**No. 15-35960**

# United States Court of Appeals
## for the
# Ninth Circuit

ANIMAL LEGAL DEFENSE FUND; PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS INC.; AMERICAN CIVIL LIBERTIES UNION OF IDAHO; CENTER FOR FOOD SAFETY; FARM SANCTUARY; RIVER'S WISH ANIMAL SANCTUARY; WESTERN WATERSHEDS PROJECT; SANDPOINT VEGETARIANS; IDAHO CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT; IDAHO HISPANIC CAUCUS INSTITUTE FOR RESEARCH AND EDUCATION; COUNTERPUNCH; FARM FORWARD; WILL POTTER; JAMES MCWILLIAMS; MONTE HICKMAN; BLAIR KOCH; DANIEL HAUFF,

*Plaintiffs-Appellees,*

– v. –

LAWRENCE G. 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 (BOISE)
DISTRICT COURT CASE NO. 1:14-cv-00104-BLW

# BRIEF FOR *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, AMERICAN BOOKSELLERS FOR FREE EXPRESSION, AUTHORS GUILD, INC., FREEDOM TO READ FOUNDATION AND MEDIA COALITION FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

The Association of American Publishers, Inc. is a non-profit organization that has no parent corporation and issues no stock.

The American Booksellers for Free Expression is a not-for-profit trade association that has no parent corporation and issues no stock.

The Authors Guild, Inc. is a non-profit organization that has no parent corporation and issues no stock.

The Freedom to Read Foundation is a non-profit organization that has no parent corporation and issues no stock.

Media Coalition Foundation is a 501(c)(3) not-for-profit corporation that has no parent corporation and issues no stock.

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## INTEREST OF THE AMICI AND INTRODUCTION[1]

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The American Booksellers for Free Expression (ABFE), a division of the American Booksellers Association (ABA), is the bookseller's voice in the fight against censorship. ABFE's mission is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABA is comprised of more than 1,700 locally owned and operated independent bookstores nationwide.

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[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29, Amici state that this brief was not authored in whole or in part by counsel for any party, and no party, counsel for any party, or person other than Amici or its counsel made a financial contribution to the preparation or submission of this brief.

The Authors Guild, Inc. (the "Guild"), founded in 1912, is a national non-profit association of roughly 9,000 professional, published historians, novelists, biographers, and other writers of fiction and nonfiction. Guild members have won Pulitzer and Nobel Prizes, National Book Awards, and other accolades. It is the nation's oldest and largest professional organization for writers. The Guild works to promote the professional interests of authors in various areas, including copyright, freedom of expression, and taxation

The Freedom to Read Foundation (FTRF) is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation monitors potential threats to free expression and engages in litigation and education to protect free speech rights, as guaranteed by the First Amendment. As such, it is concerned by the issues raised by this case for the reasons set forth below.

This brief is motivated by Amici's concern that First Amendment rights be fully protected in the context of undercover investigative reporting, which frequently relies upon information-gathering techniques Idaho has proscribed in

Idaho Code § 18-7042. Amici are particularly concerned with subsection 7042(1)(d), which prohibits unauthorized audio or video recording of the operations of an agricultural production facility. While Amici endorse the entirety of the district court's reasoning in striking down section 18-7042 and Appellees' arguments to this Court, they focus primarily on two issues with significant bearing on the government's ability to criminalize undercover reporting: (1) whether, as the district court found, section 7042(1)(d) is a content- and viewpoint-based restriction on protected speech, and (2) whether the purported privacy interests section 18-7042 is assertedly needed to protect are compelling for purposes of strict scrutiny review. Amici demonstrate that section 7042(1)(d) is a content-and viewpoint-based restriction on protected speech that fails strict scrutiny because, *inter alia*, it does not advance any cognizable privacy interest, let alone a compelling one.

Far from a benign response to bona fide property crimes, section 18-7042 was designed to arm those who stand to benefit from suppressing the truth with a shield against those who seek to expose it. In the guise of a putative trespass law, section 18-7042 would shut down public discussion of factory farming practices by threatening critics of such practices with criminal sanctions for engaging in clandestine fact-gathering – a hallmark of modern investigative journalism. As the district court stated, section 18-7042 "seeks to limit and punish those who speak

out on topics relating to the agricultural industry, striking at the heart of important First Amendment values." *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015).

The avowed purpose – not merely an incidental effect – of section 18-7042 is to insulate the operations of Idaho agricultural facilities from "the court of public opinion" by curtailing the free flow of information. The "marketplace of ideas" theory that defines our constitutional free-speech framework is reflected in the precept that the remedy for disfavored speech ordinarily is "more speech, not enforced silence." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). Hence, although Idaho dairymen may wish to be spared the burden of publicly defending their practices, that is the burden imposed upon all of us in a society where the right to obtain and disseminate information concerning public issues is broadly protected.

Laws like this one that are intended to interfere with the gathering of newsworthy information warrant First Amendment scrutiny no less than restrictions on the actual dissemination of the information. Although activists, journalists, and others have no right to trespass on private property simply because their purpose in doing so is to engage in protected speech, the First Amendment bars the government from passing laws aimed at banning or burdening speech on

particular subjects or expressing particular viewpoints unless such laws can survive strict scrutiny. The targeting of those dedicated to exposing unsavory aspects of agricultural operations distinguishes section 18-7042 from generally applicable tort laws such as trespass, fraud, defamation, and conversion that can be enforced against journalists, activists, and other speakers in appropriate circumstances without violating the First Amendment. In contrast with these established torts, government-endorsed suppression of truthful speech on matters of public interest is an attack on the recognition that such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted).

The speech restrictions embodied in section 7042(1)(d) are constitutionally vulnerable because the privacy interests invoked to justify the law are illusory. Businesses do not have privacy rights, and no privacy rights of the *owners* of agricultural businesses or of their employees are implicated by section 7042(1)(d) because it does not apply to the kind of intimate personal matters protected by Idaho privacy law. The information-gathering section 7042(1)(d) prohibits also is not actionable under Idaho law because it is not offensive to a reasonable person as a matter of law.

The history of undercover reporting, including on issues such as industrial working conditions, is long and distinguished, as discussed in Section III below.

Such investigative journalism is now enhanced by technologies capable of capturing in vivid, indelible detail shockingly inhumane practices, the existence of which might otherwise be subject to dispute or indifference. The notion that socially valuable speech documenting such abhorrent conduct can and should be silenced to protect that conduct from public scrutiny cannot be reconciled with the First Amendment. Amici accordingly urge this Court to affirm the judgment below.

## ARGUMENT

### I. SECTION 18-7042(1)(D) IS A CONTENT-BASED REGULATION OF PROTECTED SPEECH

Idaho Code § 18-7042(1) makes it a crime to, *inter alia*, "[e]nter[] 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, make[] audio or video recordings of the conduct of an agricultural production facility's operations." On its face, this provision applies to both undercover journalists and whistleblowing employees. Because it expressly proscribes the creation of speech on a particular subject, with the goal of preventing secret recording of agricultural practices, section 18-7042(1)(d) is a content-based regulation of speech and is, accordingly, subject to strict scrutiny review.

### A. Section 18-7042(1)(d) Restricts Protected Speech

The district court held correctly that the act of unauthorized audio or video recording proscribed by section 18-7042(1)(d) is protected speech. *Otter*, 118 F. Supp. 3d at 1202. The reason such recording must be treated as protected speech and not as mere conduct, as Appellants contend, was well explained by the Seventh Circuit in *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012): "The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Id.* at 595. "Criminalizing all nonconsensual audio recording," the court stated, "necessarily limits the information that might later be published or broadcast . . . and thus burdens First Amendment rights." *Id.* at 597. "Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the recording." *Id.* at 596; *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 381 (2011) (arguing that because image capture "is an essential element in producing, and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication," attempting to dissect such communications into their constituent acts "is as inappropriate as maintaining that the purchase of

stationery or the application of ink to papers are 'acts' and therefore outside of the aegis of the First Amendment").

Accepting the principle that government can no more restrict the acts involved in producing speech than it can restrict its public dissemination, this Court in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051(9th Cir. 2010), rejected the argument that the act of tattooing could be treated as conduct distinct from the resulting tattoo, which unquestionably is pure expression. The Court held that "the tattoo *itself*, the *process of tattooing*, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." *Id.* at 1060 (emphasis in original). The Court concluded that because the tattooing process is "inextricably intertwined with the purely expressive product (the tattoo), [it] is itself entitled to full First Amendment protection." *Id.* at 1062; *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986) (noting that the exemption of "generally applicable" regulations from First Amendment scrutiny does not extend to rules that prohibit activity "intimately related to expressive conduct protected under the First Amendment").

The analysis is no different where the speech-creation process is mechanized. *See Alvarez*, 679 F.3d at 596; *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 378 (S.D.N.Y. 2015) ("While videotaping an event is not itself expressive activity, it is an essential step towards an expressive activity, at least

when performed by a professional journalist who intends, at the time of the recording, to disseminate the product of his work."). Thus, although the First Amendment may not protect automatic recording by bank security cameras, it does protect the secretly made recording of the operations of a dairy farm by an undercover journalist for the purpose of documenting unsanitary conditions, since in that case the recording is, by design, "inextricably intertwined" with the subsequent reporting. *Anderson*, 621 F.3d at 1062.

Section 7042(1)(d) squarely implicates the principle that lawmakers "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). For this reason, First Amendment scrutiny has been triggered by a special tax levied on ink and paper used by newspapers, *see Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983); by confiscating payments to criminals for speech about their crimes, *see Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); and by banning payments to federal civil service employees for speaking and writing engagements, *see United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995).

It is clear, in short, that section 18-7042(1)(d) restricts speech. As shown below, it is further clear that it does so in a content- and viewpoint-based manner.

### B. Section 18-7042 Is Content- and Viewpoint-Based and Therefore Subject to Strict Scrutiny

Strict scrutiny "requires the Government to prove that [a speech] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (citation omitted). Strict scrutiny applies "either when a law is content-based on its face or when the purpose and justification for the law are content based." *Id.* at 2228; *see also Sorrell*, 564 U.S. at 565 ("Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered" in determining whether it is content-based) (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) (if "the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment," it is content-based); *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006) ("'[T]he mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content' . . . if . . . the main purpose in enacting it was to suppress or exalt speech of a certain content." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994)).

In *Valle del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013), this Court held that a ban on day-labor solicitation that impeded traffic but said nothing about any other type of solicitation was content-based on its face. However, the Court further took note of the stated legislative purpose, namely, to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States," *id.* at 819, and it relied on "facts showing that the purpose of the day labor provisions was to suppress labor-solicitation speech" in rejecting the state's contention that the law was content-neutral. *Id.* at 820; *see also Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1378 (S.D. Fla. 2011), *appeal pending*, No. 12-14009-FF (11th Cir.) (finding that legislative history, in which legislators expressed disagreement with health practitioners' firearm safety message, reinforced conclusion that law prohibiting licensed health care practitioners from asking patients about firearm ownership was content-based); *Jamal v. Kane*, 105 F. Supp. 3d 448, 453, 457 (M.D. Pa. 2015) (rejecting state's argument that law authorizing civil suits against an "offender" for conduct that "perpetuates the continuing effect of the crime on the victim" was a limitation on behavior rather than a content-based regulation of speech where the law "was championed *primarily* as a device for suppressing offender speech").

Section 18-7042(1)(d) is content-based on its face, and the legislative history demonstrates that it is not just content-based but viewpoint-based in purpose. On

its face, it singles out recording of "the conduct of an agricultural production facility's operations" and does not address the unauthorized filming of any other subject matter on the premises of an agricultural production facility. Similarly, in *Indiana Civil Liberties Union Found., Inc. v. Indiana Sec'y of State*, No. 1:15-cv-01356-SEB-DML (S.D. Ind. Oct. 19, 2015), the court held that a state law making it a felony to "[t]ake a digital image or photograph of the voter's ballot while the voter is in a polling place . . . except to document and report to a precinct election officer, the county election board, or the election division a problem with the functioning of the voting system" or to "[d]istribute or share the image . . . using social media or by any other means" was content-based on its face because it defined which photographs were not allowed to be taken or shared according to their subject matter and purpose. *Id.* at 2. The law left voters "free . . . to take photographs of anything and everything other than her ballot while in the polling place." *Id.* at 7; *see also Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015), *appeal pending*, No. 15-2021 (1st Cir.) (striking down statute making it "unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted").

As in *Whiting*, moreover, the legislative history of section 7042 reveals a viewpoint-discriminatory purpose. As the district court pointed out, statements by members of both houses of the Idaho legislature unequivocally conveyed animus

toward animal rights activists, referring to them as "terrorists" seeking to expose Idaho dairymen and other farmers to "the court of public opinion." *See Otter*, 118 F. Supp. 3d at 1200. The court found that the legislative history "leads to the inevitable conclusion that the law's primary purpose" was "to suppress speech critical of the agricultural industry, and not protect private property as the State claims." *Id.* at 1206-07; *see also id.* at 1201 (finding that the intended effect of section 18-7042 was "to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment").

The conclusion that section 18-7042 is a viewpoint-based speech regulation – that is, a "more blatant" and "egregious form of content discrimination," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995) – accords with what now-Justice Elena Kagan has called the "primary, though unstated" object of First Amendment law: "the discovery of improper government motives." Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). As Kagan noted: "The key principle with respect to motive is that the government may not limit speech on grounds of mere disapproval, no matter whose or how widely shared." *Id.* at 430; *see also Police Dept. of City of Chicago v. Mosley*, 408 U.S.

92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (government "may not prohibit expression simply because it disagrees with its message"). Section 18-7042 as a whole, and section 7042(1)(d) in particular, is a blatant violation of this fundamental First Amendment principle.

Accordingly, section 7042(1)(d) is subject to strict scrutiny and thus "presumptively invalid." *Sorrell*, 564 U.S. at 571. For the reasons explained by the district court and those discussed below, Appellants cannot overcome this presumption.

## II. THERE IS NO COMPELLING STATE INTEREST IN PROTECTING THE PURPORTED PRIVACY OF AGRICULTURAL BUSINESS OPERATIONS

Among the reasons section 18-7042 fails strict scrutiny is that it is unnecessary: a variety of torts, including trespass, defamation, conversion, and fraud, already are available to the owners of agricultural production facilities to obtain redress for unauthorized entry onto their premises and any resulting physical, financial, or reputational harm. *See Otter*, 118 F. Supp. 3d at 1208. The law thus serves no compelling state interest. *See*, *e.g.*, *Johnson*, 491 U.S. at 410 (finding fact that Texas already had a statute prohibiting breaches of the peace

tended to confirm that the state "need not punish . . . flag desecration in order to keep the peace").

Even if the law did fill a meaningful gap in available legal remedies, the state does not have a compelling interest in criminalizing the type of intrusion covered by section 18-7042(1)(d). As an initial matter, laws proscribing the dissemination of truthful information must be justified by a state interest of the highest order, at least where the information is obtained lawfully. *See Smith v. Daily Mail Publ'g Co.*, 443 U. S. 97, 103 (1979) ("if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (applying *Daily Mail* standard). The Supreme Court has found even compelling privacy interests, such as the confidentiality of the name of a rape victim who is a minor, insufficient to justify restricting the dissemination of truthful, lawfully obtained information on a matter of public concern. *Florida Star*, 491 U.S. at 536.

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court held that application of federal and state wiretapping statutes to media disclosures of an intercepted conversation between school union officials concerning collective bargaining negotiations implicated "the core purposes of the First Amendment" because it "impose[d] sanctions on the publication of truthful information of public

concern." *Id.* at 533-34. Where the tape had been obtained lawfully by the defendants (even if they knew it had been intercepted illegally), *see id.* at 525, the Court found that "privacy concerns [gave] way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

The issue here is whether Idaho can avoid the *Florida Star/Bartnicki* line of cases by criminalizing the manner in which information concerning agricultural operations is obtained. The answer is that it cannot do so because the state's viewpoint-based targeting of particular speech – which distinguishes section 7042(d)(1) from the content-neutral, inarguably constitutional wiretapping statutes at issue in *Bartnicki* – does not survive strict scrutiny. This conclusion is rendered inescapable by the fact that the purported privacy interests Appellants invoke to justify the law have no substance.

Appellants contend that a "very important feature" of subsection 7042(1)(d) is that it applies "only on property that is closed to the public," Appellant Br. 29-30, and they insist that the owner of a facility "may have good reasons to keep its operations out of view of a camera." *Id.* at 33. They quote legislators' statements to the effect that protecting the "privacy of personal property" was a central purpose of the law. *See id.* at 48-49. The problem with this rationale is that privacy interests have no weight in this context. Indeed, section 7042(1)(d) does not apply to matters protected by the law of privacy at all; it is directed toward

surveillance of the *business operations of* agricultural production facilities, as to which there are no privacy rights. Corporations can protect trade secrets and other confidential business information, but they do not have privacy rights. *See Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 814 (9th Cir. 2002) ("Privacy is personal to individuals and does not encompass any corporate interest."); Restatement (Second) of Torts § 6521, cmt. c (1976) ("A corporation, partnership or unincorporated association has no personal right of privacy."); J. Thomas McCarthy, The Rights of Publicity and Privacy § 4:41 (2d ed. 2016) ("Neither a corporation nor any other form of business organization has a right of privacy or publicity.").

In *FCC v. AT&T Inc.*, 562 U.S. 397 (2011), the Supreme Court, addressing whether the Freedom of Information Act exemption for law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" applied to corporations, held that it did not, noting, *inter alia*, the understanding at the time the exemption was drafted that "the specific concept of 'personal privacy,' at least as a matter of common law, did not apply to corporations," *id.* at 406, and that AT&T had failed to identify "a single instance in which this Court or any other (aside from the Court of Appeals below)" had "expressly referred to a corporation's 'personal privacy.'" *Id.*

Even putting aside this fatal flaw, section 7042(1)(d) fails. The Idaho Supreme Court has held with respect to the intrusion on seclusion branch of the invasion of privacy tort that "the prying or intrusion into the plaintiff's private affairs must be of a type which is offensive to a reasonable person," *Hoskins v. Howard*, 971 P.2d 1135, 1141 (Nev. 1998), and it must involve matters of an intimate nature. *See Steele v. Spokesman-Review*, 61 P.3d 606, 611 (Idaho 2002) (stating that intrusion claims require "the invasion of something secret, secluded or private pertaining to the plaintiff"); *Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29, 33 (Idaho 2003) (stating that liability for intrusion claim must be based on "interference with the plaintiff's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns"); Restatement (Second) of Torts § 625B.

Because such private matters typically do not come into play in the conduct of a business, it is well recognized that there is "a reduced objective expectation of privacy in the workplace." *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1281 n.2 (Nev. 1995); *see also Med. Lab. Mgmt.*, 306 F.3d at 817 (referring to "limited privacy in the workplace"). Accordingly, courts considering intrusion on seclusion claims relating to the workplace generally have found for the plaintiffs "only if the challenged intrusions involved information or activities of a highly intimate nature," *Med. Lab. Mgmt.*, 30 F.

Supp. 2d 1182, 1188 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002), and the claims have failed "[w]here the intrusions have merely involved unwanted access to data or activities related to the workplace." *Id.* (citing cases).

In *Medical Laboratory Management* this Court held that where a secretly taped conversation with undercover television reporters "discussed Medical Lab's business operations, the pap smear testing industry, and Gordon's supposed plans to open her own laboratory," no reasonable expectation of privacy was implicated because the information was "at most, company confidential" and did not involve "private and personal affairs" of the lab owner. 306 F.3d at 814.

As noted, section 18-7042(1)(d) similarly is directed to business operations, not to the privacy interests of any individuals associated with agricultural production facilities. The fact that it applies to surveillance by employees, who are entitled to be on the premises, and that it does not proscribe oral or written accounts of a facility's operations, confirm the pretextual nature of the state's asserted privacy rationale and that the state's actual concern is with graphic, unimpeachable accuracy, not with any legitimate privacy interests.

Another roadblock section 7042(1)(d) encounters is the proposition that intrusions for the purpose of collecting newsworthy information generally are not "offensive to a reasonable person," *Hoskins*, 971 P.2d at 1141, and thus are not

actionable. As the Supreme Court of California has explained, in determining whether a reporter's alleged intrusion into private matters is "offensive,"

> courts must consider the extent to which the intrusion was . . . justified by the legitimate motive of gathering the news. Information-collecting techniques that may be highly offensive when done for socially unprotected reasons – for purposes of harassment, blackmail, or prurient curiosity, for example – may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.

*Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200 (1998). In *Deteresa v. Am. Broadcasting Co.*, 121 F.3d 460, 465 (9th Cir. 1997), this Court, applying California law, held that the "motives and objectives" of a reporter who surreptitiously recorded his conversation with the plaintiff in connection with a report on O.J. Simpson murder case weighed against an invasion of privacy claim. *See also Med. Lab. Mgmt.*, 306 F.3d at 819 ("any offensiveness of the alleged intrusion is mitigated by the public interest in the news gathered"); *Berosini*, 895 P.2d at 1282 ("[E]ven if Gesmundo was conspiring to put an end to the use of animals in entertainment, this is not the kind of motive that would be considered highly offensive to a reasonable person.").

In *Medical Laboratory Management*, the district court noted that the defendants "were reporting on potential laboratory errors in testing of pap smears, information that was clearly in the public interest because the results of the tests involve vital health issues." 30 F. Supp. 2d at 1190. As the district court in this

case pointed out, "an agricultural facility's operations that affect food and worker safety are not exclusively a private matter. Food and worker safety are matters of public concern." *Otter*, 118 F. Supp. 3d at 1202.

The following analysis of the *Food Lion* case, which involved hidden camera recording of food-handling practices at a chain supermarket by undercover television reporters, sets forth the proper assessment of the interplay of the First Amendment and privacy interests in this context:

> It is true that Food Lion was deceived and the Food Lion would not have invited the ABC employees in if Food Lion had known their identity, or if Food Lion had known that the activity was being recorded. . . . This was not an intrusion into confidential relationships. It was not an intrusion into a place of contemplation or peace. It was not an intrusion into actions involving intimacy. If there was trespass or fraud, it was technical. No palpable damage flowed directly from either. ABC's motivation, on the contrary, was laudable. ABC acted with "journalistic probable cause," relying on information furnished by numerous "whistleblowers' inside Food Lion that were complaining of the food preparation practices of the company. The story involved matters of the highest public concern. The only way to document the practices was through the use of hidden cameras. In this setting, the First Amendment should either be understood to preclude liability altogether, or to limit damages to those physical or financial harms that flowed directly and immediately from the technical trespass or fraud.

Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 Geo. Wash. L. Rev. 1097, 1130 (1999).

In sum, the privacy rationale for section 7042(1)(d) does not withstand scrutiny.

## III. SECTION 18-7042 CRIMINALIZES UNDERCOVER REPORTING

Louis D. Brandeis wrote over one hundred years ago that publicity "is justly commended as a remedy for social and industrial diseases." "Sunlight," he noted, "is said to be the best of disinfectants." Louis D. Brandeis, "What Publicity Can Do," Harper's Weekly, Dec. 20, 1913, at 10. Section 7042(1)(d), turning Brandeis' observation on its head, embodies the perverse premise that keeping private businesses safe from prying eyes is more important than making the public aware of animal cruelty, unsanitary food production, or unsafe work conditions. It facilitates state-sponsored censorship of matters of great public importance.

The complaint in this action details the courageous efforts of the plaintiffs to document and expose abhorrent conduct occurring behind the closed doors of agricultural production facilities and the salutary effects of such exposure in terms of regulatory intervention and voluntary reform. Such necessarily clandestine investigations are in keeping with the long history of undercover reporting in this country, a form of "muckraker" journalism that flourished in the late nineteenth and early twentieth centuries and continues to the present day. In 1888, for example, Eva Gay posed as a shirt factory worker and wrote a series of articles in the *St. Paul Globe* exposing the grim working conditions she experienced. Her

article "Song of the Shirt" carried the lead "Starvation Wages for Hard Work – Girls Terrorized by Their Taskmasters." *See* Undercover Reporting: Deception for Journalism's Sake: A Database, at *http://dlib.nyu.edu/undercover/ii-song-shirt-eva-gay-aka-eva-mcdonald-aka-eva-valesh-st-paul-globe* (visited Apr. 19, 2016) ("Undercover Reporting"). A similar series, by Nell Nelson, appeared the same year in the *Chicago Daily News*, *id.*, and in 1902 Bessie and Marie van Vorst "made the circuit as ostensible factory girls from the pickle factories of Pittsburgh to the shoe factories of Lynn, Massachusetts and on to the cotton mills of North Carolina," which they documented in a series of articles in *Everybody's Magazin*e that were published in book form the following year by Doubleday. *Id.*

Nelly Bly famously posed as a patient to write about conditions in mental institutions in the 1890s, *see* Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 Univ. Rich. L. Rev. 1185, 1190 (2000), and Upton Sinclair's landmark novel *The Jungle* (1906), which revealed unsanitary practices and harsh working conditions in the meatpacking industry, was the product of seven weeks of undercover work in the meatpacking plants of the Chicago stockyards. The book prompted President Theodore Roosevelt to order an investigation by his Labor Commissioner, the results of which, delivered to Congress, led to passage of the Meat Inspection Act and the Pure Food and Drug Act of 1906.

In the 1960s and 1970s secret filming was used to document, among other things, the operations of bookie parlors in St. Louis, Zimmerman, op. cit., at 1190 (citing James H. Dygert, *The Investigative Journalist: Folk Heroes of a New Era VIII* (1976)), and in the 1970s William Sherman of the *New York Daily News* won a Pulitzer Prize for reporting conducted while posing as a patient to expose Medicaid fraud. *See id.* at 1190 n.21.

Going to a greater deceptive extreme, journalist John Howard Griffin, a white man, used medication to darken his skin in order to pass himself off as black in the Deep South in the 1950s, as described in his book *Black Like Me* (1962). "How else except by becoming a Negro could a white man hope to learn the truth?" he wrote. Barbara Ehrenreich's 2001 book *Nickel and Dimed* documented her experiences working "undercover" as an unskilled worker in minimum wage jobs across the country.

These serious works of investigative print journalism based on surreptitious reporting are akin to the technology-enabled surveillance utilized by plaintiffs in this case and by the reporters in several of the cases discussed above. All used deception or misrepresentation of some kind to document conditions behind the closed doors of private businesses in order to focus public attention on pressing social problems. Section 18-7042 targets both the use of deception (misrepresentation) to gain access to agricultural production facilities – an age-old

investigative technique – and the most accurate means of documenting what occurs there. If section 18-7042 is upheld, any number of other industries whose abuses make them the target of secret investigations by journalists or activists or whistleblowing employees could seek similar legislative protection. Indeed, a law recently enacted in North Carolina, N.C. Gen. Stat. § 99A-2 ("Recovery of damages for exceeding the scope of authorized access to property"), now being challenged on First Amendment grounds, *see People for the Ethical Treatment of Animals v. Cooper*, Civil Action No. 1:16-cv-25 (M.D.N.C. filed Jan. 13, 2016), began as a similar "ag-gag" law but was subsequently broadened to apply to all types of businesses. It, like section 18-7042, is being defended as protection against interference with an employer's privacy interests. *See* Def's Mem. of Law To Supp. Mot. to Dismiss, *People for the Ethical Treatment of Animals v. Cooper*, Civil Action No. 1:16-cv-25, ECF No. 31 (M.D.N.C. Apr. 4, 2016) at 2.

In *Thornhill v. Alabama*, the Supreme Court stated that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern, without previous restraint or fear of subsequent punishment." 310 U.S. 88, 101-02 (1940). The Court held that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102. In terms relevant to section 18-7042, the Court further stated:

> It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

*Id.* at 103. A quarter century later, the Supreme Court articulated the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). These principles dictate that informed discussion of agricultural production practices and their impact on the public welfare, unhindered by viewpoint-based legal roadblocks, must override the misplaced assertion of privacy interests on behalf of businesses that have a direct effect on public health and that, with the State's support, are seeking to evade public scrutiny.

## CONCLUSION

For the foregoing reasons, Amici submit that the judgment of the district court should be affirmed.

June 24, 2016

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the rules of the Court, Amici Curiae are not aware of any related cases pending in this Court which arise out of the same case in the district court.

June 24, 2016

*/s/R. Bruce Rich*
R. Bruce Rich

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

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 Microsoft® Word 2010, Times New Roman, 14 point.

*s/ Jonathan Bloom*
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Dated: June 24, 2016

## CERTIFICATE OF SERVICE

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

June 24, 2016

*/s/R. Bruce Rich*
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