R. SHANE JOHNSON (14217)
R. Shane Johnson, PLLC
75 E 400 S STE 201
Salt Lake City, UT 84111
Office: (801) 364-2222
Fax: (801) 364-4317
shane@utahdefense.com

SHAYANA KADIDAL [application for admission *pro hac vice* pending]
Center for Constitutional Rights
666 Broadway, Floor 7
New York, NY 10012
T: (212) 614-6432
F: (212) 614-6499
kadidal@ccrjustice.org

Attorneys for amicus curiae Center for Constitutional Rights

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, and SEAN D. REYES, in his official capacity as Attorney General of Utah, Defendants.	Case No. 2:13-cv-00679-RJS Judge Robert J. Shelby

BRIEF OF AMICUS CURIAE
CENTER FOR CONSTITUTIONAL RIGHTS

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The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has protected the rights of marginalized political activists throughout its fifty years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). CCR's First Amendment work continues to this day. *See, e.g., In re NSA Telecomms. Records Litig.*, 522 Fed. Appx. 383 (9th Cir. 2013); *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014) (facial challenge to Animal Enterprise Terrorism Act); *United States v. Buddenberg*, No. 09-00263-cr, 2010 U.S. Dist. LEXIS 78201 (N.D. Cal. July 12, 2010) (dismissing Animal Enterprise Terrorism Act indictments); *ALDF v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015) (amicus in successful challenge to Idaho ag-gag statute).

ARGUMENT

The State of Utah has the right to protect the agricultural industry and the property of its citizens. But this right does not trump the freedom of speech and expression enjoyed by all Utah's citizens and visitors. The state may not, even in the name of protecting property, ban speech about the agricultural industry, nor outlaw misrepresentations made to investigate that industry. Utah Code Ann. § 76-6-112 is no ordinary criminal law, prohibiting unlawful conduct. Instead, it is a content- and viewpoint-based statute which would broadly prohibit the First Amendment protected acts of video and audio-recording and making misrepresentations that do

not amount to fraud. As such the law must be subjected to strict scrutiny and, because it cannot survive such exacting analysis, must be struck down as incompatible with the First Amendment.

I. Utah Code Ann. § 76-6-112 Regulates Speech Based on Content and Viewpoint

Utah Code Ann. § 76-6-112 impermissibly discriminates on the basis of content and viewpoint. The law discriminates on the basis of content by targeting speech about the agricultural industry. Even worse, it discriminates on the basis of viewpoint by privileging speech that is supportive of such industry and criminalizing certain speech that is opposed to that industry. And even if parts of section 76-6-112 were, as the State argues, limited to regulating speech that is connected to unlawful conduct, it would still engage in unconstitutional content and viewpoint discrimination.

Content-based regulation is impermissible because it allows the Government to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 391 (1992) (finding regulation to be impermissibly content-based because it proscribed speech based on subject matter). Viewpoint-based restrictions are an even more dangerous form of content-based discrimination, because they represent the Government picking sides in a disputed issue. *See Rosenberger v. Rector,* 515 U.S. 819, 829 (1995). The First Amendment is offended by both kinds of regulations because directly or indirectly, they suggest that "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks omitted). While this showing may be based upon explicit or implicit legislative intent, a content-based purpose is not necessary. *Id.* at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id*. at 642-43.

"[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Turner,* 512 U.S. at 643. This is so even if the law at issue has a legitimate, non-content-based purpose.[1] *See Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993)). The State claims that the Act is content-neutral because it prohibits only "employment-based surreptitious recording." Defs. Memo. in Support of Summary Judgment (hereinafter "Defs. MSJ Br.") at 11. But section 76-6-112 explicitly singles out for punishment recordings of "an image of, or sound from, [an] agricultural operation." *See* Utah Code Ann. § 76-6-112(2)(a), (c). An activist employee who, without the owner's consent, films animals being abused on a farm may be punished under the law; the same employee, who without consent films the owner's children (rather than "an image of … the agricultural operation"), may not. *Cf. ALDF v. Otter*, 118 F. Supp. 3d at 1206 (Idaho ag-gag statute's "recording prohibition targets one type of speech activity—audiovisual recordings capturing 'the conduct of an agricultural production facility's operations'—while saying nothing about other types of recordings made at an agricultural production facility," and thus discriminates based on content). That section 76-6-112 cannot be analyzed as content-neutral is further corroborated by analysis of how it will be enforced. Though not always dispositive, it is "persuasive evidence" that a law is content-based if law enforcement officials must view the material in question to determine whether it is prohibited. *See*; *Reed v. Town of Gilbert*, 587 F.3d 966, 976 (9th Cir. 2009) (quoting

[1] Amici agree with Plaintiffs that section 76-6-112 is content-based because of the legislature's clear purpose of silencing animal activists, *see* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 106, at 20-21; *see also id*. at 28-29; *cf. United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013) (relying on legislative history regarding purpose of Arizona's day laborer solicitation ban in finding statue content-based); *ALDF v. Otter*, 118 F. Supp. 3d at 1206. However, given the law's facially discriminatory nature, it must be found to be a content-based law even if the Court were to disregard Plaintiffs' allegations regarding the legislature's discriminatory motive. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1078 (9th Cir. 2006)); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In enforcing Utah's law, law enforcement personnel would certainly need to view suspect video or audiotape to determine whether it captures an "agricultural operation" and thus is prohibited. This assessment of content would not be limited to the "content-neutral elements of who is speaking … and when an event is occurring." *Reed*, 587 F.3d at 979. Thus, section 76-6-112 is content-based.

That section 76-6-112(2)(a) regulates the *manner* in which information about agricultural operations may be gathered (and thus disseminated), does not lessen its discriminatory nature. *See Berger v. City of Seattle*, 569 F.3d 1029, 1050-51 (9th Cir. 2009) (*en banc*) (rule regarding manner in which street performers may solicit was nonetheless content-based due to its prohibition on "communicating a particular set of messages."). As the *Berger* court explained, a "performer at the Seattle Center need not rely on a sign … to express his or her views on a political candidate; she can use her voice," but a solicitor is limited in the ways she may communicate her message. *Id.* at 1051. Here too, animal activists are limited in the manner (through audio and visual recording) by which they can communicate their "particular" message.

The State defends § 76-6-112 as punishing only trespass and conversion without regard to any particular expressive content. *See* Defs. Mem. in Support of Motion to Dismiss, Dkt. No. 112, at 11-12. But a similar argument was made and rejected by the Ninth Circuit in *Valle Del Sol Inc., v. Whiting*, 709 F.3d 808 (9th Cir. 2013), a First Amendment challenge to a provision of "Arizona's recent comprehensive immigration reform bill, S.B. 1070," prohibiting day laborer solicitation from a stopped car that is impeding traffic. *Id.* at 814-15, 819-20. The defendants argued that the law was content-neutral because it was enacted to ameliorate the traffic problems created when day-laborers congregate and solicit employment from passing vehicles. *Id.* at 820.

But while Arizona could certainly legislate to promote traffic safety, the "mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content." *Id.* at 820, *quoting ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006); *see also Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires"); *United States v. Eichman*, 496 U.S. 310, 315 (1990).

Section 76-6-112(2)(a) is not the only problematic provision of the statute; sections (2)(c) and (d) are impermissibly viewpoint-based as well. As shown in Part II.B, below, misrepresentations are protected by the First Amendment, but even if they are not, or if section 76-6-112 is interpreted to prohibit only those misrepresentations amounting to fraud, its viewpoint-based discrimination is still impermissible.

In *R.A.V.*, for example, the ordinance at issue criminalized "fighting words" that the speaker "knows or has reasonable grounds to know arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380-81. The Court made clear that even though "fighting words" are generally unprotected by the First Amendment, the Government may not choose to criminalize only a subset of unprotected speech using content- or viewpoint-based discrimination. *Id.* at 391-94. As the Supreme Court elaborated in *Virginia v. Black*, the Government may only make such distinctions within a category of speech that is generally unprotected when the distinction is drawn for the same reasons that the category of speech is unprotected as a general matter. 538 U.S. 343, 361-63 (2003). Thus, in *Black*, burning a cross with the intent to intimidate could be criminalized because the category of "true threats" is un-

protected precisely because of its intimidating nature, and burning a cross is simply one especially pernicious mode of intimidating speech. *Id.* at 363.

Section 76-6-112(2)(c) is more like *R.A.V.* than *Black*, in that it criminalizes a subset of misrepresentations made to gain employment with an agricultural production facility *with the intent to record sounds or images from the agricultural operation*. Illustrated simply, an animal rights protestor who misrepresents his past employment, and is hired at a facility with the purpose of exposing unlawful animal abuse, can be prosecuted. An otherwise "earnest employee" who lies about his resume simply to get a paying job, and then later decides to "document[] animal abuse or health and safety violations inside an agricultural facility through audio and video recordings," cannot be prosecuted under Section (2)(c). Defs. MSJ Br. at 21-22. (This rather obviously demonstrates that the supposed safety concerns cited in defense of Sections (2)(a), (c) and (d), Defs. MSJ Br. at 16-18, are not to be taken seriously.[2]) Unlike the statute in *Black*, such viewpoint discrimination cannot be justified by the reason fraud may be proscribed in the first place. Because section 76-6-112 does not single out a type of fraud that is particularly pernicious, *see Black*, 538 U.S. at 363, but rather proscribes misrepresentations distinguishable only in that they support a specific viewpoint, the law discriminates, and must be subjected to strict scrutiny.

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[2] *See id*. at 18 ("The Act encourages agricultural operations employees to focus on their primary job of food safety rather than recording images and sounds"); *id*. at 17 ("A worker whose attention is divided between the worker's assigned task and secret recoding activities is likely to be distracted, placing the animals at risk."); *id*. at 19 ("focusing on recording" endangers safety of all workers); *id*. at 16 (persons with "agenda other than proper animal husbandry may not follow proper biosecurity protocol").

Preventing worker distraction would be an especially odd goal of the Act given that the State also concedes that *passive* recording by "leaving a recording device on the agricultural operation" under 76-6-112(2)(a) would remain criminal for anyone, including an "earnest employee." *See* Defs. MSJ Br. at 22 n.231. So a whistleblowing employee would have to make their recordings *actively* in order to be exempt from prosecution under the Act.

II. Section 76-6-112 Criminalizes Protected Speech

Both the press and private individuals regularly employ undercover investigations to uncover public and private corruption or other bad dealing, exposing, among hundreds of other things, conditions in nursing homes, mental institutions, hospitals, and day care facilities; commercial dishonestly by medical providers, restaurants, auto repair business; and racial and other illegal discrimination in housing, employment, and elsewhere. *See* Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 746-47 (1999). Without question, this undercover reporting plays an important societal role, acting as a surrogate where the public has neither the time nor the access to observe or investigate wrongful conduct but nevertheless has an important interest in conduct affecting its health and safety. *See* Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL OF RS. J. 1145, 1153 (1996); Ben Depoorter, *Fair Trespass*, 111 COLUM. L REV. 1090, 1117-18 (2011); *see also* Lewis Bollard, *Ag-gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10975 (2012) (collecting cases describing the importance of undercover investigations).

Undercover investigations typically involve two central actions—obtaining access and video recording. The Utah legislature, at the behest of powerful agricultural interests, seeks to criminalize both aspects of the investigative process,[3] but both restrictions run afoul of the First Amendment.

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[3] *See also* Josh Loftin, *Filming on farms banned by proposed Utah law*, ASSOCIATED PRESS, Feb. 26, 2012, http://www.deseretnews.com/article/765554350/Filming-on-farms-banned-by-proposed-Utah-law.html; Cindy Galli and Randy Kreider, *'Ag Gag': More States Move to Ban Hidden Cameras on Farms*, ABC NEWS, Mar. 15, 2013, http://abcnews.go.com/Blotter/states-move-ban-hidden-cameras-farms/story?id=18738108;

A. Section 76-6-112(2)'s Prohibition on Audio and Video Recording Unacceptably Restrains Protected Speech

Prohibiting audio or visual recording of agricultural facilities' operations quells speech, not conduct. The State's only argument on this point is that section 76-6-112(2) protects property rights. Defs. MSJ Br. at 23 (76-6-112 is mere "regulation of pre-speech information gathering"). However, the Act does not regulate *access* to facilities but rather the communication of information from the facilities. Its prohibition is not limited to access obtained through trespass or other unlawful methods. Sections 76-6-112(2)(a), (c) and (d) prohibit audio and video recording done without permission of the facility's owner. These provisions serve only to silence a primary mode of conveying information about the operation of agricultural production facilities and to limit the public's ability to receive this information. As such, they directly target speech.

Creating a recording is "included with the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). The stages of speech relating to recordings are so intertwined as to be nearly inseparable, and the protection accorded them is even more apparent when, as in this case, the subject of recording is a matter of public interest. This is because videotaping unsafe conditions is indistinguishable from "commenting" and "speaking" on such conditions, and videotapes, like other statements, "'speak' for themselves." *Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663, 666 (D.R.I. 1995) (teacher's videotaping of school conditions protected by First Amendment); *see also Scott v. Harris*, 550 U.S. 372, 379 n.5 (2007) (videotape of police chase "speak[s] for itself"); *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011) (videotaping of public officials discharging their duties is protected by the First Amendment and this protection

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Richard A. Oppel Jr., *Taping of Farm Cruelty is Becoming the Crime*, THE NEW YORK TIMES, Apr. 6, 2013, http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html.

is "fundamental and virtually self-evident"); *ALDF v. Otter*, 118 F. Supp. 3d at 1205; *Demarest v. Athol/Orange Cmty. TV, Inc.*, 188 F. Supp. 2d 82, 92-95 (D. Mass. 2002) ("At base, plaintiffs had a constitutionally protected right to record matters of public interest" which ran contrary to a provision requiring all persons filmed to sign a release form); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (First Amendment right to record matters of public interest); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) (First Amendment right to videotape police conduct).

B. Section 76-6-112(2) Criminalizes Misrepresentations Protected by the First Amendment

Section 76-6-112(2)'s prohibitions on misrepresentation cannot even plausibly be framed as prohibitions on conduct, despite the State's attempt to cast them as such. *See, e.g.*, Defs. MSJ Br. at 2, 4. The law's prohibitions on misrepresentation are restrictions on pure speech.

Section 76-6-112(2) criminalizes two types of misrepresentation. Section 76-6-112(2)(b) punishes misrepresentation made in connection with obtaining access to an agricultural facility without regard for whether it causes actual injury or damage. Section 76-6-112(2)(c) punishes misrepresentation made to obtain employment "with the intent to record an image of, or sound from, the agricultural operation." The First Amendment unquestionably protects the right of investigators to use misrepresentation as a means to gain access to "agricultural facilities."

False statements that do not cause a "legally cognizable harm"—such as those that constitute defamation, fraud, or perjury—are fully protected speech. *United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012) (plurality); *id*. at 2453-56 (Breyer, J., joined by Kagan, J., concurring). "It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed." *United States v. Alvarez*, 617 F.3d 1198, 1203 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012). "The First Amendment is a value-free provision whose protection is not dependent on

the truth, popularity or social utility of the ideas and beliefs which are offered." *Meyer v. Grant*, 486 U.S. 414, 419 (1988) (internal quotation marks omitted). "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting John Stuart Mill, On Liberty 15 (Oxford: Blackwell 1947)).

Investigators' misrepresentations made to obtain access do not fall within the traditional categories of unprotected false statements—defamation, fraud, or perjury. Unprotected fraud requires more than a misrepresentation; it requires, among other things, materiality, proximate cause, reliance, and injury.[4] *Alvarez*, 132 S. Ct. at 2554; *see also Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991) (stating the elements of common law fraud in Utah as a false representation as to a material fact, made knowingly or recklessly, "for the purpose of inducing the other party to act upon it," which the other party reasonably relies on, not knowing it to be false, and was thereby induced to act and injured as a result). Sections 76-6-112(2)(b) and (c) seek to remove various elements of this test and criminalize misrepresentation itself. The First Amendment does not allow such a shortcut. *See Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1263 n.15 (N.D. Ala. 2013) ("[F]alsity must be coupled with some other element of culpability, such as an intent to injure or defraud another person," to lose First Amendment protec-

[4] Needless to say, harms resulting to an animal enterprise from the disclosure of its illegal conduct – animal abuse, violations of safety standards, etc. – are not cognizable as injury for the purposes of establishing that misrepresentations made to obtain access constitute unprotected fraud. *See, e.g.*, *Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1352 (7th Cir. 1995); *ALDF v. Otter*, 118 F. Supp. 3d at 1204 ("harm caused by the publication of [a] true story is not the type of direct material harm that *Alvarez* contemplates" (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988))); *see also* Alan K. Chen and Justin Marceau, *High-Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1494-95 (2015); *id*. at 1501-06 (same applies to reputational harms).

tion); *ALDF v. Otter*, 118 F. Supp. 3d at 1203 ("Here, however, the State has done nothing to show the lies it seeks to prohibit [with the misrepresentation provision of the Idaho ag-gag statute] cause any legally cognizable harm"); Alan K. Chen and Justin Marceau, *High-Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1452-53 (2015) ("Both the plurality and concurring decisions [in *Alvarez*] share the view that punishing 'falsity alone' is not permissible; instead, the government may only regulate false speech when there is some 'intent to injure,' or more precisely, some intent to cause a 'legally cognizable harm.'") ; *Alvarez*, 132 S. Ct. 2445-47 (plurality); *id*. at 2453-56 (Breyer, J., joined by Kagan, J., concurring).

Misrepresentation by undercover investigators has been deemed a newsgathering exercise, *see Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 819 (9th Cir. 2002), that is subject to First Amendment protections. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated"). Such protection extends to the "unconventional news-gatherer [whose First Amendment rights] are equal to those of an employee of a mainstream television station." *Fordyce v. City of Seattle*, 840 F. Supp. 784, 791 (W.D. Wash. 1993) (citing *Branzburg*, 408 U.S. at 704 and *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977)), *rev'd in part on other grds*, 55 F.3d 436 (9th Cir. 1995)).

In *Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995), the seminal case on the issue of undercover investigators' use of misrepresentation to gain access to newsworthy material, reporters sent undercover patients to obtain service at an ophthalmologist's offices and secretly videotaped employees giving exams. *Id.* at 1348. The reporters told the ophthalmologist that they would not cast him in a negative light. *Id*. Judge Posner, writing for the Seventh Circuit, affirmed the dismissal of the ophthalmologist's fraud claim, stating that the re-

porters' actions to expose misconduct were not fraudulent. *Id*. at 1352. Following *Desnick*, courts have quite frequently determined that investigators' misrepresentations in pursuit of a news story generally fall short of fraudulent conduct. *See Pitts Sales v. King World Prods*., No. 04-cv-60664, 2005 U.S. Dist. LEXIS 42197, at *14 (S.D. Fla. July 29, 2005), *see also Ouderkirk v. PETA*, No. 05-cv-10111, 2007 U.S. Dist. LEXIS 29451, at *65 (E.D. Mich. Mar. 29, 2007) ("[T]elevision shows….often conduct undercover investigations to reveal improper, unethical, or criminal behavior. Often, these investigations involve misrepresentations and deception by the investigators. The Court cannot conclude that an undercover investigation is "intolerable" in contemporary society."); *Med. Lab. Mgmt. Consultants*, 306 F.3d at 819 ("when a member of the print or broadcast press commits an intrusion in order to gather news, the public's interest in the news may mitigate the offensiveness of the intrusion."); *American Transmission, Inc. v. Channel 7 of Detroit, Inc*., 239 Mich. App. 695, 705-09 (Mich. Ct. App. 2000); *cf.* Ben Depoorter, *Fair Trespass*, 111 COLUM. L REV. 1090, 1123-26 (2011). Even in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), a case upon which the State relies, the court denied the plaintiff's fraud claim for failure to meet all of the elements of common law fraud. *Id*. at 514. Because misrepresentations in the context of undercover activities do not generally implicate fraudulent conduct, they fall well within the scope of First Amendment protection.

III. Section 76-6-112 Cannot Survive Strict Scrutiny

As a content- and viewpoint-based restriction on speech and expressive conduct, and as a restriction on protected speech and activity including audio and visual recording and making misrepresentations, section 76-6-112 can only stand if it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813

(2000). If a less restrictive alternative would serve the State's purpose, the legislature must use that alternative. Amici submit that the State has not, and cannot, make that showing.

When faced with laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content," the Supreme Court applies "the most exacting scrutiny." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Here, Defendants are unable to articulate a narrowly tailored and compelling government interest to support the law. As justification for Section 76-6-112's ban on certain types of expression, the State claims it is protecting against a variety of occupational and biological safety concerns. But section 76-6-112 is not narrowly tailored to achieve that interest because it includes no requirement that entry into a facility be gained by fraudulent or subversive means; speech by fully-qualified, legitimate employees who properly gain entry but intend to record operations is prohibited by section 76-6-112(2)(c). The State concedes that an "earnest employee, one who did not seek employment with intent" to record operations, is not prohibited by the Act from "documenting animal abuse ... through audio and video recordings," Defs. MSJ Br. at 21-22, which casts serious doubt on the sincerity of the State's asserted concerns about distracted workers. (Indeed, as noted above,[5] such would-be whistleblowers would have to make their recordings actively, as simply leaving a recording device in place for passive recording is flatly banned (so long as it is done without the business owner's consent) by section 76-6-112(2)(a).) Further, although recordings are uniquely powerful as tools for sharing information or ideas,[6] given the stated interest of deterring or preventing trespass, it is unclear why the legislature chose to exclude photography from the prohibition.

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[5] *See supra* note 2.

[6] That the power of a recording is unique can be attested to by the billion people who used the video site YouTube in a given month or who upload 100 hours of video footage every minute. Reuters, "YouTube says has 1 billion monthly active users," March 21, 2013, http://www.reuters.com/article/2013/03/21/us-youtube-users-idUSBRE92K03O20130321.

Moreover, other laws and regulations specifically targeting trespass and misrepresentation—including those already on the books—could be applied to fully accomplish the purported state interest without burdening speech.[7] Instead, section 76-6-112 is so broad that it effectively bars an entire medium of speech on a particular topic. As noted by the Supreme Court "[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.... The danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). This dangerous suppression of speech is apparent here and will have a long lasting impact on the ability to communicate as well as the public's right to know information relating to agricultural safety and worker and animal welfare. This court should enjoin the enforcement of section 76-6-112.

Respectfully submitted this 23d day of June, 2016,

/s/R. Shane Johnson
R. Shane Johnson (14217)
R. Shane Johnson, PLLC
75 E 400 S STE 201
Salt Lake City, UT 84111
Office: (801) 364-2222
Fax: (801) 364-4317
shane@utahdefense.com

Shayana Kadidal
pro hac vice application pending

[7] *Cf. ALDF v. Otter*, 118 F. Supp. 3d at 1207-09 (noting, in narrow tailoring analysis, that Idaho has failed to justify ag-gag statute by showing why fraud, defamation and trespass statutes do not adequately protect asserted interests of agricultural producers, at 1208; dismissing privacy interests given heavily-regulated nature of food production, at 1207; noting impact on whistleblowing and liberty to discuss matters of great public concern such as food safety and animal welfare, at 1208-09; and failure to show why counterspeech could not suffice to protect businesses from wrongful conduct, at 1209).

Center for Constitutional Rights
666 Broadway, Floor 7
New York, NY 10012
T: (212) 614-6438
F: (212) 614-6499
kadidal@ccrjustice.org