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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellees (collectively, "ALDF") and their numerous *amici curiae* argue vigorously about what the law should be, not what it is. Several key (and established) principles control the outcome here.

- The First Amendment does not displace the States' authority to protect the right of landowners to limit access to their property. Gaining access through misrepresentation infringes on that right. Neither journalists nor special interest advocates have any constitutional dispensation from this rule; *e.g.*, no First Amendment exception exists for "high-value lies."

- The First Amendment does not turn the act of audio or video recording into speech itself. Subsequent expressive conduct must occur. But even if otherwise qualifying for First Amendment protection, such recording is subject to the right of landowners to control use of their property and to prohibit it.

- The Supreme Court has identified three review standards under the Equal Protection Clause of the Fourteenth Amendment: rational basis, intermediate scrutiny, and strict scrutiny. It has never recognized a "heightened rational basis" category. The claim that a law unconstitutionally targets a class not subject to intermediate or strict scrutiny can succeed only if no rational ground can be plausibly hypothesized for the challenged classification.

ALDF's analysis runs afoul of each of these principles. It should be rejected.

ARGUMENT

I. THE PROHIBITIONS AGAINST MISREPRESENTATION IN IDAHO CODE § 18-7042(1)(a)-(c) PROTECT SETTLED PROPERTY INTERESTS IN CONTROLLING ACCESS TO OR POSSESSION OF PROPERTY AND INJURY TO BUSINESS INTERESTS

ALDF postulates a novel rule for determining the constitutionally protected nature of false statements: "[L]ies used to reveal and disclose information of great public concern—high-value lies—warrant rigorous First Amendment protection." Plaintiffs-Appellees' Answering Brief (DktEntry 18) ("ALDF Br.") at 17. Such lies "facilitate rather than impede truthful discourse and transparency on matters of public concern." *Id.* In support of this standard, ALDF points to *Alvarez* where the Supreme Court concluded that Congress could not establish a blanket prohibition on misrepresentations related to receipt of the Congressional Medal of Honor. It distills from the decision's plurality and concurring opinions "a limiting principle" that false statements lose First Amendment-based immunity "only when [they] cause a 'legally cognizable harm.'" ALDF Br. at 18. "High-value lies," under ALDF's analytical construct, cannot cause such harm.

Alvarez invalidated a statute "that target[ed] falsity and nothing more." 132 S. Ct. at 2545. But § 18-7042(1)(a)-(c) differs fundamentally from the Stolen Valor Act, 18 U.S.C. § 704(b), because misrepresentations impose liability only

when used to invade settled interests possessed by an agricultural production facility (1) to control access to and use of its land or acquisition of its papers and (2) to avoid hiring individuals who seek employment with an intent to injure the facility's interests. The Idaho law thus demands proof beyond a reasonable doubt of not only a knowing misrepresentation (which the Stolen Valor Act arguably did (132 S. Ct. at 2552-53 (Breyer, J., concurring)) but also a specific intent to invade those interests through the misrepresentation's use (which the Stolen Valor Act did not). ALDF thus asks this Court to limit or wholly discount these interests based upon the perceived social utility of the misrepresentation. So, for example, journalists and sleuthing non-journalists with a claimed altruistic cause have license to lie in order to access otherwise private areas or to acquire documents that belong to another on the strength of a court's assessment that the lies have "high quality."

ALDF's theory goes astray, as does its reliance on *Alvarez*, for a straightforward reason. The First Amendment does not affect the existence or weight of the property interests that ALDF seeks to compromise. Those interests' source lies elsewhere, typically as here in state law. Both the plurality and concurring opinions in *Alvarez* recognize that lies lose any grasp on First Amendment protection once they cross the line and infringe on (as here) a settled right to control access to property and employment. Journalists stand in the same

shoes as non-journalists; animal or food-safety activists have no greater rights than persons seeking access or employment to achieve economic competitive advantage. Neither the First Amendment nor *Alvarez*, in short, distinguishes between the "good" and the "bad."

A. The First Amendment And Property Right Infringement

The Supreme Court in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), resolved the question whether the First Amendment creates a right to trespass for journalists.[1] The *Houchins* litigation arose when a television station reporter was denied access to a county jail on terms more lenient than those applicable to the ordinary public. Both the district court and the Court of Appeals concluded that the station established a likelihood of success on the merits, with the latter holding "that the public and the media had a First and Fourteenth Amendment right of access to prisons and jails." 438 U.S. at 7. Speaking for a plurality of the Court, Chief Justice Burger disagreed:

> The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.

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[1] It had previously resolved that issue as to the public generally. *See Adderly v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

Id. at 9. The Chief Justice added that "[t]he respondents' argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes." *Id.* at 12. He further emphasized that the station possessed a variety of other methods for carrying out its reportorial function, including "a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions" and "to seek out former inmates, visitors to the prison, public officials, and institutional personnel." *Id.* at 15.[2]

Houchins involved *public* property. The same result, of course, obtains with respect to *private* property. The Attorney General has addressed the absence of any such right. Br. of Appellant (DktEntry 11) at 21 (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976)). *Lloyd Corp.*

[2] Justice Stewart concurred in the judgment of reversal and agreed that "[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally" and that "[t]he Constitution does no more than assure the public and the press equal access once government has opened its doors." 438 U.S. at 16. The plurality and concurring opinions thus saw eye-to-eye on the principle that the First Amendment does not provide greater access to public buildings for the press than for other citizens. No need exists in light of their unanimity on that principle to consider whether Justice Stewart's opinion provides the narrowest grounds for the judgment on the basis of "a single underlying rationale." *United States v. Davis*, No. 13-30133, 2016 WL 3245043, at *2 (9th Cir. June 13, 2016) (en banc).

presented the issue "whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling." 407 U.S. at 367. Rejecting the union's analogy to the company-owned town in *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court found no dedication of the shopping center to public use so "as to entitle respondents to exercise therein the asserted First Amendment rights." 407 U.S. at 570. It reiterated this holding in *Hudgens* with respect to peaceful picketing by a labor union inside a shopping center with the observation that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." 424 U.S. at 521. A district court thus recently, and correctly, concluded that "Plaintiffs' First Amendment right to create speech does not carry with it an exemption from other principles of law, or the legal rights of others." *W. Watersheds Project v. Michael*, No. 15-CV-00169-SWS, 2016 WL 3681441, at *6 (D. Wyo. July 6, 2016).

B. *Alvarez* And Property Right Infringement

Alvarez did not revise these First Amendment principles. The challenged Stolen Valor Act provision was unusual; it sought "to control and suppress all false statements on . . . one subject in almost limitless times and settings . . . without regard to whether the lie was made for the purpose of material gain." 132 S. Ct. at 2547 (plurality op.). Justice Kennedy's plurality opinion explained that "[w]ere

the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." *Id.* at 2547-48. Justice Breyer's concurring opinion identified the same fundamental defect in the statute. *Id.* at 2553 (interpreting the Act to penalize "only false factual statements made with knowledge of their falsity and with the intent that they be taken as true").

The plurality and the concurring opinions nevertheless recognized, as ALDF acknowledges, that the First Amendment does not immunize lies aimed at invading a property interest for the purpose of securing some benefit. The plurality opinion thus noted that "[w]here 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." 132 S. Ct. at 2547. Justice Breyer's opinion observed more generally the "many statutes and common-law doctrines [which] make the utterance of certain kinds of false statements unlawful" but which "tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims." 132 S. Ct. at 2553-54. Among those statutes, Justice Breyer included fraud laws that "typically require proof of a misrepresentation that is material, upon which the victim relied, and which cause

actual injury." *Id.* at 2554.

The misrepresentation provisions in § 18-7042(1)(a)-(c) fall squarely within the types of statutes that escape First Amendment prohibition. *Houchins*, *Lloyd Corp.* and *Hudgens* teach that the Free Speech Clause does not authorize trespass on public or private property. By parity of logic, they leave States with the authority to criminalize use of lies to gain possession of private records. These prohibitions protect the settled right of land and property owners to control access to, and use of, their property, with nominal, actual and/or punitive damages available. *See, e.g.*, *Aztec Ltd. v. Creekside Inv. Co.*, 602 P.2d 64, 68 (Idaho 1979) (nominal damages presumed "to flow naturally" from trespass, with punitive damages available "without proving that [landowner] is entitled to more than nominal damages").[3] The *Alvarez* plurality opinion, moreover, excludes

[3] ALDF asserts that "[e]ntry gained by misrepresentations, whether affirmative or by omission, is not a trespass and the State cites no authority to suggest otherwise." ALDF Br. at 20. However, in Idaho misrepresentation negates consent in a variety of contexts, including intentional torts. *E.g.*, *Neal v. Neal*, 873 P.2d 871, 876 (Idaho 1994) ("Consent obtained by fraud or misrepresentation vitiates the consent and can render the offending party liable for a battery."); *Pitner v. Fed. Crop Ins. Corp.*, 491 P.2d 1268, 1270 (Idaho 1971) (consent to bilateral contract "is vitiated where it is procured by fraud"). Idaho is not an outlier. *See generally Restatement (Second) of Torts* § 173 cmt. b (1963) ("A conscious misrepresentation as to the purpose for which admittance to the land is sought, may be a fraudulent misrepresentation of a material fact."); *id.* § 892B cmt. d ("If the actor is aware that the consent is given under a substantial mistake, either as to the nature of the invasion of the other's interests reasonably to be expected from the conduct or as to the extent of the harm reasonably to be expected to result, the actor is not entitled to rely on the consent given.").

misrepresentations used to gain employment—an exclusion that necessarily encompasses a statute that proscribes lies uttered with the intent to secure employment for the specific purpose of harming the employer—a species of tortious interference with the economic relationship. *See Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 859-60 (Idaho 1991). This Court has accorded the plurality opinion's reasoning on that exclusion "'great weight.'" *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014).

ALDF discounts these property interests with the assertion that the *Alvarez* plurality opinion carved out from First Amendment protection only misrepresentations causing "more than nominal or symbolic" damage. ALDF Br. at 22. However, the opinion itself, as explained immediately above, does not require a threshold *quantum* of harm to a protected interest. The issue is whether the interest exists and has been invaded.[4] Two illustrations mentioned in *Alvarez*

[4] ALDF discusses four cases in which federal courts of appeals exercised diversity jurisdiction over tort claims. ALDF Br. at 20-22, 37 n.18; *see Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 809 (9th Cir. 2002) (applying Arizona law); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1347 (7th Cir. 1995) (defamation and trespass claims subject principally to Illinois law; one federal law claim under 18 U.S.C. § 2511(2)(d)); *Dietemann v. Time, Inc.*, 449 F.2d 245, 247 (9th Cir. 1971) (applying Arizona law). Each required resolution of fact-specific claims with reference to the several States' common law. More important, each also addressed a First Amendment defense to liability. *Med. Lab. Mgmt. Consultants*, 306 F.3d at 825 (editorial decision as "the true rate of error" in industry protected by First Amendment); *Food Line*, 194 F.3d at 520-24 (rejecting First Amendment defense to trespass and breach-of-loyalty claims; affirming

underscore that point. Impersonation of a federal officer may well not result in monetary damage to the United States. It nonetheless impairs the "substantial government interest" in the integrity of governmental processes and the sovereign's "'general good repute and dignity.'" *Tomsha-Miguel*, 766 F.3d at 1048. Defamation *per se* in Idaho, as in other States, does not require a showing of special damages. *Barlow v. Int'l Harvester Co.*, 522 P.2d 1102, 1111-12 (Idaho 1974). Nominal damages are available for such defamation. *See generally Restatement (Second) of Torts* § 620 cmt. a (nominal damages "are also awarded when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter"). Knowing false statements of fact enjoy no constitutional protection even when about public figures or matters of public concern (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (plurality op.)) and even if the "actual malice" standard applies beyond the traditional media (*Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014)).

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denial of publication damages on First Amendment grounds); *Desnick*, 44 F.3d at 1355 (discussing application of First Amendment to possible defamation claim); *Dietemann*, 449 F.2d at 249 ("The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."). Taken as a group, these decisions establish that the First Amendment does not authorize conduct deemed tortious under applicable state law or, as ALDF would have it (ALDF Br. at 10), impose a "material harm" requirement. They thus stand shoulder-to-shoulder with *Alvarez*.

The protections at issue here demand no less constitutional respect. The right to exclude, to choose one, is "one of the most essential sticks in the bundle of rights that commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *accord Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011). ALDF plainly misreads *Alvarez* by conflating the importance of the underlying property right with the monetary recovery that may lie for its infringement or to draw from its plurality and concurring opinions First Amendment protection predicated on judicial assessments of a lie's social utility.[5]

In sum, neither *Alvarez* nor First Amendment precedent more generally sanctions journalists or any other person to engage in tortious conduct prohibited under the misrepresentation component of § 18-7042(1)(a)-(c). The record below does not establish that "[t]he prohibition of such lies simply insulates wrongdoers from accountability by allowing them to hide their dangerous conduct from public

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[5] As one commentator has explained:

> Limiting the interests trespass protects merely to physical damage, simply because that is the only real compensation available in a lawsuit, ignores a key feature of trespass: that it provides nominal damages for trespasses that cause no harm. Why does it do so? Because trespass protects other important interests beyond damage to the land, including privacy and the right to exclude. It protects the right to associate with whomever one wishes. It protects the right to keep secret one's business, including meat handling (putting aside whether it protects the right to keep secret unlawful activity).

Laurent Sacharoff, *Trespass and Deception*, 2015 B.Y.U. L. Rev. 359, 392 (2015) (footnotes omitted).

scrutiny" (ALDF Br. at 27),[6] but, leaving aside the accuracy of ALDF's rhetorical broadside, the fact remains that every agricultural facility has the right to control access to its premises and records absent lawful judicial or administrative process and to avoid tortious interference with its economic relationships. *See generally* Sacharoff, 2015 B.Y.U. L. Rev. at 393, 394 (lies vitiate consent whether by "a police officer or reporter disguising her identity and purpose" or "a burglar who lies about a surprise party" to facilitate a robbery). It is the violation itself, not the violator's identity or amount of monetary harm arising from it, which counts for First Amendment purposes.[7]

II. ALDF HAS NO FIRST AMENDMENT RIGHT TO ENTER CLOSED, NONPUBLIC PROPERTY TO MAKE RECORDINGS

ALDF contends that the First Amendment disables the State from prohibiting entry to closed, nonpublic agricultural production facilities, and, without obtaining the owner's consent or legal authorization, making audio or video recordings. ALDF disputes the Attorney General's characterization of recording and says that recording is indeed speech: The ability to record and

[6] *See* Br. of Appellant at 40-50; ER 40 ¶ 23.

[7] ALDF is silent concerning the severability argument raised below and in the Attorney General's opening brief with respect the term "misrepresentation" in § 18-7042(1)(a)-(c). *See* Br. of Appellant at 22-24. This silence leaves unrebutted the twin propositions that (1) the First Amendment does not authorize entry into an agricultural facility or acquisition of facility records by force, threat or trespass or use of force or threat to obtain employment with intent to cause economic or other injury and (2) "misrepresentation" can be severed under Idaho state law standards.

memorialize speech "is an essential component of expressive autonomy because it allows one to formulate ideas and thoughts" akin to note-taking. ALDF Br. at 32, 51. But ALDF's justification for classifying this conduct as speech protected by the First Amendment does not square with binding precedent.

A. Recording As Speech

ALDF errs when it argues that recording is expressive. The act of recording is not inherently expressive. "[N]ot everything that communicates an idea counts as 'speech' for First Amendment purposes." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010). Conduct that is inherently expressive is protected, but, as this Court recognizes, "[t]he Supreme Court has consistently rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" *Id.* (quoting *O'Brien*, 391 U.S. at 376). If the activity is not speech or expressive conduct, the First Amendment loses relevance, and inquiry becomes whether the regulation is rationally related to a legitimate government interest. *Id.* at 1059.

The act of recording is not "sufficiently imbued with elements of communication" so as to justify First Amendment protection as expressive conduct because recording lacks "[a]n intent to convey a particularized message." *Spence v. Washington*, 418 U.S. 405, 409-11 (1974). Recording is conduct involving a

tool used to capture and preserve sights and sounds. It is unlike picketing or handbilling, dancing, flag burning, movies, music, or wearing a shirt with a verbal expression or image on it. Those activities are inherently communicative; recording is not. A person may record things for myriad purposes and may do myriad things with a recording, one of which is put it in a box never to be seen ever again. Video or sound recording becomes expressive only when *communicated*—in other words, by being published or shown or posted.

The Supreme Court has said plainly that conduct has no claim upon First Amendment protection when reliant on accompanying or subsequent speech to give it expressive character. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). There, the Court differentiated the flag burning in *Texas v. Johnson*, 491 U.S. 397 (1989), from law schools' exclusion of military recruiting from their campuses based on the schools' disagreement with military policy regarding sexual orientation. The Court reinforced the requirement that the conduct *itself* be inherently expressive:

> The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it.

547 U.S. at 66. That the act of surreptitious, nonconsensual recording may be a

convenient way to preserve information for later speech, in short, is not a justification to transform conduct into expressive conduct.

ALDF's argument—recording promotes the free flow of information, recording and is therefore necessarily protected speech—fails for similar reasons. Merely because a restriction on conduct may present some impediment to the flow of information does not transform that conduct into protected speech. *See Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (acknowledging that government refusal to issue passports to Cuba inhibited the free flow of information about the country, but holding that refusal to issue passport inhibits action, and denying that any First Amendment right was involved). The act of recording itself, then, is not speech and is not entitled to First Amendment protection.

B. Recording And Trespass

ALDF additionally justifies its asserted right to record on the theory that recording images or sounds is conduct "necessary and preparatory" to speech even if not speech itself. ALDF Br. at 34. In other words, because the resulting speech is protected, the conduct that facilitates it is protected, too. This is particularly true, ALDF asserts, when the subject matter of the resulting videos concerns issues of public importance. This argument, however, ignores the issue presented by its challenge to § 18-7042(1)(d): Whether a First Amendment right exists to *access* closed, nonpublic agricultural production facilities to gather information—or, here,

make recordings—without first obtaining the owner's consent.[8] ALDF's constitutional theory discounts both the owner's right to exclude and a State's police power to define the contours of trespass.

First, the decisions relied upon by ALDF do not help its argument. The key here is that a landowner's control over use of its property is at issue. *Anderson* was an outright ban on tattoo parlors; the case (and logically the result) would have been entirely different had the ordinance imposed sanctions on the operation of a parlor without consent of premises' owner. The latter is the situation here. The same goes for the campaign finance cases. That *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 558 U.S. 310 (2010), rejected congressional attempts at campaign spending limitations on the basis that spending facilitates speech says nothing about whether a candidate or her supporters have a First Amendment right to go onto private property to convey their political message. *Lloyd Corp.* and other decisions have answered that question long ago in the negative.

Second, ALDF's contention that First Amendment protects the recordings its members seek to make because of their perceived public importance fails for the same reason. In *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 2011), this

[8] Section 18-7042(1)(d) regulates only entry to and use of closed, nonpublic agricultural production facilities. Like subsection (1)(a), it simply puts a gloss on ordinary trespass statutes to define specifically the terms of a person's entry to and use of a specific class of property. *See infra* at 26-27; Br. of Appellant at 38-41.

Court's statement that there is a "First Amendment right to film matters of public interest" came in an action challenging a Washington State law that forbade recording private conversations without consent of all parties. The arrest that spawned the suit occurred while the plaintiff was part of a public demonstration on public streets—paradigmatic public forums. ALDF thus would have this Court eliminate the distinction between acquiring a recording in a public space and acquiring one in a nonpublic area without the property owner's consent.

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012), is different, too. The Illinois law at issue there prohibited all audio recording of any oral communication without consent of everyone. At issue there was the ACLU's complaint that the statute would prevent it from filming police officers discharging their duties "in public places and speaking at a volume audible to bystanders." *Id.* at 586. The court noted that the conduct of police officers in public was an important public matter. However, whether a First Amendment right to record on another's property existed was not at issue. That case, then, recognizes a First Amendment right to record public officers *in public*, but has no bearing in this case. In *Houchins*, for example, the Supreme Court did not deny that conditions in jails and prisons was clearly matters of great public importance, yet still held that such importance provided no basis to infer from the First Amendment a journalist's right to trespass. 438 U.S. at 9. In short, no case cited by ALDF supports the

proposition that the First Amendment protects a right to record or that § 18-7042(1)(d), by protecting the right of agricultural production facilities to control audio-video recording in nonpublic areas, runs afoul of the First Amendment.

C. Recording As Content And Viewpoint Based

ALDF argues that subsection (1)(d) is content and viewpoint based. These arguments need not be addressed because, as explained above, the First Amendment neither protects as speech the act of recording nor compromises a legislature's ability to prohibit recording in nonpublic areas absent consent by the property owner.[9] Nonetheless, several points ignored by ALDF warrant highlighting.

ALDF contends that § 18-7042(1)(d) is content based because it limits recordings in closed, nonpublic areas of agricultural production facilities to the "conduct of an agricultural production facility's operations." The Attorney General, however, previously explained that subsection (1)(d) applies to all

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[9] ALDF's overbreadth argument need not be addressed for the same reasons. ALDF Br. at 50-52. Its reliance on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), therefore misses the mark. ALDF Br. at 50. The Court there counseled that the overbreadth doctrine captured a hate-speech ordinance which "was 'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to [R.A.V.], because it is content based." 505 U.S. at 381 n.3. Here, to reiterate, no First Amendment right exists to lie one's self onto private property or to take videos of activities there. The various hypothetical applications that ALDF conjures up add nothing from the third-party standing component of the overbreadth doctrine because it claims § 18-7042(1)(a)-(d) unconstitutionally infringes on its own speech rights; *i.e.*, ALDF need not rely on others' First Amendment rights.

activities that occur in the agricultural production facility. Br. of Appellant at 28-29. It is a *location-based* limitation, not a restriction that applies differently depending on *what* is being recorded. *See Hill v. Colorado*, 530 U.S. 703, 723 (2000). ALDF's reading ignores "[t]he general rule of constitutional avoidance[, which] encourages courts to interpret statutes so as to avoid unnecessary constitutional questions." *Miller v. Idaho State Patrol*, 252 P.3d 1274, 1283 (Idaho 2011).[10] Moreover, before a federal court will invalidate a state statute on its face, it must determine "whether the statute is 'readily susceptible' to a narrowing construction by the state courts." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1147 (9th Cir. 2001) (*quoting Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)).

ALDF contends as well that subsection (1)(d) is content based because of the legislative motivation behind it. The Supreme Court has said that examining the motives or purposes of a statute is a "hazardous matter" and that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *O'Brien*, 391 U.S. at 383-84; *see also* Br. of Appellant at 47-50 & n. 10. ALDF's cases demonstrate the hazard noted by the Court in *O'Brien*. ALDF nevertheless soldiers ahead on this line of attack, offering a handful of other

[10] Idaho rules of statutory construction govern, *In re First T.D. & Investment, Inc.*, 253 F.3d 520, 527 (9th Cir. 2001), but federal common law is the same. *E.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

statements that it takes as targeting animal rights activities. *Id.* at 46. Even were this Court to consider the issue, *O'Brien* requires it to decline ALDF's invitation to delve into the Idaho legislature's collective psyche and attempt to draw a conclusion about the statute's purpose from those statements. It is the statute's text (which reveals no illicit motive or purpose), and its effects (regulation of access to nonpublic property) that would control the analysis.

The cases ALDF cites are, again, readily distinguishable. *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), was not a motivation case. It involved a city ordinance regulating "passive solicitation" that was "content-based by its very terms." *Id.* at 1051. Subsection (1)(d) is not content-based. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), involved not even the First Amendment but the Fourteenth Amendment and the Fair Housing Act, and concerned racially discriminatory purposes. And in *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013), the Arizona day laborer statutes were "classic examples of content-based restrictions" on their face. *Id.* at 819. The stated purpose of that law was to address immigration, not traffic, as the state alleged in litigation. *Id.* And, to the extent the Court examined comments of lawmakers, which it deemed "[t]hough not dispositive of legislative intent" (*id.*), those comments merely corroborated the conclusion that the law was, in fact, content-based. Here, the face and purpose of subsection (1)(d) are content-neutral.

All ALDF and the district court had were a handful of statements from which, under *O'Brien*, the legislature's collective intent of cannot be intuited.

ALDF's contention that subsection (1)(d) is viewpoint based also fails. ALDF's reasoning is that it "turns each agricultural facility owner into a government censor with unbridled discretion to prohibit speech he dislikes, backed by the full force of the State's police, prosecutors, and jails." ALDF Br. at 44. Subsection (1)(d) does not prohibit recording because of the maker's intent to criticize or praise the facility. It prohibits any recording on a closed, nonpublic area without consent of the owner. The statute neither requires nor empowers authorities to examine why the owner did not give consent.

III. ALDF'S EQUAL PROTECTION CLAIM IS SUBJECT TO AND FAILS UNDER TRADITIONAL RATIONAL BASIS STANDARDS

ALDF predicates its equal protection claim on application of a "heightened form of rational basis review" because "the State cannot prove both that the law would have passed but for the existence of animus[] and that the fit between the enacted law and the government interest is sufficiently close." ALDF Br. at 55. ALDF contends that the legislative animus is directed at "animal rights activists." *Id.* at 53. It further complains that the lack of a constitutionally adequate fit derives from the lack of any need for § 18-7042(1)(a)-(d) because existing laws "guard[] against such dangers as trespass, conversion, and fraud." *Id.* at 57. ALDF relies chiefly on *USDA v. Moreno*, 413 U.S. 528 (1973), and *City of*

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), as the basis for its entitlement to heightened rational review. This reliance is misplaced, as is ALDF's application of the rational basis standard to the inter-industry classification created under § 18-7042.

A. Animus And "Heightened Rational Basis"

The Supreme Court has never used the term "heightened rational basis." Nor has it suggested that two categories of rational basis exist. Indeed, the Court explicitly resolved *Moreno* and *Cleburne* under ordinary rational basis standards. *Moreno*, 413 U.S. at 533; *Cleburne*, 473 U.S. at 446-47. A review of those decisions, moreover, shows that they did not create a unique rational basis analytical regimen where the challenged law allegedly targets a politically disfavored group not possessing suspect classification status.

In *Moreno*, the Supreme Court invalidated an amendment to the Food Stamp Act that redefined the definition of an eligible "household" to limit its coverage only to groups of related individuals who satisfied several other requirements. 413 U.S. at 530. Noting the problem that the Act sought to address—"hunger and malnutrition among members of [low-income] households" (7 U.S.C. § 2011)—the Court deemed the statutory distinction between households of related persons and those of unrelated persons "irrelevant to the stated purposes of the Act." 413 U.S. at 533, 534. It therefore looked for "some [other] legitimate governmental

interest." *Id.* at 534. The Court rejected the Government's sole justification, fraud prevention, because other provisions of the Act "specifically impose strict criminal penalties" for fraudulent acquisition or use of food stamps (*id.* at 536) and because financially able unrelated individuals could modify their living arrangements to qualify as two "households" eligible for assistance (*id.* at 537). Thus, "only those persons so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility" felt the amendment's impact. *Id.* at 538. The Court therefore turned back to legislative history and concluded that the sole basis for the amendment lay in preventing "so called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* at 534 (citing H.R. Conf. Rep. No. 91-1793 at 8 (1970); 116 Cong. Rec. 44,439 (1970) (Sen. Holland)). That objective, however, did not pass rational basis muster insofar as it embodied simply "a bare congressional desire to harm a politically unpopular group." *Id.*

Cleburne struck down a municipal ordinance that denied facilities for the mentally retarded, but not other types of group housing, access to a special use zoning permit. *Id.* at 447-48. The Supreme Court rejected the proffered justifications based upon the plaintiff facility's location and size on the ground that the same concerns applied to other group dwellings. *Id.* at 449-50. It was left, therefore, with the first factor relied upon by the city council for the ordinance:

"the negative attitude of the majority of property owners located within 200 feet of the . . . facility, as well as with the fears of elderly residents of the neighborhood." *Id.* at 448. Such attitudes and fears, the Court held, did not constitute a permissible basis for the disparate treatment absent any relationship to considerations "properly cognizable in a zoning proceeding." *Id.*

Although *Moreno* and *Cleburne* represent the unusual situation where a rational basis claim succeeded, neither modified the standard applied. In each instance, the Court considered the justifications advanced for the classification and came away convinced that none of them rationally explained the basis for the classification except to deny a socially or politically disfavored group rights extended to similarly situated group. Nothing in the decisions suggests that the *rigor* of the attendant examination derived from the alleged presence of animus. The Court instead deemed the various justifications patently implausible, making "bare" animus against the disfavored class as the only possible explanation under the circumstances before it.[11] It would have come to the same result, however, even had no hint of class disfavor existed; *i.e.*, the Court simply would have

[11] This Court's decision in *Mountain Water Co. v. Montana Department of Public Service Regulation*, 919 F.2d 593 (9th Cir. 1990), so held and remains law of the circuit. *Id.* at 598 ("Under 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.").

identified no discernable explanation for the challenged classification, thereby rendering it no less arbitrary.

B. Application Of The Rational Basis Standard

This Court has recognized "that when Congress is legislating in the general economic sphere, 'the reform may take one step at a time, addressing itself to the phase of the problem which seems the most acute to the legislative mind.'" *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573 (9th Cir. 1993) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). The same principle applies to state legislatures and political subdivisions. *Wright*, 665 F.3d at 1142 n.8 ("equal protection does not require [a village improvement district] 'to eliminate all evils in order to legislate against some'").

Here, § 18-7042 responded to activities that affected the agricultural sector: (1) an employee video-taping animal abuse but not bringing it immediately to the State's or the employer's attention, with the consequences that (a) the abusive conduct continued unnecessarily and (b) the employer and other employees received death threats because knowledge of the abuse was attributed inaccurately to them; and (2) the destruction of crops, animals and records by opponents to the facilities' operation. Br. of Appellant at 41-42. It thus made perfect sense to enact legislation providing remedies to protect agricultural production facilities' ability to control access to, use or acquisition of their property and to hire persons whose

purpose in seeking employment is to discharge faithfully their job duties, not to harm the facility's business interests.

ALDF's contention that animus against animal rights' activists, and animus alone, prompted the legislation focuses on two points. First, "'existing laws against trespass, conversion, and fraud . . . already serve th[e] purpose'" of preventing those evils. ALDF Br. at 57 (quoting district court memorandum decision and order at ER 24). Second, "the State failed to provide sufficient explanation for why agricultural production facilities deserve more protection from these crimes than other private businesses that are at risk of undercover whistleblowing." *Id.* at 58. Both are wrong.

The first point ignores the fact that Title 18, Chapter 70 is replete with sections directed to specific forms of property injury or trespass. Br. of Appellant at 38-39 & n.4. Rather than an exception, § 18-7042 instead follows suit with other provisions in that chapter. ALDF also fails to deal substantively with the fact that the prohibitions in § 18-7042(1)(a), (c) and (d) find little or no direct counterpart in other criminal laws. *See* Br. of Appellant at 40-41. The general trespass statutes, Idaho Code §§ 18-7008 and -7011, require posting and are plainly ill-suited for use in the present context. *See W. Watersheds Project*, 2016 WL 3681441, at *10 ("Although the challenged statutes may aim to prevent trespassing, they operate in a different manner than existing [trespass] law, and

seek to provide a more effective deterrent to protect private property rights."). No statutory counterparts to § 18-7042(1)(c) and (d) exist. The second point largely re-characterizes the first. That aside, ALDF's objection runs squarely into settled authority cited above that recognizes a legislature's ability to enact less-than-comprehensive laws without violating the Equal Protection Clause.

The Idaho statute, in short, does not create classifications among individuals. It protects various property and employment-relation rights for a particular economic sector based upon activities, if not unique to, at least disproportionately prevalent in that sector. That ALDF believes that the law misbalances the involved interests—*e.g.*, agricultural production facilities' rights as property owners or employers on one hand, and advocacy groups' desire to achieve their policy ends on the other—says nothing relevant about whether the Idaho legislature possessed a rational basis for enacting industry-specific regulation. Here, a rational basis exists for the prohibitions in § 18-7042(1)(a)-(d), and the Equal Protection Clause does not invite the judiciary to second-guess their wisdom.

CONCLUSION

The district court's final judgment should be reversed.

DATED this 4th day of August 2016.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ *Clay R. Smith*
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