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

Matthew Liebman (California Bar No. 248861)
170 E. Cotati Ave., Cotati, CA 94931, mliebman@aldf.org

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

Paige M. Tomaselli (California Bar No. 237737)
303 Sacramento St., 2nd Floor, San Francisco, CA 94111, ptomaselli@centerforfoodsafety.org

Leslie A. Brueckner (California Bar No. 140968)
555 12th St., Suite 1230 Oakland, CA 94607, lbrueckner@publicjustice.net

Richard Alan Eppink (Idaho Bar No. 7503)
ACLU of Idaho Foundation, P.O. Box 1897, Boise, ID 83701, reppink@acluidaho.org

Maria Andrade, (Idaho Bar No. 6445)
3775 Cassia Street, Boise, ID 83705, mandrade@andradelegal.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, *et al.*, Plaintiffs, v. **C.L. "Butch" Otter, in his official capacity as Governor of Idaho, *et al.*,** Defendants.	Case No. 1:14-00104-BLW **PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY (DKT 63).**

The Ninth Circuit decision in *Arizona Dream Act Coalition v. Brewer*, No. 13-16248 (9th Cir. Jul. 7, 2014) confirms rather than undermines Plaintiffs' contention that even under rational

basis review there is a meaningful evaluation of the fit between the proffered rationales and the actual operation of the law in question.

Defendants have argued that "once plausible grounds are asserted [for a law] the inquiry is at an end." (Dkt. 12-1 at 14) (citation omitted). In *Arizona Dream Act*, the State proffered four objectively legitimate rationales in defense of the enactment of a law, Slip Op. at 22-25, but the Ninth Circuit examines each rationale and assesses the fit between the proffered state interest and the law in question. *Id.* This is exactly the sort of fact-based inquiry regarding the proper tailoring of the law that Plaintiffs have asserted is required in this case. The *Arizona Dream Act* case confirms that unless the legitimate government interests are uniquely related to the classification at issue, the law violates Equal Protection.

The *Arizona Dream Act* is entirely consistent with *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985). In *Cleburne*, although interests like reducing traffic and avoiding the dangers associated with constructing large housing projects on flood plains were legitimate government interests, because the State failed to meet its *factual* burden of demonstrating that these risks were more serious in the context of housing for the intellectually disabled than for others, for example, fraternities, the Supreme Court struck down the relevant law under rational basis. *Id.*; *id*. at 450 (noting that the City never supported its view that the distinction between the intellectually disabled and other high density housing was necessary).

In the *Arizona Dream Act* case, as in *Cleburne* and other animus cases, the proffered rationales are *actually evaluated*, and contrary to the cases relied on by the State, (Dkt 12-1 at 14), when animus is alleged, the law in question must be given "careful consideration." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans,* 517 U.S. 620, 633 (1996)). Such consideration requires, at the very least, that the State show not only that the law

would have passed without animus, but that there is an adequate fit between the law passed and the proffered justifications for the law. When, as in *American Dream Act*, the proffered government interests don't line-up with the practical effect of the law, or the legitimate government interests appear over-or under-inclusive in serving those interests, then the law fails rational basis review. Slip. Op. at 21-24 (carefully scrutinizing the fit between the classification and the proffered interests the law purportedly serves); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (the "classification itself" must be "rationally related to a legitimate governmental interest").

In short, just as in *American Dream Act*, the Defendants in this case must demonstrate why the stated goals – protecting property– are uniquely served by criminalizing whistle-blowers in just one industry but not others.[1] The failure of the State to make (or even promise) such a factual showing justifying the classification renders the law invalid under rational basis review.[2]

Dated: July 8, 2014

Respectfully submitted,

/s/ Justin Marceau

Professor Justin Marceau
Of Counsel, Animal Legal Defense Fund
University of Denver
Sturm College of Law

[1] "[N]othing opens the door to arbitrary action so effectively as to allow those officials to *pick and choose* only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

[2] The presence of animus as a motivating factor for a law triggers the sort of rational basis review –heightened review– that is unknown to the traditional rational basis cases relied on in the State's Motion to Dismiss. See*, e.g.,* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 889 (2012) ("while the Court has discerned the presence of unconstitutional animus on only a few occasions, when animus is found, it functions as a doctrinal silver bullet"); Dale Carpenter, *Windsor Products: Equal Protection from Animus* (April 14, 2014), Supreme Court Review (2014 Forthcoming); *available at*: http://ssrn.com/abstract=2424743.

2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

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

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

Paige M. Tomaselli
Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94111
(415) 826-2770
ptomaselli@centerforfoodsafety.org

Leslie A. Brueckner,
Public Justice
555 12th St., Suite 1230
Oakland, CA 94607
(501) 622-8150
lbrueckner@publicjustice.net

Richard Alan Eppink, ISB no. 7503
American Civil Liberties Union
of Idaho Foundation
P.O. Box 8791
Boise, ID 83701
(208) 344-9750, ext. 1202
reppink@acluidaho.org

Maria Andrade, ISB no. 6445
3775 Cassia Street
Boise, ID 83705
(208) 342-5100, ext. 102
mandrade@andradelegal.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of July, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Clay Smith clay.smith@ag.idaho.gov
Carl J. Withroe carl.withroe@ag.idaho.gov
OFFICE OF THE ATTORNEY GENERAL OF IDAHO

Thomas C. Perry tom.perry@gov.idaho.gov
Cally A. Younger cally.younger@gov.idaho.gov
OFFICE OF THE GOVERNOR OF IDAHO

Attorneys for Defendants

DATED this 8th day of July, 2014.

/s/ Justin Marceau