Nos. 15-35960

# In the United States Court of Appeals for the Ninth Circuit

ANIMAL LEGAL DEFENSE FUND, et al.,
*Plaintiffs-Appellees*,

v.

LAWRENCE WASDEN,
in his official capacity as Attorney General of Idaho,
*Defendant-Appellant.*

On Appeal from the United States District Court
for the District of Idaho

**BRIEF OF *AMICUS CURIAE* ERWIN CHEMERINSKY IN SUPPORT OF APPELLEES**

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

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 district court was correct in holding that the misrepresentation prohibition is subject to, and fails, strict scrutiny under Justice Kennedy's plurality opinion in *United States v.*

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the preparation and submission of the brief.

*Alvarez*, 132 S. Ct. 2537 (2012). In the alternative, the brief explains why 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 the City of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972). This brief explains that the district court correctly held that Idaho's Ag Gag law independently violates the Equal Protection Clause, even setting aside an animus-based rationale, because it unjustifiably discriminates on the basis of the fundamental right of speakers 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.

Last year, the district court struck down Idaho's Ag Gag Law, concluding that the law's misrepresentation prohibition was 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*, 118 F. Supp. 3d. 1195, 1204 (D. Idaho 2015) ("*ALDF II*"). As the district 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 1207. This Court should affirm the decision below.

**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, "targets falsity and nothing more." As the district court 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 II*, 118 F. Supp. 3d at 1203–04. 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, ABC News reporters 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 in that case 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," these courts reasoned, "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." *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1022 (D. Idaho 2014) ("*ALDF I*") (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 2548, 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, the district court found that Idaho's Ag Gag law "discriminates based on both content and viewpoint," is not "narrowly tailored to a compelling state interest," and therefore "violates the First Amendment." *ALDF II*, 118 F. Supp. 3d at 1204, 1207, 1209. For the reasons given in the appellees' brief (at 47–48), the state is unable to overcome that presumption.

But 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—as the district court held below—is therefore the right approach under controlling law, Idaho's statute fails either way. 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, in other words, 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 reach the same result under the Equal Protection Clause, even apart from an animus-based rationale.

Where a law classifies speech based on its content, equal-protection and free-speech principles can be "closely intertwined."*Mosley*, 408 U.S. at 94–95. "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).

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 invalidating Idaho's Ag Gag law, the district court concluded that "the law violates the Equal Protection Clause" because its enactment "was animated by an improper animus toward animal welfare groups and other undercover investigators in the agricultural industry, and the law furthers no other legitimate or

rational purpose." *ALDF II*, 118 F. Supp. 3d at 1211. That the law was motivated by "bare animus" is a sufficient condition for holding the law unconstitutional, but it is not a necessary condition. While the bare-animus test is "the most deferential of standards" under the Equal Protection Clause, *Romer v. Evans*, 517 U.S. 620, 632 (1996),. 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 judgment of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 3,716 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Baskerville font.

*/s/ Deepak Gupta*
Deepak Gupta

June 27, 2016

## CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed the foregoing Brief of *Amicus Curiae* Erwin Chemerinsky in Support of Appellees with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

*/s/ Deepak Gupta*
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