this Court has already recognized, “the limited misrepresentations *ALDF* says it intends to make—affirmatively misrepresenting or omitting political or journalistic affiliations, or affirmatively misrepresenting or omitting certain educational backgrounds”—will not cause “any material harm to the deceived party.” *ALDF*, 2014 WL 4388158, at *9. It is true that the *Alvarez* plurality at one point described as unprotected those false claims “made to effect a fraud or secure moneys or other valuable considerations, say offers of employment.” 132 S. Ct. at 2547. But the proposed

speech at issue here does not fit that description—it would not be “used to gain a material advantage,” *id.*, but rather to find evidence of animal abuse and truthfully publicize that evidence. *See State v. Melchert-Dinkel*, 844 N.W.2d 13, 21 (Minn. 2014) (holding that *Alvarez’s* fraud exception is not met where the speaker does not gain “a material advantage or valuable consideration” for the false speech). The misrepresentations, in other words, are made solely for the purpose of newsgathering.

To be sure, while “[t]he Supreme Court has not yet addressed the relevant constitutional implications of a common law misrepresentation action against a media defendant,” *Veilleux v. Nat’l Broad. Co.*, 206 F.3d 92, 102 (1st Cir. 2000), it has held that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *see also Desnick v. Am. Broad Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (“[T]he media have no general immunity from tort or contract liability.”). Idaho, however, is not simply attempting to subject newsgathering to a body of “generally applicable” law, such as tort law, which applies to the “daily transactions of the citizens.” *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999). Idaho instead “singles out the press,” *id.*—and, indeed, singles out those investigators and journalists critical of animal abuse. And the law’s effect on newsgathering, by design, is far from “incidental”—it *directly* criminalizes surreptitious newsgathering at agricultural facilities.

But even if the speech here were assessed under the standards applicable to tort suits, the outcome would still be the same: misrepresentations are not actionable unless they cause cognizable harm in their own right. In the famous *Food Lion* case, for example, the ABC News reporters in that case falsified their resumes to get jobs at Food Lion solely for the purpose of exposing unsanitary food-handling practices. *Food Lion*, 194 F.3d at 512. Even though the

reporters had “knowingly made misrepresentations with the aim that Food Lion rely on them,” the Fourth Circuit held that there was no actionable fraud, and hence reversed a jury verdict for punitive damages, because there was no legally cognizable harm caused by reliance on the misrepresentations. *Id.* Similarly, in *Desnick*, an ABC News program sent in seven undercover “test patients” to expose an eye-care center that was providing vulnerable elderly patients with unnecessary cataract surgery to collect on Medicare reimbursements. 44 F.3d at 1348. The Seventh Circuit saw no scheme to defraud in these facts: “[T]he only scheme here,” wrote Judge Posner, “was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme.” *Id.* Finally, in yet another case involving misrepresentations by journalists, the First Circuit concluded that tort law, consistent with the First Amendment, could permit recovery only for “pecuniary harm caused [to the plaintiffs] by their justifiable reliance upon an actionable representation.” *Veilleux*, 206 F.3d at 123, 129.

Thus, even before *Alvarez*, the lower courts had staked out a general rule that is strongly protective of newsgathering by misrepresentation: “[I]f the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it ... then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.” *Desnick*, 44 F.3d at 1355. So too here. “[I]f an undercover investigator omits certain facts, like political affiliations, to secure employment with agricultural facility and then publishes a false story, the harm would stem from the publication of the *false story*, not the lies told to gain access to the facility.” *ALDF*, 2014 WL 4388158, at *9 (emphasis added). In that scenario, the facility owner’s remedy would lie in the law of defamation, not fraud. “Conversely, if an undercover investigator lies to get a job at an industrial agricultural facility and then publishes a *true story* revealing the conditions present at the

facility without causing any other harm to the facility, there is no compensable harm for fraud.” *Id.* (emphasis added).

Speech of this sort is the functional equivalent of “testing” in civil rights cases. As the Supreme Court has explained in the housing discrimination context, “‘testers’ are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). The ability to make misrepresentations is integral to this activity. “Investigators and testers, however, do not engage in misrepresentations of the grave character implied by the words dishonesty, fraud, or deceit but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence.” *Apple Corps Ltd. v. Int’l Collectors Soc.*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998) (concluding that misrepresentations used in testing do not violate legal ethics rules prohibiting fraud). “[T]he misrepresentations as to identity and purpose employed by discrimination testers for the purpose of gathering information are uniquely useful for that purpose, are legal, are long-established and widely used, and are generally employed for socially desirable ends.” David S. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 GEO. J. LEGAL ETHICS 791, 792 (1995).

And this long tradition of constitutionally protected misrepresentation extends well beyond discrimination cases. Going undercover—which by its nature entails a certain degree of deception—is a practice with a long and venerable history in the finest traditions of the First Amendment. In the 1970s, for example, William Sherman won a Pulitzer Prize for posing as a patient to expose Medicaid fraud. *See* JAMES H. DYGART, *THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA* 23-25 (1976). But perhaps the most famous example is also most relevant here: The muckraker Upton Sinclair engaged in misrepresentation so he could get a job

at a meat-packing plant in Chicago to gather material for his influential novel, *The Jungle*. See WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977). The fruit of Sinclair’s investigations—a vivid exposé of horrifying unsanitary conditions in the meat industry—spurred both President Theodore Roosevelt and Congress to take action on the Meat Inspection Act and the Pure Food and Drugs Act, which paved the way for the creation of the FDA. See, e.g., *Meat Inspection Bill Passes The Senate*, N.Y. TIMES, May 26, 1906, at 1 (reporting how the Senate’s action was “the direct consequence of the disclosures made in Upton Sinclair’s novel, ‘The Jungle’”); *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 967 (2012). The question here, a century later, is whether the government may brand any would-be Upton Sinclairs as criminals.

2. The four-justice plurality in *Alvarez* invalidated the Stolen Valor Act under “exacting scrutiny,” finding that the statute was not “actually necessary to achieve the Government’s stated interest,” as exacting, or strict, scrutiny requires. 132 S. Ct. at 2549. Because the speech at issue here does not fall into the exceptions for fraud, defamation or other categories of unprotected speech, the same level of scrutiny applies. Applying strict scrutiny, this Court previously found that “[o]n its face” the Ag Gag law is a presumptively invalid “content-based restriction” on speech. *ALDF*, 2014 WL 4388158, at *10. For the reasons given in the plaintiffs’ motion for summary judgment, the state is unable to overcome that presumption.

This Court should also explicitly hold, in the alternative, that the Ag Gag law would pass muster even under the intermediate-scrutiny approach suggested by the concurring opinion of Justice Breyer, joined by Justice Kagan. As Amicus has previously noted, this approach is “puzzling” because “the law is clearly settled that content-based restrictions on speech must meet strict scrutiny and will be upheld only if they are proven necessary to achieve a compelling interest.” Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA JOURNAL, Sept. 5, 2012. “Proportionality” review—the label Justice Breyer uses to describe his analysis—never has

been part of First Amendment analysis.” *Id.* And a majority of the Supreme Court has recently rejected such a “free-floating test for First Amendment coverage” as both “startling and dangerous.” *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

Although strict scrutiny is therefore the right approach under controlling law, an alternative holding on intermediate scrutiny would facilitate appellate review in the event that the Ninth Circuit disagrees. Justice Breyer’s “proportionality” approach “take[s] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objective, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court must consider whether the statute works speech-related harm that is out of proportion to its justifications.” *Alvarez*, 132 S. Ct. at 2551. Where, as here, “the checking function served by investigative reporting involving some deception” is weighed against the “government’s interest in protecting against invasions of the listener’s autonomy,” the balance favors the truth exposed by the speaker. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1125-26 (2006). At the end of the day, the First Amendment favors truth seeking over truth suppression.

B. Because Idaho’s Ag Gag Law unjustifiably discriminates on the basis of a fundamental right, it is also subject to—and fails—strict scrutiny under the Equal Protection Clause.

As discussed above, Idaho’s crime of “interference with agricultural production” is a content- and viewpoint-based restriction on speech that cannot satisfy First Amendment scrutiny. For that reason alone, the law is unconstitutional. This brief adds that the Court can, and should also, reach the same result under the Equal Protection Clause of the Fourteenth Amendment.

Where a law classifies speech based on its content, equal protection and First Amendment concerns can be “closely intertwined.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 94–95

(1972). “Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” *Id.* at 96. But the Equal Protection Clause serves a distinct purpose from the First Amendment and protects distinct constitutional interests. While the First Amendment is concerned with protecting speech, the Equal Protection Clause “protects the individual from state action which selects him out for discriminatory treatment.” *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Thus, the “crucial question” in an equal protection case is “whether there is an appropriate governmental interest suitably furthered by the differential treatment.” *Mosley*, 408 U.S. at 94-95.

The “first step in equal protection analysis is to determine the standard of scrutiny.” *Scariano v. Justices of the Supreme Court of Indiana*, 38 F.3d 920, 924 (7th Cir. 1994). Strict scrutiny under the Equal Protection Clause is commonly invoked against laws that discriminate against members of a suspect class, and courts sometimes loosely describe equal protection claims as requiring membership in such a class. *See, e.g., Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Nevertheless, it is black-letter law that the Equal Protection Clause also requires a strict scrutiny standard where, as here, a state discriminates based on the exercise of a fundamental right. ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.11(i) (2008). “All First Amendment rights are fundamental rights and, therefore, classifications related to them are subject to this compelling interest standard.” *Id.* Under either a free-speech or equal-

protection analysis, then, such a law is valid only if it can survive strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

Under the Equal Protection Clause, restrictions on speech are presumptively unconstitutional when they target a “narrow segment of the media” for special treatment. *Pitt News v. Pappert*, 379 F.3d 96, 105 (3d Cir. 2004). In *Grosjean v. American Press Co.*, for example, the Supreme Court struck down a Louisiana tax that applied only to newspapers with weekly circulations of more than 20,000 because the tax targeted “a selected group of newspapers.” 297 U.S. 233, 251 (1936). As later decisions make clear, this presumption of unconstitutionality is not limited to instances where there is evidence that the state’s action represents a purposeful attempt to interfere with protected speech. Even where “there is no evidence of an improper censorial motive,” state action that singles out particular members of the press “poses a particular danger of abuse by the State.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (striking down a tax on general-interest magazines that exempted religious, professional, trade, and sports journals). Thus, in an opinion written by then-Judge Alito, the Third Circuit in *Pitt News* struck down a Pennsylvania statute that prohibited college newspapers from receiving payment for alcoholic beverage advertisements. 379 F.3d at 101. Because the statute targeted only a narrow portion of the media—college newspapers—the court held the law to be presumptively unconstitutional. *Id.* at 111.

In denying the defendants’ motion to dismiss the equal-protection claims here, this Court based its analysis on the question “[w]hether bare animus motivated the legislation or whether the law truly furthers the offered purposes.” *ALDF*, 2014 WL 4388158, at *13. That the law was motivated by “bare animus” is a sufficient reason for holding the law unconstitutional, but it is not the end of the question. The bare-animus test is “the most deferential of standards” under the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 633 (1996). But laws that distinguish

between speakers based on the content of their speech are usually unconstitutional even if the distinction is based on more than pure animus—that is, *even if the law actually furthers a legitimate state interest*. To justify those kinds of distinctions, the state must put forward a *compelling* interest and show that the law is *narrowly tailored* toward advancing that interest. See *Plyler v. Doe*, 457 U.S. 202, 217–218 (1982) (“With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest”); *Williams v. Rhodes*, 393 U.S. 23 (1968) (requiring classification to be narrowly tailored to substantial legitimate interests).

Even assuming, for example, that a state could show a legitimate interest in restricting door-to-door solicitation, it could not prohibit solicitation *only* by religious charities. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). And though a state presumably has a legitimate interest in preventing litter, it could not constitutionally criminalize littering only by African-Americans, by Republicans, or by political opponents of the current Governor. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding unconstitutional the prohibition of pamphleteering for the purpose of preventing disorderly conduct and litter); see NOWAK & ROTUNDA § 20.11(i) (“[I]f a city ordinance ... prohibited distribution of leaflets on public streets by persons who opposed the mayor, ... the statute could be held invalid under equal protection because the classification regarding who could use the sidewalks to engage in a fundamental constitutional right was not narrowly tailored to promote a compelling governmental interest.”). Similarly, even assuming that Idaho has some interest in prohibiting what it calls “interference with agricultural production,” it cannot prohibit that activity only for those with the intent to expose illegal, inhumane, or unsafe behavior.

CONCLUSION

The plaintiffs' motion for summary judgment should be granted. The Court should hold that Idaho's Ag Gag law fails strict scrutiny under the First Amendment and should explicitly hold, in the alternative, that the misrepresentation prohibition would be unconstitutional even under an intermediate-scrutiny approach. The Court should also hold that the Ag Gag law is unconstitutional under the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, I electronically filed the foregoing amicus brief with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel required to be served.

/s/ Erika Birch
Erika Birch

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