No. 15-35960

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND; et al.,

Plaintiffs/Appellees,

v.

LAWRENCE G. WASDEN,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
CASE NO.: 1:14-cv-00104-BLW

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees alleged jurisdiction in the district court under 28 U.S.C. §§ 1331 and 1343, as their claims for relief arose under the First and Fourteenth Amendments to the Constitution and the Supremacy Clause. ER 394 ¶ 22. They invoked 28 U.S.C. §§ 2201 and 2202, together with Fed. R. Civ. P. 57 and 65, as the basis for the district court's authority to grant declaratory and injunctive relief. ER 394 ¶ 23.

The district court's final judgment was entered on November 12, 2015. ER 34. Appellant's notice of appeal was timely filed on December 10, 2015. ER 30. This Court's jurisdiction arises under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR APPEAL

I. Whether the district court erred in invalidating Idaho Code § 18-7042(1)(a)-(d)'s misrepresentation and recording provisions under the Speech Clause of the First Amendment.

II. Whether the district court erred in invalidating Idaho Code § 18-7042(1)(a)-(d) under the Fourteenth Amendment on equal protection grounds.

STATEMENT OF THE CASE

Appellees seek a right, shielded by the First and Fourteenth Amendments, to lie their way onto agricultural production facilities, to lie so that they may obtain a facility's records, and to lie in order to obtain a job at a facility—*even* if they seek

and obtain that job intending to harm the business. They also claim that they must be permitted under those Amendments to enter agricultural production facilities that are not open to the public and make audio or video recordings of the facility's operations—*even* over the owner's objections. Their justification has been that because they are either "newsgatherers" or "whistleblowers," and because agricultural production is an important public matter, they do valuable work that must be allowed to occur in their preferred manner irrespective of state efforts to curb such invasions of legitimate property interests.

This appeal arises from a law Idaho passed in 2014 that the appellees claimed unlawfully interfered with their work and in fact specifically targeted them in order to suppress their speech. The law, Idaho Code § 18-7042, prohibits five different things at agricultural production facilities. It prohibits a person

- who is not employed by an agricultural facility from knowingly entering such a place by "force, threat, misrepresentation or trespass." *Id.* § 18-7042(1)(a);
- from knowingly obtaining records of an agricultural production facility by "force, threat, misrepresentation or trespass." *Id.* § 18-7042(1)(b);
- from knowingly obtaining employment at an agricultural production facility by "force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel,

equipment, buildings, premises, business interests or customers." *Id.* § 18-7042(1)(c);

- from entering "an agricultural facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural facility's operations[.]" *Id.* § 18-7042(1)(d); and,
- from "[i]ntentionally caus[ing] physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises." *Id.* § 18-7042(1)(e).

An agricultural production facility is "any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production." *Id.* § 18-7042(2)(b).[1] The entire statute is reproduced in the Addendum.

[1] An agricultural production facility is "any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production." *Id.* (2)(b). Agricultural production is defined as:

> Activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses and includes without limitation:
> (i) Construction, expansion, use, maintenance and repair of an agricultural production facility;
> (ii) Preparing land for agricultural production;
> (iii) Handling or applying pesticides, herbicides or other chemicals, compounds or substances labeled for insects, pests, crops, weeds, water or soil;
> (iv) Planting, irrigating, growing, fertilizing, harvesting or producing agricultural, horticultural, floricultural and viti-cultural crops, fruits and vegetable products, field grains, seeds,

Appellees Animal Legal Defense Fund *et al.* (collectively, "ALDF") are a group of national and regional and local organizations and people who all want access to agricultural production facilities to conduct "undercover" work related to their concerns about food safety, animal welfare, environmental quality, and other concerns. ER 392 ¶ 16. ALDF sued Idaho Governor C.L. "Butch" Otter and Attorney General Lawrence Wasden shortly after the Governor signed the legislation. ER 408 ¶¶ 42, 43. It alleged the law violates the Free Speech and Equal Protection Clauses of the First and Fourteenth Amendments and is preempted by several federal statutes. ER 427-434 ¶¶ 144-195.

The Governor and Attorney General moved to dismiss the Governor as a party and to dismiss the complaint shortly after the suit was filed. ER 12. The Governor was dismissed under *Ex parte Young*, 209 U.S. 123 (1908), as was ALDF's challenge to Idaho Code § 18-7042(1)(e) on standing grounds. ER 337-

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hay, sod and nursery stock, and other plants, plant products, plant byproducts, plant waste and plant compost;

(v) Breeding, hatching, raising, producing, feeding and keeping livestock, dairy animals, swine, furbearing animals, poultry, eggs, fish and other aquatic species, and other animals, animal products and animal byproducts, animal waste, animal compost, and bees, bee products and bee byproducts;

(vi) Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities;

(vii) Manufacturing animal feed.

Idaho Code § 18-7042(2)(a).

342. The district court determined ALDF otherwise stated plausible claims. ER 342-362. ALDF then moved for summary judgment on their free speech and equal protection claims. ER 317. The district court granted the motion (ER 28) and later judgment and a permanent injunction (ER 116). The court dismissed the preemption claim without prejudice as moot. ER 34-35. ALDF's motion for attorney fees under 42 U.S.C. § 1988 is pending in the district court. ER 462.

The district court found that § 18-7042(1)(a)-(d) violated the First and Fourteenth Amendments. *First,* the court ruled that the law was content-based and overbroad. ER 8-18. It viewed the law as targeting undercover investigators who intended to publish videos made on agricultural production facilities and that it sought to suppress speech critical of agricultural practices. ER 6, 9, 12. It read *United States v. Alvarez,* 132 S. Ct. 2537 (2012), as standing for the proposition Idaho could only criminalize false statements that cause a legally cognizable harm. ER 10. But, obtaining entry to property or access to records by misrepresentation was not a legally cognizable harm, the court reasoned, because the lies ALDF intends to tell actually advance First Amendment principles by exposing the conduct of agricultural production facilities. ER 12.

The recording provision, too, was deemed content based. ER 13-18. The court held that that recording was a purely expressive activity to which the First Amendment applied. ER 13. The recording provision in § 18-7042(1)(d) was

content-based because it was only limited to recordings of the facility's operations and viewpoint-based because the provision's purpose was "to silence animal activists." ER 14.

Neither the misrepresentation nor recording provisions survived the court's application of strict scrutiny. The court explained its view that "food production is a heavily regulated industry" and that agricultural production facilities "already must suffer numerous intrusions on their privacy and property because of the extensive regulations that govern food production and the treatment of animals." ER 19. So, the court ruled the state had no compelling interest in granting the agricultural production facilities "extra protection from public scrutiny." *Id.*

The court dismissed any argument that the state may prohibit unconsented-to recording on nonpublic property. It reiterated its view that "food production is not a private matter" and that because "food production and safety are matters of the utmost public concern," the state's argument that nonpublic facilities are equivalent to a private forum did not hold sway. ER 21. It then wrote that recordings that are "not disruptive of the workplace, and carried out by people who have a legal right to be in a particular location" are lawful. ER 22.

The district court found the law to violate the Equal Protection Clause, too. First, it said that there was no rational basis for the law. ER 23-28. Idaho, it stated, already has laws prohibiting conversion, trespass, and fraud, so there was

no need for another law similar to it. ER 24. The court also faulted the state because "[p]rotecting private interests of a powerful industry, which produces the public's food supply, against public scrutiny, is not a legitimate interest." *Id.* It selected a handful of statements (among hundreds) from the committee hearing debates and concluded that the "overwhelming evidence" was that the purpose of the law was to silence animal rights activists and whistleblowers. ER 25. The court also rejected the Attorney General's argument that the law created no classification, deciding instead that it singled out whistleblowers in the agricultural industry and impermissibly classifies on the basis of the exercise of First Amendment rights. ER 26-27.

REVIEWABILITY AND STANDARD OF REVIEW

This appeal comes from a judgment following the district court's grant of ALDF's motion for summary judgment (ER 34) and the Attorney General's timely appeal (ER 30). This Court reviews *de novo* a district court's grant of summary judgment. *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1223 (9th Cir. 1990). Under the *de novo* standard, the Court's review on appeal "is governed by the same standard used by the trial court[.]" *Delta Savings Bank v. United States*, 265 F.2d 1017, 1021 (9th Cir. 2001). Hence, this Court's task is to determine, viewing the evidence in the light most favorable to the non-moving party—here the Attorney General—"whether there are any

genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

SUMMARY OF ARGUMENT

I. Idaho Code § 18-7042(1)(a)-(c) does not penalize simple falsity. Subsections (1)(a) and (b) prohibit the intentional use of misrepresentations for the purpose of gaining access to property. Subsection 1(c) prohibits the intentional use of misrepresentation to secure employment with the specific intent of causing economic or other injury to the employer's or its customers' interest. No tradition of First Amendment protection exists for false statements conjoined with intent to deprive or damage another's legal interests. Indeed, the very opposite is true in varied contexts running from defamation and intentional infliction of emotional distress to fraud. The decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), adheres to this tradition because there the Supreme Court found the Stolen Valor Act to proscribe falsity without any purpose of injuring third party interests or otherwise securing a material benefit from that party. Rather than militating against the validity of § 18-7042(1)(a)-(c), *Alvarez* supports the opposite conclusion.

The district court thus missed its way in navigating through this First Amendment area. The court wrongly held that no harm sufficient to deprive the proscribed misrepresentations of Free Speech Clause protection can occur before

publication of information or documents acquired as a result of the misrepresentation. That reasoning runs squarely contrary to established Idaho law recognizing that individuals or businesses have the right to control access to their property and overlooks the obvious: The misrepresentation is made precisely because the speaker sees it as essential to influencing the exercise of that right. The court went further astray by giving weight to what it perceived as the public interest—exposure of animal abuse or other malfeasance—served by the misrepresentation. Whatever value the publication may have, however, says nothing relevant for First Amendment purposes about the means used to gather the information communicated.

The district court also erred in determining that the act of making video and audio recordings on closed agricultural production facilities is speech entitled to First Amendment protection. First, the act of making a recording is not speech or expressive conduct. That act is not the written or spoken word, or art on paper or skin, or music, or other expression of thought. Neither is the act conduct that itself conveys any message. Recording simply captures images or sound and is not sufficiently imbued with any elements of communication that would warrant First Amendment protection. The act of recording, therefore, is different than the act of spending money in aid of a political or other message, as was at issue in *Citizens United v. FEC*, 558 U.S. 310 (2010), which the district court relied on.

Second, even if this Court determines recording on closed agricultural properties is speech or entitled to First Amendment protection, § 18-7042(1)(d) is a legitimate content neutral limitation on the *place* where recording may occur. It applies only on closed agricultural production facilities. It applies as a practical matter to all recordings there and so is unconcerned with any message a particular recording might intend to convey.

Finally, whatever protection the act of recording may enjoy in the abstract, the district court erroneously ignored the forum at issue—closed agricultural facilities. There is no First Amendment right to enter another's property to engage in speech or expressive activities. Investigators or journalists or whistleblowers get no special exemption from generally applicable laws that protect property owners' interests in conditioning entry and use of property. The district court's ruling creates an exemption in disregard of Supreme Court cases to the contrary. It further ignores settled precedent that establishes governments may impose viewpoint neutral, reasonable restrictions on the use of their own property that constitutes a limited or nonpublic forum.

II. The district court held that § 18-7042(1)(a)-(d) violated the Equal Protection Clause because its only plausible justification lay in animus against ALDF. It then held that § 18-7042(1)(c) and (d) classify on the basis of, and penalize, speech. The court erred on both points.

Section 18-7042 contains economic and social legislation subject to rational basis review. To succeed, ALDF must establish both that the law classifies between similarly situated groups and, if it does, that no conceivable basis exists for the classification. Here, the only classification created by the statute is between agricultural and non-agricultural production facilities. Whistleblower status is irrelevant. That the legislature drew a law tailored to a particular economic sector is not novel. Title 18, Chapter 70 is replete with provisions addressing discrete types of property injury or trespass that affect specific property owner categories. Section 18-7042(1) comports with this general legislative practice because there is only minor overlap between the protections afforded under § 18-7042(1) and other Idaho statutes.

Ample justification exists for the classification drawn. The legislature knew that agricultural production facilities had been the focus of malicious property destruction and that an undercover investigation had resulted in death threats to a blameless Idaho dairy owner and employees. It was entirely rational to respond with legislation that extends additional property protection to that sector.

The district court's reliance on animus to conclude otherwise was wrong for two reasons. First, under settled rational basis standards, animus becomes relevant only when there is no other rational basis for a law, and one exists here. Second, the court predicated its animus determination on what it believed to be legislative

motivation for § 18-7042's enactment. The Supreme Court has repeatedly warned against judicial inquiry into why individual legislators voted as they did. A review of legislator statements made during committee hearings and chamber debate shows the wisdom of this warning. Few senators or representatives spoke, and those who did expressed a desire to preclude wrongful or tortious conduct in an important Idaho economic sector. Inferring an improper motive to those speakers or their colleagues amounts to unfounded speculation.

The district court grounded its conclusion that § 18-7042(1)(c) and (d) classifies on the basis of speech content on two hypotheticals. The first hypothetical—the possibility that the audio-video restriction in subsection (1)(d) would not capture a recording of an agricultural facility owner's children at play—ignores the fact that the statute applies to all activities likely to occur in the facility. The restriction focuses on place, not content. Imaginative scenarios cannot distort that focus. The second hypothetical—the inapplicability of subsection (1)(c) to a journalist who misrepresents her or his identity to obtain employment—ignores the fact that the subsection does not classify on the basis of speech; it classifies on the basis of intent to injure. Journalists and non-journalists are treated equally.

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ARGUMENT

I. IDAHO CODE § 18-7042 IS VALID UNDER THE SPEECH CLAUSE OF THE FIRST AMENDMENT

A. Subsections (1)(a), (1)(b), and (1)(c), prohibiting certain conduct facilitated by misrepresentation, are consistent with the Supreme Court's decisions addressing false statements and, if not, are severable.

1. The misrepresentation provisions prohibit knowing, false representations of fact intended to obtain entry to property, records, or employment.

The district court's judgment invalidating § 18-7042(1)(a)-(c) on First Amendment grounds suffers, as did the ALDF's arguments, from a misunderstanding of what the misrepresentation components of the statute actually did. The "first step" in First Amendment analysis, of course, is to construe the statute. *United States v. Williams*, 533 U.S. 285, 293 (2008). The district court accepted ALDF's argument that the statute prohibited speech. The statute actually prohibits conduct facilitated by knowing, false statements of fact that induce the target to do something he or she otherwise would not do. The statute prohibits knowingly entering a facility, obtaining its records, or gaining employment by misrepresentation. (The subsection addressing employment—(1)(c)—contains the added element of specific intent to cause harm to the employer.) A representation is a "presentation of fact—either by words or conduct—made to induce someone to act." *Black's Law Dictionary* (10th ed. 2014). A misrepresentation is "[t]he act

or an instance of making a false or misleading assertion about something, usu[ally] with the intent to deceive." *Id.*

So, by its plain terms, the law prohibits (1) knowing (2) false statement (3) of fact, (4) intended to deceive the target, (5) that thereby allows the defendant to gain entry to property, access to records, or (with the specific intent to cause economic or other injury) obtain employment. This means that the representations must be affirmative; omissions are insufficient. And they must be knowingly false. Mistakes or opinions will not support a prosecution. They must be material—meaning, there must be a causal link between the misrepresentation and the benefit gained and harm caused. And because this is a criminal statute, the State will bear the burden in any prosecution to prove these elements beyond a reasonable doubt.

The statute is far more limited than the district court or ALDF claims it is. It does not, as ALDF alleged, outlaw all "undercover employment investigations" (ER 391 ¶ 12), nor does it criminalize investigative journalism or whistleblowing. It does not criminalize resume inflation or interview or application puffery. It does not differentiate based on content or viewpoint. It applies to *all* misrepresentations used to gain access to property or to records or to obtain employment. And in so doing, it proscribes misrepresentations only when accompanied by specific conduct, and only to prevent violations of a facility owner's right to control access to a facility and possession of its records and to protect the owner's interest against

unwittingly hiring people who intend to cause the facility harm. Contrary to the district court's view, then, the misrepresentation provisions are narrow, specific, and generally applicable; and they require the highest standards of proof.

2. Proscriptions on knowing, false, injurious representations of fact coexist with the First Amendment in many contexts.

The Supreme Court has said more than once that there is "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). That is of course not to say that false statements of fact enjoy no First Amendment protection; they indeed do in some cases. *See, e.g., Alvarez*, *supra* (invalidating Stolen Valor Act, which prohibited falsely claiming to have been awarded Medal of Honor). But in many contexts, the Court has upheld the constitutionality of knowing, false, injurious representations of fact. Defamatory falsehoods (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), the false light tort (*Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974)), intentional infliction of severe emotional distress (*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)), and fraudulent solicitation of charitable donations (*Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003)) are a few examples.

These cases have something in common: They each involved false statements that are accompanied by harm. *See Alvarez*, 132 S. Ct. at 2545 (quotations from cases upholding liability for false statements "derive from cases

discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation"). But falsity per se is not protected, as *Gertz* stated. *Alvarez* and *Telemarketing Associates* illustrate the distinction. In *Telemarketing Associates*, the Court upheld a complaint by the Illinois Attorney General alleging a telemarketing company fraudulently solicited charitable donations from members of the public. Rejecting the First Amendment defense the telemarketers raised, the Court explained the difference "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Id*. at 619-20. It had invalidated the latter approach in three cases where laws prohibited charitable organizations from engaging in charitable solicitation if they spent "high percentages" of donated funds on fundraising regardless of whether fraudulent representations were made to donors. *Id.* at 619.

But *Telemarketing Associates* differed because the Illinois Attorney General's complaint had "a solid core in allegations that hone in on affirmative statements Telemarketers made intentionally misleading donors regarding the use of their contributions." 538 U.S. at 620. Important to the Court were the elements the Attorney General had to prove and the standards by which she had to prove them: A false statement was not enough; the Attorney General had to show that the defendant "made a false representation of a material fact knowing that the

representation was false" and that "the defendant made the representation with the intent to mislead the listener, and succeeded in doing so." *Id.* The Attorney General bore the burden of proof and the showings had to be made by clear and convincing evidence. *Id.* All of this provided the "sufficient breathing room for protected speech." *Id.*

Contrast the action in *Telemarketing Associates* with the mere prohibition on a false statement at issue in *Alvarez*. There, the defendant challenged his conviction under the Stolen Valor Act as violating the First Amendment. The Stolen Valor Act prohibited falsely claiming to have been awarded the Medal of Honor. The law "by its plain terms applies to a false statement made at any time, in any place, to any person." 132 S. Ct. at 2547. It sought "to control and suppress all false statements on this one subject in almost limitless times and settings" and, the Court observed, the law does this "entirely without regard to whether the lie was made for material gain." *Id.* Unlike the prior cases where harm attended the false statement, the Stolen Valor Act "targets falsity and nothing more." *Id.* at 2544. Thus, the state may proscribe knowingly false statements that cause harm.

3. The misrepresentation provisions satisfy the First Amendment because they require knowing falsity that causes harm.

The misrepresentation provisions in § 18-7042 protect against unwarranted intrusions on legitimate property interests. There is no serious dispute that people

have the right of control and enjoyment and use of their property, real and personal, and to prevent intrusions on those rights. *See, e.g.*, *Walter E. Wilhite Revocable Living Trust v. Nw. Yearly Meeting Pension Fund*, 128 Idaho 539, 549, 916 P.3d 1265, 1274 (1996) (trespass committed "when one, without permission, interferes with another's exclusive right to possession of the property"). This includes the right to exclude others. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). It has long been recognized that taking unauthorized control of another's personal property—here, records—constitutes a form of trespass that if accompanied by a serious interference with the owner's right of control, constitutes conversion. *Restatement (Second) of Torts* § 222 (1965); *see also Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743, 979 P.2d 605, 614 (1999) (defining conversion as act of dominion wrongly asserted over another's personal property in denial or inconsistent with rights therein). And ALDF did not say, and the district court did not hold, that an employer must employ a person who intends to harm the employer and lie in order to be able to do. Indeed, the covenant of good faith and fair dealing is baked into every employment relationship in Idaho. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242, 108 P.3d 380, 389 (2005).

So the interests § 18-7042 protects are real, substantial and legitimate. Just as in *Telemarketing Associates*, where the Attorney General's suit was designed to protect people from parting with their money based on misrepresentations about

where that money would go, § 18-7042 is aimed at preventing people from invading legitimate property interests. These interests, and the harm to them the law prevents, are the sort of thing *Alvarez* said would justify a law regulating false speech but was absent from the Stolen Valor Act. 132 S. Ct. at 2547 ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment") (emphasis added). When a person is deprived of something valuable, be it money, or personal property, or something less tangible like rights attending ownership or control of real property, the knowing and false statements used to deprive the target may be regulated.

But the district court cast aside these interests (and the harm to them) as insufficient in light of the value the court ascribed to the lies at issue. First, the court mistakenly said no harm could arise from merely entering property or obtaining records or employment. Rather, the court said, harm can only arise from whatever an undercover investigator publishes once he or she has secured access to the property or records. ER 11. But this cannot square with uncontroversial principles of property law, that harm arises when one enters property or obtains another's personal property by misrepresentation without need for further injury. The harm is the unwanted intrusion on the right irrespective of what happens once

a person has secured entry or records. There is no requirement, in *Telemarketing Associates* or *Alvarez* or elsewhere, that the harm be anything different than what § 18-7042 protects against.

Second, the district court said the person telling the lie obtains no material gain from it because "undercover investigators tell such lies in order to find evidence of animal abuse and expose any abuse or other bad practices the investigator discovers." ER 12. This ignores (a) that offers of employment are specifically mentioned in *Alvarez*, and (b) that the material gain to the person telling the lie *is* the entry to the property or the access to the records or the offer of employment that they believe otherwise would not be possible *but for* the misrepresentation. The people, in sum, tell the lies to get the access; that is a material gain to them.

Another defective feature of the district court's judgment is that even if the lies cause harm and confer material gain to the speaker, the court said, the lies ALDF wishes to tell advance First Amendment principles by exposing conduct about agricultural operations, and this is a matter of public interest. ER 12. The court dismissed the property interests, and wrote that food production is a public matter and highly regulated, and that agricultural production facilities already endure "numerous intrusions on their privacy and property." ER 19. So, the court discarded legitimate private property interests and opened up property based on the

value the court perceived the lies to have, given the subject matter on which ALDF wishes to speak. There is no basis for this justification. Just as an initial matter, the lies here are not statements designed to inspire, produce, influence, persuade, challenge, or otherwise engage in expression or debate. They are not the sort of lies that may "serve useful human objectives," as Justice Breyer identified in his concurrence in *Alvarez*. *See* 132 S. Ct. at 2553 (Breyer, J., concurring). They are tools used to facilitate a given goal of accessing information otherwise unavailable and in so doing, deprive someone of a legitimate right.

Just as importantly, there is no "unrestrained right to gather information" under the First Amendment. *Zemel v. Rusk*, 381 U.S. 1, 7 (1965). Nor is there a First Amendment right to enter another's property to speak on private property. *See Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972) (no right to enter private property for First Amendment purposes); *Hudgens v. NLRB*, 424 U.S. 507 (1976). And it does not matter how important a particular court thinks the speech is. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (rejecting call for reporter's privilege, even recognizing "the significance of free speech, press, [and] assembly to the country's welfare"). The Court does not balance the relative values of the property interests of one and the speech-related interests of the other and then decide whether the First Amendment commands a particular result. The analytical

standards applicable in this case are found in *Alvarez* and *Telemarketing Associates* and § 18-7042 is consistent with them.

4. "Misrepresentation" is severable if it cannot be applied constitutionally.

Even were inclusion of "misrepresentation" in § 18-7042(1)(a) through (c) proscribed by the First Amendment, the term is subject to severance under Idaho decisional law—an issue raised below that the district court did not address. D.C. Dkt. 88 at 18-19. Idaho rules of statutory construction govern the severability issue. *E.g., Am. Bankers Ass'n v Lockyer*, 541 F.3d 1214, 1216-17 (9th Cir. 2007); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 935 (9th Cir. 2004). The session law expressly provided for severance (2014 Idaho Sess. L. ch. 30, § 2), and the Idaho Supreme Court has held repeatedly that "when the unconstitutional portion of a statute is not integral or indispensable, it will recognize and give effect to a severability clause." *Simpson v. Cenarrusa*, 130 Idaho 609, 614, 944 P.2d 1372, 1377 (1997); *see also In re SRBA No. 39576*, 128 Idaho 246, 254, 912 P.2d 614, 632 (1995) ("[w]hen determining whether the remaining provisions in a statute can be severed from the unconstitutional sections, this Court will, when possible, recognize and give effect to the intent of the Legislature as expressed through a severability clause in the statute"). The Idaho Supreme Court additionally recognizes the propriety of severing a single word where "part of a statute or ordinance is unconstitutional and yet is not an integral or indispensable

part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance." *Voyles v. City of Nampa*, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976).[2]

Here, severing "misrepresentation" does not deprive the relevant subsections of their core objective—protecting agricultural production facilities from trespass, document acquisition or employment for purposes of injuring a facility's operations. The severance provision in the 2014 Session Laws Chapter 30 could not be plainer as to the Legislature's "preference," and no legitimate doubt exists that paragraphs (a) through (c) could be given meaningful effect after severance. It thus cannot be said that "[t]here is nothing of substance in [these paragraphs] beyond the [term 'misrepresentation']." *Wasden v. State Bd. of Land Comm'rs*, 153 Idaho 190, 196, 280 P.3d 693, 699 (2012). Prohibiting "misrepresentation" is not "integral or indispensable" to the subsections' operation given the unchallenged application of the other forms of conduct—*i.e.*, force, threat and trespass—as a predicate for their violation. *Boundary Backpackers v. Boundary*

[2] Federal common law leads to the same result. As the Supreme Court reiterated in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006): "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact." *Id.* at 328-29 (citation omitted).

County, 128 Idaho 371, 378, 913 P.2d 1141, 1148 (1996). Indeed, the district court's judgment, which left § 18-7042(1)(e) untouched, supports this conclusion.

B. Subparagraph (1)(d), prohibiting audio or video recording on a nonpublic agricultural production facility without the owner's consent or other authorization, is valid because ALDF has no First Amendment right to make recordings on nonpublic property over the owner's objections.

Section 18-7042(1)(d) prohibits a person from entering an agricultural production facility that is not open to the public and, without the facility owner's permission or judicial or statutory authorization, making audio or video recordings of the facility's operations. In so doing, it regulates access to information with a specified tool and the location where the regulated conduct may occur. The district court nevertheless concluded that the act of making video or audio recordings in closed agricultural production facilities enjoys First Amendment protection. Three propositions undergirded the court's novel holding.

First, in denying the Attorney General's motion to dismiss, the district court held that recording is protected under the First Amendment because it facilitates *later* speech that may result from the recordings. ER 351. Second, the court reasoned that the subsection is content- and even viewpoint-based because it limits only recording the facility's "operations." ER 15, 27. Third, it wholly discounted the fact the recording restriction applies only in facilities not open to the public. In the court's view, the specific speech in this case—speech about food production

and other agricultural practices—is "not a private matter" and that, anyway, agriculture is heavily regulated, thus further intrusions are warranted. ER 21. Each of these propositions is incorrect.

1. Recording in closed agricultural production facilities is not speech or expressive conduct entitled to First Amendment protection

No decision of the United States Supreme Court or this Court has held that making video or audio recordings on private property over the owner's objections is entitled to First Amendment protection. Recording is neither speech nor expressive conduct. It is also not the spoken or written word; it is not the expression of music or sound or visual art; it is not dance or other bodily movement; it is not the burning of a flag or the wearing of an armband or a tent pitched in protest; it is not the spending of money or commitment of resources in order to assist a political message.

Rather, recording is conduct whereby a person uses a tool designed to capture and preserve information or images. It is conduct that "on its face, does not necessarily convey a message," so it is not purely expressive activity. *Cohen v. California*, 403 U.S. 15 (1971). Nor is it conduct with an expressive component. There is no "intent to convey a particularized message." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Merely capturing an image or sound reveals no communicative purpose; it is therefore not "sufficiently imbued with elements of

communication" so that it falls within the protections of the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam). The act of capturing sound or images accordingly differs from the act of producing an expression such as, for example, tattooing. In *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), which the district court cited, this Court found that the act of tattooing was entitled to First Amendment protection because it was "purely expressive activity." *Id.* at 1061. But there are bounds. The Supreme Court has dismissed the idea that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States. v. O'Brien*, 391 U.S. 367, 376 (1968). Simply because ALDF would like to make recordings at closed facilities does not mean the act of recording by itself contains an expressive component that the First Amendment protects. Because recording is not speech or expressive conduct, the First Amendment does not apply to § 18-7042's prohibition on recording at an agricultural facility.

Recording, too, is different than the campaign finance laws at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976), or *Citizens United v. FEC*, 558 U.S. 310 (2010). Assuming ALDF has a right to publish or disseminate recordings generally, it has no right to go into closed facilities and make those recordings. *Citizens United* involved a federal ban on corporate and union spending on

political speech. It applied to *all* such spending. As the Chief Justice characterized the law, it would "allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern." *Id.* at 372-73 (Roberts, C.J., concurring). Any attempt to export from *Citizens United* some overarching First Amendment rule applicable here ignores the unique context in which that case arose.

Campaign expenditures differ fundamentally from making recordings on private property. The former reflects definite intent to convey a message, and the expenditure facilitates the effort to convey it; it embodies a single, integrated process. But recording only captures information. It is impossible to tell from the act of recording what the person making the recording intends to do with it. And *Citizens United* foreclosed a corporation's or union's spending *entirely*. Here, the prohibition is limited to recordings made at an agricultural facility. And it imposes this limitation solely on nonpublic property. It is a general prohibition with, at most, an incidental burden on the manner in which ALDF would like to gather information. As the Supreme Court has said, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

2. Even if recording is entitled to some First Amendment protection, § 18-7042's recording provision is content- and viewpoint -neutral.

Even if this Court holds that recording on private property is entitled to protection under the First Amendment, § 18-7042(1)(d) is a content-neutral limitation on the manner and place: It is limited to (a) recordings of an agricultural facility on (b) property that is not open to the public. The district court gave subsection (1)(d) a crabbed reading and relied on fanciful hypotheticals—children playing in a facility or a conversation between a facility owner and a spouse—to find a content-basis in the law. ER 15, 27. It deemed these activities to constitute something other than an agricultural facility's "operations."

This Court should reject the district court's strained effort as characterizing § 18-7042(1)(d) as anything other than what it is in practical effect: a location-based restriction on recording. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The focus of subsection (1)(d) is on the *location* in which the recording is made. The restriction is not concerned with whether the resulting image portrays benign or non-benign conduct; it is concerned with preserving the facility owner's right to control what use is made of the facility.

The term "operations," in sum, extends to what occurs within the agricultural facility—a location whose sole purpose is to carry out "agricultural production." At day's end, the district court seeks to invalidate the subsection because it employs the phrases "of the conduct of an agricultural production facility's operations" rather than "of the conduct in an agricultural production facility." First Amendment status should not turn on such semantics.

The Supreme Court's decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), lights the path forward on content neutrality. It dealt there with an abortion clinic buffer zone. It held that the involved Massachusetts statute "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" but was not because "[w]hether petitioners violate the Act 'depends' not 'on what they say,' . . . but simply on where they say it." *Id.* at 2531 (citation omitted). The district court found *McCullen* inapposite (ER 15), but only by virtue of its constricted construction of § 18-7042(1)(d). Imaginative scenarios cannot obscure the location-based focus of the subsection.

3. The location of the affected activity—agricultural production facilities not open to the public—means at the least that that viewpoint neutral, reasonable regulation is permissible.

The district court gave short shrift to a very important feature of this subsection in granting ALDF the right to make recordings on another's property:

The subsection applies only on property that is closed to the public. This feature demonstrates that the prohibition on unconsented-to recordings is a reasonable exercise of the State's police power, not an impermissible limitation on speech.

The First Amendment is not federal authorization of an absolute right to engage in every form of speech wherever and whenever a person chooses. *See Adderly v. Florida*, 385 U.S. 39, 48 (1966) (First Amendment does not mean "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"). And, the First Amendment does not confer a right on the people to enter private, closed property—commercial or personal—to engage in First Amendment activity. *Lloyd Corp.*, 407 U.S. at 569-70. Reporters or whistleblowers or investigators get no special exemption from these principles. *Branzburg*, 408 U.S. 665. Indeed, this Court and the Supreme Court have recognized that "[r]equiring private property owners to allow the general public to access their property to express messages the property owners may oppose could violate the property owners' First Amendment rights." *Wright v. Incline Vill. Gen. Imp. Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011) (citing *Lloyd Corp.*, 407 U.S. at *id.*).

The district court summarily rejected the Attorney General's argument that restrictions about what people may do on another's closed property are permissible under *Lloyd Corp.* and similar cases. It held that the recording provision in this

case was like the Arizona law in *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013), that prohibited someone in a car from soliciting or hiring a day laborer if the car blocked or impeded traffic. ER 16. That statute, of course, regulated day-laborer solicitation on the public streets. *Valle Del Sol*, then, says nothing about a state's ability to limit when a person may go on another's closed property and make audio or video recordings.

The lower court identified several other justifications for rejecting the Attorney General's forum argument under *Lloyd Corp*. None finds any support in the decisions of this Court or the Supreme Court. First, the district court accepted ALDF's argument that because its speech about food production is an important public matter, the First Amendment grants them special treatment. The court wrote that the speech ALDF wishes to engage in concerns "matters of the utmost public concern" and food production is a heavily regulated industry. ER 21. The court cited *Snyder v. Phelps*, 562 U.S. 443 (2011), for support, but that case, like *Valle Del Sol*, concerned demonstrations on public streets that were the subject of a private tort suit. *Snyder* does not apply.

Next, the district court said that the recording provisions were invalid because they prohibited recordings "even when made by a person who is otherwise lawfully permitted to be there," and even if they were "not disruptive of the workplace, and carried out by people who have a legal right to be in a particular

location and to watch and listen to what is going on around them." ER 22. The court cited a Seventh Circuit case, *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), for support. *ACLU v. Alvarez* involved Illinois' eavesdropping statute. That law "prohibits nonconsensual audio recording of public officials performing their official duties in public." 679 F.3d at 597. The law concerned public officials in public. It said nothing at all about unconsented-to recordings made on another's closed property. It does not matter whether a person has a right to be in a particular place and observe a particular thing when the property is private or closed to the public. No one would seriously argue the police in New York could not remove a person filming the exhibits of the Met over the owner's objections. No one would suggest that the Jet Propulsion Laboratory could not remove a person filming the lab's newest rocket being built. Property owners are not obligated to open up their property to those who wish to gather information or engage in other First Amendment activity. So *ACLU v. Alvarez* is no support for the district court's result.

Similarly lacking any precedential support is the district court's view that because nonpublic agricultural facilities are already highly regulated and subject to governmental "intrusions," they somehow have reduced First Amendment status. That the government may have a keen regulatory interest in agricultural production facilities says nothing relevant about their nonpublic character. Indeed, § 18-

7042(1)(d) so recognizes through its reference to "judicial process or statutory authorization." Needless to say, that speech about agricultural production may be important to ALDF or anyone else is not relevant to whether the property is nonpublic for First Amendment purposes.

A concluding and crystallizing point must be made. Even on their own limited or nonpublic forum property, including those within the definition of "agricultural production facility," governments may limit access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *see also Wright*, 665 F.3d at 1138 n.5 ("[r]egardless of whether the beaches are a limited public forum or a nonpublic forum, the test is the same"). The limitation here—nonconsensual audio or video recordings—is viewpoint neutral. The restriction applies without regard to what is being recorded. It is also plainly reasonable. A facility owner may have good reasons to keep its operations out of view of a camera. Operations at agricultural production facilities range the gamut from not just food production, but seed development, grape growing, and any number of things that for whatever reason, the owner may not wish to see on YouTube. Nobody likes being surveilled, especially in private areas of his or her own property. Property owners have a right to be protected from it, and ALDF's

request for an exception to the owners' right to exclude and condition the use of his or her property should be rejected.

II. SECTION 18-7042 IS RATIONALLY RELATED TO PROTECTION OF PROPERTY INTERESTS IN THE AGRICULTURAL SECTOR AND DOES NOT TREAT ALDF DIFFERENTLY THAN OTHER PERSONS ON THE BASIS OF SPEECH CONTENT.

Section 18-7042 has a straightforward objective expressed in its title: protection against interference with agricultural production. It does this by providing five prophylactic prohibitions: trespass by non-employees (subsection (1)(a)); conversion or theft of records (subsection (1)(b)); securing employment with the intent to cause economic or injury to the employer's interests or customers (subsection (1)(c)); nonconsensual audio or video recording of a non-public agricultural facility's operations (subsection (1)(d)); and physical damage to any agricultural facility's operations or personnel (subsection (1)(e)). None of these prohibitions is untethered to that objective.

The district court nevertheless found the statute justified, as to the first four prohibitions, only by simple animus against ALDF. It gave several reasons: failure to explain why current law is inadequate; failure to explain why agricultural facilities deserve more protection than other private business; and "abundant evidence" from the legislative history that § 18-7042 was intended to silence "animal rights activists who conduct undercover investigations in the agricultural industry." ER 26. The court, however, went even further as to subsections (1)(c)

and (d), concluding that they discriminate between actors based on speech content. ER 26-28. The first of these grounds for finding a Fourteenth Amendment violation ignores settled rational-basis equal protection standards; the second ignores the statute's text.

A. Section 18-7042 passes rational-basis equal protection scrutiny.

1. Settled rational basis standards apply.

The Equal Protection Clause polices statutory or regulatory classifications. *E.g.*, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008) ("[o]ur equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others'"). The Supreme Court has often made clear where the "subject matter is local, economic, social, and commercial" and "does not involve a fundamental right or suspect classification[,]" it will uphold the law "if 'there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). Actual legislative motivation is immaterial. *FCC v. Beach Comm'cs, Inc.*, 508 U.S. 307, 315 (1993).

It thus "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Willia*ms, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *accord New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.39 (1979). Consistent with this overall deference to state line-drawing, "[l]egislatures may implement their program step by step . . . in . . . economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (citation omitted). The party mounting the equal protection challenge must "negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

Section 18-7042 addresses mine-run economic and social issues. Long-established rational basis standards therefore apply with full force.

2. Section 18-7042 classifies between industries, not individuals, and has a plainly rational basis.

As a threshold matter, § 18-7042 draws no distinctions among the persons that it regulates. ALDF labors under no different burden than any other person. Nor did ALDF show below that the statute has been applied selectively against it; § 18-7042 remained operative for over 17 months before the district court's memorandum and order granting the motion for partial summary judgment. It is

also immaterial for equal protection purposes, outside the context of alleged racial or other suspect or quasi-suspect classifications, that the statute may have a disparate impact. *See Bd. of Trustees v. Garrett*, 531 U.S. 356, 373 (2001); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272-74 (1979). If such impact cannot form the basis for a rational basis-controlled claim, it necessarily cannot create a classification subject to rational basis analysis.[3]

The district court thus erred in concluding that the statute classifies "between

[3] The district court relied upon *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), for the proposition that a classification can be created "by showing that the law is applied in a discriminatory fashion; or by showing that the law is 'in reality . . . a device designed to impose different burdens on different classes of persons.'" *Id.* at 1331 (quoting 2 Rotunda § 18.4 at 344). The current Rotunda treatise, Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance & Procedure* ("Rotunda & Nowak") (Westlaw Database Update May 2015), identifies the same three methods for determining the existence of an equal protection-related classification. Rotunda & Nowak § 18.4. However, the authors direct their analysis on this issue to classifications based on suspect class status or the exercise of constitutionally protected rights. So, as to the third basis for determining existence of a classification, they state:

> Finally, the law may contain no classification, or a neutral classification, and be applied evenhandedly. Nevertheless the law may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons. If this claim can be proven the law will be reviewed as if it established such a classification on its face. However, because all laws are susceptible to having their impact analyzed in a variety of ways, it will be most difficult to establish this claim for the purpose of seeking *strict judicial review* of a legislative act.

Id. (emphasis added). *Christy* did not examine this classification basis. 857 F.2d at 1332. Here, § 18-7042 imposes exactly the same "burdens" on all persons. ALDF complains only because it may limit certain techniques used to carry out its investigations. That amounts to nothing more than a garden-variety disparate impact claim not available in rational review.

whistleblowers in the agricultural industry and whistleblowers in other industries" or through a discriminatory purpose to silence individuals conducting undercover investigations. ER 26. Whistleblowers or undercover investigators stand on equal footing with non-whistleblowers who engage in the prohibited conduct. The sole "classification" created by § 18-7042 arises from the fact that it applies only to agricultural facilities. The question becomes, therefore, whether that classification fails rational basis scrutiny. None of the grounds identified by the district court warrants an affirmative response.

a. Scope and Substance of § 18-7042(1)

1. The Equal Protection Clause does not require the Idaho legislature to withhold comprehensive treatment of a specific area of concern or to explain why it deemed existing legislation ill-suited to remedying that concern. The Idaho Code generally, and Title 18 specifically, contains myriad provisions focused on discrete matters. For example, Chapter 70 of Title 18 collects trespass and malicious injury to property prohibitions, including interference with agricultural production. It has general provisions criminalizing malicious injury to property (§ 18-7001), trespass (§ 18-7008) and unlawful entry (§ 18-7034), but Chapter 70 also contains over two dozen provisions aside from § 18-7042 directed to discrete

types of property injury or trespass.[4] The legislature, moreover, used § 18-7042 to address a broad array of conduct—*e.g.*, trespass, conversion, unauthorized activities on non-public property, securing employment with intent to harm employer, and causing physical damage to facility's property or customers—viewed as interfering with agricultural facility operations. *Dukes* and other

[4] Destruction of timber on state lands (§ 18-7009); cutting state timber for shipment (§ 18-7010); opening gates and destroying fences (§ 18-7012); polluting reservoirs and tanks when posted (§ 18-7013); injury to crops (§ 18-7014); trespass on inclosure for fur-bearing animals (§ 18-7015); obliterating and defacing boundary monuments (§ 18-7016); defacing natural scenic objects (§ 18-7017); injuring jails (§ 18-7018); injuring dams, canals, and other structures (§ 18-7019); injuring lumber, poles, rafts, and vessels (§ 18-7020); injuring monuments, ornaments and public improvements (§ 18-7021); injuring gas or water pipes (§ 18-7022); destroying mining and water right notices (§ 18-7023); setting fire to underground workings of mines (§ 18-7024); sabotage (§ 18-7026); desecration of grave, cemetery, headstone or place of burial (§ 18-7027); removal of human remains (§ 18-7028); placing posters or promotional material on public or private property without permission (§ 18-7029); placing debris on public or private property (§ 18-7031); tampering with parking meters, coin telephones or vending machines (§ 18-7032); use of unauthorized vehicles on airports (§ 18-7033); damaging caves or caverns (§ 18-7035); injury by graffiti (§ 18-7036); unauthorized release of certain animals, birds or aquatic species (§ 18-7037); destroying livestock (§ 18-7038); killing and otherwise mistreating police dogs, search and rescue dogs and accelerant detection dogs (§ 18-7039); interference with agricultural research (§ 18-7040); and damage to aquaculture operations (§ 18-7041); *see also* Idaho Code § 21-213(2)(a)(ii) (creating private right of action for damages for, *inter alia*, warrantless use of unmanned aircraft system by any person, entity or state agency to "gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property including, but not limited to . . . [a] farm, dairy, ranch or other agricultural industry with the written consent of the owner of such farm, dairy, ranch or other agricultural industry"); *id.* § 22-4907(2) (prohibiting warrantless searches under the Beef Cattle Environmental Control Act absent "either consent from the property owner or other authorized person").

decisions establish that the rational basis standard leaves lawmakers' determination as to the timing and breadth of responses to perceived social or economic problems virtually unfettered. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) ("[t]his Court has made clear that a legislature need not 'strike at all evils at the same time or in the same way'").

In any event, only minor overlap between § 18-7042 and other statutes exists. Certain of the prohibitions—theft and property destruction—are likely prohibited under pre-existing statutes.[5] But the trespass, unauthorized audio or video recording and faithless employee prohibitions either are not addressed by a criminal statute or conceivably are but under conditions not imposed by § 18-7042(1).[6] Because the judgment leaves the property destruction provision in § 18-

[5] Idaho Code § 18-2403(3) ("[a] person commits theft when he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the intent of depriving the owner thereof"); *id.* § 18-7001(1) ("every person who maliciously injures or destroys any real or personal property not his own, or any jointly owned property without permission of the joint owner, or any property belonging to the community of the person's marriage, in cases otherwise than such as are specified in this code, is guilty of" a crime).

[6] The principal trespass statutes are Idaho Code §§ 18-7008 and -7011. Entering without permission is prohibited under both, in relevant part, only when the real property is posted with "No Trespassing" signs. *Id.* §§ 18-7008(9), -7011(1). Idaho is a one-party consent State for purposes of recording oral conversations. *Id.* § 18-6702(d). Section 18-6701(2) defines the term "oral communication" to mean "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation but such term does not include any electronic communication."

7402(1)(e) in place, the theft provision in Title 18 becomes the only relevant pre-existing provision.

2. The legislature had wholly rational grounds for enacting legislation tailored to agricultural production. The legislative record reflects that a video of animal abuse in an Idaho dairy became public in 2012. ER 122:8-13, 265:18-20. Nothing indicates that the diary's owner had knowledge of the abuse until informed of the video by the Idaho Department of Agriculture ("ISDA"). *Id.*; *see also* ER 236:10-15. The owner responded by firing the involved employees, reviewing internal operational protocols, installing on-site cameras, and initiating an animal welfare audit by an independent entity. ER 265:24-26. The video itself was taken by an employee conducting an undercover investigation on behalf of Mercy for Animals. ER 75:12-19. Following video's release, the dairy's owner and other employees received death threats. The legislative record also reflected concerns arising from damage during 2012 and 2013 to Oregon crops where genetically modified seeds were in use and to a mink ranch where breeding papers were destroyed and animals were released and died. ER 66:15-24, 243:19-244:8. Against this background, the district court's conclusion that the legislature acted irrationally in tailoring the law to agricultural facilities departs inexplicably from applicable equal protection standards. *Cf. Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality op.) ("States adopt laws to address the problems that confront

them. The First Amendment does not require States to regulate for problems that do not exist.").[7]

Section 18-7042(1)'s prohibitions correlate as well with the overall objective of maintaining property right integrity. Again, they protect agricultural facilities from entry that is unauthorized or secured by misrepresentation, document theft or destruction, unauthorized audio or video recording in facilities not open to the public, individuals who seek employment with the specific intent of injury to the employer, and physical damage to the facility. None of these protections is irrational. No one wants her or his home or property damaged by an interloper; most, indeed likely everyone, want the right to prohibit audio or video recording of activities within the home by invited guests or employees; and no one wants to hire a person to work in a home who harbors intent to damage it. Agricultural

[7] The district court summarily rejected the Attorney General's reliance on the significance of the agricultural sector to Idaho's economy as one justification for § 18-7042. *See* Paul Levin *et al.*, *The Role of Agricultural Processing in Idaho's Economy: Status and Potential*, Univ. of Idaho Extension Bull. 886 (2013) ("[t]ogether the whole food processing industry and agricultural industry in Idaho account directly for 6% of jobs, 15% of sales, and 7% of GSP" in 2011), *available at* http://www.cals.uidaho.edu/edcomm/pdf/BUL/BUL886.pdf (last visited Feb. 27, 2016). In so doing, it failed to recognize that the legislature could rationally conclude that, given the sector's importance, some response to the problem of interference with agricultural facilities' ability to control access to and use of their workplaces was warranted. To the extent the district court suggested that a legislature may not take into consideration economic consequences of acting or not acting, it erred. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 485 (2005) ("[p]romoting economic development is a traditional and long-accepted function of government").

production facilities do not differ in these respects from homeowners. *Cf. Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) ("Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe"). In sum, § 18-7042 is a rational response to a rational concern arising in the agricultural production sector.

b. Animus against animal rights activists

1. The district court relied on various statements in the legislative record for the conclusion that § 18-7042 has as its purpose silencing animal rights activists. Obviously enough, however, the statute's *purpose* lay in prohibiting specified conduct that interferes with agricultural production by any person. It is also plain from the preceding discussion that, independent of any claimed animus against animal rights activists, not merely rational but quite weighty governmental interests supported the legislature's action. Under these circumstances, the Idaho legislature's purported animus is immaterial.

This Court recently rejected a rational basis challenge under the Equal Protection Clause in *International Franchise Association v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015). The appeal there involved a denial of a preliminary injunction with respect to a minimum-wage-increase implementation schedule distinguishing between large and small employers. The Court reasoned that "the

classification [is] not the result of 'mere animus or forbidden motive[]'" because, "[a]s a threshold matter, . . . the district court did not clearly err in finding a legitimate, rational basis for the City's classification." *Id.* at 407. This holding comports with *Mountain Water Co. v. Montana Department of Public Service Regulation*, 919 F.2d 593 (9th Cir. 1990), where the Court stated that "[u]nder the *Moreno* analysis, a court may hold a statute not implicating a suspect class violative of equal protection if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment." *Id.* at 598-99 (emphasis added); *see also Ave. 6E Invests., LLC v. City of Yuma*, No. 13-16159, 2016 WL 1169080, at *7, *11, *12 (9th Cir. Mar. 25, 2016) (alleged animus against Hispanics relevant to claims alleging discriminatory rezoning decision); *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014) (noting the possibility of animus as the basis for state law that barred issuance of driver's licenses to persons who could not establish legal presence in the United States only after the panel rejected the proffered rational grounds for the law). This Circuit is not alone in finding no need to address claims of animus when a rational basis otherwise exists.[8]

[8] *E.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638-39 (1986) ("just as in . . . *Moreno*—the decision which the District Court read to require 'heightened scrutiny'—the 'legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest'"); *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 654 (7th Cir. 2013) ("Where, as in *Moreno*, an act furthers

2. Legal immateriality aside, two flaws attend the court's conclusion that § 18-7042 was the product of mere animus against animal rights activists on the part of the Idaho legislature. As a matter of law, the *motives* of individual legislators in supporting or opposing a bill should not be considered in identifying its *purpose*. As a matter of undisputed fact, the legislative record shows that the law's purpose was protection of property rights.

The "motives" of individual legislators generally are not an appropriate basis for attacking a statute's validity. As the Supreme Court held in *United States v. O'Brien*, 391 U.S. 367 (1968), "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383. The core reason is quite straightforward:

> Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 383-84. Such motive-finding endeavors are, as well, doomed to failure as a

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no legitimate government interest, it fails rational basis review. *Moreno* is not a case . . . where the Court suggested a statute would have passed rational basis review but for animus towards a particular group. As unfortunate as it may be, political favoritism is a frequent aspect of legislative action."); *MERSCORP Holdings, Inc. Malloy*, 131 A.3d 220, 229 n.8 (Conn. 2016) ("[a]s long as the challenged distinction is rationally related to some legitimate public purpose that conceivably may have motivated the legislature, it is irrelevant whether certain legislators also may have been motivated by animus toward the plaintiffs").

practical matter. *See Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.").[9]

Applied here, *O'Brien* and like decisions preclude this Court from psychoanalyzing the Idaho legislature as a whole or individual legislators to extract a subjective "motive" for enacting § 18-7042. But even if the Court were to engage in the feckless task of trying to discern such motive(s), the legislative history relied upon by ALDF establishes only that which is set forth in the

[9] Legislators' individual "motives" for supporting or opposing a bill must be distinguished from the bill's purpose. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) ("[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law"); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1033 (9th Cir. 2010) ("The dissent points to instances where individual Congressmen proclaimed, as politicians often do in election years, the obvious religious elements of the amendment. But we are called upon to discern Congress' ostensible and predominant purpose, not the purpose of an individual. . . . That purpose is not the statement of one or more individual members of Congress, but what the committees putting forth the amendment actually stated and, more important, what the *text* of the statute says."). No doubt exists as to the *purpose* of § 18-7042 for the reasons discussed in the text. This Court's decision in *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013), upon which the district court relied as deeming consideration of § 18-7402's legislative history appropriate (ER 353), does not stand for the contrary proposition. The *Valle Del Sol* panel looked to legislative history to shed light on the Arizona statute's purpose, not the motives of Arizona legislators. 709 F.3d at 815.

Statement of Purpose accompanying Senate Bill No. 1337 (Idaho 66th Leg. 2014): The statute's objective is "to protect agricultural production facilities from interference by wrongful conduct." Idaho legislators who supported adoption reiterated that objective from the beginning to the end of their respective chambers' deliberations.

- The principal sponsor in the Idaho Senate, Senator Patrick, explained the bill's purpose when introducing it to the Senate Agriculture Committee as follows:

> [W]hat this piece of legislation does, is it's a protection, it's Ag security, basically. We don't want wrongful entry and criminal trespass, and like I say, anyone's asked, I've always approved. We don't want theft of records, and this has occurred in some instances in our seed industry and others. Obtaining employment by wrongful means, and what that means is basically to potentially set up some sort of a hazard, video it, or whatever they might want to do, other than doing the job, Making recording in a workplace activities without the owner's consent. I've never turned anyone down, news media or others, that wanted to come in and take pictures, but I would not like them coming in without my permission because it really opens it up to potential staging of an event. And intentionally interfering with farming operations. That's really the basis of the Bill.

ER 51:17-52:2. He repeated this theme in his closing remarks, pointing to the destruction of genetically modified grain crops and the release of animals being raised for their fur. ER 129:4:14. Senator Patrick further disclaimed in his closing remarks any intent "to stop whistleblowers"— noting his industry's policy to encourage them. ER 128:16-22.

- Senator Patrick's statements during the Senate floor debate followed

suit: "[T]he basics of this bill are dealing with wrongful entry and criminal trespass. Trespass is illegal, but this is a little more. It's theft of records, obtaining employment by wrongful means, making records of workplace activities without the owner's consent and intentionally interfering with farming operations." ER 136:25-137:2.

- Other senators expressed the same rationale for their support. *E.g.*, ER 162:20-22 (Sen. Bair: "Senators, ultimately this bill and this debate is a property rights' issue. Everybody here has the right to own, possess, and manage their property."); ER 176:7-9 (Sen. Lakey: "For me, it comes down to private property rights. This is akin to someone hiring a caregiver to come in to their home based on false pretenses and that person begins videotaping in their home.").

- Representative Batt opened the House of Representatives floor consideration by explaining:

> [W]e're seeing a tax on agricultural producers and operations by extreme activists that exploit agricultural's [*sic*] venerability of being visible and accessible. Havoc has been brought on a broad spectrum of agriculture through the destruction of crops, breeding records are being destroyed, theft of intellectual property, misrepresentation of agricultural practices and physical damage that includes burning down of structures and breaking into facilities. Idaho should not tolerate these extreme tactics.

ER 283:22-26. Her concern thus was not in stifling legitimate First Amendment speech but in protecting "rights of private property owners[] to be secure in their homes and their businesses." ER 300:22-23; *see also* ER 292:17-19 (Rep. Malek:

"There's no interpretation of the First Amendment that gives somebody the right to enter into a private place with a camera and take pictures of something that they find objectionable without due process under the law."); ER 293:17-20 (Rep. Hartgen: "You may take pictures from a public place. Okay? Of whatever you can see from there. But there is no First Amendment right to enter a personal private property owned by other individual and take pictures and gather that information."); ER 295:9 (Rep. Andrus: "[L]et's deal with this Bill as it is: a privacy of personal property.").

These legislators' statements do not square the proposition that animus against the views of animal rights activists animated § 18-7042's passage. They instead reflect legislators' view that enhanced protection of the agricultural production facility owners' property rights was necessary. This reading of the legislative record comports with the statute's text which addresses only certain forms of conduct. Nothing in that text restricts animal rights activists' advocacy rights; at most, § 18-7042 may preclude certain investigative practices that particular groups wish to employ. In sum, the district court's attempt to divine what *motivated* individual legislators to support or oppose the statute, or to ascribe to the Idaho House and Senate as collective bodies what it perceived as the motivation for a few members, departs not only from *O'Brien* but also from the

legislative record.[10]

B. Section 18-7042(1)(c) and (d) do not classify on the basis of speech and therefore are not subject to strict scrutiny.

The district court stated that "the central problem with § 18-7042 is that it distinguishes between different types of speech, or conduct facilitating speech,

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[10] The district court summarized the legislative record as follows:

> The *overwhelming* evidence gleaned from the legislative history indicates that § 18-7042 was intended to silence animal welfare activists, or other whistleblowers, who seek to publish speech critical of the agricultural production industry. *Many* legislators made their intent crystal clear by comparing animal rights activists to terrorists, persecutors, vigilantes, blackmailers, and invading marauders who swarm into foreign territory and destroy crops to starve foes into submission. *Other* legislators accused animal rights groups of being extreme activists who contrive issues solely to bring in donations or to purposely defame agricultural facilities.

ER 25 (emphasis added). A review of the legislative record shows that the term "terrorism" or "terrorist" was used by three legislators during committee hearings or chamber debate: Senator Patrick (ER 130:5, 170:9, 170:14); Senator Bair (ER 164:24-27, 165:23, 166:6); and Representative Dayley (ER 248:25). Senator Patrick used the term "persecuted" twice. ER 127:27, 146:2. A second representative referred to the Idaho Dairyman's Association's determination that it "could not allow fellow members of the industry to be persecuted in the court of public opinion." ER 284:18. One representative used the term "blackmail." ER 192:9. Another stated that "[m]uch of the opposition to Senate Bill 1337 is coming from extreme activists who wish to contrive issues to get donations for their cause" and that "I cannot condone vigilante activity." ER 286:5-7. The Idaho House of Representatives has 70 members and the Idaho Senate 35 members. The legislation passed with large majorities in both chambers. *See* http://legislature.idaho.gov/legislation/2014/S1337.htm (last visited Feb. 29, 2016) (23-10-2 (Senate); 56-14 (House)). Various individuals speaking during committee hearings used the terms "terrorism," "terrorist," "vigilante" or "blackmail," but their statements have little or no relevance in assessing legislator motives. *See Int'l Franchise Ass'n*, 809 F.3d at 407 n.10 ("The animus argument also fails because most of the cited evidence consists of statements of IIAC members. The district court did not err in finding these statements to be of little value in determining the motivations of the City Council and Mayor.").

based on content." ER 27. It posed two hypotheticals to support this conclusion: the claimed inapplicability of the audio-video recording restriction to children playing in an agricultural production facility and absence of a prohibition against "an undercover journalist who misrepresents his identity to secure a job at an agricultural production facility so he can publish a laudatory piece about the facility." *Id.* The court analogized these provisions to the City of Chicago ordinance struck down in *Police Department v. Mosley*, 408 U.S. 92 (1972).

The district court's reliance on *Mosley* glosses over the critical difference between subsections (1)(c) and (d) and the Chicago ordinance. As the Court observed there, "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter"—*i.e.*, "[p]eaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited." 408 U.S. at 95. Neither subsection, however, has a comparable carve-out. Subsection (1)(c) applies to any person who obtains employment through one of the designated means with the requisite intent to harm. Subsection (1)(d) applies to all nonconsensual audio or video recording in an agricultural facility not open to the public.

The hypothetical posed by the lower court as to § 18-7042(1)(d)—*i.e.*, children playing in the facility—thus misses the mark. The ordinance's "operative distinction" turned on the picket sign's expressive content. 408 U.S. at 95. No

"operative distinction" based on speech exists under subsection (1)(d). As discussed above at 28-29, the subsection is a location-driven restriction covering all activities likely to occur in an agricultural facility. Imaginative or unrealistic scenarios cannot obscure this fact or that the recording restriction bears no resemblance to the *Mosley* ordinance's explicit authorization of one form of picketing and prohibition of all others.

As to the district court's second hypothetical, § 18-7042(1)(c) does not differentiate on the basis of speech. Any person, including investigative reporters, may seek employment and misrepresent their identities without penalty. A labor organization accordingly can "salt" an agricultural facility for organizing purposes; an animal rights organization can embed an advocate with the object of determining whether livestock is being abused. The subsection only prohibits a person seeking employment with the specific intent of injuring the employer. Here, culpability arises not on what a prospective employee communicates but on intent to injure the employer's interests. Journalists and non-journalists are treated identically.

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CONCLUSION

The district court's final judgment should be reversed.

DATED this 20th day of April 2016.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ *Clay R. Smith*
Clay R. Smith

/s/ *Carl J. Withroe*
Carl J. Withroe
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STATEMENT OF RELATED CASES

No related cases within the scope of Circuit Rule 28-2.6 exist to Appellant's knowledge.

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I certify that:

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By /s/ *Clay R. Smith*
Clay R. Smith
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 20, 2016.

I certify that all participants in the case who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Clay R. Smith*
Clay R. Smith
Deputy Attorney General
Attorney for Appellant

ADDENDUM

IDAHO CODE § 18-7042

§ 18-7042. Interference with agricultural production

(1) A person commits the crime of interference with agricultural production if the person knowingly:

(a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;
(b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;
(c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or
(e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.

(2) For purposes of this section:

(a) "Agricultural production" means activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses and includes without limitation:
(i) Construction, expansion, use, maintenance and repair of an agricultural production facility;
(ii) Preparing land for agricultural production;
(iii) Handling or applying pesticides, herbicides or other chemicals, compounds or substances labeled for insects, pests, crops, weeds, water or soil;
(iv) Planting, irrigating, growing, fertilizing, harvesting or producing agricultural, horticultural, floricultural and viticultural crops, fruits and vegetable products, field grains, seeds, hay, sod and nursery stock, and other plants, plant products, plant byproducts, plant waste and plant compost;
(v) Breeding, hatching, raising, producing, feeding and keeping livestock, dairy animals, swine, furbearing animals, poultry, eggs, fish and other

aquatic species, and other animals, animal products and animal byproducts, animal waste, animal compost, and bees, bee products and bee byproducts;

(vi) Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities;

(vii) Manufacturing animal feed.

(b) "Agricultural production facility" means any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production.

(3) A person found guilty of committing the crime of interference with agricultural production shall be guilty of a misdemeanor and shall be punished by a term of imprisonment of not more than one (1) year or by a fine not in excess of five thousand dollars ($5,000), or by both such fine and imprisonment.

(4) In addition to any other penalty imposed for a violation of this section, the court shall require any person convicted, found guilty or who pleads guilty to a violation of this section to make restitution to the victim of the offense in accordance with the terms of section 19-5304, Idaho Code. Provided however, that such award shall be in an amount equal to twice the value of the damage resulting from the violation of this section.