No. 15-35960

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, *et al.*,

Plaintiffs-Appellees,

v.

LAWRENCE WASDEN, in his official capacity as Attorney General of Idaho,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
Case No. 1:14-cv-00104-BLW

BRIEF OF *AMICUS CURIAE* PROFESSOR SUSANNAH W. POLLVOGT, SCHOLAR OF THE LAW OF UNCONSTITUTIONAL ANIMUS IN SUPPORT OF PLAINTIFF-APPELLEES REQUEST TO AFFIRM THE DISTRICT COURT'S RULING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *amicus* states that she is not a corporation that issues stock and has no parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No other individuals or entities made a monetary contribution to fund the preparation or submission of this brief.

I. INTEREST OF *AMICUS CURIAE*

Amicus curiae, Susannah W. Pollvogt, is a law professor who has extensively researched and written about the doctrine of unconstitutional animus. Plaintiffs and Defendants in this case offer different views of the doctrine, and *Amicus* has an interest in sharing her findings in the event they are helpful to the court in its deliberations.

II. SUMMARY OF ARGUMENT

The Fourteenth Amendment's Equal Protection Clause is designed to protect against an acknowledged flaw of our democracy: the tyranny of the majority.[1] In its original context, this meant protecting Black Americans and their political allies from the violent and persistent backlash that followed emancipation.[2] Legal measures enforcing the second-class status of Black Americans (Black Codes[3]) were popular among the electorate, requiring a constitutional

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1 *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 78-82 (1980); *see also* David H. Gans, *The Unitary Fourteenth Amendment*, 56 Emory L. J. 907, 909 (2007) (noting that both the due process and equal protection components of the Fourteenth Amendment "play a central role in protecting marginalized social groups from the tyranny of local majorities").

2 *See* Eugene Gressman, *An Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1326-29 (1952) (describing violence committed against emancipated slaves and their white sympathizers, and statutory and constitutional efforts to protect those groups).

3 *See id.* at 1325 (describing enactment of Black Codes following ratification of the Thirteenth Amendment).

mechanism that empowered the judiciary to protect electoral minorities from the punitive impulse sometimes enabled by majority rule. This culminated in the constitutional guarantees of the Fourteenth Amendment. [4] Thus, the Fourteenth Amendment creates a special role for the judiciary: to monitor the political process for misuse by the majority.[5]

The Fourteenth Amendment's impact on the institution of judicial review is manifest in the tiers-of-scrutiny framework that characterizes contemporary Equal Protection jurisprudence. Under this framework, the default standard is rational basis review.[6] This standard presumes the constitutionality of legislative enactments and expresses deference to the legislative branches, in accordance with separation-of-powers principles.[7] However, where a law discriminates against a suspect or quasi-suspect class, the presumption of constitutionality no longer applies—rather, reliance on such classifications is presumed to reflect prejudice or

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4 *See id.* at 1329.

5 *See* Ely at 8 (describing special role of the judiciary with respect to preventing tyrannies of the majority); *see also* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 717-18 (1985) (describing role of *Carolene Products* decision's interpretation of the Equal Protection Clause as reviving the legitimacy of judicial review).

6 *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 896 (2012).

7 *See id.* at 894.

antipathy toward the targeted group.[8] Accordingly, in such cases, the Court applies a heightened level of judicial scrutiny.

But the presumption of constitutionality that attends enactments targeting non-suspect groups can be challenged on a case-by-case basis;[9] this is where the doctrine of unconstitutional animus comes into play. Indeed, the doctrine of unconstitutional animus may be thought of as the primary vehicle for identifying invidious discrimination in cases that do not involve a suspect or quasi-suspect classification.[10] In these cases, once there is a suspicion that animus is afoot, the presumption of constitutionality is called into question, and the Supreme Court

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8 *See Schuette v. BAMN*, 134 S. Ct. 1623, 1668 (2014) ("[W]hile ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups.") (discussing *United States v. Carolene Products*, 304 U.S. 144 (1938)); *see also* Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. at 893-94 (2012) (noting that in certain cases, there is a presumptive concern about unfair prejudice, triggering the application of heightened scrutiny).

9 *See* Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. at 927.

10 *See id.* at 898 (describing animus as avenue for arguing equal protection claim in the absence of suspect or quasi-suspect classification, or fundamental right). As Professor Dale Carpenter has cogently explained:

> *Carolene Products* would correctly predict that the targets of animus will almost always be politically unpopular minorities. Yet the anti-animus doctrine does not specify, as would formal heightened scrutiny, certain classifications that are subjected to special judicial scrutiny. It doesn't favor certain vulnerable classes. All citizens are protected from animus-based government action.

Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183, 186 (2013).

applies a distinctly heightened form of rational basis review to assure itself that the challenged discrimination is not invidious in nature.

In the instant case there is sufficient evidence of animus against animal rights activists to trigger application of heightened rational basis review. Specifically, the legislative history reveals that: (1) animal rights activists were the intended target of the challenged legislation and (2) negative attitudes, fears, and hostility toward this group were at least part of the motivation behind the law. This is, at a minimum, sufficient to trigger a more searching inquiry into whether the law serves general public purposes or instead constitutes discrimination for its own sake, something the Constitution does not permit.[11]

In applying heightened rational basis review to Idaho's Ag-Gag Law, it is apparent that the State cannot provide a credible, non-discriminatory reason to single out animal rights activists for enhanced criminal liability and penalties where generally applicable laws already address the interests purportedly protected by the Law (protection against trespass and fraud).

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[11] *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (the Constitution does not permit discrimination for its own sake); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (laws must serve some purpose independent of discrimination itself); *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (A "purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.").

III. ARGUMENT

"Animus" was originally defined as "a bare congressional desire to harm a politically unpopular group."[12] But there is more to animus doctrine than is encompassed by this concise description. Careful review of the totality of the Supreme Court's animus jurisprudence reveals three basic features of animus analysis. First, that a finding of animus may be premised on much milder mindsets than a "desire to harm," including fear,[13] private bias,[14] moral disapproval,[15] or mere negative attitudes.[16] Further, these mindsets need not be held by legislators or other government actors; it is also impermissible for government actors to enact legislation in response to negative attitudes, etc. held by community members. Second, there are various forms of evidence that suffice to prove the presence of animus, from legislative history to reference to community attitudes to an inference drawn from the structure of a law. Third, where there is *some* evidence of animus, this triggers a heightened form of rational basis review that shifts the burden of proof

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12 *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

13 *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

14 *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1989).

15 *See Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

16 *See Cleburne*, 473 U.S. at 448.

to the government and requires governmental justifications to have a stronger grounding in logic.[17]

IV. THE SUPREME COURT'S ANIMUS JURISPRUDENCE

The Court's animus jurisprudence is confined to a handful of cases. Among these, the most complete analysis is offered in *United States Department of Agriculture v. Moreno* and *City of Cleburne v. Cleburne Living Center*. These two cases address the definition of animus, what counts as evidence of animus, and the relationship between animus and rational basis review.[18] Another significant animus decision— *Palmore v. Sidoti*—reiterates that the private bias at issue in animus

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[17] Defendant-Appellant contends that "[s]ettled rational basis standards apply" to review of Idaho's Ag-Gag law. *See* Brf. of App. At 35. However, the only thing that is "settled" about rational basis review is that it has at least two incarnations: its deferential form and its heightened form. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev 1 (1972); Robert C. Farrell, *The Two Versions of Rational Basis Review and Same-Sex Relationships*, 86 Wash. L. Rev. 281 (2011); ."); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (9th Cir. 2014) ("There are . . . two versions of the rational basis test—traditional rational basis review and a more rigorous rational basis standard sometime referred to as rational basis with a bite.").

[18] *See* Pollvogt, *Unconstitutional Animus*, at 924 (identifying three unanswered questions about the doctrine of animus). Writing in 2012, Pollvogt initially concluded that the presence of animus obviated the need for application of rational basis review (*i.e.*, that animus operates as a "doctrinal silver bullet"). This is the apparent approach of *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013). However, reexamination of the Court's full animus precedent has led Pollvogt to the conclusion that the best understanding of these cases is that the presence of some evidence of animus triggers heightened rational basis review.

analysis need not emanate from a governmental actor; rather, impermissible animus can also be established where governmental actors respond to biases held by private actors (*e.g.*, society at large or constituents). Finally, the Court's decisions in *Romer* and *Windsor* represent the most recent, but not necessarily the most helpful or complete, examples of animus analysis. In particular, these cases focused less on direct evidence of animus and more on a structural analysis from which an inference of animus can be drawn. Such an analysis is unnecessary in the instant case, where direct evidence of animus is abundant in the record.

A. *Moreno* and *Cleburne*

Moreno and *Cleburne* represent the origin and the heart of animus doctrine. And yet Defendant-Appellant discussed neither in his opening brief.[19] This is a significant oversight as these two cases present the clearest and most comprehensive examples of animus analysis.

Moreno, the Court's first recognized animus case, set the pattern for the "one-two punch" of animus analysis: once the Court finds some evidence of private bias toward the group targeted by the challenged legislation, the Court applies a more searching form of rational basis review to make certain that the proffered

[19] *Moreno* is mentioned twice through discussion of other precedent (Brf. of App. At 44-45, n.8); *Cleburne* appears nowhere in the brief.

governmental justifications for the law are not mere pretext for invidious discrimination.

At issue in *Moreno* was an amendment to the Food Stamp Act of 1964 that sought to exclude from benefits those households containing any individuals not related to one another.[20] In so doing, the amendment "create[d] two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest."[21] But although the classification on its face drew distinctions based on the seemingly neutral criterion of relatedness, the legislative history behind the amendment revealed that at least some members of Congress were in fact specifically targeting "hippies" and "hippie communes" with the amendment.[22] Significantly, in analyzing the constitutionality of this discrimination, the Court addressed the actual target of the legislation—politically unpopular hippies—rather than the classification defined on the face of the law.[23]

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20 413 U.S. at 529.

21 *Id.*

22 *Id.* at 534.

23 *See Moreno*, 413 U.S. at 534; *see also* Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. at 901 (noting distinction between classification and actual target of amendment to Food Stamp Act).

In terms of defining animus, the *Moreno* Court famously described animus as "a bare congressional desire to harm a politically unpopular group."[24] But the legislative history cited by the Court evinces not so much a "desire to harm" as a simple intent to exclude the targeted group from certain governmental benefits. Thus, while Congress' motive was not particularly nefarious, this nonetheless represented impermissible discrimination for its own sake.[25]

In terms of evidence of animus, it was remarkably scant in *Moreno*—at least the scope of evidence relied upon by the Court:

> Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment . . . . The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose.[26]

Significantly, the Court did not require overwhelming evidence of animus or that the congressional body was unanimously motivated by anti-hippie bias in enacting the amendment. Rather, the Court discerned anti-hippie bias as a possible purpose of the law, and rejected that purpose as illegitimate.

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24 *Moreno*, 413 U.S. at 534.

25 *See id.* at 534-35 (A "purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.").

26 *Id.* at 534.

This then brings us to the relationship between animus and rational basis review. It is clear that animus itself is not a legitimate government interest. But is it possible for other government interests to save the law after a finding of animus? While theoretically possible, what we see the Court actually doing is ratcheting up the rational basis review standard and ultimately deciding that the government's other proffered justifications lack credibility in the face of the suspicion that the presence of animus arouses.[27]

This heightened form of rational basis review has distinct features that differentiate it from traditional rational basis review. Traditional rational basis review places the burden on the plaintiff to negative every conceivable governmental interest that might be served by the challenged legislation. The government need not come forward with any evidence in support of its proffered interests. Further, the Court is free to imagine—post hoc—possible government interests that might be served by the law. The law may be decidedly under-inclusive or over-inclusive; this is of no moment under traditional rational basis review.

Heightened rational basis review, by contrast, shifts the burden of proof to the government in that the government is required to demonstrate with evidence

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[27] *See Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("Where a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

that there are legitimate purposes that justify the law. Further, the Court will not engage in judicial speculation to provide legitimate interests. In addition, the government must be able to articulate some reason why discrimination against *this group* in particular serves the identified interests. Finally, under-inclusiveness and over-inclusiveness are of concern under the heightened rational basis review standard.

Heightened rational basis review is clearly the standard applied in *Moreno*. That the Court placed the burden of proof on the government is evinced by the fact that Court examined the actual congressional declaration of policy in looking for justifications for the discriminatory law.[28] It further looked to legislative history to discern the true purpose of the enactment.[29] Finally, the Court scrutinized only the purported interests offered by the government and did not engage in judicial speculation.[30] Rather, the Court looked to the actual "practical effect" of the amendment in assessing its validity.[31]

The Court also took seriously the under-inclusive and over-inclusive nature of the legislation. When the government offered fraud prevention as a

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28 *Moreno*, 413 U.S. at 533.

29 *Id.* at 534.

30 *Id.* at 535.

31 *Id.* at 537.

justification for the amendment, the Court discredited this claim because there was a lack of connection between the trait of relatedness and the propensity to commit fraud, such that the amendment would not capture those most likely to engage in fraud (*i.e.*, it was under-inclusive). Rather, the amendment's prohibitions would tend to capture many household units that were not predisposed to engage in fraud (*i.e.*, it was over-inclusive). Significantly, the Court took special notice of the existence of more general, non-discriminatory provisions in the Food Stamp Act that addressed the issue of fraud directly, concluding that "[t]he existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could have been intended to prevent these very same abuses."[32] Thus, where discriminatory statutory provisions are redundant of general statutory provisions, this raises a suspicion of animus.

The presence of some evidence of animus in *Moreno* was sufficient to trigger substantial judicial concern. This concern was manifested in the Court examining the actual interests offered by the government, the practical effect of the law, and the extent to which it was under-inclusive and/or over-inclusive.

A strikingly similar analysis was applied in *Cleburne*—a case that truly provides a treatise on both suspect classification analysis and the law of animus.[33]

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32 *Id.* at 536-37.

33 473 U.S. 432 (1985).

As in *Moreno*, the evidence of some private bias toward the targeted group triggered a distinctly heightened version of rational basis review.

In *Cleburne*, the Court reviewed two distinct but related forms of governmental action. The first was enactment of a city zoning regulation that required a special use permit for the operation of certain types of group homes, including "[h]ospitals for the insane or feeble-minded."[34] The plaintiff, Cleburne Living Center (CLC), had proposed to build a group home for persons with cognitive disabilities.[35] Per the zoning ordinance, CLC was required to obtain a special use permit, because the home was considered analogous to a hospital for the "feeble-minded." The second form of governmental action was the City Council's decision to deny that special use permit following a hearing on the request.[36] CLC challenged the zoning ordinance as facially invalid and the ordinance invalid as applied.[37] The Court took up the latter challenge.

Regarding the definition of animus, the Court clearly expanded it beyond the notion of a "congressional desire to harm." First, while the Court cited *Moreno* for the "desire to harm" language, the evidence the Court relied on in

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34 *Id.* at 436.

35 *Id.* at 435-36.

36 *Id.* at 437.

37 *Id.*

Cleburne was of "negative attitudes" toward and "fear" of those with cognitive disabilities. Second, the *Cleburne* decision made clear that the impermissible purpose need not be held by legislators or other government actors; rather, a law was based in unconstitutional animus where it reflected and enforced prejudices and fears held by the community at large. Here the Court cited *Palmore v. Sidoti* (discussed below) for a proposition central to the doctrine of animus: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." There was no suggestion that the City Council members themselves were biased against those with cognitive disabilities; rather, the concern was with private bias expressed by community members.

Under this understanding, the essence of animus is the improper harnessing of the public laws to reflect and enforce private bias toward a particular group of persons. As the *Cleburne* Court noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . . and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." [38] Thus, the prohibition against animus addresses the complex

[38] *Id.* at 448.

relationship between majority preferences and the government's enforcement of those preferences.

In terms of evidence of animus, the Court looked to the record of the City Council's deliberations on the special use permit. There it found that: "[T]he City Council's insistence on the permit rested on several factors," including "the negative attitude of the majority of property owners located within 200 feet of the Featherstone facility, as well as the fears of elderly residents of the neighborhood." Again, the presence of some evidence of private bias (not overwhelming evidence or evidence of unanimous negative attitudes) was sufficient to trigger concern.

It is also abundantly clear that the Court applied a heightened version of rational basis review in *Cleburne*. The Court placed the burden of justification on the government, looking to the text of the proceedings behind the decision and judging the government's justifications on the record: "[T]his record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherstone home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." The Court

required the City to "justif[y]" its discrimination—a dramatic departure from traditional rational basis review.[39]

Beyond placing the burden of proof on the government, the Court also demanded some articulable, affirmative connection between the trait defining the excluded group and the interests proffered. In this way, the Court focused on the under-inclusive nature of the government action in finding it invalid. In the face of the City's argument that excluding the Featherstone residents served interests in flood plain safety, residential density, and congestion of streets, asking why similar concerns did not prohibit group housing for other uses, including "a boarding house, nursing home, family dwelling, fraternity house, or dormitory." This is a classic under-inclusiveness analysis. The Court required the City to defend its decision to "singl[e] out" the Featherstone residents.

Thus, the lessons of *Moreno* and *Cleburne* are at least three in number. First, the term "animus" includes more than a bare desire to harm; it also encompasses negative attitudes and fears. Further, animus refers not only to negative attitudes held by governmental actors, but also by the constituents to whom government actors respond. Second, evidence of animus need not be overwhelming or unanimous. If some legislators or some constituents express negative attitudes

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[39] *Id.* at 450 (noting that the City "never justifies its apparent view that other people [besides the Featherstone residents] can live under such 'crowded' conditions when mentally retarded persons cannot").

toward the targeted group, this is enough to prick the presumption of constitutionality and trigger heightened rational basis review. And this is the third lesson. Although the Court has not explicitly acknowledged it as such, it is evident that the Court applies a more stringent version of rational basis review upon suspicion of animus.

B. *Palmore*

In *Palmore*, the Court took the unusual step of reviewing a family court custody order. The mother had initially been awarded custody, but when she later entered into an interracial relationship, the child's father petitioned for custody to be granted to him in light of these changed circumstances. The family court granted the father's request, concerned that the mother's relationship would subject the child to stigmatization.[40] Thus, the family court's order relied on a racial classification because "the outcome [of the matter] would have been different had petitioner married a Caucasian male of similar respectability."[41] In other words, race served to determine the allocation of legal rights.

Because the family court order relied on a race classification, the Supreme Court applied strict scrutiny in reviewing the constitutionality of the

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40 466 U.S. at 431.

41 *Id.* at 432.

family court's ruling.[42] In evaluating the sufficiency of the government's interest, the Court had little difficulty concluding that the broad goal of "granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[43] Further, the Court acknowledged that racial and ethnic prejudices would affect the experience of the child, and likely in a negative way.[44] If racial prejudice is the problem, then reliance on a race classification is not only narrowly tailored, but perfectly tailored, to address that problem. Hostility toward mixed-race couples was pervasive, and it was only by keeping the child out of such a relationship that the child could be shielded from those negative social effects. In other words, the use of racial classifications in this context arguably satisfied the strict scrutiny standard—the government had a compelling interest in preserving the best interests of the child, and taking custody away from the mother directly addressed that concern. But this superficial validity of the family court's decision was poisoned by its capitulation to private bias. On this point the Court famously stated,

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42 *Id.* at 432–33. The Court in *Palmore* articulated the strict scrutiny standard as requiring that the classification "be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Id.*

43 *Id.* at 433.

44 *See id.*

"Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[45]

It is significant that the family court expressed no negative views about interracial relationships, but merely noted that there were pervasive negative views about interracial relationships *in society in general*, such that being raised in such a situation would harm the child. Thus, the governmental actor in *Palmore* (*i.e.*, a family court judge) did not possess an impermissible objective mindset in any way, nor was there any allegation to this effect. Rather, the family court rationally and understandably was reacting to very real biases present in society. It was the family court's reliance on private bias, not the family court's own bias, which rendered the order removing custody unconstitutional. In this way, the reasoning in *Palmore* tends to support a view of animus as an impermissible objective function as opposed to an impermissible subjective mindset held by a governmental actor. Under this understanding of the doctrine, statements of private bias or negative attitudes are better understood as evidence of the presence of animus as opposed to constituting animus itself.

It bears noting that if animus were to be conceived of as a form of impermissible subjective intent, this would essentially equate it with the doctrine of

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45 *Id.*

discriminatory intent articulated in *Washington v. Davis*[46] and *Feeney v. Personnel Administrator*.[47] This would be improper and indeed nonsensical. The requirement of proving discriminatory intent adheres only where a law does not rely on facial classifications, but is instead claimed to have a discriminatory impact.[48] The doctrine of animus, by contrast, is invoked where a law does rely on facial classifications. The presence of classifications itself is sufficient to establish discriminatory intent[49]—the question then becomes whether that discrimination is invidious and therefore impermissible.

Thus, *Palmore* reinforces the principle that private bias and its kin are never legitimate governmental interests, and it further confirms the point made in *Cleburne* that the constitutionally impermissible purpose that triggers the animus analysis need not be seated in a governmental actor.

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46 426 U.S. 229 (1976).

47 442 U.S. 256 (1979)

48 *See Davis*, 426 U.S. at 242 (describing inquiry into discriminatory purpose as relevant where a law does not rely on facial classifications); *Feeney*, 442 U.S. at 272 (facially neutral laws unconstitutional only where there is a discriminatory purpose).

49 *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d. Ed. 2006), at 644 ("[T]here are two alternative ways of proving the existence of a classification: showing that it exists on the face of the law or demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose.").

C. *Romer* and *Windsor*

The Court's most recent animus decisions—*Romer v. Evans* and *United States v. Windsor*, which followed in *Romer's* footsteps—are arguably the least helpful in terms of understanding animus analysis.

Romer addressed the constitutionality of Colorado's Amendment 2, which sought to eliminate and prohibit future adoption of antidiscrimination protections for gays, lesbians, and bisexuals. The Court determined that the law was unconstitutional, concluding that the "unusual" nature of the law and its "sheer breadth" suggested that the law was "inexplicable by anything but animus toward the class it affects."[50] Thus, while *Romer* cited *Moreno* and *Cleburne*, it did not follow the same two-step analysis as was employed in those cases.[51] There are historical reasons for this departure that are beyond the scope of this brief. Suffice it to say that *Romer* did not follow the doctrinal pattern set in *Moreno* and *Cleburne*.

Justice Kennedy, the author of *Romer*, employed a similar approach to his analysis in *Windsor*, which held the Defense of Marriage Act (DOMA) unconstitutional. Although there was direct evidence of animus in the legislative history behind the DOMA, the *Windsor* decision focused on the "unusual" nature of

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50 517 U.S. at 632.

51 For a discussion of the manner in which the timing of *Romer* may have affected the reasoning in that case, *see* Susannah W. Pollvogt, *Forgetting Romer*, 65 Stanford L. Rev. Online 86 (2013).

the discrimination enacted by the statute and inferred the presence of animus on this basis.[52] Much to the chagrin of certain other Justices and commentators, Justice Kennedy never announced the applicable level of scrutiny for the case. This stands in contrast to *Moreno* and *Cleburne*, both of which purported to apply rational basis review, while clearly applying a heightened version of that standard.

V. IN THE INSTANT CASE, THERE IS SUFFICIENT EVIDENCE OF ANIMUS TO DEMAND THE APPLICATION OF HEIGHTENED RATIONAL BASIS REVIEW

The legislative history in the instant case goes well beyond what is required by *Moreno* and *Cleburne* in terms of the types of statements that trigger, at a minimum, heightened rational basis review. It is apparent that proponents of Idaho's Ag-Gag Law (1) intended to target animal rights activists and (2) bore intensely negative attitudes toward those activists. As documented in the record, proponents of the law were concerned with "extreme activists" [ER 4], "extremist groups" [ER 305], "vigilante operation[s]" [ER 5], "anti-agriculture activists" [ER 305], "radical groups" [ER 5] and "farm terrorists" [ER 5]. The Idaho Law was in no uncertain terms aimed at criminalizing and silencing this specific group of activists. This is significant in light of Defendant's claim that the Idaho Law does not explicitly target animal rights activists on its face. The situation

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[52] 133 S. Ct. at 2692.

presented here strongly parallels the facts of *Moreno*, where the challenged law on its face distinguished on the seemingly neutral characteristic of relatedness, but the legislative history revealed that the true target of the law was so-called "hippies."[53]

Further, statements in the legislative history make it clear that proponents of the law viewed animal rights activists extremely negatively, as a form of internal enemy with which the agricultural industry is at war. Proponents compared activists to war-time enemies as well as terrorists. They attributed to animal rights activists malicious, destructive motives. All this goes to prove that the Law's proponents targeted a specific group—animal rights activists—and did so because of intensely negative attitudes toward the members of that group.

Because there is evidence suggesting animus is afoot, it is appropriate for this Court to apply a heightened form of rational basis review. As discussed above, under heightened rational basis review, the state bears the burden of proving that there is some affirmative connection between its purported interests and the trait defining the targeted group. In contrast to deferential rational basis review, significant under- and over-inclusiveness are fatal under this standard.

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53 *See Moreno*, 413 U.S. at 534; *see also* Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. at 901 (noting distinction between classification and actual target of amendment to Food Stamp Act).

Here, the state offers that the law facilitates consensual employment and protects property interests. In a strong parallel to *Moreno,* these are interests that are already protected by laws of general application, giving lie to the claim that these interests require discriminatory legislation to be effectuated. Further, similar to *Cleburne*, these are interests that could be affected by any number of groups, and yet the proponents of the law were clearly preoccupied by animal rights activists alone.

It is apparent from the record that agricultural producers and their advocates in the legislature feel threatened by animal rights activists. They recognize that public exposure of certain agricultural practices can alienate their customers. They perceive that their economic well-being is in danger due to this unfavorable public exposure of agricultural practices.

While these concerns may be very real, equal protection principles do not permit harnessing of the public laws to criminalize, marginalize, and silence one's political enemies.

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VI. CONCLUSION

For the foregoing reasons, *Amicus Curiae* suggests that this court conclude that the record presented here contains sufficient evidence of animus to trigger heightened rational basis review—a level of scrutiny the Idaho Ag-Gag Law cannot withstand, per the arguments of Plaintiffs.

Respectfully submitted this 24th day of June 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 29(d) and FRAP 32(a)(7)(B) because it contains 6,277 words, excluding the parts of the brief exempted by FRAP(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 24, 2016.

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