NO. 15-35960

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, et al.
Plaintiffs-Appellees

v.

LAWRENCE G. WASDEN, in his official capacity as the
Attorney General of the State of Idaho

Defendant-Appellant

On Appeal from the United States District Court
For the District of Idaho
District Court Case No. 1:14-cv-00104-BLW
The Honorable B. Lynn Winmill, Judge

AMICUS CURAE BRIEF OF THE IDAHO BUILDING TRADES COUNCIL and THE IDAHO AFL-CIO, IN SUPPORT OF APPELLEE AND FOR AFFIRMANCE

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The Idaho Building Trades Council and the Idaho AFL-CIO submit this brief in opposition to Defendant's appeal of the District Court's Order granting Plaintiff's Motion for Summary Judgment.

No party, party's counsel or any other person other than amicus curiae contributed any money intended to fund the preparation and submission of this brief.

All parties have consented to the filing of this brief amicus curiae.

STATEMENT OF INTEREST

The Idaho Building Trades Council and the Idaho AFL-CIO represent the interest of Idaho workers. The Idaho Building Trades Council is comprised of labor unions in the construction industry whose mission is to develop and deploy the safest, most highly skilled and productive skilled craft workforce found anywhere in the world, while establishing and protecting wage and benefit standards. The Idaho AFL-CIO is the umbrella federation for Idaho unions, with 89 locals representing over eleven thousand workers. Idaho AFL-CIO member unions include those in the building trades, as well as those in other impacted industries such as production, maintenance and transportation. The Building Trades Council and the Idaho AFL-CIO advocate for worker safety and the rights of workers to organize on the job. They want to ensure

that all people who work receive the rewards of their work—decent paychecks and benefits, safe jobs, respect and fair treatment.

The Idaho Building Trades Council and the Idaho AFL-CIO state pursuant to Federal Rule of Appellate Procedure 26.1 that they are not corporations and have no stock.

SUMMARY OF ARGUMENT

In 2015, the Idaho legislature passed a law prohibiting "Interference with Agricultural Production." Idaho Code § 18-7042. Violation is a criminal offense which could result in a year in jail, a $5,000 fine and double restitution. This law directly interferes with rights created in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.* (2010). The Idaho Building and Construction Trades Council and Idaho AFL-CIO assert that the statute is preempted by the Supremacy Clause of the U.S. Constitution, U.S. Const., art. VI, cl. 2, and the NLRA.

Idaho Code § 18-7042 states, in relevant part:

> (1) A person commits the crime of interference with agricultural production if the person knowingly:
>
> > (c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;

(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or

(2) For purposes of this section:

(a) "Agricultural production" means activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses and includes without limitation:

(i) Construction, expansion, use, maintenance and repair of an agricultural production facility;

(ii) Preparing land for agricultural production;

(vi) Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities;

(b) "Agricultural production facility" means any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production.

(3) A person found guilty of committing the crime of interference with agricultural production shall be guilty of a misdemeanor and shall be punished by a term of imprisonment of not more than one (1) year or by a fine not in excess of five thousand dollars ($ 5,000), or by both such fine and imprisonment.

(4) In addition to any other penalty imposed for a violation of this section, the court shall require any person convicted,

> found guilty or who pleads guilty to a violation of this section to make restitution to the victim of the offense in accordance with the terms of section 19-5304, Idaho Code. Provided however, that such award shall be in an amount equal to twice the value of the damage resulting from the violation of this section.

The Idaho AFL-CIO represents workers in numerous industries, including agricultural production. The Idaho Building Trades Council represents workers in the construction industry, many of whom will be employed in the construction of agricultural production facilities. The definition of "agricultural production" is expansive, and could include everything from paper mills to school cafeterias. This law impacts a great number of workers, many of whom may not even be aware that they are working in "agricultural production" as defined by Idaho Code § 18-7042(2).

I. Idaho Code § 18-7042 is Preempted by the National Labor Relations Act.

The cornerstone of the National Labor Relations Act is Section 7, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

The Supreme Court held in *Golden State Transit Corp. v. City of Los Angeles* ("*Golden State II*"), 493 U.S. 103, 108 (1989), that the NLRA, 29 U.S.C. § 141 et seq., creates rights in labor and management that are protected against governmental interference. In so holding, the Court rejected the defendant city's argument that the NLRA does not secure rights against the state because the duties of the state are not expressly set forth in the text of the statute, explaining that the NLRA "creates rights in labor and management both against one another and against the State." *Id*. at 109 (quoting Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b): "It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ."). Thus, the Court concluded in *Golden State II* that the NLRA "confers certain rights 'generally on employees and not merely as against the employer.'" Id. (citing *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 545 (1945)).

The NLRA contains no statutory preemption provision. The Supreme Court has explained, however, that Congress implicitly mandated preemption as necessary to implement federal labor policy. *Garmon* preemption, see *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's

interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles* ("*Golden State I*"), 475 U.S. 608, 613 (1986). To this end, *Garmon* preemption forbids states to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986). Idaho Code § 18-7042 prohibits activity protected by the NLRA.

A. Idaho Code § 18-7042 Prohibits Salting

Section 1(c) of Idaho Code § 18-7042 criminalizes activity that is protected by the NLRA. Specifically, it prohibits "salting." "Salting a job" is obtaining employment with a non-union employer and then organizing its employees for the union. *Tualatin Elec. v. NLRB*, 84 F.3d 1202 (9th Cir. 1996) fn. 1.

Because access to worksites can be denied to union organizers, unions have turned in recent years to salting. This tactic is more commonly used in the construction trades where work is intermittent and where a sustained organizing effort would be difficult. Salting frequently involves misrepresentation on an employment application, as identifying oneself as a union organizer would likely not result in an offer of employment. Salting is not only legal but is protected activity under the National Labor Relations Act. *NLRB v. Town &*

Country Elec., 516 U.S. 85, 96, 116 S.Ct. 450, 133 L.Ed. 2d 371 (1995). Idaho Code § 18-7042(1)(c) prohibits misrepresentation in obtaining employment with the intent to cause harm.

Labor disputes can, and do, result in economic harm. While salting itself can result in economic harm when salted workers strategically choose a time to leave the worksite, more generally a strike is the ultimate tool that can be utilized in resolving such disputes, and its purpose is to put economic pressure on the employer. Thus, protected activity would be prohibited, indeed criminal, conduct pursuant to Idaho Code § 18-7042 and a worker could be jailed and ordered to pay double restitution for exercising rights that are protected by the NLRA.

The NLRA protects the right of worker to engage in concerted activity for the purpose of mutual aid and protection. 29 U.S.C. § 157. In addition to salting, this includes activity to document potential violations of employee rights or activity to document working conditions, including safety conditions, which activity is now prohibited by Idaho Code § 18-7042(1)(d).

B. Organizing, Including Salting, is Activity Protected by the NLRA.

Ordinary union organizing activity is itself specifically protected by the NLRA. Employer restrictions on union solicitation during nonworking time in nonworking areas are presumptively invalid under the Act. *NLRB v. Town &*

Country Elec., 516 U.S. 85 at 96, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995). This is true even if a company perceives those protected activities as disloyal. After all, the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity. *Id.*

Obtaining employment in agricultural production by misrepresentation is prohibited by Idaho Code § 18-7042(1)(c). However, a salt is allowed to misrepresent his or her status to get a job. *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110 (7th Cir. 2002). Failure to disclose, or misrepresent, union status or unionizing objective is not material to any legitimate hiring decision, because, as *Town & Country* held, an employer cannot turn down a job applicant just because he or she is a salt or other type of union organizer or supporter. As the Seventh Circuit explained in relation to another state statute which sought to prohibit misrepresentation in employment applications:

> Hartman points to an Indiana statute that makes it a crime for a person to "knowingly or intentionally make[] a false or misleading written statement with intent to obtain . . . employment," Ind. Code § 35-43-5-3(a)(2), an apt description of Starnes's job application. But if interpreted to entitle an employer to turn down a job application on the basis of a lie about salt status, the statute would be preempted by the National Labor Relations Act because it would interfere with union organizing activity without any justification consistent with the Act. As we have said, a lie related solely to one's union affiliation or unionizing intentions rather than

> to one's fitness for the job cannot, consistent with the Act as it was interpreted in Town & Country, be material to the hiring decision. (The Indiana statute contains no requirement of proving materiality.) The only purpose of criminalizing such a lie could be to discourage salting, an activity protected by the Act.

Hartman, supra, at 1113.

Where, as here, state law interferes with the exercise of rights protected by Section 7 of the NLRA, there is an actual conflict, and the law is preempted by direct operation of the Supremacy Clause. See *Garmon*, 359 U.S. at 244 ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield"); see also id. at 239 ("Obvious conflict, actual or potential, leads to easy judicial exclusion of state action"). Because efforts to organize a workplace are a form of concerted activity protected under Section 7, Idaho Code § 18-7042(1)(c) which prohibits obtaining employment by misrepresentation necessarily conflicts with the NLRA, and is therefore preempted.

C. Concerted Activity for Mutual Aid or Protection is Protected by the NLRA.

Employees who engage in concerted activity to improve working conditions, including reporting unsafe conditions and refusing to perform unsafe tasks, are protected by Section 7 of the NLRA. See *Morrison-Knudsen*

Co. v. NLRB, 358 F.2d 411 (9th Cir. 1966); *Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662 (2d Cir. 1966); *Babcock & Wilcox*, 255 N.L.R.B. 480 (1981). This includes action to document and inform other workers, or regulatory agencies, about safety violations. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) ("where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.") *Id* at 946. citing *Alleluia Cushion Co.*, 221 NLRB. 999, 1000 (1975) Indeed, any act of recording by a single employee that forms part of, or is undertaken in furtherance of, a course of group action constitutes concerted activity within the meaning of Sec. 7. *Whole Foods*, 363 NLRB 87, 89 (2015) fn. 9. Such information can be documented and communicated via visual or audio recording, both of which are now prohibited under Idaho Code. § 18-7042(1)(d). Photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015).

In *NLRB v. White Oak Manor*, 452 Fed. Appx. 374 (4th Cir. 2011) company policy prohibited the taking of photographs at the workplace. An employee was discharged for violating this policy by photographing other workers to document uneven enforcement of the company's dress code. The Court found the activity to be protected as the employer failed to establish that the employees actions were egregious enough to make her unfit for duty.

In *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012), three employees planned and recorded a meeting with a supervisor. They were then terminated for what the company called "egregious conduct." *Id* at 1249. The Court found that the employees were "proactively responding to what they reasonably and honestly believed to be an imminent unfair labor practice," and therefore engaged in protected activity by recording the conversation. *Id* at 1256. Although no company policy or law prohibited the recording, the Court stated:

> In *Opryland Hotel*, 323 N.L.R.B. 723, 723 n.3 (1997), the Board expressly refused to adopt a per se rule against the making of secret audio recordings. Like the Company here, the respondent company in Opryland Hotel had "no rule, prohibition, or practice against employees using or possessing tape recorders at work." Id. (citations omitted). "And, in the absence of such rule, practice, or prohibition," the Board refused to hold that "such possession or use constitutes malum in se."

Id at 1257.

Idaho Code § 18-7042(1)(d) seeks to criminalize activity that is not "malum in se" but prohibited only because it is perceived to be inconvenient for some employers. Idaho law does not prohibit the recording of communications if one party consents. Idaho Code § 18-6702. Under Idaho Code § 18-7042(1)(d), some concerted activity would be protected by the NLRA and some would be prohibited by Idaho law, based entirely on the industry in which the activity occurred. To further highlight the inequity of the new law, an employer would be allowed to engage in audio or visual recording, but the employee would be criminally prosecuted for recording the exact same thing, at the exact same time, at the exact same place. This offends the intent of the NLRA, which is to protect the rights of workers.

Idaho Code § 18-7042(1)(d) would subject a worker to criminal sanctions who documents an unsafe working condition. Agriculture and construction are among the most hazardous industries. The Idaho Department of Labor maintains records on fatal occupational injuries. In 2012 they reported 6 deaths in "natural resources, construction, and maintenance occupations." This category includes farming. In 2013, fifteen deaths were reported, and in 2014 there were fourteen fatal injuries.[1] Workers in these industries face unsafe

[1] http:/www.bls.gov/iff/oshwc/cfoi.

conditions and need to document those conditions to effectively report violations and increase workplace safety.

The Occupational Safety and Health Act protects worker from unsafe conditions and workers may initiate investigations by making anonymous complaints. 29 U.S.C. § 657(f)(1). Contacting OSHA, or threatening to contact OSHA, is concerted activity for the purpose of mutual aid and protection. *Systems With Reliability, Inc.*, 322 N.L.R.B. 757 (1996). It is an unfair labor practice under Section 8(a)(1) of the NLRA to retaliate against this protected activity. This includes filing a complaint or causing and investigation into unsafe working conditions and violations of OSHA. *American Poly Therm Co, Inc*. 298 N.L.R.B. 1057 (1990),citing *Monarch Water Systems, Inc*., 271 NLRB 558 (1984); *Daniel Construction Company, a Division of Daniel International Corporation*, 277 NLRB 795 (1985*); Meyers Industries (I)*, 268 NLRB 493 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986). Under Idaho Code § 18-7042, a worker who documents unsafe working conditions could be protected or prosecuted, depending entirely on the industry in which he or she works, an outcome directly in conflict with federal law.

The implications of Idaho Code § 18-7042 are profound, as it decidedly tips the balance of employer/employee relationships in favor of the employer.

The rights of agricultural and construction employees to organize and act in concert for mutual aid and protection will be impermissibly restricted.

II. The First Amendment Protects Workers

Plaintiffs and other amicus have addressed First Amendment issues raised by Idaho Code § 18-7042. The media play an important role in our democracy by investigating matters of public concern. This includes investigating conditions that affect workers. Upton Sinclair's *The Jungle* is probably best known for its expose of the health violations and unsanitary conditions of the meat packing industry. However, Sinclair's intent was to expose the exploitation of the workers and their miserable working conditions. Exploitation of workers continues to this day, as evidenced by recent exposes of conditions in the garment industry.

Unsafe conditions come to light only through the efforts of journalists, and workers, who are willing to come forward and document what happens behind factory gates. Idaho Code § 18-7042 would discourage workers from documenting working conditions by criminalizing the simple act of photographing an unsafe condition, such as a blocked fire exit or a hazardous construction trench. The worker can describe what he has seen or heard, but collecting the best evidence could land the worker in jail for up to a year. A picture should be worth a thousand words, not 365 days.

Plaintiffs have alleged harm to journalists who may be prosecuted for reporting on conditions in the agricultural industry. Members of the Idaho AFL-CIO and the Building Trades Council likewise risk prosecution should they engage in any kind of reporting, or assist others in reporting, about conditions in their workplace. Reporters and workers "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). The ability to report on working conditions in the agricultural industry is a matter of great public concern that should be protected, not restricted.

For decades, the labor movement has fought, often at great expense and even loss of life, to protect the rights of workers and to ensure that workers can do their jobs in a safe environment. Idaho Code § 18-7042 represents a giant step backwards and the Idaho Building Trades Council and the Idaho AFL-CIO join with Plaintiffs in asking the Court to uphold the District Court's decision.

Dated this 27th day of June, 2016.

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s/ Marty Durand

Attorneys for Idaho Building and Construction Trades Council and Idaho AFL-CIO

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a) FOR CASE NUMBER 15-35960

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 3348 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman.

s/ Marty Durand
Attorneys for Idaho Building and Construction Trades Council and Idaho AFL-CIO

June 27, 2016

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 by using the appellate CM/ECF system on June 27, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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