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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. LAWRENCE WASDEN, in his official capacity as Attorney General of Idaho, Defendant.	Case No. 1:14-CV-00104-BLW PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

The non-profit organizations Animal Legal Defense Fund, People for the Ethical Treatment of Animals, American Civil Liberties Union of Idaho, Center for Food Safety, Farm Sanctuary, River's Wish Animal Sanctuary, Western Watersheds Project, Sandpoint Vegetarians,

Idaho Concerned Area Residents for the Environment, Idaho Hispanic Caucus Institute for Research & Education, and Farm Forward; the news journal CounterPunch; award-winning author and journalist Will Potter; animal agriculture scholar and historian James McWilliams; would-be-investigator Monte Hickman; freelance journalist Blair Koch; and agricultural investigations expert Daniel Hauff (hereinafter Plaintiffs), hereby move for a declaratory judgment pursuant to Fed. R. Civ. P. Rule 57. This motion is supported by the accompanying Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Declaratory Judgment, Declaration of Jeffrey S. Kerr in Support of Plaintiffs' Motion for Summary Judgment; Declaration of Stephen Wells in Support of Plaintiffs' Motion for Summary Judgment; Plaintiffs' Request for Judicial Notice, 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.

Respectfully submitted on the 20th day of February, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of February, 2018, I filed the Plaintiffs' Motion for Declaratory Judgment, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Declaratory Judgment, Declaration of Stephen Wells in Support of Plaintiffs' Motion for Declaratory Judgment, Declaration of Jeffrey S. Kerr in Support of Plaintiffs' Motion for Declaratory Judgment, and Plaintiffs' Request for Judicial Notice electronically through the CM/ECF system, which caused the all parties or counsel in this action to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

DATED this 20th day of February, 2018.

/s/ Matthew S. Strugar

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. LAWRENCE WASDEN, in his official capacity as Attorney General of Idaho, Defendant.	Case No. 1:14-CV-00104-BLW MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

Plaintiffs are before this Court seeking further relief in light of the Ninth Circuit's recent decision affirming in part and reversing in part this Court's prior order invalidating all provisions of Idaho's ag gag law. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) ("*Wasden*"). Plaintiffs request alternative forms of relief. First, Plaintiffs move this Court to enter a declaratory judgment clarifying that I.C. § 18-7042(1)(c) ["subsection (c)"], the provision that prohibits gaining employment by misrepresentation with an intent to injure as interpreted by the Ninth Circuit's narrowing construction, does not apply to the type of undercover investigative activity that the Plaintiffs seek to engage in. In the alternative, Plaintiffs request this Court to declare that subsection (c) is unconstitutional as applied to the undercover investigative activity that Plaintiffs seek to engage in. While not upholding the facial injunction of § 18-7042(1)(c), the Ninth Circuit decision in this case applies a narrowing construction to that section's statutory language that makes clear Plaintiffs' intent to promote transparency and reveal truth are *not* the sort of harms covered by the statute, or outside of free speech protections—and are therefore fully protected.

PROCEDURAL HISTORY

Plaintiffs—the Animal Legal Defense Fund and other animal and human rights organizations, journalists, and workers' associations—challenged Idaho's ag gag law on the ground that it violates constitutional guarantees of freedom of speech, freedom of the press, and equal protection, and because federal laws protecting whistleblowers preempt the State's law under the Supremacy Clause. After prevailing at the motion to dismiss stage, Plaintiffs moved for summary judgment and a total injunction against the enforcement of the law, which this Court granted in Plaintiffs' favor. *Animal Legal Def. Fund v. Otter*, 118 F.Supp.3d 1195, 1200 (D. Idaho 2015) ("*Otter*").

Recognizing that a contrary conclusion would undermine the entire field of undercover journalism, thwart whistleblowing, and deliberately chill speech on matters of public concern, this Court concluded that the recording and misrepresentations criminalized by the law enjoy First Amendment protection. *Id*. at 1201, 1204, 1206. The Court also found that the law was content-based because its purpose and effect were to insulate a single industry from media scrutiny, or what the law's supporters repeatedly referred to as being tried "in the court of public opinion." *Id*. at 1200-01. Accordingly, the Court applied strict scrutiny and struck the law down. *Id*. at 1209. The Court also granted summary judgment to Plaintiffs on the ground that the ag gag law violated the Fourteenth Amendment's Equal Protection Clause because it was substantially motivated by animus against animal rights activists. *Id*. at 1212. Accordingly, this Court enjoined the enforcement of the four provisions of the statute challenged by Plaintiffs, I.C. § 18-7042(1)(a)–(d). Final Judgment & Permanent Injunction, 1:14-CV-00104-BLW, ECF No. #116 (Nov. 12, 2015).

Defendant Wasden ("the State") appealed to the Ninth Circuit, which affirmed in part and reversed in part. *Wasden*, 878 F.3d at 1184. The Ninth Circuit affirmed this Court's holding that the Idaho ag gag law's prohibition on gaining access to an agricultural facility through misrepresentation, I.C. § 18-7042(1)(a), violated the First Amendment. Relying on the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709, 722-23 (2012) (plurality opinion), the Ninth Circuit held that lies are constitutionally protected so long as they do not cause a legally cognizable harm. *Wasden*, 878 F.3d at 1193-94. Thus, the Court held, a misrepresentation that confers entry "alone does not constitute a material gain, and without more, the lie is pure speech." *Id.* at 1195. Like the statute in *Alvarez*, the Idaho ag gag statute's prohibition sought to control and suppress false statements without regard to whether they are made for material gain.

Id. at 1194-96.

Because subsection (a) regulates pure speech—targeting falsity and nothing more—the Ninth Circuit subjected it to strict scrutiny under the First Amendment. *Id*. at 1196. The Court held the law did not survive strict scrutiny given that "the statute punishes speech where there is no fraud, no gain, and no valuable consideration," in a broad range of scenarios far beyond a classic agricultural facility. *Id*. at 1197. The Court also found the statute problematic because trespassing is already a crime in Idaho, the law is not content-neutral, and the breadth of the prohibition on access by misrepresentation "is so broad that it gives rise to suspicion that it may have been enacted with an impermissible purpose." *Id*. at 1198. Finally, the Court noted that the prohibition on access by misrepresentation would fail under intermediate scrutiny, as well.[1] *Id*.

However, the Ninth Circuit rejected Plaintiffs' facial challenge to subsection (c), which prohibits gaining employment by misrepresentation with the intent to cause economic injury, I.C. § 18-7042(1)(c), but only after applying an important and substantial narrowing construction. *Wasden*, 878 F.3d at 1201-02. The Court found that the section's additional element requiring an intent to injure provides a "clear limitation" that "cabins the prohibition's scope" and takes the prohibition outside of the scope of lies protected by *Alvarez*. *Id*. at 1201. Thus, for example, a person who lied to gain employment with the intent to engage in physical destruction of the

[1] The Court also affirmed this Court's ruling that the statute's prohibition on recording the operation of an animal agriculture facility, I.C. § 18-7042(d), was facially unconstitutional. *Wasden*, 878 F.3d at 1202-05. However, the Court reversed this Court's ruling that subsection (b), which prohibits obtaining records by force, threat, misrepresentation or trespass, I.C. § 18-7042(1)(b), violated the First Amendment. *Id*. at 1199-1201. It concluded that this provision protects against a legally cognizable harm associated with a false statement, because false statements made to actually acquire agricultural production facility records inflict a "property harm upon the owner, and may also bestow a material gain on the acquirer." *Id*. at 1199. Because misrepresentation to obtain records "wreaks actual and potential harm on the facility and bestows a material gain on the fibber," it is not constitutionally protected and is properly regulated by the ag gag statute. *Id*. at 1200.

agricultural operation's property could legitimately be prosecuted. *Id.* at 1202. But in construing the employment provision's "economic injury" requirement in connection with the statute's provision for restitution for "economic loss," I.C. § 18-7042(4) (providing for restitution pursuant to I.C. § 19-5304), the Court found that the injury a potential employee intends to cause must be direct, tangible harm—such as the value of destroyed property or medical expenses—and not the type of "reputational damages" that flow from the exposés typical of employment-based undercover investigations. *Wasden*, 878 F.3d at 1201. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" the Ninth Circuit construed the employment subsection to exclude those who misrepresent themselves to gain employment, but only intend to cause "reputational and publication" injuries. *Id.* (*quoting Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc)).

This narrowing construction and its relevance to Plaintiffs' heretofore unaddressed as-applied claim is the focus of this motion. While the Ninth Circuit's narrowing construction obviated the need for, and overturned, this Court's facial injunction, the decision is entirely consistent with this Court's threshold conclusion that investigative whistleblowing of the sort for which Plaintiffs have sought protection is constitutionally protected. *See* Compl. ¶¶ 21, 196 (raising an as-applied challenge). This Court never squarely reached the application of this provision to Plaintiffs' specific speech, and thus the Ninth Circuit did not address it either.

ARGUMENT

As explained below, the investigative techniques that Plaintiffs engage in neither cause cognizable legal injury to agricultural facilities nor confer a material gain on investigators or whistleblowers within the meaning of the Ninth Circuit's holding. As a result, Plaintiffs' are

entitled to a declaratory judgment recognizing that their specific intended use of misrepresentations to secure employment are either constitutionally protected, or outside the scope of section (c) as narrowed by the Ninth Circuit's judgment in this case.

I. The Ag Gag Law's Prohibition on Gaining Employment by Misrepresentation with Intent to Injure Does Not Reach the Activities Plaintiffs Seek to Engage In

Plaintiffs seek a declaratory judgment that, given the Ninth Circuit's limiting construction, I.C. § 18-7042(1)(c) does not apply to the employment-based undercover investigation that Plaintiffs undertake. These investigations intend to expose illegal or abusive behavior that may result in boycotts and other harms associated with agricultural enterprises' loss of reputation due to the dissemination of truthful information about their practices. *See* Declaration of Jeffrey S. Kerr in Support of Plaintiffs' Motion for Summary Judgment ("Kerr Decl.") ¶¶ 12-16; Declaration of Stephen Wells in Support of Plaintiffs' Motion for Summary Judgment ("Wells Decl.") ¶¶ 8-25. The Ninth Circuit's decision in this regard is entirely consistent with core free speech principles, particularly those emerging from defamation cases, holding that imposing liability for truthful statements that cause reputational type injuries is impermissible.

The Ninth Circuit's interpretation of *Alvarez* affirms that only those lies that cause direct, cognizable harm fall outside the First Amendment's protection. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" *Wasden*, 878 F.3d at 1202 (*quoting Berger*, 569 F.3d at 1046), the Ninth Circuit construed the employment provision's "economic injury" requirement together with the statute's restitution provision for "economic loss," I.C. § 18-7042(4) (providing for restitution pursuant to I.C. § 19-5304), and concluded that it excludes those who misrepresent themselves to gain employment and only intend to cause "reputational and publication" injuries,

878 F.3d at 1202.

This distinction was crucial to the Ninth Circuit's ruling upholding the statute's employment provision against a facial challenge. The fact that the statute was construed as requiring an intent to cause *direct and tangible* injuries, and not merely the reputational and publication damages that flow from the types of exposés typical of employment-based undercover investigations, rendered it unnecessary to hold the section facially unconstitutional. This statutory feature, in the words of the Ninth Circuit, provided the "narrowing construction" to the "unconstitutionally broad statute" that "eliminate[d] its constitutional deficiencies." *Id.* This narrowing construction is sensible insofar as it retains criminal penalties for persons who intend to gain employment in order to steal trade secrets, cause property damage, or otherwise engage in physical sabotage, while at the same time recognizing that misrepresentations to secure employment that are made in order to expose or document wrongdoing and that do not cause direct, tangible harms fall outside the scope of misrepresentations that the statute can constitutionally regulate.

Indeed, the Ninth Circuit characterized its own narrowing construction of section (c) as imposing a "specific intent" to impose harm requirement. *Id.* at 1202. Because securing employment with a specific intent to cause direct, tangible harms may impose a cognizable harm on the owner, the Court reasoned, misrepresentations made with this intent can be proscribed. *Id.* at 1199-1203. But the misrepresentations Plaintiffs desire to engage in are not made with the intent to, and in fact do not, cause the types of tangible harms contemplated by the statute as construed by the Ninth Circuit. Kerr Decl. ¶¶ 12-16; Wells Decl. ¶¶ 8-25. As the Ninth Circuit observed, subsection (c) would not even apply to a person who "'*overstates* her education or experience to get a job for which she otherwise would not have qualified, whether the person is

an undercover investigator or not,' because the requisite intent to injure would not be satisfied." *Id*. at 1201 (emphasis added). Moreover, because Plaintiffs have established that misrepresentations are a form of speech covered by the First Amendment, it would be the State's burden to prove that the type of undercover investigations conducted by Plaintiffs would cause the requisite tangible harm, and it has presented absolutely no evidence to suggest that such harms are likely to occur. As a matter of law, efforts to promote transparency and truthful discourse do not create such harm.

Accordingly, Plaintiffs request a declaration that § 18-7042(1)(c) does not criminalize Plaintiffs' employment-based undercover investigations undertaken with the intent to expose illegal or abusive behavior resulting in boycotts and other reputational harms. The specific intent requirement read into section (c) by the Ninth Circuit cannot be satisfied on the facts of this case.

II. Alternatively, the Ag Gag Law's Prohibition on Gaining Employment by Misrepresentation with Intent to Injure is Unconstitutional As Applied to Plaintiffs' Intended Activity

Alternatively, if this court disagrees and finds that § 18-7042(1)(c) includes Plaintiffs' employment-based undercover investigations, then Plaintiffs seek a declaration that subsection (c) is unconstitutional as applied to their intended activity.

A. Plaintiffs' As-Applied Challenge Is Properly Before This Court.

As an initial matter, Plaintiffs raised as-applied claims in this case. Compl. ¶¶ 21, 196. Because this Court did not reach the as-applied claim in its prior order (ECF No. 110 at 14, 23 (evaluating facial discrimination and concluding that the law violates the First Amendment in general terms)), the Ninth Circuit was only presented with, and only decided, the facial validity of the statute. While the Ninth Circuit's mandate requires that this Court lift the permanent injunction that it issued with respect to subsection (c)'s facial unconstitutionality, it does not preclude (and, instead, it actually compels) as-applied relief in this case.

Because Plaintiffs intended to bring this motion after remand from the Circuit Court, Plaintiffs requested that the Circuit transfer consideration of Plaintiffs' entitlement to attorneys fees on appeal to this Court. *See* Request for Judicial Notice, Ex. A. In their request, Plaintiffs noted that "transferring consideration of fees to the district court makes sense because this case is not yet fully decided" because their "as-applied claims under the First Amendment . . . have yet to be adjudicated," as this Court "did not decide the merits of Plaintiffs' First-Amendment as-applied claim in light of its ruling that the state laws at issue are facially unconstitutional." *Id*. at 2. Plaintiffs informed the Circuit that "[f]inal judgment in this matter will, accordingly, not be automatic on remand and Plaintiffs intend to engage in additional dispositive motion practice" and that "resolution of these remaining issues will assist in determining which parties ultimately prevail, and to what extent, for the purpose of assessing reasonable attorneys fees." *Id*. at 3.

The State opposed the transfer request. *See* Request for Judicial Notice, Ex. B. It argued that "this case has been 'fully decided' as to First Amendment claims," *id*. at 2, because the "judgment did not reserve the right for Appellees to litigate as-applied First Amendment claims." *Id*. at 3.

At least implicitly disagreeing with the State, the Circuit granted Plaintiffs' motion and transferred consideration of Plaintiffs' entitlement to attorneys fees on appeal to this Court. *See* Request for Judicial Notice, Ex. C.

B. The Misrepresentations Plaintiffs Desire to Engage in to Gain Employment at Agricultural Facilities Do Not Cause Material Gain or Direct, Tangible Harm, and Thus Are Constitutionally Protected.

There is no fair reading of the Ninth Circuit's decision in this case that would treat the desire to facilitate transparency and expose wrongdoing as tantamount to a tangible harm that excludes these investigations from First Amendment protection. Upton Sinclair famously entered

meatpacking facilities around Chicago in the early twentieth century in order to expose misconduct and unsanitary conditions, and the direct results of his investigation were federal legislative reforms that adversely impacted agricultural businesses, and altered consumer awareness and behavior in a way that harmed the meat industry. Likewise, modern day muckrakers (including Plaintiffs) conduct investigations of factory farms and intentionally reveal, among other things, animal mistreatment and food safety issues that result in boycotts, negative publicity, food recalls, criminal prosecutions and, at times, the shuttering of the facility whose misdeeds was exposed. It would turn the Ninth Circuit's judgment and the basic principles of free speech on their head to treat lies about military honors as fully protected, but the lies of Upton Sinclair as non-speech. As applied to Plaintiffs' investigations, Kerr Decl. ¶¶ 12-16; Wells Decl. ¶¶ 8-25, section (c) is unconstitutional.

As this Court has found, Plaintiffs' investigative acts cause, and are intended to cause, "boycotts, food safety recalls, citations for environmental and labor violations, evidence of health code violations, plant closures, criminal convictions, and civil litigation" as a result of "exposure of illegal or abusive behavior," not physical, direct, tangible harm. *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1018 (quoting Compl. ¶ 4). The goal of undercover employment-based investigations is not to "secure moneys or other valuable considerations" for the investigator, as it would be for the type of job applicant hoping to secure an offer of employment described in *Alvarez*. *Alvarez*, 567 U.S. at 2547; *Wasden*, 878 F.3d at 1201. Rather, investigators seek to expose threats to the public for the public's benefit. Neither this Court nor the Ninth Circuit had evidence or a complete record about the nature and intent of the Plaintiffs' investigations, which is necessary to decide the as-applied claims. Plaintiffs have now submitted evidence detailing exactly what the intent for engaging in the proffered investigations would be,

Kerr Decl. ¶¶ 12-16; Wells Decl. ¶¶ 8-25, and the as-applied claims are now properly and fully before this Court for resolution.

Anticipating the State's likely response to this motion, Plaintiffs reiterate that an agricultural operation's payment of salary to an undercover investigator for her labor does not constitute the type of unjustified material gain (or fraudulent harm to the employer) that permits the state to punish someone for a misrepresentation used to gain employment. As the leading case on this point, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), has observed:

> The question is what was the proximate cause of the issuance of paychecks to [Undercover investigators] Dale and Barnett. Was it the resume misrepresentations or was it something else? It was something else. *Dale and Barnett were paid because they showed up for work and performed their assigned tasks as Food Lion employees*. Their performance was at a level suitable to their status as new, entry-level employees . . . . In sum, Dale and Barnett were not paid their wages because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance element of fraud.

Id. at 514 (emphasis added). The Ninth Circuit decision's emphasis on the need for a specific intent to cause tangible injury to the employer is entirely consistent with this holding. As the Ninth Circuit clarified here, the state cannot punish a lie used to gain access to property but which causes no material harm to the listener, as in the case of a teenager who is prosecuted for misrepresenting his identity to gain access to a new pop-up restaurant, but pays for the meal. "[L]unch could go off without a hitch. The restaurant is none the wiser, it gets paid for the meal, and loses nothing." *Wasden*, 878 F.3d at 1195.

The State cannot show, as a matter of law, that Plaintiffs' specifically delineated investigations cause any legally cognizable harm. There is no causation or injury attributable to misrepresentations made by investigators to gain employment because the investigators are

qualified or over-qualified for all the work they apply to do, complete all their assigned tasks in the course of their work, do not physically damage the property, and commit no injurious fraud. Kerr Decl. ¶¶ 12, 17; Wells Decl. ¶¶ 9-17. This alone demonstrates that the element of intent to cause tangible harm, which the Ninth Circuit referred to as the "critical element" in its narrowing construction, has no application in this as-applied challenge. *Id.* at 1202.

As this Court has understood, any harm that arguably flows from the misrepresentations at issue derive not from the misrepresentations, themselves, but from subsequent publication of truthful information on matters of public concern. *Otter*, 118 F. Supp. 3d at 1202-03 (internal citations omitted). The Ninth Circuit has now agreed that such non-defamatory reputational injuries are not the type of cognizable harm that justify speech restrictions under *Alvarez*. *Wasden*, 878 F.3d at 1202. Thus, Plaintiffs' specific speech remains constitutionally protected. To hold otherwise would be to permit the State to impose a form of speech restriction that allows it to circumvent the strict First Amendment limitations on defamation liability by criminalizing truthful exposés. *See Food Lion*, 194 F.3d at 522 ("What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*.").

C. Subsection (c) Is Not Narrowly Tailored to Protect Against Direct, Tangible Harm.

The Ninth Circuit found that the specific intent required by the statute's employment provision sufficiently limited the statute's sweep as a facial matter that the statute could survive "searching scrutiny," *Wasden*, 878 F.3d at 1201-02. Yet, as applied to Plaintiffs' investigations—as opposed to a merely facial review of the statute—the analysis is quite different. If the statute is construed as applying to Plaintiffs' alleged conduct, then the statute

regulates protected speech based on the content of such speech. *Otter*, 118 F. Supp. 3d at 1202-03; *Wasden*, 878 F.3d at 1202. It therefore must be narrowly tailored to serve the State's "compelling" interest in protecting property and privacy from harm.

Criminal statutes are especially dangerous from a First Amendment perspective because of their potential to chill important expression, *City of Houston v. Hill*, 482 U.S. 451, 459 (1987), and to force individuals to "refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression," *see Gooding v. Wilson*, 405 U.S. 518, 521 (1972). To that end, imposing criminal liability on speech requires limitations to ensure not just that First Amendment speech is not punished, but that it is not unduly chilled or deterred by excessive liability. *Otter*, 118 F. Supp. 3d at 1205-06. In a criminal context, such limitations involve proving injury rather than intent. *See Alvarez*, 567 U.S. at 736 (Breyer, J., concurring) (statutes properly prohibiting false statements are those with "limitations of context, or *requirements of proof of injury*" to narrow the prohibition to "a subset of lies where specific harm is more likely to occur" and not "where harm is unlikely or the need for the prohibition is small."). Critically, the Ninth Circuit recognized that not every investigative reporter intends to harm the employer; "this is a critical element that requires proof." *Wasden*, 878 F.3d at 1202.

The Court's concession demonstrates precisely how the law, even as limited by the Court, continues to chill constitutionally protected speech when applied to Plaintiffs. Exposing Plaintiffs to criminal liability for speech that does not cause direct, tangible harms—that is, protected speech—is precisely what makes criminal statutes like Idaho's problematic under the First Amendment when applied to Plaintiffs. Plaintiffs have put forward evidence in this case that suffices to demonstrate the specific, as-applied injury, and they are not required to face prosecution and attempt to rebut the prosecution's efforts to establish that their investigations fall

within the scope of the Idaho law. Kerr Decl. ¶¶ 12-16; Wells Decl. ¶¶ 8-25.

Idaho's statute cannot withstand strict scrutiny because it is not narrowly tailored to achieve a compelling government interest. The law is not narrowly tailored to achieve the interests the Ninth Circuit identified, nor is it the least restrictive means of doing so, in relation to Plaintiffs' speech. The status quo, through laws prohibiting trespass, theft, property damage, defamation, and fraud; laws ensuring employers' right to hire and fire at will; and prohibiting theft of trade secrets—together with I.C. § 18-7042(1)(c)'s prohibition on obtaining employment an agricultural facility with intent to cause direct, tangible injury—already use the least restrictive means of regulating speech in a manner that protects privacy and property rights. Criminalizing investigative techniques employed in the context of matters of great public importance does little, if anything, to promote those interests, while implicating protected speech.

As applied to Plaintiffs' intended investigations, subsection (c) criminalizes individuals who are fully qualified for the job they get, but who engage in misrepresentation merely by affirmatively denying their political or journalistic associations or motivations on a job application or during an interview—which directly implicates Plaintiffs' investigations. *See* Kerr Decl. ¶ 11; Wells Decl. ¶¶ 9-10; Compl. ¶¶ 80, 81, 86, 103; *cf. Wasden*, 878 F.3d at 1194 n.8 (limiting scope of subsection (c) to affirmative misrepresentations and not omissions). In these instances, the prohibition of such lies simply insulates wrongdoers from accountability by allowing them to hide their dangerous conduct from public scrutiny. For that very reason the misrepresentations made by Plaintiffs directly serve the core purposes of the First Amendment by exposing truth and facilitating debate on issues of considerable public interest.

Further, the animus that the Ninth Circuit recognized at least partially animated the

passage of this law was squarely directed toward Plaintiffs, and is critically relevant to the First Amendment as-applied challenge now before this Court. *See Wasden*, 878 F.3d at 1200. Subjecting Plaintiffs to the whim of a government that has targeted their specific speech smacks directly into Justice Breyer's concern about protecting free speech:

> the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a [politically unpopular individual who makes false claims], while ignoring members of other political groups who might make similar false claims.

Alvarez, 567 U.S. at 734. The presence of animus towards the speech of the very Plaintiffs before this Court sharpen the constitutional concerns underlying this as-applied challenge.

CONCLUSION

The Ninth Circuit's decision in *Wasden* dramatically narrowed the reach of § 18-7042(1)(c), such that only persons who gain employment through deception with a specific intent to cause concrete injury can be criminally liable. As applied to the misrepresentations Plaintiffs desire to participate in, the Ninth Circuit's narrowing of the statute entitles Plaintiffs to declaratory relief. In the alternative, if the statute is construed as applicable to Plaintiff's conduct—a question not directly answered by the Ninth Circuit when it ruled on the facial challenge to the statute—then both the Ninth Circuit's decision and underlying First Amendment law compel the conclusion that § 18-7042(1)(c) is unconstitutional as applied to Plaintiffs' non-injurious, transparency-enhancing investigations.

Respectfully submitted on the 20th day of February, 2018.

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