DEEPAK GUPTA
(pro hac vice admission pending)
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

ERIK STRINDBERG
(Utah State Bar No. 4154)
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Suite 350
Salt Lake City, Utah 84106
(801) 359-4169
erik@utahjobjustice.com

Attorneys for Amicus Curiae Erwin Chemerinsky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ANIMAL LEGAL DEFENSE FUND, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, and AMY MEYER *Plaintiffs*, v. GARY R. HERBERT, in his official capacity as Governor of Utah; SEAN D. REYES, in his official capacity as Attorney General of Utah, *Defendants*.	Case No. 2:13-CV-00679-RJS Judge: Robert J. Shelby

Brief of Amicus Curiae Erwin Chemerinsky, Founding Dean and Distinguished Professor of Law and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

In February 2013, Amy Meyer—an animal-rescue worker and plaintiff in this case—stood on publicly owned land outside of a Draper City, Utah slaughterhouse and recorded footage of a bulldozer pushing around a visibly sick cow. Though Ms. Meyer remained on public property while filming, she was soon questioned by the police and charged with violating Utah's law prohibiting "agricultural operation interference."[1] Ms. Meyer is the first person in the country charged under an "Ag Gag" law—one of several laws enacted in recent years, at the behest of industry lobbyists, to obstruct undercover investigations that expose abuse. As its sponsor explained, Utah's "Ag Gag" law was enacted to stop "national propaganda groups" from publishing these kinds of videos "for the advancement of animal rights nationally." Compl. ¶¶ 42, 43. The law creates a new crime, "agricultural operation interference," 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 (Utah Code Ann. § 76-6-112). *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 in *Alvarez*. Both the plurality and concurring opinions make

[1] Meyer Decl. ¶¶ 5–8; *See also* Leighton Akio Woodhouse, *Charged With the Crime of Filming a Slaughterhouse*, The Nation, July 31, 2013, http://bit.ly/1UraYM7.

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 material harm 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 Utah'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 Utah'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.

Last year, the U.S. District Court for the District of Idaho struck down that state's essentially indistinguishable 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*"). As the Court noted, under Idaho's Ag Gag law "a job applicant who lies to secure employment with the goal of praising the agricultural production facility will skate unpunished. But a job applicant who fails to mention his affiliation with an animal welfare group with the intent of exposing abusive or unsafe conditions at the facility will face the full force of the law." *Id.* at 1207. This brief outlines several reasons why this Court should follow the lead of the Idaho district court and strike down Utah's statute.

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 further "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.

Utah's law, as applied to the speech at issue, "targets falsity and nothing more." As the court recognized in invalidating Idaho's statute, "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*, 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.* at 1248, 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, 126 (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. Cos., Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("[T]he media have no general immunity from tort or contract liability."). Utah, 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 all the citizens." *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999). Utah 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 some form of material harm, like that described in *Alvarez*. *See* 132 S. Ct. at 2545. 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 510. 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 Food Lion incurred no harm by relying on the journalists' misrepresentations. *Id.* at 512–14. 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: "The 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." *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1022 (D. Idaho 2014) (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 B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 GEO. J. LEGAL ETHICS 791, 828 (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 Idaho district court found that the state'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*, 118 F. Supp. 3d at 1204, 1207, 1209. For the reasons given in the

plaintiffs' memorandum in support of their motion for summary judgment (at 23–25), Utah here is similarly 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 rejected such "free-floating test[s] 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 Tenth 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 objectives, 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 has had to determine 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 Utah'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, Utah's crime of "agricultural operation interference" 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). "[U]nder 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 separate 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 invalidating Idaho's Ag Gag law, the district court there 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*, 118 F. Supp. 3d at 1211. 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, 632 (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 Utah 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. Though Utah "may not agree with the message certain groups seek to convey about [the state's] agricultural production facilities, such as releasing secretly-recorded videos of animal abuse to the Internet and calling for boycotts, it cannot deny such groups equal protection of the laws in their exercise of their right to free speech." *ALDF*, 118 F. Supp. 3d at 1211-12.

CONCLUSION

The plaintiffs' motion for summary judgment should be granted. The Court should hold that Utah'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 Utah's Ag Gag law is unconstitutional under the Equal Protection Clause.

Respectfully submitted,

/s/ Erik Strindberg

ERIK STRINDBERG
(Utah State Bar No. 4154)
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Suite 350
Salt Lake City, Utah 84106
(801) 359-4169
erik@utahjobjustice.com

DEEPAK GUPTA
(*pro hac vice admission pending)*
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Tel. (202) 888-1741
deepak@guptawessler.com

Attorneys for Amicus Curiae Erwin Chemerinsky

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 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/ Erik Strindberg
Erik Strindberg

June 17, 2016