Stewart Gollan (Utah Bar No. 12524)
584 Wall Street, Salt Lake City, UT 84103
(801) 413-3406; sgollanlaw@gmail.com

Justin Marceau (Calif. Bar No. 243479)
2255 E. Evans Avenue, Denver, CO 80208, jmarceau@law.du.edu

Matthew Liebman (Calif. Bar No. 248861)
170 East Cotati Avenue, Cotati, CA 94931, mliebman@aldf.org

Matthew Strugar (Calif. Bar No. 232951)
2154 W. Sunset Blvd., Los Angeles, CA 90026, matthew-s@petaf.org

Alan Chen (Illinois Bar No. 6197902)
2255 E. Evans Avenue, Denver, CO 80208, achen@law.du.edu

Ed Ramey (Colo. Bar No. 6748)
Heizer Paul, LLP, 2401 15th Street, Suite 300, Denver, CO 80202, eramey@hpfirm.com

Attorneys for Plaintiffs

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

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

---

Plaintiffs Animal Legal Defense Fund, People for the Ethical Treatment of Animals, and Amy Meyer hereby move for summary judgment pursuant to Fed. R. Civ. P. Rule 56, on the grounds that there is no genuine dispute as to any material fact and the movants are entitled to judgment as a matter of law. This motion is supported by the Memorandum in Support of Motion for Summary Judgment (included herein), the declarations and exhibits accompanying this motion, all of the materials already on file in this case, and any other material that the Court may further consider at any hearing on this Motion. Certain portions of this brief refer to materials and exhibits that have been designated as confidential by one of the parties and are subject to the Standard Protective Order. DuCivR. 26-2. These materials will be filed conventionally under seal.

Table of Contents

Introduction

This case arises out of Utah's enactment and threatened enforcement of Utah Code Ann. § 76-6-112, known as Utah's Ag Gag law.

Plaintiffs are two animal protection organizations and an individual who intend to carry out the type of investigations at animal agricultural facilities that the Ag Gag law criminalizes. In recent years, investigations of this type have revealed systematic and horrific animal abuse, leading to food safety recalls, citations for environmental and labor violations, plant closures, and criminal convictions. Surreptitious video recordings made by undercover investigators employed at a California slaughterhouse precipitated the largest federal recall of beef in U.S. history. Such investigations and the public conversation they ignite are an integral part of the market place of ideas concerning animal rights and agricultural policy.

Not surprisingly, the animal agriculture industry is eager to prevent investigative whistleblowing. To this end, animal agriculture industry groups have pushed for state legislatures to enact laws to criminalize undercover investigations in their industry. Under these laws, which include Utah Code Ann. § 76-6-112, animal rights and food safety advocates, as well as investigative journalists, are cast as criminals.

Utah's Ag Gag law violates the First and Fourteenth Amendments to the United States Constitution because it is content- and viewpoint-discriminatory and overly broad, it discriminatorily burdens the exercise of the fundamental right of free speech, and was passed with animus against animal protection advocates such as Plaintiffs.

The U.S. District Court for the District of Idaho recently struck down Idaho's virtually indistinguishable Ag Gag law, holding that the law sought "to limit and punish those who speak

out on topics relating to the agricultural industry, striking at the heart of important First Amendment values." *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015). As the court recognized, "[t]he effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment." *Id*.

Plaintiffs urge this Court to follow the Idaho District Court and grant summary judgment for Plaintiffs, striking down Utah Code Ann. § 76-6-112 as unconstitutional, and permanently enjoining its enforcement.

Statement of Elements

Pursuant to Local Rule DUCivR 56-1(b)(2), Plaintiffs set forth the statement of elements of the claims asserted in this action with supporting legal authority:

I. Plaintiffs Have Standing to Assert Their Claims Against State Officials for Violating Their Rights under the United States Constitution

1. Article III of the Constitution provides that, "The judicial power shall extend to all cases, in law and equity, arising under this Constitution . . ." U.S. Const., Art. III, §2.

2. To have standing, (1) Plaintiffs must have suffered an injury in fact; (2) that injury must be caused by the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

3. "[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional

rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007).

4. Rather than require plaintiffs to risk arrest to challenge a statute that encumbers their constitutional rights, the Supreme Court has established a "credible threat of prosecution" standard. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). Under this standard, plaintiffs have standing when they have (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute," and (2) that "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *see also Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003).

5. "When an individual is subject to such a threat [of prosecution], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List*, 134 S. Ct. at 2342. "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Id*. (quoting *Steffel*, 415 U.S. at 459). *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat").

6. Where plaintiffs' claims seek prospective relief from a statute's "chilling effect" on speech, they "can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so

because of a credible threat that the statute will be enforced." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). Under the first *Walker* factor, "[E]vidence of past activities obviously [is not] an indispensable element—people have a right to speak for the first time" but past activities can "lend[] concreteness and specificity to the plaintiffs' claims." *Id*.

7. While "affirmative assurance of non-prosecution from a government actor responsible for enforcing the challenged statute" can undermine plaintiffs' chill and therefore their injury, *Bronson*, 500 F.3d at 1108, where such a government actors fails to disavow future prosecutions, plaintiffs' desire to engage in expressive activity prohibited by the challenged statute is sufficient to establish injury in fact. *Ward*, 321 F.3d at 1268.

8. "In other words," a plaintiff establishes an injury when "the plaintiff's expressive activities must be inhibited by an objectively justified fear of real consequences." *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006) (quotation omitted); *see also D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004).

II. The Ag Gag Law Violates Plaintiffs' First Amendment Rights Because it is a Content-Based Restriction That Does Not Withstand Strict Scrutiny.

9. The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. Const. Amend. I. The First Amendment's protections of freedom of speech and press apply to the states through its incorporation into the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

10. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). These types of restrictions on speech

are known as content-based restrictions. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir. 2006) ("Content-based restrictions on speech are those which suppress, disadvantage, or impose differential burdens upon speech because of its content.").

11. When the government aims to prohibit "particular views taken by speakers on a subject," rather than merely subject matter or other type of content, the restriction is considered viewpoint-based. *Pahls v. Thomas*, 718 F.3d 1210, 1229 (10th Cir. 2013) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Viewpoint-based discrimination "is a 'more blatant' and 'egregious form' of content discrimination." *Reed v. Town of Gilbert*, *Ariz.*, 135 S. Ct. 2218, 2223 (2015) (quoting *Rosenberger*, 515 U.S. at 829); *see also Pahls*, 718 F.3d at 1229 ("Viewpoint discrimination is a subset—and a particularly 'egregious form'—of content discrimination. (quoting *Rosenberger*, 515 U.S. at 829)).

12. "Content based regulations are presumptively invalid," even as to unprotected speech, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1982), and must meet strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *R.A.V.*, 505 U.S. at 395. Strict scrutiny applies to content-based restrictions whether they apply to pure speech or conduct preparatory to speech. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010) (recognizing that strict scrutiny applied to a statute regulating the conduct of materially supporting a terrorist organization).

13. The First Amendment prohibits states from restricting protected activity based on its content because such laws threaten to allow the government to "manipulate the public debate through coercion rather than persuasion," *Turner*, 512 U.S. at 641, and to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387.

14. The "mere assertion of a content neutral purpose" is not "enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-43.

15. In assessing whether a law is content-based, the Supreme Court recently reiterated a two-tiered approach. *Reed*, 135 S. Ct. at 2222. The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *Id*. at 2228. The second step, if necessary, requires a court to examine the legislative justifications for the law. *Id*. at 2228 ("[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose.").

16. "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645; *see also Reed*, 135 S. Ct. at 2222 ("[S]trict scrutiny applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based . . . ." (emphasis added)); *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2664 (2011) (noting that even if a law "on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–502 (1996).

17. "Laws designed or intended to restrict the expression of specific speakers contradict basic First Amendment Principles." *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 812 (2000) (quoting the statement of a senator who supported the law in question, in order to show that a specific group of speakers was being targeted, thus rendering the law content-based).

18. In determining whether a regulation is content-neutral or content-based, "'the government's purpose in enacting the regulation is the controlling consideration.'" *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010), *aff'd*, 132 S. Ct. 873 (2012) (*quoting Z.J. Gifts D–2, L.L.C. v. City of Aurora*, 136 F.3d 683, 686 (10th Cir. 1998)); *see also Texas v. Johnson*, 491 U.S. 397, 406 (1989); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression and concerned with the content of such expression.") (citation omitted).

III. The Ag Gag Law's Recording Provision Directly Regulates Speech or Conduct Preparatory to Speech.

19. The act of video "recording is entitled to First Amendment protection." *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

20. "Restricting the use of an . . . audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id*. at 596 (analogizing to a law banning the taking of notes and holding that "making an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording").

21. "[J]ust as 'the processes of writing down words on paper, painting a picture, and playing an instrument are purely expressive activities,' the act of audiovisual recording is a purely expressive activity 'entitled to full First Amendment Protection.'" *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1205 (D. Idaho 2015) (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010)).

22. Laws that prohibit conduct both necessary and preparatory to speech are subject to scrutiny under the First Amendment. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19 (1972) (determining that restrictions on campaign spending implicate the First Amendment because they "necessarily reduce[] the quantity of expression"); *Anderson*, 621 F.3d at 1061-62 ("Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation").

IV. The Ag Gag Law's Misrepresentation Provision Directly Regulates Pure Speech

23. Although "there are instances in which the falsity of speech bears upon whether it is protected," the Supreme Court "rejects the notion that false speech should be in a general category that is presumptively unprotected." *United States v. Alvarez*, 132 S. Ct. 2537, 2546-47 (2012).

24. In other words, falsehoods retain First Amendment protections. *Alvarez*, 132 S. Ct. at 2544 (holding that there is no "general exception to the First Amendment for false statements"); *id*. at 2545 ("[s]ome false statements are inevitable if there is to be an open and vigorous expression of views"); *id*. at 2551 (Breyer, J., concurring in the judgment).

25. The government may criminalize lies "only when those statements themselves cause a 'legally cognizable harm.'" *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1203 (quoting *Alvarez*, 132 S. Ct. at 2545).

V. The Ag Gag Law Violates Plaintiffs' First Amendment Rights Because it is Unconstitutionally Overbroad.

26. The overbreadth doctrine requires that laws be invalidated when they restrict significantly more speech than the First Amendment allows. *New York v. Ferber*, 458 U.S. 747, 769, 772-73 (1982); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

27. Criminal statutes must be examined particularly carefully for overbreadth. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

28. Overbroad criminal laws are especially dangerous from a First Amendment perspective because of their potential to chill important expression. *Id*.

29. The overbreadth doctrine protects individuals who "may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

30. When the criminalized conduct implicates the core concerns of the First Amendment, it is more likely to be deemed overbroad. *See generally* Richard Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991).

31. The first step in overbreadth analysis is to assess the breadth of the challenged statute. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

32. The second step is to determine whether the statute, as construed by the court, prohibits a substantial amount of conduct or speech protected by the First Amendment. *United States v. Williams*, 553 U.S. 285, 297 (2008).

VI. The Ag Gag Law Does Not Survive Strict Scrutiny Review

33. Laws that discriminate based on content or viewpoint are subject to strict scrutiny. *Turner*, 512 U.S. at 642.

34. Laws that criminalize pure speech on the basis of the speaker's viewpoint or the speech's content are subject to strict scrutiny. *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001).

35. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231.

36. Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (internal quotation marks omitted).

37. Strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner*, 512 U.S. at 680. It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id*. Indeed, "[t]here must be some pressing public necessity, some essential value that has to be preserved," in order for the interest to be compelling. *Id*. Moreover, the interest served by the law can never be one that injures primarily a private rather than a truly public good. *Id*.

VII. The Ag Gag Law Does Not Survive Intermediate Scrutiny Review

38. To survive intermediate scrutiny, a law must "further[] an important or substantial governmental interest" that is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also United States v. Windsor*, 133 S. Ct. 2675, 2717 (2013) (intermediate scrutiny requires that a restriction is "substantially related to the achievement of important governmental objectives" (internal citations, quotations, and alterations omitted)); *Golan*, 609 F.3d at 1083 ("Applying intermediate scrutiny, a content-neutral statute will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech . . . ." (internal quotation marks omitted)). *See also McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).

39. Additionally, the law "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798-99.

40. Laws are narrowly tailored under intermediate scrutiny if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" *O'Brien*, 391 U.S. at 377 (1968).

41. Even where a law is subject to intermediate, rather than strict scrutiny, "the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 798).

42. Essentially, laws will survive intermediate scrutiny only if they "are justified without reference to the content of the regulated speech . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791.

VIII. The Ag Gag Law Violates the Equal Protection Clause of the Fourteenth Amendment

43. The Equal Protection Clause of the Fourteenth Amendment guarantees that "[no] State [shall] deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

44. A legislative enactment can violate the Equal Protection Clause when it discriminatorily burdens a fundamental right or draws impermissible classifications among individuals. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996).

A. The Ag Gag Law Violates the Fundamental Rights to Freedom of Speech and the Press

45. Fundamental rights are those "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither

liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted).

46. The right to freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow*, 268 U.S. at 666; *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3061 (2010) (Thomas J., concurring) (citing the First Amendment as emblematic of the sort of right recognized as fundamental).

47. Laws that discriminatorily burden First Amendment rights to freedom of speech and press are subject to strict scrutiny under the Equal Protection Clause. *Mosley*, 408 U.S. at 101 ("[S]tatutes affecting First Amendment interests [must] be narrowly tailored to their legitimate objective"); *see also Carey v. Brown*, 477 U.S. 455, 471 (1980).

B. The Ag Gag Law is Motivated by Substantial Animus Against Plaintiffs and Other Animal Welfare Activists

48. **"**[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

49. The existence of animus makes a crucial, generally dispositive difference in the rational basis review of a statute. Under traditional rational basis review, a court will uphold a challenged law "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach*

Comm'c'ns, Inc., 508 U.S. 307, 313 (1993)). But the existence of animus as a substantial motivating factor behind a law fundamentally changes the inquiry into a far more rigorous form of review. *See generally Bishop v. Smith*, 760 F.3d 1070, 1097-1103 (10th Cir. 2014) (Holmes, J., concurring) (discussing impact of animus on rational basis review and collecting cases).

50. Animus-based legislation is per se unconstitutional. Judge Holmes of the Tenth Circuit has noted that the presence of animus is "a doctrinal silver bullet" that requires a court to strike down an otherwise valid law, regardless of whether the law is also supported by valid governmental interests. *Bishop*, 760 F.3d at 1103 (Holmes, J., concurring) (quoting Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012)).

51. Even if a law motivated by animus is not per se unconstitutional, when animus is present, "courts apply a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); *see also Windsor*, 133 S. Ct. 2675; *id*. at 2692 (recognizing the need for "careful consideration" of laws motivated in part by animus); *Moreno*, 413 U.S. at 534, 538; *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009); *Bishop*, 760 F.3d at 1099 (Holmes, J., concurring) (compiling authorities).

52. Under this heightened form of rational basis review, a law must be invalidated if the State cannot prove both that the law would have passed even in the absence of such animus, and that the fit between the enacted law and the government interest is sufficiently strong. *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985). Stated differently, once animus is established through the legislative record or impact of the law, the classification must uniquely serve the proffered government interest.

53. Impermissible animus need not take the form of repeated statements of overt bias or malice to the disadvantaged group. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The Supreme Court's animus cases actually reflect very little actual evidence of malice towards the group in question. *See, e.g.*, *Moreno*, 413 U.S. at 534 (treating a single legislator's comment about "hippies" as tainting the legislation and triggering heightened rational basis review). Indeed, in *Windsor*, the Court found animus sufficient to invalidate the Defense of Marriage Act based on just three statements in a House Report. *See* 133 S. Ct. at 2693.

Statement of Undisputed Material Facts

Pursuant to Local Rule DUCivR 56-1(b)(2), Plaintiffs set forth the statement of undisputed material facts demonstrating that the elements of the claims asserted in this action have been met and Plaintiffs are entitled to summary judgment.

1. In 2012, the Utah Legislature passed House Bill 187, eventually codified at Utah Code Ann. § 76-6-112 (the "Ag Gag law"), criminalizing whistleblowing by 1) recording an image or sound by "leaving a recording device on the agricultural operation" without consent from the owner; 2) obtaining "access to an agricultural operation under false pretenses;" 3) applying for employment "with the intent to record an image of, or sound from, the agricultural operation" while knowing that the operation prohibits such recording and actually recording such an image or sound; and 4) recording an image or sound without the consent of the owner while committing criminal trespass. Utah Code Ann. § 76-6-112(2)(a)-(d).

2. The Ag Gag law states, in full:

> (1) As used in this section, "agricultural operation" means private property used for the production of livestock, poultry, livestock products, or poultry products.
>
> (2) A person is guilty of agricultural operation interference if the person:
>
> (a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;
>
> (b) obtains access to an agricultural operation under false pretenses;
>
> (c)(i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;

(ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; and

(iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or

(d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.

(3) A person who commits agricultural operation interference described in Subsection (2)(a) is guilty of a class A misdemeanor.

(4) A person who commits agricultural operation interference described in Subsection (2)(b), (c), or (d) is guilty of a class B misdemeanor.

Utah Code § 76-6-112.

I. Plaintiffs Have Standing to Challenge the Constitutionality of Utah's Ag Gag Law

3. Plaintiff ALDF is a national non-profit animal protection organization founded in 1979 that uses education, public outreach, investigations, legislation, and litigation to protect the lives and advance the interests of animals, including those raised for food. (Dillard Decl. ¶ 4; *see also* Strugar Decl. ¶¶ 3-4, Ex. A at 5-7 (Response to Interrogatory No. 2, describing publicly-disclosed investigations that ALDF has performed or on which ALDF worked with individuals

who performed since 2013) and 12-13 (Response to Interrogatory No. 7, describing ALDF's activities other than undercover investigations) Ex. B (ALDF Dep.) at 100:23-25 (affirming responses).)

4. ALDF's mission is best served by demonstrating that meat, dairy, eggs, and related products are produced in a similarly cruel manner industry-wide, across the United States. (Dillard Decl. ¶ 5.) This requires the ability to gather evidence and information in a variety of states, rather than in a select few. (*Id.*)

5. ALDF thus conducts investigations of facilities at various locations throughout the country. (Dillard Decl. ¶¶ 5-6; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 94:8-95:13; Ex. A at 5-12 (Responses to Interrogatory Nos. 2 through 6, listing undercover investigations).) This approach allows ALDF to demonstrate that certain practices, e.g. the use of battery cages for egg laying hens, are consistently cruel across locations and should be eliminated. (Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 95:4-13.)

6. ALDF's investigations have focused on agricultural operations, including (since 2013) Judy's Family Farm, Olivera's Egg Farm, Jambba's Ranch, Cal-Cruz Hatchery, Cuesta Farms, Tyson Foods, and various dairies in California. (Dillard Decl. ¶ 7; *see also* Strugar Decl. ¶ 3, Ex. A at 5-12 (Responses to Interrogatory Nos. 2 through 6, listing undercover investigations).)

7. In conducting its investigations, ALDF has found that it is often necessary to use undercover investigators who access the facilities in question via the use of a false pretense because other methods of information gathering, such as communications with whistleblowers or filming from outside of factory farm facilities, are unreliable and frequently ineffective. (Dillard Decl. ¶ 8;

see also Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 44:15-19 (explaining that the use of whistle-blowers is not a reliable and effective method of investigation); 84:7-21 (explaining that filming from the side of the road is ineffective "because of the hidden nature of factory farming in a mechanized, closed facility" where "[t]he cruelty is limited to the space that the employer needs their workers working"); 128:14-129:9 (explaining that Utah Code Ann. § 76-6-112 criminalizes "the most important methods" that ALDF can use for obtaining information about animal welfare in agricultural operations).) For example, ALDF conducted an employment-based investigation of Tyson Foods wherein an investigator obtained a position as a slaughter-line employee and worked full time while using surveillance equipment to record the conditions in the facility. (Dillard Decl. ¶ 9; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 120:13-121:3.) In applying for the position, the investigator provided inaccurate information regarding her affiliation with an animal rights organization. (Dillard Decl. ¶ 9; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 129:3-9). The investigation ultimately gave rise to four separate legal complaints. (Dillard Decl. ¶ 9; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 121:305.) Similarly, in ALDF's investigation of Jambbas Ranch in Fayetteville, Arkansas, an investigator gained access to the facility via the use of a pretext by posing as a patron. (Dillard Decl. ¶ 9; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 111:19-112:7.)

8. ALDF is particularly interested in conducting agricultural investigations in heavily agricultural states such as Utah and other states in the Mountain West. (Dillard Decl. ¶ 10; *see also* Strugar Decl. ¶ 3, Ex. A at 20 (Response to Interrogatory No. 14).) ALDF's desire to conduct an investigation in Utah deepened upon the release of video footage shot by Plaintiff Amy Meyer immediately prior to her prosecution under Utah Code Ann. § 76-6-112. (Strugar Decl. ¶ 4, Ex. B

(ALDF Dep.) at 45:20-46:10.) As ALDF's corporate representative Carter Dillard explained at his deposition, Meyer's footage "appeared to show downed animals being moved" and is thus "an example of a public revelation that signaled to [ALDF] an interest in agricultural operations in Utah." (*Id.* at 45:23-25.)

9. Accordingly, ALDF has made concrete plans to conduct an investigation at a Utah animal agriculture facility (Dillard Decl. ¶ 11): It has "researched potential targets for investigation, including one or more factory farms, dairies, and slaughterhouses with operations in the state of Utah"(Strugar Decl. ¶ 3, Ex. A at 22 (Response to Interrogatory No. 15)); "collected employment applications from one or more potential targets" (*id.*); "considered using undercover investigators to gather photographic evidence, videographic evidence, and eye witness testimony" (*id.*); contracted with a private investigation firm licensed in Utah regarding the firm's potential engagement to coordinate the investigation (Strugar Decl. ¶¶ 4-5, Ex. C (contract), Ex. B (ALDF Dep.) at 80:16-19 (authenticating contract)); allocated money in its budget to fund an investigation (Dillard Decl. ¶ 11); and obtained conditional approval for an investigation in Utah from its executive director, Stephen Wells (*id.*). ALDF also initiated discussions with expert consultant (and former Plaintiff) Daniel Hauff to advise it on an undercover, employment-based investigation at a factory farm in Utah.[1] (*Id.* ¶ 12.)

[1] ALDF is no longer working with Daniel Hauff as it now employs Travis Powell on a full-time basis as Director of Investigations. Mr. Powell will serve in a role similar to that intended for Mr. Hauff should Utah Code Ann. § 76-6-112 be struck down. ((Dillard Decl. ¶ 12 fn. 1; Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 78:16-19 (explaining that Mr. Powell has taken over ALDF's investigations program.).)

10. In conducting the investigation, ALDF planned to instruct its investigator to take photos and videos to document the conditions inside the facility, without the permission or consent of the owner. (Dillard Decl. ¶ 13.) ALDF likewise intended to instruct its investigator not to disclose his or her affiliation with animal protection organizations or to reveal his or her intent to document conditions in the subject facility. (*Id.*; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 96:12-20.)

11. ALDF intended to publicize its findings from that investigation through the publication of at least press releases or articles on its website and online social networking presence. (Dillard Decl. ¶ 14; *see also* Strugar Decl. ¶ 3, Ex A at 22 (Response to Interrogatory No. 15, describing the manner of in which information gathered from an undercover investigation would be publicized); *see also* Ex. A at 9-10 (Response to Interrogatory No. 5, describing the manner in which ALDF has publicized prior investigations of agricultural facilities).) Publication of its findings is ALDF's standard protocol following the completion of a successful investigation. (*See, e.g.,* Strugar Decl. ¶¶ 6-10, Exs. D-H (representative examples of press releases regarding investigations); Dillard Decl. ¶ 14.)[2]

12. Nevertheless, ALDF has refrained from commencing its planned investigation out of a fear of criminal prosecution. (Dillard Decl. ¶ 16; Strugar Decl. ¶ 3, Ex. A at 18 (explaining that ALDF cannot conduct an investigation that would allow it to respond to Interrogatory Nos. 12 and 13 without violating the statute in question).) As Mr. Dillard explained in his deposition,

[2] ALDF also uses the results of undercover investigations by other organizations in its outreach and litigation projects and would do so with regard to any investigation conducted in Utah. (Dillard Decl. ¶ 15; *see also* Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 137:3-9 (describing Cal-Cruz investigation).)

"I don't think we could engage in true investigations of factory farms without running afoul of Utah's Ag Gag law." (Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 83:3-5.) "[T]he information [ALDF] need[s] is inside the facilities that the law is designed to protect and to prevent documentation of that information. That's videotaping, photography, that sort of thing, to document what the investigator's seeing. To get into those facilities we would need an investigator on the inside, we need them with access to animals." (*Id.* at 83:8-14.)

13. ALDF was particularly concerned that Utah Code Ann. § 76-6-112 "presented a real liability given the fact that Ms. Meyer[ ] was arrested for the video that she shot." (Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 75:17-21; *see also* Dillard Decl. ¶ 17.) As a result, ALDF's planned investigation in Utah "stopped more or less with the applications process to those facilities based on the advice of counsel at the time." (Strugar Decl. ¶ 4, Ex. B (ALDF Dep.) at 75:21-23; *see also* Dillard Decl. ¶ 17.)

14. If the Ag Gag law is declared unconstitutional, however, ALDF will follow through with its plans to conduct and publicize an undercover investigation at an agricultural operation in Utah. (Dillard Decl. ¶ 18.)

15. Plaintiff PETA is a Virginia non-stock corporation and animal protection charity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code. (Kerr Decl. ¶ 3.) PETA is dedicated to protecting animals from abuse, neglect, and cruelty, and undertakes these efforts through public education, undercover investigations, research, animal rescue, legislation, special events, celebrity involvement, protest campaigns, and lawsuits to enforce laws enacted to protect animals. (Kerr Decl. ¶ 4; Strugar Decl. ¶ 11, Ex. I at 5-7 (Response to Interrogatory No. 2,

describing publicly-disclosed investigations that PETA has performed since 2013) and 12-13 (Response to Interrogatory No. 7 describing PETA's activities other than undercover investigations).)

16. Central to PETA's mission are exposing cruelty to farmed animals, educating the public about such cruelty, and encouraging people to choose a lifestyle that does not involve or support abuse, neglect, or exploitation of animals. (Kerr Decl. ¶ 5; *see also* Strugar Decl. ¶ 12, Ex. J (PETA Dep.) at 88:4-9 ("We are always working for any way to reduce or eliminate cruelty and abuse inflicted on animals, including and especially in the factory farming or what you refer to as the agricultural industry.").)

17. PETA has a long history of using undercover investigations in order to expose cruelty to animals. PETA's first undercover investigation—the 1981 investigation of Dr. Edward Taub's monkey testing laboratory in Silver Spring, Maryland—resulted in the nation's first arrest and criminal conviction of an animal experimenter for cruelty to animals. (Kerr Decl. ¶ 6.) PETA has conducted dozens of investigations in the United States over the past three decades, exposing illegal animal abuse and turning the results of each investigation over to appropriate law enforcement and/or regulatory authorities. (Kerr Decl. ¶ 7; *see also* Strugar Decl. ¶ 12, Ex. J (PETA Dep.) (PETA Dep.) at 49:11-23 (discussing PETA's investigations department).) It continues to conduct these investigations to expose further illegal conduct on the part of workers and management personnel. (Kerr Decl. ¶ 8.)

18. Like ALDF, PETA's mission is best served by demonstrating that meat, dairy, eggs, and related products are produced in a similarly cruel manner industry-wide, across the United States. (Kerr Decl. ¶ 9.) This requires the ability to access a diverse array of states and not just a select few. (*Id.*; *see also* Strugar Decl. ¶ 11, Ex. I at 22-23 (explaining that PETA has used videos

and/or photographs from investigations to further its mission by encouraging legislative and industry reform and effectuating change to corporate policies and supply chains).)

19. PETA thus conducts investigations of agricultural facilities at various locations throughout the country. (Kerr Decl. ¶ 10; *see also* Strugar Decl. ¶¶ 11-12, Ex. J (PETA Dep.) (PETA Dep.) at 173:24-174:13.); Ex. I at 5-12 (Responses to Interrogatory Nos. 2 through 6, listing investigations including undercover investigations) and 20-21 (Response to Interrogatory No. 14 (explaining why investigations are central to PETA"s mission).)

20. PETA's investigations have focused on the type covered by Utah Code Ann. § 76-6-112, including (since 2013) Hudson Valley Foie Gras, Southern Quality Meats, Linda Bean's Maine Lobster, Babcock Genetics, Osborne Dairy Farm, and, to the extent the state takes the position that animal raised for their fur or skin are "agricultural operation[s]" under Utah Code Ann. § 76-6-112(1), Adams Valley View Chinchilla Ranch, a mink farm in Wisconsin, a rabbitry, and Lone Star Alligator Farms. (Kerr Decl. ¶ 11; *see also* Strugar Decl. ¶ 11, Ex. I at 5-12 (Response to Interrogatory No. 2 through 6, listing investigations including undercover investigations).)

21. In conducting its investigations, PETA has found it necessary, to use undercover investigators who access the facilities in question without disclosing that they are investigators, their animal-protection purpose, or their affiliation with PETA. (Kerr Decl. ¶ 12; Strugar Decl. ¶ 12, Ex. J (PETA Dep.) at 68:7-69:9.)

22. PETA has conducted two previous investigations in Utah. (Kerr Decl. ¶ 13.) In 2009, a PETA investigator worked undercover at the University of Utah in Salt Lake City and documented miserable conditions for and terrible suffering of dogs, cats, monkeys, rats, mice, rabbits, frogs, cows, pigs, and sheep confined there. (*Id.*) PETA also conducted an employment-

based undercover investigation in March of 2014 relating to sheep shearing and wool that involved various locations in Colorado, Nebraska, Wyoming, and Utah.[3] (*Id.*; Strugar Decl. ¶ 11, Ex. I at 13-14 (Response to Interrogatory No. 8).)

23. PETA is committed to conducting an investigation of another agricultural facility in Utah because the state is home to a large number of factory farms. (Kerr Decl. ¶ 14; Strugar Decl. ¶¶ 11-12, Ex. J (PETA Dep.) at 96:16-97:3; Ex. I at 26-27 (Response to Interrogatory No. 21 ("PETA is particularly interested in conducting agricultural investigations in heavily agricultural states such as Utah and other states in the Mountain West.").)

24. PETA would have begun coordinating such an investigation were it not for the threat of criminal prosecution under Utah Code Ann. § 76-6-112. (Kerr Decl. ¶ 15.)

25. In conducting such an investigation, PETA would instruct its investigators to take photos and videos to document illegal conduct inside the facility, without the permission or consent of the owner, and their investigators would not disclose their affiliation with animal protection organizations. (Kerr Decl. ¶ 16; Strugar Decl. ¶ 12, Ex. J (PETA Dep.) at 60:8-9.) The investigator would be instructed either to enter the facility using a pretext (such as posing as a customer) or to obtain employment at the facility with the intent to make video or audio recordings therein. (Kerr Decl. ¶ 16.)

26. If Utah Code Ann. § 76-6-112 is declared unconstitutional, PETA intends to move forward with an undercover investigation of a Utah agricultural facility. (Kerr Decl. ¶ 17.)

[3] PETA declined to release footage of or otherwise act upon the Utah footage out of concern regarding perceived violations of Utah Code Ann. § 76-6-112, a decision that provides yet more evidence of the chilling effect of the statute. (Kerr Decl. ¶ 13.)

27. PETA intends to publicize the findings of its investigation through the publication of, for example, press releases and/or articles on its website and online social networking presence. (Kerr Decl. ¶ 18; *see also* Strugar Decl. ¶ 11, Ex. 11 at 5-7, 10-11 (Responses to Interrogatory Nos. 2 and 5, identifying the manner in which PETA has publicized prior investigations of agricultural facilities).) Publicity of findings from successful investigations is part of PETA's standard protocol. (*See, e.g.,* Strugar Decl. ¶¶ 13-16, Exs. K-N (representative examples of website releases regarding investigations); Kerr Decl. ¶ 18.) PETA may also use the findings of its investigation to support requests for enforcement actions by various government entities. (*See, e.g.,* Strugar Decl. ¶¶ 17-19, Exs. O-Q (examples of enforcement requests arising out of prior investigations).)

28. Plaintiff Amy Meyer is a resident of Salt Lake County, Utah. (Meyer Decl. ¶ 3.) Ms. Meyer is an animal activist and has in the past engaged in activities such as protests and demonstrations in an effort to bring public awareness to animal issues, including the treatment of farmed animals. (Meyer Decl. ¶ 4; Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 20:24-21:13, 37:19-24.)

29. On February 8, 2013, Ms. Meyer was standing on public property adjacent to a slaughterhouse in Draper City, Utah. (Meyer Decl. ¶ 5.) While there, she witnessed practices that she found troubling, including workers pushing what appeared to be a sick cow with a bulldozer. (*Id*.)

30. Ms. Meyer recorded images of these practices from her vantage point on the adjacent public right-of-way. (Meyer Decl. ¶ 6; Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 47:17-48:5, 54:15-55:8.)

31. Although Ms. Meyer never entered private property (Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 56:24-57:1), she was questioned by the Draper City Police and subsequently charged with violating Utah Code Ann. § 76-6-112(4) (Meyer Decl. ¶ 7), making her the first person in the country to be charged under an Ag Gag statute.[4] She was subject to court process and mandatory appearances until April 30, 2013, when her case was dismissed *without prejudice*. (*Id*.)

32. At the time that she filmed the property, Ms. Meyer was aware of the existence of Utah Code Ann. § 76-6-112, but did not expect that she would be prosecuted under it for standing on public property. (Meyer Decl. ¶ 8.)

33. Ms. Meyer intends to continue her animal activism and has concrete plans to engage in First Amendment activities related to that activism generally and to animal agriculture specifically. (Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 101:3-102:4; *see also* Meyer Decl. ¶ 9.) Following her arrest and prosecution, however, she is fearful that if she records or is thought to have recorded images of animal agricultural activities, she may be arrested and again criminally charged—even if she does so while on generally accessible public property. (Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 102:19-103:7; *see also* Meyer Decl. ¶ 9.)

[4] See Leighton Akio Woodhouse, *Charged with the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), http://www.thenation.com/article/charged-crime-filming-slaughterhouse/ (reporting that the charges against Ms. Meyer were the first in the country under an Ag Gag law). Ms. Meyer believes that she may have been arrested because the manager of the slaughterhouse was aware of the existence of Utah's Ag Gag law. (Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 110:9-13 ("[C]learly the manager who approached me was angry because he said I couldn't videotape his property. He was—he didn't—you know, he was concerned about the Ag Gag law and saying what I was doing was illegal."), 111:3-8 (explaining that the slaughterhouse manager stated the she couldn't "do this in Utah now").)

34. The Ag Gag law has a real and chilling effect on the exercise of Ms. Meyer's constitutionally protected rights because it places her in fear that she will again be arrested and charged under that law. (Meyer Decl. ¶ 10.) As she explained in her deposition, "I'm not comfortable, especially if I'm alone, being anywhere with my camera near an agricultural operation. And, you know, haven't really organized protests out—you know, in front of many factory farms . . . mostly because I do always bring my camera to protests[.]" (Strugar Decl. ¶ 20 Ex. R (Meyer Dep.) at 109:1-7; *see also* 102:18-24 ("the whole reason I went to the Dale Smith slaughterhouse was to see if it was a good protesting location. And so, yeah, just wanted to do protests there, but specifically there I'm fearful because I know how easy it is for them to just make one false allegation and have the cops believe them over me[.]").) In fact, as Vice President of the Utah Animal Rights Coalition (UARC), she hesitates to even post videos on the organization's website for fear that doing so will give rise to allegations of criminal conduct. (Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 103:2-7.) If Utah's Ag Gag law is declared unconstitutional, Ms. Meyer's fears would be allayed and she could and would again confidently engage in constitutionally protected free speech. (Meyer Decl. ¶ 11; *see also* Strugar Decl. ¶ 20, Ex. R (Meyer Dep.) at 105:20-25 (stating that she would like to gain access to an animal agricultural facility under false pretenses in the future, but noting that it may be difficult if she does not change her name).)

II. The History and Purpose of the Ag Gag Law Reveal the State's Impermissible Motive

35. When state Representative John Mathis introduced the legislation that became the Utah Ag Gag law, he explained that his intent was to stop "national propaganda groups" from using footage of industrial animal agriculture to advance their political agendas, which he characterized as "undoing animal agriculture." (Complaint, ECF #2, ¶ 42; Answer, ECF #60, ¶ 42.)

36. Rep. Mathis elaborated on his motivation by expressing his disdain for animal protection organizations, saying that recordings from undercover investigations of animal agriculture should be criminalized because such recordings are used "for the advancement of animal rights nationally, which, in our industry, we find egregious." (Complaint, ECF #2, ¶ 43; Answer, ECF #60, ¶ 43.)

37. Rep. Mathis further stated that animal protection groups "should not be allowed to continue," and called for legislators to "stand[] up" to the national animal protection groups. (Complaint, ECF #2, ¶ 44; Answer, ECF #60, ¶ 44.)

38. Representative Daniel McCay spoke in support of the House Bill, taking note of "those who are fraudulently accepting employment" and then recording behavior that "they interpret as abuse." Rep. McCay explained that he supported the bill because "you have to look at [what someone] is trying to accomplish" by taking a recording. (Complaint, ECF #2, ¶ 45; Answer, ECF #60, ¶ 45.)

39. In supporting the House Bill, Representative Michael Noel stated that he was opposed to letting "these [animal protection] groups like PETA and some of these organizations control what we do in this country, a country that feeds the world." Rep. Noel then referred to anyone who wanted to film an agricultural operation as a "jack wagon." (Complaint, ECF #2, ¶ 46; Answer, ECF #60, ¶ 46.)

40. In supporting the House Bill, Representative King referred to animal protection organizations as "very controversial groups." (Complaint, ECF #2, ¶ 46; Answer, ECF #60, ¶ 46.)

41. Senator David Hinkins, the sponsor of the legislation in the Senate, discussed his support for the legislation by maligning one of the Plaintiffs, saying, among other things, "I'd like

to share some things with you on this PETA group and I'm not sure how many of you realize this but they are the People for Ethical Treatment of Animals, an organization known for uncompromising animal rights positions . . . ." The senator provided a numerous objections to PETA's lawful activity as a basis for supporting the legislation. (Complaint, ECF #2, ¶ 47; Answer, ECF #60, ¶ 47.)

42. Senator Hinkins stated that he viewed the Ag Gag law as a means of targeting "the vegetarian people" who "are trying to kill the animal industry." Senator Hinkins elaborated that in his view the law was necessary because the vegetarian groups are "terrorists." (Complaint, ECF #2, ¶ 48; Answer, ECF #60, ¶ 48.)

43. In the House Law Enforcement Committee's review of HB 187, Rep. Mathis described his hope that the bill would undermine the "many groups around the country" that "use propaganda" to "change the way agriculture's done." (Complaint, ECF #2, ¶ 50; Answer, ECF #60, ¶ 50.)

44. The Committee's consideration of the bill also involved distinguishing between protecting the "innocent" people on the one hand, and Plaintiffs like PETA on the other, who legislators attempted to tar as "so-called animal rights terrorists." During the committee hearings Rep. Perry expressed his view that undercover investigations are "just another version of domestic terrorism." (Complaint, ECF #2, ¶ 51; Answer, ECF #60, ¶ 51.)

45. During the committee hearings Rep. Mathis stated that the mission of the Plaintiffs was "very misguided" and that the purpose of the bill was to target those groups whose work he deems "egregious." (Complaint, ECF #2, ¶ 52; Answer, ECF #60, ¶ 52.)

46. Utah Department of Agriculture Commissioner Leonard Blackham was tasked by the state executive branch with responding to inquiries about H.B. 187 (the bill that became the Ag Gag law). (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 14:3-14; 20:1-6).

47. Commissioner Blackham made clear that the purpose of the H.B. 187 was to protect animal agriculture from bad press. In his form letter to constituents, Blackham wrote: "the intent of the bill is to strengthen our trespassing laws to protect farmers from people who sneak onto their property for the purpose of taking pictures of embarrassing mistakes." (Strugar Decl. ¶¶ 22-24, Exs. T-V.)

48. In response to a small dairy farmer who opposed the bill, Commissioner Blackham wrote: "The intent of the bill is not to protect animal abusers, but to protect growers and animal agriculture from misleading videos taken by some over-zealous groups." (Strugar Decl. ¶ 25, Ex. W).

49. Defendants' documents reflecting the rationale or purpose of H.B. 187 includes a statement by the Utah Department of Agriculture of Food that states: "HB 187 is a bill designed to protect farmers from those who would manipulate video images to satisfy a political agenda." (Strugar Decl. ¶ 26, Ex. X).

50. Members of the Utah Legislature asserted a legislative privilege against testifying as to the purposes of H.B. 187 and/or the Ag Gag law. (Stipulation Regarding Discovery Dispute Involving the Use of Testimony of Individual Utah Legislators, ECF #77.)

51. The sole witness in any branch of government identified by Defendants as having discoverable information in this lawsuit was Larry Lewis, Public Information Officer with the Utah Department of Agriculture & Food. (Strugar Decl. ¶ 27, Ex. Y).

52. Lewis was not involved with drafting H.B. 187. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at12:16-17.)

53. Lewis did not speak with any legislators about H.B. 187. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 15:12-18.)

54. Lewis did not communicate with anyone about H.B. 187 prior to it being enacted into law. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 12:21-23.)

55. Prior to its enactment into law, Lewis had no involvement in the bill except hearing that it was being put together. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 12:24-13:11.)

56. Lewis' involvement with H.B. 187 was limited to responding to the controversy surrounding the Ag Gag law after its passage on behalf of the executive branch of the state government. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 14:1-17.)

57. In defending the Ag Gag law on behalf of the state, Lewis served as a mouthpiece for the state's agriculture industry. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 20:1-19.)

58. Lewis did not defend the law on the basis of his personal beliefs, but on the beliefs of the agriculture industry. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 21:5-22:1.)

59. The agricultural organizations with whom Lewis communicated in formulating the support for the Ag Gag law included the Cattlemen's Association, wool growers, dairy operations, and pork producers. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 33:5-13.)

60. Lewis' talking points in defense of the law were not based at all on the intent of Utah legislators in passing the law. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 22:19-22.)

61. Lewis' defense of the Ag Gag law regarding the supposed transparency of agricultural producers was based only on the agricultural producers' own self-described commitment to transparency. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 26:13-18.)

62. Lewis' defense of the Ag Gag law regarding the agricultural industry's supposed lack of tolerance for bad actors who violate standards of animal care was based only on the agricultural producers' own self-described commitment to such care. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 26:19-27:1.)

63. Lewis' claim, made in the defense of the Ag Gag law, that activists gained entry to farms and purposefully enticed others to mistreat animals was based on claims from the agricultural industry. (Strugar Decl. ¶ 21, Ex. S (Lewis Dep.) at 35:12-20.)

64. Defendants identified Ryan Holt, a private mink rancher, as an individual having discoverable information in this lawsuit. (Strugar Decl. ¶ 30, Ex. BB.)

65. Before H.B. 187 was signed into law, Holt had no communication with any Utah government officials, including legislators, regarding the law. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 37:24-38:22.)

66. According to Holt, the Ag Gag law was necessary "[t]o protect farmers' ability to control images of their property." (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 37:20-23.)

67. Holt believes that the Ag Gag law is justified because it is not "a good idea to have cameras on the farm [no matter] whose cameras they are." (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 37:10-11.)

68. Holt believes that the Ag Gag law is necessary to prevent "gaining employment to do nothing other than report disparaging situations that might not be understood by a common person." (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 44:18-23.)

69. According to Holt, the Ag Gag law was also necessary to prevent arsons against the state's fur industry, such as the 1996 arson at the Fur Breeders Agricultural Co-op in Midvale, Utah. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 10:1-13:5.)

70. There was no evidence that anyone connected to the 1996 arson at the Fur Breeders Agricultural Co-op in Midvale, Utah obtained access to the premises through false pretenses. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 15:23-16:1; 42:21-43:1; 45:15-25.)

71. There was no evidence that anyone connected to the 1996 arson at the Fur Breeders Agricultural Co-op in Midvale, Utah recorded any images or video from within the facility prior to the arson, whether through seeking employment at the facility or any other means. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 16:2-13.)

72. The individuals who conducted that arson were apprehended, charged, and convicted under existing criminal law that pre-dated the Ag Gag law. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 14:1-4.)

73. According to Holt, the Ag Gag law was also necessary to prevent crimes like the 1996 break-in at Holt's own mink ranch, where individuals opened minks' pens, damaged a fence, painted graffiti, destroyed breeding records, and removed an oil filter from a truck. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 16:14- 18:18.)

74. The individual responsible for the break in gained access to Holt's property by cutting a hole in the fence surrounding his property. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 18:22-24.)

75. The individuals who conducted that break in were apprehended, charged, and convicted under existing criminal law that pre-dated the Ag Gag law. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 20:13-21:5.)

76. While Holt believed that the Ag Gag law was necessary to stop employment-based undercover investigations, he had no personal experience of any employment-based undercover investigation at any of the facilities, including his own, that suffered damages as a result of prior criminal activity that he believed underscored the need for the law. (Strugar Decl. ¶ 28, Ex. Z (Holt Dep.) at 25:20-27:21; 42:21-43:1; 45:15-25.)

III. Undercover Investigations Are Part of This Country's Rich and Celebrated Journalistic History

77. Brooke Kroeger is tenured full Professor and the Director of Global and Joint Program Studies at the New York University Arthur L. Carter Journalism Institute, where she has been on faculty since 1998 and served as Institute director and department chair from 2005-2011. She is also a Senior Fellow at the Schuster Institute for Investigative Journalism at Brandeis University and has been since 2013. She previously worked as a reporter and editor for *Newsday* and *New York Today*, and as a reporter, editor, bureau chief, and chief editor for Europe, the Middle East, and Africa in the Scripps Howard Days (1972-84) of *United Press International*. She has published extensively on the use of deception in undercover reporting, including a book entitled

UNDERCOVER REPORT: THE TRUTH ABOUT DECEPTION (2012). (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 2-3.)

78. Ted Conover is a tenured associate professor at the New York University Arthur L. Carter Journalism Institute, where he has been on faculty since 2005. He teaches courses at the graduate and undergraduate levels including Undercover Reports, Ethnography for Journalists, and The Journalism of Empathy. His reporting has included working undercover as a New York State corrections officer at Sing Sing prison, reported in his book NEWJACK: GUARDING SING SING, which won the National Book Critics Circle Award for General Nonfiction in 2001 and was a finalist for the Pulitzer Prize in General Nonfiction in 2001. Conover also went undercover as a meat inspector for the Food Safety Inspection Service of the United States Department of Agriculture in 2012, resulting in an 8,000-word article in *Harper's* magazine titled *The Way of All Flesh: Undercover in an Industrial Slaughterhouse*, which was a finalist for the National Magazine Award in Reporting in 2014. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 5-6.)

79. Mickey Osterreicher is Of Counsel to Barclay Damon LLP in the Media & First Amendment Law practice areas and serves as General Counsel to the National Press Photographers Association. He is on the governing board of the American Bar Association Communications Law Forum, co-chair of the Fair Use Committee of the American Bar Association Intellectual Property Law Committee, a member of the New York State Bar Association Media Law Committee, the Media Law Resource Center Newsgathering Committee (and also co-chair of the drone use for newsgathering subcommittee) and the First Amendment Lawyers Association. He is also an

award-winning visual journalist with over forty years' experience in print and broadcast. His work has appeared in such publications as the *New York Times*, *Time*, *Newsweek* and *USA Today* as well as on *ABC World News Tonight*, *Nightline*, *Good Morning America*, *NBC Nightly News* and *ESPN*. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 6-7.)

80. Kroeger, Conover, and Osterreicher collectively prepared and submitted an expert report in this matter. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A.)

81. Ken Silverstein is an investigative journalist with over three decades' experience and 1,000 bylines. He has worked on staff as an investigative reporter with the Washington, D.C. office of the *New York Times* and as the Washington, D.C. correspondent for *Harper's* magazine. He is currently a contributing editor to *VICE Magazine* and is a columnist for the *New York Observer*. He is the author of several books of investigative reporting, including THE RADIOACTIVE BOY SCOUT, PRIVATE WARRIORS, WASHINGTON ON $10 MILLION A DAY: HOW LOBBYISTS PLUNDER THE NATION, THE SECRET WORSHIP OF OIL, and TURKMENISCAM: HOW WASHINGTON LOBBYISTS FOUGHT TO FLACK FOR A STALINIST DICTATORSHIP. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 1.)

82. Silverstein prepared and submitted an expert report in this matter. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A.)

83. Will Potter is an investigative journalist, author, and Knight-Wallace Fellow in Law Reporting at the University of Michigan. Since 2000, his work has focused on the animal rights and environmental movements, and, since September 11, 2011, civil liberties. His book, GREEN IS

THE NEW RED: AN INSIDER'S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE, examines how non-violent animal rights and environmental protesters came to be classified by the FBI as "eco-terrorists." It has been translated into four languages and received a Kirkus Star for "remarkable merit" and was named one of the best books of 2011 by Kirkus Book Reviews. He has been invited to testify before the U.S. Congress about his reporting and has been cited by the Congressional Research Service in reports to members of Congress. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A, p. 1-2.)

84. Will Potter prepared and submitted an expert report in this matter. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A.)

85. Undercover investigations—including those which use deception to obtain information of great public importance but otherwise not available by other means—has a rich and storied history in American journalism. Much valuable journalism has emerged from investigations that employed subterfuge to expose wrong. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 4); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 7-8.)

86. By way of historical example, one of the most famous undercover stories in American history came in the 1880s, when Nellie Bly—at the direction of the *New York World* newspaper—pretended to be insane in order to reveal the atrocious treatment of inmates at the Women's Lunatic Asylum on Blackwell's Island in New York City. Her writings about her experiences while undercover were published in the *New York World*, and later as a book, TEN DAYS IN A MAD HOUSE. As a result of her exposure, the City of New York changed its funding for care of those

housed in asylums. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 5-6.)

87. In 1937, the *Chicago Daily Times* assigned its reporters, John Metcalfe, James Metcalfe, and William Mueller, to infiltrate the German American Bund, which was led by Hitler acolyte Fritz Kuhn and was "the largest and best-financed Nazi group operating in America," according to historian Warren Grover. The reporters' resulting series of articles about their experiences won the National Headliners Club's Medal of Honor for the Best Story of 1937. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 6.)

88. In more modern times, the *Chicago Sun-Times* bought its own tavern in the 1970s and exposed, in a 25-part series, gross corruption on the part of city inspectors. Pam Zekman, the reporter, received complaints about city inspectors seeking bribes, but no one would go on the record out of fear of retaliation from the city. So she got funds from the *Sun-Times* to purchase a bar for the purpose of investigating whether city inspectors would pass the building with obvious violations for a bribe. Zekman and her colleagues also used the bar to take surreptitious photographs of the inspectors accepting bribes. The stories led to federal corruption prosecutions against the city's inspectors. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 6.)

89. In 1980, the *Washington Post*'s Neil Henry posed as a homeless person and wrote a series about life on the streets in Washington and Baltimore. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 6.)

90. Barbara Ehrenreich famously chronicled the plight of low-wage workers, based on her undercover work in those jobs, in her 2001 book, NICKEL AND DIMED. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 6-7.)

91. There are more than 3,000 examples of major and important investigative reporting work in mainstream media that have relied on the use of undercover techniques. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 4)

92. Respected and widely-circulated media outlets still rely on and publish investigative journalism. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 8.)

93. In 2007, two investigative reporters working for the *Washington Post* went undercover to expose abysmal conditions at Walter Reed Hospital. The investigative series forced the ouster of the hospital's commander, the Secretary of the Army, and the Army's Surgeon General. Congress scheduled special field subcommittee hearings on-site at the hospital and invited testimony from some of the reporters' named sources. Three blue-ribbon panels investigated how wounded U.S. soldiers who had served their country so valiantly could be treated so badly under the Army's own watch. The *Post*'s Walter Reed investigation won the Pulitzer Prize for Public Service in 2008 and is among the most admired and celebrated journalistic achievements of this century. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p.. 15-16); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 8-10.)

94. In 2013, *New York Times* reporter Eric Lipton attended a private D.C. function, with the admitted purpose of listening to politicians and lobbyists speak when they thought no reporters were present. He arrived at the function and did not provide his last name or identify himself as a reporter, and while there, he captured a damning, inculpatory quote from Senator Max Baucus's chief of staff. The *New York Times* decided to publish the quote, despite the fact that it was recorded while its reporter was undercover. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 10.)

95. Most major media outlets in the United States permit the use of undercover reporting by their reporters. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p. 16-19); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A, p. 10); (Defendants' Rule 26(a)(2) Disclosure Report of Dr. Amy Sanders, ECF #87-1, p. 8-10.)

96. Both the *New York Times* and the *Washington Post* have recognized the need for parties like Plaintiffs to be able to continue to use undercover tactics to uncover examples of animal cruelty, despite that much of their work involves the use of deception. The *New York Times*' editorial board, which speaks on behalf of the paper as a whole, has criticized Ag Gag laws in three separate editorials as "clear violation[s] of the constitutional freedom of speech and the press," and has noted that undercover work that would be prohibited under such laws is "[t]he only way" to expose cruelty in livestock facilities. Similarly, the *Washington Post* editorial board has criticized Ag Gag laws as "trampl[ing] First Amendment rights" and impeding "useful undercover work." (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover,

and Mickey Osterreicher, ECF #95, Attachment A, p. 20); (Disclosure of Counter Report of Expert Ken Silverstein, ECF #97, Attachment A p. 10.)

97. Even when other methods of obtaining information are available, recordings serve an independent and powerful function. Recordings provide visible evidence of practices that do not require independent corroboration and cannot be rejected for lack of impartiality. In addition, recorded evidence often generates the strongest emotional connection to the intended audience, which is an important part of journalism. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Experts Brook Kroeger, Ted Conover, and Mickey Osterreicher, ECF #95, Attachment A, p.23.)

98. The First Amendment is not limited to the freedom of the press. U.S. Const., Amend. I.

IV. There Are No Meaningful Alternatives to Undercover Investigations to Obtain and Disseminate Information Related to Animal Agriculture

99. Employment-based undercover investigations are vitally important to public understanding of factory farming and modern animal agriculture. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A, p.5); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Thomas Devine, ECF #83, Attachment A, p. 2-3); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 7-14); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 28-31.)

100. Animal agricultural operations tend to be located in rural areas, geographically removed from the majority of the population. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A, p. 6.); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 10.)

101. Animal agricultural operations are resistant to providing tours to the media or the public. For example, in 2014, the Idaho dairy industry group sent a letter to its members urging them to deny media requests for tours and on-farm interviews. Acclaimed author Jonathan Safran Foer was denied in his attempts to visit farms in researching his book EATING ANIMALS. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A, p. 6.)

102. In those instances where animal agricultural operations do provide tours to the media and/or the public, they present an unsurprisingly sanitized view of animal agriculture. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Will Potter, ECF #84, Attachment A, p. 6.)

103. Animal agriculture facilities are typically physically isolated, fenced, and/or indoors, and thus out of view from public roadways or other public access points. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 30.); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 13.)

104. Whistleblowing in animal agriculture by employees who are not undercover investigators is unlikely and not a dependable source of information on animal agricultural practices. Many factors contribute to this reluctance toward whistleblowing, including that many of these workers are undocumented or otherwise disenfranchised and are not aware of whistleblower protections under the law; a lack of whistleblower protection for employees of meat and poultry plants; a constant fear of retaliation from management if they make any complaints; lack of incentive to report problems; a code of silence perpetuated by owners and managers who participate in the objectionable conduct; and a culture of masculinity involving being able to endure work without complaint. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 11-13); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis

Powell, ECF #93, Attachment A, p. 10); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Thomas Devine, ECF #83, Attachment A, p. 2-3); (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 9, 11-12, 28-29.)

105. There is no federal law governing the treatment of animals on farms – federal law regulates only the transportation of farmed animals and their slaughter. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 7-8.)

106. Utah's state law prohibiting cruelty of animals, Utah Code Ann. § 76-9-301, specifically exempts livestock, so long as the treatment is "customary." (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 8.)

107. The jurisdiction of the United State Department of Agriculture's (USDA) Food Safety Inspection Service (FSIS) extends only to slaughter and does not reach most animal agriculture. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 10.)

108. Chickens, which make up more than 98% of all land animals slaughtered for food, are not covered by the humane handling requirements under the Humane Methods of Slaughter Act and FSIS inspectors therefore do not monitor their treatment. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 10.)

109. The United States Government Accountability Office has repeatedly concluded that the USDA has failed to implement sufficient systems to address contamination of pathogens from meat products. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 8-9.)

110. A survey of inspectors conducted by Public Citizen and the Government Accountability Project revealed instances where, pursuant to USDA inspection systems, inspectors did not take direct action against observed contamination (feces, vomit, metal shards, etc.), they were instruct not to document violations, and they were threatened with retaliation by the company and agency for raising issues and attempting to take enforcement actions. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 9.)

111. USDA has refused to listen to whistleblowers even within their own ranks. A former USDA inspector has testified to Congress regarding supervisors at the USDA retaliating against inspectors for trying to enforce the laws they were tasked with enforcing. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Travis Powell, ECF #86, Attachment A, p. 9-10); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 10.)

112. For six weeks in the fall of 2007, an undercover investigator obtained employment with and worked at Hallmark/Westland Beef, a slaughterhouse and beef processor in Chino, California that killed mainly "spent" dairy cattle and processed them into ground beef. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 15, 25.)

113. The facility killed approximately 500 cows each day. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 15.)

114. The investigator captured footage showing "downer" cows (cows who were unable to walk) being dragged, violently prodded, shocked with electricity, and moved and pushed by forklifts. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 14-23.)

115. Inspectors either inspected and approved these downed cattle and their treatment or were shielded or blocked by employees from witnessing the cows and their treatment by the employees. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 20-22, 30.)

116. Five FSIS inspectors were present at the Hallmark/Westland facility, none of whom recorded a single violation of the humane handling regulations during the six weeks the investigator was employed at Hallmark. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 30.)

117. The release of footage from the Hallmark investigation caused a national outrage. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 25-31.)

118. USDA pulled its inspectors from the plant the day after the release of the investigation footage, effectively closing the facility. Plant operations were formally suspended after evidence related to animal handling and violations of the inspection process were turned over to the USDA. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 25.)

119. The Hallmark investigation resulted in the largest recall of meat products in the history of the United States – a total of 143 million pounds of beef that had been distributed to the National School Lunch Program, the Emergency Food Assistance Program, and the Food Distribution Program on Indian Reservations. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 26.)

120. The Hallmark investigation lead to numerous felony animal cruelty charges against workers. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 25.)

121. The Hallmark investigation precipitated a series of Congressional hearings to investigate the failure of the FSIS inspection process and to identify gaps in the food safety and humane handling protocols. In connection with those hearings, numerous members of Congress noted that the undercover investigation succeeded in exposing the inhumane practices and threat to the food supply where government investigators had failed. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 26-31.)

122. The Hallmark investigation precipitated revised FSIS rules for the handling of non-ambulatory cattle, which require a complete ban on the slaughter of cattle who become non-ambulatory after passing initial inspection by FSIS personnel. (Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Sean Thomas, ECF #85, Attachment A, p. 26-27.)

V. Alleged Bio-Security Concerns Are a Red Herring

123. Undercover investigators who obtain employment in animal agriculture facilities perform their job duties in the same manner as any other employee at the facility. (*See* Strugar Decl. ¶¶ 4, 12, Ex. B (ALDF Dep.). at 72:14-22, Ex. J (PETA Dep.) at 63:12-19.)

124. Undercover investigators who obtain employment with animal agriculture operations go through the same biosecurity training and follow the same biosecurity protocols as all other employees. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 4-5); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert

Sean Thomas, ECF # 94, Attachment A, p. 2); (Defendants' Rule 26(a)(2) Disclosure of Counter Report of Eric Parks, ECF #92-1, p. 4).

125. There is no evidence of undercover investigators ever contributing to any biosecurity outbreak or contributing to disease transmission. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Sean Thomas, ECF # 94, Attachment A, p. 1-7); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 2-10);(*See also, generally*, Defendants' Rule 26(a)(2) Disclosure Report of Dr. William James, ECF #88-1; Defendants' Rule 26(a)(2) Disclosure Report of Dr. David Pyle, ECF #89-1; and Defendants' Rule 26(a)(2) Disclosure of Counter Report of Dr. William James, ECF #91-1.)

126. The source of the 2014-15 avian flu outbreak appears to have been wild birds combined with the movement of contaminated equipment and people among different farms and areas of farms. There is no evidence that the disease was spread by undercover investigators. (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Sean Thomas, ECF # 94, Attachment A, p. 1-2); (Plaintiffs' Rule 26(a)(2) Disclosure of Counter Report of Expert Travis Powell, ECF #93, Attachment A, p. 8.)

Argument

Utah's Ag Gag law violates the First and Fourteenth Amendments to the United States Constitution because it is content- and viewpoint-discriminatory and overbroad, it discriminatorily burdens the exercise of the fundamental right of free speech, and was passed with animus against animal protection advocates such as Plaintiffs. This Court should strike down Utah Code Ann. § 76-6-112 as unconstitutional.

I. Legal Standard on Summary Judgment

This Court must grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The non-movant(s) must then present specific facts by affidavit or other admissible form sufficient to raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249-50 (1986). There must be a genuine dispute as to any *material* fact—a fact "that might affect the outcome of the suit." *Id.* at 248.

When the only issue that needs to be decided is a question of law, as Plaintiffs contend is the case here, summary judgment is especially appropriate, and the mere fact that "the parties differ on the legal conclusions to be drawn from the facts is not in and of itself a ground for denying summary judgment." 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2725.

II. Plaintiffs Have Standing to Challenge the Constitutionality of Utah's Ag Gag Law

A. Animal Legal Defense Fund Has Standing

ALDF has standing to challenge the Ag Gag law because the law has forced ALDF to refrain from engaging in constitutionally-protected speech for fear of criminal prosecution. ALDF has presented "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006); Statement of Elements (SOE) ¶ 6.

ALDF's mission to protect the lives and advance the interests of animals, including those raised for food, is best served by demonstrating that meat, dairy, eggs, and related products are produced in a similarly cruel manner industry-wide, a task that requires ALDF to gather information in a diverse array of states. Statement of Undisputed Material Fact (SUMF) ¶ 3-4. Accordingly, with regard to the first prong of the *Walker* test (past speech), ALDF has previously conducted undercover investigations, including investigations focusing on animal agriculture, at facilities in various regions of the country. *Walker*, 450 F.3d at 1089; SUMF ¶¶ 5-7. Because many of these investigations involved gaining access to a facility via the use of a pretext or by obtaining employment in order to gather video and audio evidence, they would unquestionably violate the challenged law. Utah Code Ann. § 76-6-112; SUMF ¶ 7.

An investigation of a facility in Utah is consistent with ALDF's objective to gather information in areas across the United States. Accordingly, with regard to the second *Walker* factor

(present desire), ALDF not only has a present desire to engage in protected speech by conducting an investigation in Utah, it has actually made specific plans to do so. *Walker*, 450 F.3d at 1089. It has researched and collected employment applications from potential investigation targets, and has considered using undercover investigators to gather photographic and videographic evidence from them. SUMF ¶ 9. It has even gone so far as to allocate funds for and contract with a private investigation firm to coordinate the potential employment-based investigation, and has obtained conditional approval for an investigation from its executive director. *Id*.

ALDF's planned investigation would, however, undoubtedly violate Utah Code Ann. § 76-6-112 because it requires an investigator to "appl[y] for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation" without the permission of the facility's owner, and it would require an investigator to access the facility by false pretenses. As to the third *Walker* factor (chill), ALDF has therefore elected to not to move forward with its investigation because there is a credible threat that the statute will be enforced against it. *Walker*, 450 F.3d at 1089; SUMF ¶ 12. Indeed, such a threat exists not only because the statute was recently enacted, *see, e.g., American Booksellers Ass'n*, 484 U.S. at 393, but, perhaps more significantly, because it has already been enforced against Ms. Meyer. SUMF ¶ 13.

Because ALDF has standing to challenge the Ag Gag law, this Court need not determine whether the remaining plaintiffs have also individually established standing. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1114 (10th Cir. 2010); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (determining that because one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs"); *Green v. Haskell Cnty. Bd. of Com'rs*, 568 F.3d 784, 793 n. 5 (10th Cir.2009) ("Because we conclude that [Plaintiff–Appellant] Mr. Green has standing,

. . . it is unnecessary to address the ACLU of Oklahoma's standing."). Nevertheless, Plaintiffs address the standing of PETA and Ms. Meyer below out of an abundance of caution.

B. People for the Ethical Treatment of Animals Has Standing

PETA's mission to protect animals, including farmed animals, from abuse, neglect, and cruelty, is best served by showing that industrial cruelty exists on a systemic level, across a variety of states. SUMF ¶¶ 15-20. With regard to the first prong of the *Walker* test, PETA has therefore previously conducted numerous undercover investigations at a variety of locations around the country. *Walker*, 450 F.3d at 1089; SUMF ¶¶ 17-22. Because these investigations involved gaining access to a facility via the use of a pretext or by obtaining employment in order to gather video and audio evidence, they would unquestionably violate the challenged law. Utah Code Ann. § 76-6-112; SUMF ¶¶ 21, 25.

Under the second *Walker* factor, *Walker*, 450 F.3d at 1089, PETA has a present desire to conduct an investigation of an agricultural facility in Utah because the state is home to a large number of factory farms. SUMF ¶ 23. As with ALDF, PETA's intended investigation would involve either gaining access to an agricultural facility via the use of a pretext (such as posing as a customer) or would involve an investigator obtaining employment at the facility with the intent to make video or audio recordings therein. SUMF ¶¶ 21, 25. PETA's intended investigation would therefore undoubtedly violate Utah Code Ann. § 76-6-112, which prohibits both gaining access to an agricultural facility under false pretenses and obtaining employment for the purposes of recording without the facility owner's permission.

Under the third *Walker* factor, PETA has not yet taken affirmative steps to commence an investigation only because there exists a credible threat of criminal prosecution under Utah Code

Ann. § 76-6-112, and does not intend to do so until the statute is declared unconstitutional. *Walker*, 450 F.3d at 1089; *American Booksellers Ass'n*, 484 U.S. at 393; SUMF ¶ 24. If Utah Code Ann. § 76-6-112 is struck down, PETA intends to move forward with an undercover investigation of a Utah agricultural facility. SUMF ¶ 26.

C. Amy Meyer Has Standing

Under the first *Walker* factor, Amy Meyer has in the past engaged in protected First Amendment activities including protests and demonstrations in an effort to bring awareness to animal issues, including the treatment of farmed animals. SUMF ¶ 28. In fact, on February 8, 2014, she was prosecuted under the statute at issue for her participation in such activities. SUMF ¶¶ 29-31.

Under the second *Walker* factor, Ms. Meyer has a present desire to organize and participate in protests at or near agricultural facilities, including by making video and audio recordings of such facilities. SUMF ¶ 33. Further, Ms. Meyer has expressed that she would like to gain access to an animal agricultural facility under false pretenses in the future in order to document the activities therein. SUMF ¶ 34. Such conduct would be a violation of Utah Code Ann. § 76-6-112.

Under the third *Walker* factor, Ms. Meyer has refrained from engaging in protected conduct, including bringing recording equipment to protests at or near agricultural facilities and posting videos to the UARC website because she fears prosecution under the statute. SUMF ¶ 34. The credible threat to Ms. Meyer could not be clearer: here, the state of Utah not only has failed to "disavow" future prosecutions, but Ms. Meyer herself has already been prosecuted under the recently-passed law. *See, e.g.*, *American Booksellers Ass'n*, 484 U.S. at 393 (discussing presumption that recently-passed statutes will be enforced); *New Hampshire Right to Life PAC*, 99

F.3d at 15 (same). Although the charges against Ms. Meyer were ultimately dismissed, the dismissal was *without prejudice*, SUMF ¶ 31, so it remains entirely possible that the state will re-initiate criminal proceedings against her for the same conduct that led to her arrest.

Nor does Tenth Circuit precedent require that an individual's intended future activity be squarely and assuredly proscribed by the challenged statute when she had been subjected to prosecution under the statute in circumstances similar to the planned future conduct. In *Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003), the plaintiff challenging Utah's hate crimes statute has previously been charged under the statute for burning a mink stole at a demonstration protesting the fur trade. *Id*. at 1264-65. The charges were subsequently dismissed before trial. *Id*. at 1265. The plaintiff expressed an intention "'to continue to legally engage in lawful First Amendment protected activities" but [was]"fearful ... that he will again be charged with a hate crime." *Id*. The Tenth Circuit addressed the fact that the charges were something of a stretch under the hate crimes statute, but found that this fact was not fatal to his standing. It was sufficient that the plaintiff "engaged in activity involving political expression and was subsequently charged under the statute he now challenges [combined with the fact that] . . . he would persist in the conduct that precipitated his past felony charge but for his fear of being charged with the same felony." *Id*. at 1269. Ms. Meyer's fear of being charged for violating the Ag Gag statute for engaging in political expression is indistinguishable from the plaintiff's fear in *Ward*.

Indeed, as this Court explained, Ms. Meyer's "prosecution underscores the objective reasonableness of her fears that engaging in the activities in which she has engaged in the past, and which she intends to engage in the future, may subject her to prosecution irrespective of whether she technically violates the statute or not. She is known to law enforcement and . . . the

charges against her were not dismissed with prejudice." (*See* Strugar Decl. ¶ 29, Ex. AA (Transcript of Motion Hearing and Order on Defendant's Motion to Dismiss) at 84: 9-17.)

III. The Ag Gag Law is Unconstitutional

Utah's Ag Gag law violates the First and Fourteenth Amendments to the Constitution, because it regulates speech—in the form of misrepresentations and videography--in ways that are content-based and viewpoint-discriminatory, because it is overly broad, because it discriminatorily burdens the exercise of the fundamental right of free speech, and because it was passed with animus against animal protection advocates.

A. The U.S. District Court for the District of Idaho Strikes Down Idaho's Ag Gag Law

In 2014—two years after Utah enacted its Ag Gag law—Idaho enacted its own Ag Gag law, codified at Idaho Code Ann. § 18-7042. The similarities between to the two laws are substantial:

- Like the Utah law's application to "agricultural operation[s]," Utah Code Ann. § 76-6-112(1), the Idaho law applied to "agricultural production facilit[ies]." Idaho Code Ann. § 18-7042(2)(b);

- Like the Utah law's criminalization of "obtain[ing] access to an agricultural operation[s] under false pretenses," Utah Code Ann. § 76-6-112(1), the Idaho law prohibited "obtain[ing] employment with an agricultural production facility by . . . misrepresentation with the intent to cause economic or other injury to the facility's operations[.]" Idaho Code Ann. § 18-7042(1)(c);

- Like the Utah law's criminalization of various prohibitions on recording sounds and images from agricultural facilities, Utah Code Ann. § 76-6-112(2)(a), (c) & (d), the Idaho law prohibited "maki[ing] audio or video recordings of the conduct of an agricultural production facility's operations" at any facility "not open to the public" and "without the facility owner's express consent or pursuant to judicial process or statutory authorization." Idaho Code Ann. § 18-7042(1)(d);

- Like the Utah law, a violation of the Idaho Ag Gag was a misdemeanor. Utah Code Ann. § 76-6-112(3-4); Idaho Code Ann. § 18-7042(3).

As with the Utah law, ALDF and PETA, along with a coalition of other plaintiffs, brought a preenforcement challenge to the Idaho law, alleging the statute violates the First and Fourteenth Amendments. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015). The district court found that the Idaho Ag Gag law violated the First and Fourteenth Amendments, granted summary judgment to the plaintiffs, and enjoined the law's enforcement.

As to the First Amendment, the court found that that the law was both content-based and overbroad. *Id*. at 1202-07. The court found that statute targeted undercover investigators who intended to publish videos made on agricultural production facilities and that it sought to suppress speech critical of agricultural practices. *Id*. at 1201, 1204, 1206.

Specifically, the court found that the statute's prohibition on gaining access to an agricultural facility through misrepresentation criminalized protected speech. *Id*. at 1203. Citing the Supreme Court's recent decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the district court held that lies are constitutionally protected, so long as they do not cause an otherwise legally cognizable harm. 118 F. Supp. 3d at 1203. The court recognized that the lies prohibited by the Ag Gag law would cause no independent harm—to the contrary, they would advance First Amendment principles by exposing the unlawful or unethical conduct at agricultural facilities. *Id*. at 1203-04 ("Indeed, the lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest. This type of politically-salient speech is precisely the type of speech the First Amendment was designed to protect.").

The court also recognized that the recording prohibition was content-based and overbroad. *Id*. at 1204-07. The court found that audio-visual recording is a purely expressive activity to which the First Amendment applies. *Id*. at 1205 ("Audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate an undercover investigator or whistleblower who is otherwise disbelieved or ignored. Prohibiting undercover investigators or whistleblowers from recording an agricultural facility's operations inevitably suppresses a key type of speech because it limits the information that might later be published or broadcast."). The court also held that the law's recording prohibition was content-based because it prohibited only recordings of the facility's *operations*. *Id*. at 1205. Moreover, the statute was not just content-based, it was viewpoint-based because "[t]he natural effect of both the audiovisual recording prohibition and the misrepresentation provision . . . is to burden speech *critical* of the animal-agriculture industry." *Id*. at 1207.

Because the Idaho law restricted speech in a content-based way, the court subjected it to strict scrutiny, which the law did not survive. The court found that Idaho had failed to put forth a compelling government interest, and that even if the court were to accept the state's proffered interest, the Ag Gag law was not narrowly tailored to those interests. *Id*. at 1207.

With regard to the state's interest in preventing investigations, the court recognized 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." *Id*. at 1207. As such, the state had no compelling interest in granting the agricultural production facilities "extra protection from public scrutiny." *Id*. The court found that prohibited 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. *Id*. at 1209.

The court further found that even if it were to accept the state's general assertion of "privacy" and "property rights" as compelling interests, the Ag Gag law was not narrowly tailored to those interests and was not the least restrictive means of ensuring them. *Id*. at 1208. As the court noted, "[c]riminal and civil laws already exist that adequately protect those interests without impinging on free-speech rights." *Id*. Because those laws already prohibit trespass, theft of trade secrets, and defamation, the only thing the Ag Gag law added was suppression of speech on matters of public concern. *Id*.

The court found that the law also violated the Equal Protection Clause. First, it found that there was no legitimate purpose for the law. The state already has laws prohibiting conversion, trespass, and fraud, so there was no need for agriculture-specific law to reinforce those protections. *Id*. at 1209-10. Instead, the court recognized that "[p]rotecting *private interests* of a powerful industry, which produces the public's food supply, against public scrutiny, is not a legitimate interest." *Id*. at 1210 (emphasis added). Second, the court found that the law's passage was motivated by constitutional animus toward the plaintiffs and similar animal protection organizations. *Id*. The court reviewed statements of various legislators, who, like the Utah legislators, admitted that the Ag Gag law was passed to shield agriculture facilities from embarrassing publicity that came from the release of undercover investigative footage, and made a variety of disparaging remarks about animal protection organizations that conduct such investigations. *Id*. Third, the court found that the statute discriminated on the basis of a fundamental right—free speech—and therefore failed

under the Equal Protection Clause for similar reasons that it failed under the First Amendment. *Id*. at 1211-12.

As described below, the Utah Ag Gag statute fails for the same reasons that the Idaho Ag Gag statute failed.

B. The Ag Gag Law Violates the First Amendment

The Utah Ag Gag law discriminates against speech based on content and viewpoint, subjecting it to strict scrutiny, which it cannot survive. Even if the Ag Gag law is subject to intermediate scrutiny, it still fails. Additionally, the law is facially overbroad and unconstitutional because it bans a substantial amount of protected speech. Therefore, the Ag Gag law violates the First Amendment and should be struck down as unconstitutional.

1. Audiovisual Recording is Protected by the First Amendment

The Ag Gag law criminalizes audiovisual recording at agricultural operations, which is protected by the First Amendment. SOE ¶¶ 27-28. Acts of recording are protected speech for two independent reasons. First, audiovisual recording is rightly regarded as pure speech in the sense that it is itself a form of expression. Second, recording images and sounds are covered by the First Amendment insofar as such activity is necessary to and preparatory to pure speech—just as buying pens and paper must be protected in order safeguard written speech, the protection of recording is a necessary component of protecting expression by video dissemination.

i. Audiovisual Recording is a Form of Expression

The very act of making an audiovisual recording has expressive qualities that make it a form of speech covered by the First Amendment. Indeed, this is so even if that recording is never broadcast to others. In the same manner as writing down one's thoughts in a diary or taking notes

about personal observations, the act of recording memorializes what a person has seen and experienced, which is an essential component of expressive autonomy. Audiovisual recording is tantamount to electronic note-taking, and note-taking has been a central component of producing speech since the earliest days of undercover investigative reporting. *See ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (analogizing law banning recording to a law banning the taking of notes and holding that "*making* an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording") (emphasis added). In fact, audiovisual recording is arguably more significant than note-taking because it is "a *uniquely persuasive* means of conveying a message" in that "it can vindicate an undercover investigator or whistleblower who is otherwise disbelieved or ignored." *ALDF*, 118 F. Supp. 3d at 1204 (emphasis added).

First Amendment scrutiny of such restrictions is necessary because "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). Justice Scalia expressed concerns about government suppression of speech before or after the act of speaking by stating:

> Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part), overruled in part on other grounds by *Citizens United*, 558 U.S. 310.

If the First Amendment protected only disseminating speech, and not also collecting and preparing for it, then "the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result," *ACLU*, 679 F.3d at 597.

The ability to engage in audiovisual recording advances the central values underlying free speech, including promotion of democratic self-governance and facilitating the search for truth. Recording is necessary to confirm or crystalize newsworthy narratives, from police misconduct to Abu Ghraib, and hold public officials accountable as well as allowing citizens to meaningfully participate in public dialogue. *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, . . . but also may have a salutary effect on the functioning of government more generally."); *accord* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory. Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 341 (2011); SUMF ¶¶ 86-96.

ii. Audiovisual Recording is a Form of Conduct Both Necessary and Preparatory to Expression

In the alternative, even if audiovisual recording is not speech in the sense that it is not immediately and overtly expressive, it is also covered by the First Amendment because it is conduct preparatory to acts of pure expression. Both the Supreme Court and lower federal courts have recognized that laws that prohibit conduct preparatory to speech must be subject to First Amendment scrutiny. SOE ¶¶ 20-22.

A vital cog in the machine of modern reporting is audiovisual recording equipment. Audiovisual recording has rapidly emerged in the last thirty years as an invaluable tool for reporters

and citizens to capture events that they witness. While the Supreme Court has yet to hear a case specifically about a First Amendment right to audiovisual record, lower federal courts have often recognized a constitutional right to record. *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 49 (2016).

In *ACLU v. Alvarez*, the Seventh Circuit held that "recording is entitled to First Amendment protection." 679 F.3d at 597. In that case, the court upheld a First Amendment challenge to an Illinois law "banning *all* audio recording of *any* oral communication absent consent of the parties." *Id.* at 595. The court rejected the State's claim that the act of recording was conduct that was "*wholly unprotected* by the First Amendment." *Id.* at 594 (emphasis in original). It concluded that "[r]estricting the use of an . . . audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id.* at 596. Using the analogy that a law banning taking notes or photos at public events would implicate the First Amendment, the court stated that "*making* an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Id.* at 595-56. Further, the court determined that if conduct preparatory to speech, such as audiovisual recording, were not protected by the First Amendment "the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." *Id.* at 597. The Court noted that the Illinois statute's "legal sanction [was] directly leveled against the expressive element of an expressive activity." *Id.* at 602-03.

As Judge Winmill of the Idaho District Court recently concluded, "[p]rohibiting undercover investigators or whistleblowers from recording an agricultural facility's operations inevitably suppresses a key type of speech because it limits the information that might later be published

or broadcast." *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1204. Prohibiting an undercover investigator from using his camera is no different than banning the journalist's notepad, Picasso's brushes, or Beethoven's instruments. *See id*. at 1205 (citing *Anderson*, 621 F.3d at 1061-62). This Court should recognize that audiovisual recording is protected by the First Amendment.

2. Obtaining Access to an Agricultural Facility Under False Pretenses is Protected by the First Amendment

Utah Code Ann. § 76-6-112(b) criminalizes the use of "false pretenses" to gain access to agricultural facilities, including the sort of journalistic misrepresentations (by act or omission) used by investigators attempting to expose matters of public concern, such as concealing their journalistic purpose, failing to announce political or journalistic affiliations, using a pseudonym, or understating credentials and experience. By directly criminalizing use of "false pretenses" to gain access to agricultural operations, the Utah Ag Gag law regulates pure speech in the form of investigators' affirmative misrepresentations and failure to disclose affiliations with animal rights groups or investigative motives. Such lies fall squarely within the existing protections of the Court's First Amendment doctrine.

In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court relied on the First Amendment to invalidate the conviction of a man who lied about having been awarded the Medal of Honor. *Id*. at 2551. In striking down the Stolen Valor Act, the majority fractured into a plurality; however, all six justices concurring in the result agreed that there is no "general exception to the First Amendment for false statements." *Id*. at 2544; *id.* at 2551 (Breyer, J., concurring in the judgment). Notably, the lie at issue in *Alvarez* was indisputably valueless to society—"a pathetic attempt to gain respect that eluded [Alvarez]," *id*. at 2542—and the government had identified a

variety of harms to the military community when its honors are diluted by those who falsely claim to hold them, *id*. at 2543. Nonetheless, six Justices in *Alvarez* recognized that even a worthless, truth-impeding lie is protected by the First Amendment unless it causes legally cognizable harm to the deceived party. *Id*. at 2547; *id*. at 2551 (Breyer, J., concurring in the judgment).

Alvarez thus articulated a limiting principle for prohibiting lies—the government may substantially limit or perhaps prohibit false statements of fact only when those statements cause a "legally cognizable harm." *Id*. at 2545. On this point both the concurrence and the plurality opinion (six of the current eight justices) were in agreement. Not every psychic or nominal harm is sufficient to justify a restriction on the constitutionally protected category of pure speech known as lies.

Here, obtaining access by false pretenses does not meet the requirements for fraud. The only "harm" flowing from the prohibited false pretenses under Utah Code Ann. § 76-6-112(b) derive not from the false speech itself, but rather from subsequent publication of truthful information on matters of public concern. *See, e.g.*, SUMF ¶ 67-69; *see also Animal Legal Def. Fund*, 118 F. Supp. 3d at 1204 ("[T]he most likely harm that would stem from an undercover investigator using deception to gain access to an agricultural facility would arise, say, from the publication of a story about the facility, and not the misrepresentations made to gain access to the facility."). These lies do not cause any injury to the agricultural operations. Investigators are able to complete the work assigned to them the same as any other employee. SUMF ¶ 123.[5]

[5] False pretenses used specifically to gain undercover employment also lack causation or injury that is fairly attributable to the misrepresentations. *See, e.g.*, *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 511 (4th Cir. 1999) (holding that not even the wages paid to an undercover investigator constituted harm so long as the person fulfilled his employment responsibilities).

Instead, as the legislative history confirms, the primary harm that the state sought to avoid was having Utah's agricultural practices used, as the legislation's sponsor Representative John Mathis put it, "for the advancement of animal rights nationally, which, in our industry, we find egregious." SUMF ¶ 36. The harm to be avoided was publication damages.[6] The ultimate consequence of Plaintiffs' investigations will be publication that may lead to boycotts, public scrutiny or other economic injury. However, such harm—non-defamatory reputational injuries—is not the type of cognizable harm that *Alvarez* contemplates. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (holding that harm from reputational injury is not cognizable outside of the limits imposed by defamation). *See also Animal Legal Def. Fund*, 118 F. Supp. 3d at 1204 ("[H]arm caused by the publication of [a] true story is not the type of direct material harm that *Alvarez* contemplates."). Any harm suffered by the subject of an investigation is self-inflicted: if an agricultural production facility loses supplier contracts, suffers reputational injury, or faces liability as a result of the inhumane and unsafe practices depicted in an investigation, it has no one to blame but itself. To hold otherwise would be to kill the messenger.[7]

[6] Any assertion that the harm suffered because of whistleblowers is tantamount to a trespassory injury is foreclosed for at least three reasons. First, access gained through misrepresentation is not a common law trespass. *Food Lion*, 194 F.3d at 517 (observing that consent gained by misrepresentation is sometimes sufficient under trespass law (citing *Desnick v. American Broad. Cos.,* 44 F.3d 1345, 1351–52 (7th Cir.1995) (Posner, C.J.)). Second even if such investigations are deemed a form of trespass, a content-based limit on trespass runs afoul of the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). Third and more generally, the spirit and purpose of the Supreme Court's protections for lies in *Alvarez* would be substantially undermined if lies told in order to facilitate an investigation of non-intimate matters of public concern were entitled to less protection than those at issue in *Alvarez*.

[7] Although there may be some narrow circumstances in which such a ban on misrepresentations might be legitimately applied, as in the case of banning individuals who gain access to an agricultural operation under false pretenses for the purposes of stealing property, the Ag Gag law regulates a substantial amount of speech or conduct that is protected by the First Amendment, such as

In sum, *Alvarez* recognizes that most lies enjoy First Amendment protection. Only those lies that cause direct, cognizable harm may fall outside the First Amendment. It would be perverse to protect one's gratuitous and valueless lies about winning the Medal of Honor, while leaving unprotected the sort of lie that made the muckraking journalism tradition famous and socially valuable, and which has spurred food and animal welfare reforms repeatedly in the past century. Free speech does not protect military-frauds more than it protects Upton Sinclair. In the context of a highly regulated, federally subsidized industry that produces food for school lunch programs and the nation at large, false pretenses for gaining employment as an undercover investigator necessarily fall within the ambit of *Alvarez*'s protection.

3. The Ag Gag Law Restricts Speech Based on its Content and Viewpoint

As detailed in the Statement of Elements, content-based laws are subject to strict scrutiny. SOE ¶¶ 9-18. Each section of the Ag Gag law is both facially content-based and content-based by reference to the justification and purpose of the law.

The entire law is facially content-based because it differentiates between agricultural operations, which are protected, and other industries, which are not. The recording provisions (and, in fact, the entire law) distinguishes on its face between agricultural content and non-agricultural content. *See* Utah Code Ann. § 76-6-112(2)(a), (c), (d) (prohibiting the recording of "an image *of*, or sound *from*, an agricultural operation") (emphasis added). The law, then, discriminates on its face against recording certain activities depending on their content, and is therefore no less content-

---

using misrepresentations to gain access to important information of public concern about agricultural operations and thereby facilitating the search for truth and the promotion of democratic self-governance.

based than a law that targeted recording political events, police abuse, or sweatshop conditions. Moreover, the State's decision to criminalize the actions of those who expose corruption or crimes in only a single industry—the agricultural industry—evinces an intent to distort the political debate about modern agricultural production.[8]

Subsection (b)'s prohibition on obtaining access by false pretenses is content-based first because it discriminates between truth and falsity, thus imposing a limit applicable only to a certain category of speech. Second, similar to the recording provisions, subsection (b) criminalizes false pretenses only in the context of a single industry (agriculture); it singles out speech critical of a single industry for special, disfavored treatment. As the Idaho District Court recognized, "a job applicant who lies to secure employment with the goal of praising the agricultural production facility will skate unpunished. But a job applicant who fails to mention his affiliation with an animal welfare group with the intent of exposing abusive or unsafe conditions at the facility will face the full force of the law." *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1207. Such discrimination among the content of speech places the restrictions within the category of facially content-based laws. *Reed v. Town of Gilbert*, *Ariz*., 135 S. Ct. 2218, 2228 (2015) (noting that laws are content-

[8] The law also discriminates based on viewpoint because it silences critics of certain agricultural practices while permitting speech that promotes the same agricultural practices. A restriction on speech is viewpoint based if it distinguishes between speakers based on the viewpoint expressed or is motivated by the desire to suppress a particular viewpoint. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). Similarly, by criminalizing all video recordings except for those made with the express consent of the facility's owner, Utah Code Ann. § 76-6-112(a) & (d), or in contravention of an owner's prohibition of recording, Utah Code Ann. § 76-6-112(c), the law criminalizes only critical video recording while permitting video recording that would place the facility in a positive light. *See Boos v. Barry*, 485 U.S. 312, 328 (1988) (striking down ordinance prohibiting signs critical of a foreign government); *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1207.

based either when they are not neutral on their face or when the legislature had a content-based purpose in enacting them).

Finally, all of these prohibitions are viewpoint-based restrictions on speech because they were enacted because of the government's disagreement with messages conveyed by animal rights groups. The text of the law itself makes clear that it seeks to prohibit undercover investigations of animal agricultural facilities. *See, e.g.*, Utah Code Ann. §76-6-112(2)(b), (c). The legislative history is legion with evidence of this intent. SUMF ¶¶ 35-45.[9]

The Court can end its inquiry into the legislative motive with the text of the law and its legislative history; nothing introduced by the state can call this into doubt. Most notably, the legislators themselves refused to testify in this case as to their motives. SUMF ¶ 50. Having asserted the privilege as a shield to hide their motives from discovery, they are now precluded from asserting that the law was motivated by proper motives. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126 (D. Neb. 2012) ("In this vein, when the plaintiffs sought to depose Nebraska legislators on this very topic, the Nebraska Attorney General's office, the body defending the litigation . . . asserted legislative privileges . . . While the defendants and their lawyers were entitled to invoke these

[9] A determination of improper motive need not rest on a finding of unanimity of legislative purpose "or even that a particular purpose was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265. (1977). The existence of a substantial, improper motive suffices to taint an otherwise valid law. Such improper motive can be gleaned from "circumstantial" evidence, including the "historical background" and context for the decision as well as the "impact" of the law. *Id*. at 267-68. Improper legislative motive can also be identified by reviewing the "contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Arlington Heights*). In this case, there is more than ample evidence from the legislative record to validate the assertion that suppressing speech was "a motivating factor in the decision." *Arlington Heights*, 429 U.S. at 266.

privileges, and while this court was duty-bound to apply the law of privilege, the defendants cannot now claim that the evidence is lacking regarding the true motives of the law-makers."); *id* ("That is, the defendants will not be allowed to use their privilege defenses as both a sword and shield.").

Larry Lewis, Public Information Officer with the Utah Department of Agriculture & Food, the sole government official who Defendants put forward as a fact witness to testify as to legislative motive, admitted that he did not communicate with legislators or anyone else *prior* to the Ag Gag law being enacted, and afterword just defended the law as the mouthpiece of the state's agriculture industry. SUMF ¶¶ 51-63. The state's only other witness was a private fur farmer who admitted that he never had any communication with any Utah government officials (including legislators) regarding the law; he simply speculated that the law was justified to protect farmers from recordings made by critics, as well as to protect against arson, break-ins, vandalism, and other activity that is already proscribed by generally-applicable laws. SUMF ¶¶ 64-76.

As made clear by the text of the law, the legislative history, and the discovery in this case, the Ag Gag law was enacted because the government disagreed with the message spread by organizations like PETA and ALDF. Therefore, it is a content- and viewpoint-based restriction on speech. Because the Ag Gag law's prohibitions are all content-based and viewpoint-based restrictions on free speech, the law is subject to strict scrutiny, which, as discussed below, it cannot survive.

4. The Ag Gag Law is Overbroad

The Ag Gag law is facially unconstitutional because it criminalizes a substantial amount of speech protected by the First Amendment. *See* SOE ¶¶ 26-30.

The first step in the overbreadth analysis is to construe the statute to determine the breadth of speech or conduct it prohibits. SOE ¶ 31. The second step is to determine whether the statute prohibits a substantial amount of protected conduct or speech. SOE ¶ 32.

The Ag Gag law indiscriminately prohibits *all* audiovisual recording of an agricultural operation from within the agricultural operation without the owner's consent if the employer sought employment in order to record agricultural activities, and the employer prohibits recording (when the employee was aware of that fact when he or she applied). While some limitations on nonconsensual video recording might be permissible, such as a restriction on taking videos of the trade secrets of an agricultural operation, the Ag Gag law prohibits a substantial amount of recording activity that is protected under the First Amendment, such as recordings of a blocked fire exit, an abusive co-worker, and animals being subjected to cruel treatment.

Additionally, subsection (c)'s prohibition on obtaining access to an agricultural operation under false pretenses criminalizes a substantial amount of speech and conduct as any lie or misrepresentation that amounts to a false pretense is prohibited. While First Amendment doctrine permits the regulation of some classes of lies, those that cause a legally cognizable harm, the Ag Gag law sweeps well beyond that range of permissible regulation to criminalize investigative lies that not only do not cause cognizable harm, but also promote public discourse by leading to the disclosure of information of great public concern. For example, if a reporter states that he or she wants to do a story on a specific worker, but actually intends to document animal abuse, the reporter is violating the Ag Gag law regardless of whether the reporter actually films animal abuse. Similarly, if that reporter fails to correct an owner or employee's understanding of why he or she was at the agricultural operation, the reporter is subject to prosecution under the law.

Even journalists who forthrightly state their purpose for entry will fear prosecution. If a journalist enters a facility covered by the statute for one purpose but sees something at the facility that is even more deserving of press coverage, the journalist will be at risk of prosecution if they write the new story. Certainly gaining entry for one explicit purpose, and then writing about another matter will oftentimes rise to the level of probable cause that one was using false pretenses to gain access. The substantial amount speech and conduct criminalized by the Ag Gag law is protected by the First Amendment as elaborated on above in Sections III.B.1 & 2. Because the Ag Gag law criminalizes a substantial amount of protected speech and conduct, it is overbroad and facially unconstitutional under the First Amendment.

5. The Ag Gag Law Does Not Survive Strict Scrutiny

The elements of strict scrutiny's application to content-based and overbroad laws are contained at SOE ¶¶ 33-37.

At the outset, the state has failed to identify a compelling government interest at stake. As in Idaho, the state cannot simply invoke "privacy" and "property" as talismans when the true purpose of the statute – as evidenced by its context and legislative history – is simply the suppression of speech. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1207 ("The State's interest in protecting personal privacy and private property is certainly an important interest. But in the First Amendment sense, these are not compelling interests in the context presented here."). The text, legislative history, and the government's own fact witnesses establish that the state's interest in passing the Ag Gag law was to silence speech critical of the agricultural industry. SUMF ¶¶ 35-50, 52-69. Moreover, the state cannot invoke "privacy" and "property" as compelling in the abstract; instead the Court must ask "privacy to do what?" and "property used for what purpose?" Certainly the

state has no compelling interest in protecting factory farms' privacy to harm animals, compromise food safety, and abuse workers, just as it has no compelling interest in consecrating a type of private property that substantially and pervasively affects the public interest. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1202 ("[A]s the story of Upton Sinclair illustrates, an agricultural facility's operations that affect food and worker safety are not exclusively a private matter. Food and worker safety are matters of public concern."); *id*. at 1208 ("[F]ood production is not a private matter. As already discussed, animal agriculture is a heavily-regulated industry and food production and safety are matters of the utmost public concern.").

Even if the Court accepts the state's purported interests, expressed at the hearing on the state's motion to dismiss, of protecting property rights, those interests are not compelling in this instance. While protection of property rights in the abstract is certainly a legitimate state interest, in the context of Utah's Ag Gag law, that interest can hardly be understood to rise to the level of a most "pressing public necessity." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994). Other than making undifferentiated assertions that agricultural operations owners' property interests need to be protected, the State has done nothing to establish that such interests are even important, much less compelling. This is especially the case when those vague interests are weighed against the concrete public interests that the Ag Gag law thwarts. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1207 ("Given the public's interest in the safety of the food supply, worker safety, and the humane treatment of animals, it would contravene strong First Amendment values to say the State has a compelling interest in affording these heavily regulated facilities extra protection from public scrutiny."). Moreover, food production is already a heavily-regulated industry and existing

generally-applicable laws prohibit theft, trespass, fraud, and defamation. *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1207-08.

Even if the state had compelling interests, the law is not narrowly tailored to those interests, nor is it the least restrictive means of achieving them. As the Idaho court observed:

> Criminal and civil laws already exist that adequately protect those interests without impinging on free-speech rights. It is already illegal to steal documents or to trespass on private property. In addition, laws against fraud and defamation already exist to protect against false statements made to injure or malign an agricultural production facility. Because the State has "various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech," it has not shown any need to have a special statute specific and unique to agricultural production facilities.

Id. at 1208 (citation omitted).

In other words, the status quo, through laws prohibiting trespass, theft, property damage, defamation, and fraud, as well as laws ensuring employers' right to hire and fire at will, already use the least restrictive means of protecting privacy and property rights. Adding to those laws a statute that criminalizes undercover investigations on matters of great public importance does nothing to promote those interests.

The Ag Gag law does not survive strict scrutiny and is unconstitutional under the First Amendment.

6. The Ag Gag Law Does Not Survive Intermediate Scrutiny

Even if this Court determines that the Ag Gag law is only subject to intermediate scrutiny because it regulates conduct or is content-neutral, the Ag Gag law is unconstitutional. The elements of intermediate scrutiny are contained at SOE ¶¶ 38-42.

For the same reasons that the state's interests are not compelling, they are also not significant under intermediate scrutiny. An interest in curbing whistleblowing is not a legitimate, much

less significant, governmental interest. Therefore, for the reasons elaborated above, the Ag Gag law does not serve significant government interests and is unconstitutional.

Even if the state's interests were significant, the Ag Gag law is not adequately tailored to serve the governmental interests because it burdens more speech than is necessary to further the governmental interests. Again, the rationale elaborated on above is applicable here. The Ag Gag law overly burdens the communication of information of public concern by effectively banning all audio and visual recording means for individuals (including journalists and animal rights organizations) attempting to represent both sides of the debate. Such video recording provides the public the opportunity to observe and understand more fully the information and knowledge, allowing for a more informed and in depth discussion of these public concerns.

Even if the Ag Gag law were adequately tailored, it does not leave open alternative channels of communication. SUMF ¶¶ 99-122. The Ag Gag law prohibits audiovisual recording, a type of expression used to document information and knowledge. Moreover, recordings themselves serve an independent and powerful function. SUMF ¶ 97. Recordings provide self-authenticating, visible evidence of agricultural practices that do not require independent corroboration and cannot be rejected for lack of impartiality. *Id*. In addition, recorded evidence often generate the strongest emotional connection to the intended audience, which is an important part of journalism and advocacy. *Id*. Perhaps most significantly, Plaintiffs' experts give numerous reasons why "traditional" or "bona fide" whistleblowers are unlikely to come forward in the agricultural industry. SUMF ¶ 104. Many of these workers are undocumented or otherwise disenfranchised and are legitimately afraid of retribution and retaliation if they come forward about abuses. *Id*. Undercover investigations are the public's only window into the reality of factory farming. SUMF ¶¶ 99-122.

Furthermore, the State already has many laws at its disposal, discussed above, to accomplish their attempted goals without burdening more speech. Therefore, the Ag Gag law does not pass intermediate scrutiny review and is unconstitutional under the First Amendment.

C. The Ag Gag Law Violates Equal Protection

The Ag Gag law violates the Equal Protection Clause of the Fourteenth Amendment because it discriminatorily burdens the fundamental right of free speech, and because it was motivated by unconstitutional animus against animal protection advocates. The elements of an Equal Protection claim are contained at SOE ¶¶ 43-53.

1. The Ag Gag Law Discriminatorily Interferes with the Exercise of a Fundamental Right

As described in the Statement of Element, a law that discriminatorily burdens a fundamental right, such as freedom of speech or press, violates the Equal Protection Clause. SOE ¶¶ 45-47. As stated in detail above, the Ag Gag law infringes on an individual's right to free speech and press by essentially chilling all recording that is unflattering to agricultural operations. For the same reasons that the Ag Gag law violates the First Amendment, it also violates the Equal Protection Clause.

2. The Ag Gag Law was Motivated by Substantial Legislative Animus

Laws that are motivated by animus cannot withstand scrutiny under the Equal Protection Clause. **"**For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

In *Moreno*, an amendment to the Food Stamp Act prevented unrelated cohabitators from receiving food stamps. *Id*. The Court invalidated the provision as unconstitutional, noting that the legislative history "indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id*. Concluding that such animus could not be a legitimate government purpose, the Court invalidated the law. *Id*.

The situation presented here is analogous to the circumstances in *Moreno*. In both cases the legislative history reveals animus towards a politically unpopular group.

In fact, this case presents a much stronger case of animus than *Moreno*. In *Moreno*, the Court noted "[r]egrettably, there is little legislative history to illuminate the purposes of the 1971 amendment [to the Food Stamp Law]." *Id*. And in fact, the Court cited just one instance of a legislator referring to "hippies." *Id*. (citing H.R. Conf. Rep. No.91—1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland)).

Here, by contrast, the legislative history oozes with disdain for animal protection groups such as Plaintiffs. Senator Hinkins, who sponsored the legislation, referred to vegetarians as "terrorists" and analogized PETA to a group of "animal rights terrorists." SUMF ¶¶ 42, 44; *see also* SUMF ¶ 44 (Representative Perry declaring that undercover investigations are "just another version of domestic terrorism"). Representative Mathis, another legislative sponsor, stated that the "advancement of animals rights nationally" is "egregious," SUMF ¶ 36, and that animals protection organization "should not be allowed to continue," SUMF ¶ 37. Representative Michael Noel stated that he was opposed to letting "groups like PETA and some of these organizations control what we do in this country, a country that feeds the world," and referred to anyone who wanted to film an agricultural operation as a "jack wagon." SUMF ¶ 39. *See also* SUMF ¶¶ 35, 38, 40-45.

The legislative history is replete with evidence of animus of the most extreme kind. In fact, counsel for Plaintiffs has not located any state of federal cases with more evidence of overt animus in the record, although Idaho's Ag Gag legislative history comes close. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1210 ("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.").

Given the presence of such animus, the Ag Gag law violates the Equal Protection Clause, because animus-based legislation is per se unconstitutional. Judge Holmes of the Tenth Circuit has noted that the presence of animus is "a doctrinal silver bullet" that requires a court to strike down an otherwise valid law, regardless of whether the law is also supported by valid governmental interests. *Bishop*, 760 F.3d at 1103 (Holmes, J., concurring) (quoting Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012)).

Even if animus does not automatically doom a law, the legislative animus in the record requires—at a minimum—a highly skeptical, heightened form of rational basis review. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (recognizing the need for "careful consideration" of laws motivated in part by animus); *Moreno*, 413 U.S. at 534, 538. Under this heightened form of rational basis review, a law must be invalidated if 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 strong. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Cen-*

ter, 473 U.S. 432, 448-50 (1985). Stated differently, once animus is established through the legislative record or impact of the law, the classification must uniquely serve the proffered government interest.

The Supreme Court's discussion in *Cleburne* is illustrative, because it shows that the mere presence of government interests that would otherwise satisfy traditional rational basis review cannot salvage a law that is tainted by animus. 473 U.S. at 448-50. There, the Court struck down, on equal protection grounds, a zoning ordinance that required a special use permit for homes for the developmentally disabled, despite the fact that the law was justified by the City on the type of concerns—reducing parking, traffic, flood plain issues—that would undoubtedly justify upholding a law under traditional rational basis review. *Id.*; *see also Ry. Exp. Agency v. People of State of N.Y.*, 69 S. Ct. 463, 466 (1949) ("It is no requirement of [traditional] equal protection that all evils of the same genus be eradicated or none at all").

In *Cleburne*, however, the Court held that because the presence of animus against the developmentally disabled tainted the government action in question, merely offering some plausible connection between the stated government interests and the classification in question was inadequate. *See id*. at 446, 448–50. Specifically, the Court concluded that the development of a home for those with developmental disabilities did not pose demonstrably greater risks to the stated government interests than, for example, allowing the construction of a fraternity or apartment building. *Id*. at 450. The holding, then, is when animus is present an actual inquiry into the fit between the law and the stated purpose of the law will be exactingly undertaken. *Accord Moreno*, 413 U.S. at 528 (closely scrutinizing and ultimately-rejecting asserted interest in "minimiz[ing] fraud in the administration of the food stamp program").

Such a review of the Ag-Gag law is fatal to the enforcement of the statute. The State's purported justification of protecting the private property rights of agricultural operation owners are protected by existing generally-applicable laws and have little connection to the law's recording and misrepresentation prohibitions. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1210 ("existing laws against trespass, conversion, and fraud . . . 'necessarily casts considerable doubt upon the proposition that [the Ag Gag law] could have rationally been intended to prevent those very same abuses.'") (quoting *Moreno*, 413 U.S. at 536-37).

The Ag-Gag law is subject to heightened rational basis review and like the laws in *Cleburne Moreno*, *Windsor*, and *ALDF* cannot survive such scrutiny.

Conclusion

The Utah Ag Gag law violates both the First and Fourteenth Amendments. It is a content-based and viewpoint-based restriction on protected speech that cannot survive strict scrutiny. Even if it is subject to intermediate scrutiny, it cannot survive that level of scrutiny either. Additionally, the law is facially overbroad making it unconstitutional under the First Amendment. Finally, the Ag Gag law violates the Equal Protection Clause of the Fourteenth Amendment because it discriminatorily interferes with the exercise of a fundamental right and was motived by legislative animus. Therefore, this Court should rule that the Ag Gag law is unconstitutional and should strike the law down.

Dated this 31st Day of May, 2015.

/s Matthew Strugar
Matthew Strugar, *pro hac vice*
PETA Foundation
2154 W. Sunset Blvd.
Los Angeles, CA 90026
(323) 210-2263
matthew-s@petaf.org

Justin Marceau, *pro hac vice*
University of Denver, Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

Matthew Liebman, *pro hac vice*
Animal Legal Defense Fund
170 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533, ext. 1028
mliebman@aldf.org

Stewart Gollan
584 Wall Street
Salt Lake City, UT 84103
(801) 413-3406;
sgollanlaw@gmail.com

Alan Chen, *pro hac vice*
University of Denver, Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6283
achen@law.du.edu

Ed Ramey, pro hac vice
Heizer Paul, LLP, 2401 15th Street, Suite 300, Denver, CO 80202
eramey@hpfirm.com

Attorneys for Plaintiffs