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
State 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* GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Government Accountability Project submits the following identification of corporate parents, subsidiaries and affiliates: NONE.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT……………………………….i

TABLE OF CONTENTS………………………………………………ii

TABLE OF AUTHORITIES…………………………..……………………..iii

***AMICUS CURIAE'S* STATEMENT OF INTEREST**……..……………………1

INTRODUCTION AND SUMMARY OF ARGUMENT……………………2

BACKGROUND……………………………………………………..3

A. Whistleblowers Serve a Vital Function in Our Representative Democracy…………………………………………………….....3

B. Undercover Investigators are Critical to the Food Industry where Employee Whistleblowers Face Nearly Insurmountable Hurdles………8

C. Idaho Enacted its "Ag-Gag" Law in Response to Industry Efforts to Prevent Future Whistleblowing Disclosures………………………….. 12

ARGUMENT…………………………………………………………14

A. Idaho Code § 18-7042(1)(a)-(d) Violates the First Amendment, Will Chill Whistleblowing, and Will Allow the Agricultural Industry to Function Unchecked……………………………………………………14

B. Idaho Code § 18-7042(1)(a)-(d) Criminalizes Whistleblowing……..….16

C. The Audio and Visual Speech at Issue in Idaho Code § 18-7042(1)(d) is Critical to Shining Light on Abuses in the Agricultural Industry...…….18

CONCLUSION………………………………………………………..…23

CERTIFICATE OF COMPLIANCE ……………………………………….25

CERTIFICATE OF SERVICE…………………………………………….26

TABLE OF AUTHORITIES

Cases

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012). 20, 22
Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014) 12
Collins v. Village of Lynchburg, Ohio, ARB No. 07-079, ALJ No. 2006-SDW-03 (ARB Sept. 29, 2006)…………………..……………………………..…………6
Connick v. Myers, 461 U.S. 138, 145 (1983) ……………………………………14
Haney v. North American Car Corp., 81-SDW-1 (Sec'y June 30, 1982)...............20
Mosbaugh v. Georgia Power Co., 91-ERA-1 and 11 (Sec'y Nov. 20, 1995).........20
Petermann v. Int'l Bhd. of Teamsters, 174 Cal.App.2d 184 (1959) ……………...15
Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968)…………...………………..15
Turner Broad. v. FCC, 512 U.S. 622 (1994). 22
United States ex. rel. Yesudian v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998) 20
United States v. Eichman, 496 U.S. 310 (1990). 23

Statutes

15 U.S.C. §78u-6……………………………………………………..…6-7
18 U.S.C. § 1514A. 6
21 U.S.C. §§ 1 to 5 (repealed)…………………………………………….....5
21 U.S.C. § 399d……………………………………………………………7-8
21 U.S.C. §§601-625…………………………………………………………5
31 U.S.C. § 3729, *et seq*..4, 7
31 U.S.C. § 3730(h) 5
5 U.S.C. § 2302 5
Cal. Health & Safety Code §§ 25990-25994 …………………..……...……21
Idaho Code § 18-7042(1) .... *passim*
Mich. Comp. Laws Ann. § 287.746(g)……………………………………………21

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Cody Carlson, *A Call for USDA Vigilance in Treatment of Food Animals*, The Atlantic, Aug. 31, 2012, http://www.theatlantic.com/health/archive/2012/08/a-call-for-usda-vigilance-in-humane-treatment-of-food-animals/261836/. 11

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Debra Cassens Weiss, *'Granny cam' law aimed at curbing nursing-home abuse takes effect in Oklahoma*, ABA Journal, Nov. 20, 2013, www.abajournal.com/news/article/granny_cam_law_aimed_at_curbing_nursing-home_abuse_takes_effect_in_oklahoma. 22

Defend Trade Secrets Act of 2016, Pub. L. No. 114-153…………………………16

Joint Hearing on: "Is Government Adequately Protecting Taxpayers from Medicaid Fraud?" Before the H. Subcommittee on Health Care, District of Columbia, Census and the National Archives and the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the House Committee on Oversight and Government Reform, 111th Cong. (2012) (statement of Claire Sylvia), oversight.house.gov/wp-content/uploads/2012/04/4-25-12-Sylvia-Testimony.pdf ………………………………………………….....6

GAP's Food Integrity Campaign, USDA Hog Inspector Affidavits, www.foodwhistleblower.org/campaign/wtf-hormel/#affidavits.........................21

Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, Ethics Resource Center, 5 (2012), erc.webair.com/files/u5/reportingFinal.pdf………………………………………9

Louis D. Brandeis, Other People's Money 92 (Frederick A. Stokes Co. 1914)…..12

Oxfam America, No Relief: Denial of Bathroom Breaks in Poultry (May 2016), www.oxfamamerica.org/static/media/files/No_Relief_Embargo.pdf...................9

Remarks of Sen. Dick Durbin, 111 Cong. Rec. S11396 (Nov. 17, 2009)…………7

Stuart Pfeiffer, *California's egg-farm law prompts a push for national standards*, L.A. Times, May 27, 2012, http://articles.latimes.com/2012/may/27/business/la-fi-egg-farms-20120527. 12

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Whistleblower Investigation Data, U.S. Dept. of Labor, Occupational Health and Safety Administration, www.whistleblowers.gov/wb_data_FY05-15.pdf.............8

AMICUS CURIAE'S STATEMENT OF INTEREST[1]

The Government Accountability Project (GAP) is an independent, nonpartisan, and nonprofit organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for effective implementation of whistleblower protections throughout industry, international institutions and the federal government, focusing on issues involving national security, food safety, and public health.

GAP defines a "whistleblower" as a person who discloses information that he or she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. Whistleblowers use free speech rights to challenge actions or inactions that betray the public trust. Typically, whistleblowers speak out to parties that can influence and rectify the situation. These parties commonly include the media, organizational managers, hotlines, or legislative and Congressional members or staff.

GAP defends employee whistleblowers and offers legal assistance where disclosures affect the public interest. For over 39 years, GAP has represented

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[1] All parties consent to the filing of this brief. No counsel for any party authored any part of this brief, and no person other than *amicus* and its counsel contributed money for the preparation and submission of this brief. Fed. R. App. Proc. 29 (c)(5).

major whistleblowers who have exposed gross injustices under every presidential administration since the group's inception. GAP is at the forefront of advocating for whistleblower rights and protections, having seen retaliation against such individuals ranging from professional demotions to criminal prosecutions.

In this case, GAP supports Plaintiffs-Appellees and opposes Defendant-Appellant's appeal to overturn the District Court's decision. Idaho Code § 18-7042(1)(a)-(d) will have a chilling effect on whistleblowers throughout Idaho's agricultural and food production industry, undermining the will of the U.S. Congress that has made it clear through its laws and later regulatory action that it has an interest in protecting food industry whistleblowing. GAP has a strong interest in being heard on this issue and in preventing threats to public health by preserving the whistleblowers' rights to speak out against wrongdoing without fear of criminal prosecution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Idaho Code § 18-7042(1)(a)-(d) is an affront to whistleblower rights. Contrary to Defendant-Appellant's claim that "whistleblower status is irrelevant" under the statute (Appellant Brief p. 11), the law has everything to do with penalizing disfavored speech and quieting whistleblowers. It silences employee and citizen whistleblowers who seek to expose illegal practices of the agricultural industry and protects agricultural operators from being held accountable for those

practices. For the state to outlaw their endeavors in the name of "consensual employment" and "property rights" is disingenuous. Especially in the food industry, employment-based undercover investigations serve as critical and unparalleled sources of information to the public. These truth-tellers have historically exposed criminal conduct and wrongdoing in the agricultural industry. To lose the benefit of these investigations would blind consumers to betrayals of the public trust and to the unsavory truth about certain bad-actors.

Most critically, Idaho Code § 18-7042(1)(d) – the provision that criminalizes unauthorized audiovisual recording – bans an entire medium of expressive communication and targets a particular viewpoint on a matter of public concern. It will chill employees from documenting and reporting workplace violations and will punish, as criminals, those who do. Moreover, given its self-authenticating nature, audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate a whistleblower who is otherwise disbelieved or ignored. There are no sufficient alternative means for this type of communication.

BACKGROUND

A. Whistleblowers Serve a Vital Function in Our Representative Democracy

Whistleblowing has a long tradition in this country of fostering transparency and accountability in government and industry, often encouraging legislative and regulatory change that benefits workers, consumers, and the public. On the federal

level alone, there now are 58 laws protecting whistleblowers in the public and private sector work force.[2] The phenomenon is hardly limited to one country. Whistleblower laws are so impactful that internationally they are seen as a necessary part of good governance. Twenty-eight nations now have whistleblower laws; as do intergovernmental organizations such as the United Nations and World Bank.[3]

More than 150 years ago, during the Civil War, Congress recognized that the Government needed help in ferreting out corruption committed by government contractors. In 1863, the False Claims Act was enacted, which included a *qui tam* provision that empowered – essentially deputized – private citizens to sue corrupt contractors on the Government's behalf. 31 U.S.C. §§ 3729-3733. The Act was an early acknowledgement that whistleblowing can promote efficiency, transparency, and good governance. It survives, with strengthened whistleblower protections, to this day.

In 1906, Upton Sinclair's *The Jungle* was published, dramatically altering the public's perception of how food was produced and spurring the enactment of

[2] Tom Devine and Alicia Reaves, *Whistleblowing and research integrity: making a difference through scientific freedom*, in Handbook of Academic Integrity 957-72 (2016) www.bmartin.cc/pubs/16hai/Devine-Reaves.html.

[3] *Id.*

the Meat Inspection Act,[4] and the Pure Food and Drug Act[5] – laws which for the first time granted federal government the authority to inspect and regulate food consumed in the United States. Sinclair's novel was a fictional account, but it was based on his first-hand investigation of the conditions under which workers in Chicago's large meatpacking plants worked and lived at the onset of the age of mass-produced food.

In more recent years, Congress has enacted statutes specifically to protect and empower whistleblowers. In 1986, it re-visited the False Claims Act to include a provision that prohibited retaliation against employee whistleblowers, which was extended in 2009 to include agents and contractors. 31 U.S.C. § 3730(h). In 1989, the Whistleblower Protection Act was enacted, which was amended and strengthened in 2012, to protect federal employees from adverse employment actions based on their disclosure of misconduct or corruption in the workplace. 5 U.S.C. § 2302. Similarly, the Sarbanes-Oxley Act, which imposed new or enhanced reporting and accountability standards for public companies, includes a provision that attaches criminal penalties for taking a "harmful" action with the

[4] Federal Meat Inspection Act of 1906, ch. 3913, 34 Stat. 669, 674-79, codified as amended at 21 U.S.C. §§601-625 (2006).

[5] Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.

intent to retaliate against a whistleblower. 18 U.S.C. § 1513(e).[6] To date, the Department of Labor's Occupational Safety and Health Administration enforces 23 whistleblower laws aimed at protecting those who speak out about abuse.[7]

Congress has not just chosen to supplement protections to employee whistleblowers, but also citizen whistleblowers.[8] For example, the Dodd-Frank whistleblower provisions for disclosures to the Securities and Exchange

[6] The section reads in full: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both."

[7] Moreover, a worker's affiliation with ALDF, PETA or any other group in no way diminishes the apparent conflict between Idaho Code § 18-7042(1) and existing whistleblower protection laws. In determining whether an employee is covered under a whistleblower law, the only relevant questions are whether the worker was an "employee" of a covered employer, and whether they engaged in protected activity. Similarly, the Department of Labor has explicitly stated that an employee's motive is irrelevant in determining whether that employee is protected by these whistleblower provisions. *See Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-03 (ARB Sept. 29, 2006).

[8] Citizen whistleblowers are civic-minded members of the public who observe and report wrongdoing. *See* Joint Hearing on: "Is Government Adequately Protecting Taxpayers from Medicaid Fraud?" Before the H. Subcommittee on Health Care, District of Columbia, Census and the National Archives and the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the House Committee on Oversight and Government Reform, 111th Cong. (2012) (statement of Claire Sylvia), oversight.house.gov/wp-content/uploads/2012/04/4-25-12-Sylvia-Testimony.pdf (discussing critical role of citizen whistleblowers in combatting fraud).

Commission, 15 U.S.C. §78u-6, are available to any witness, not just employees. Similarly, any witness can file a lawsuit under the False Claims Act, 31 U.S.C. §3729-3733, to challenge fraud in government contracts. Moreover, the trend to protect citizen whistleblowers is not unique to U.S. law.[9]

Whistleblower protections extend to workers in agricultural industries. In 2011, after a string of high-profile cases of food-borne illnesses sickening hundreds, the Food Safety Modernization Act (FSMA) was enacted to combat contamination in the nation's food supply.[10] To assist in that mission, FSMA contains strong protections for employees who disclose violations of the Food Drug and Cosmetics Act by employers engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food." 21

[9] Citizen whistleblowing is a criteria in whistleblower rights best practices prepared by the Organization for Economic Cooperation and Development for the G20 nations. It is recognized in the whistleblower policies of numerous regional development banks, including the Asian Development Bank and the African Development Bank. Protection for whistleblowing citizens also is included in eight nations' laws, including Australia, Ghana, Japan, Korea, New Zealand and Serbia.

[10] *See, e.g.,* Remarks of Sen. Dick Durbin (Bill's author), 111 Cong. Rec. S11396 (Nov. 17, 2009) ("As we learned from recent events, eating unsafe food--whether it is spinach contaminated with E. coli, peanut butter laced with salmonella or melamine-spiked candy--can lead to serious illness and death. Every year 76 million Americans suffer from preventable foodborne illness; 325,000 are hospitalized each year and 5,000 will die… Parsing [FSMA] is an important step toward ensuring that the food we eat is safe …. This act will finally provide the FDA with the authority and resources it needs to prevent, detect, and respond to food safety problems.")

U.S.C. § 399d. Employees have been slow to take advantage of this new law. In the first year of FSMA's enactment, only 11 complaints were filed under the Act.[11] This number rose to only 71 complaints in FY2015.[12]

B. Undercover Investigators are Critical to the Food Industry where Employee Whistleblowers Face Nearly Insurmountable Hurdles

Unfortunately, even where federal whistleblower protections exist, they do not always shield workers from retaliation and do not always lead to workers reporting wrongdoing. Where employees fear speaking out, sometimes the only way to inform law enforcement and the public about corporate or government abuse is through citizen whistleblowing where citizens serve as undercover watchdogs of corporate practices.

GAP is intimately familiar with the risks that employee whistleblowers take when coming forward. The tactics companies employ to keep whistleblowers silent are brutal. Speaking the truth means more than just putting your job on the line, it is putting your family, your income and your reputation at risk. For speaking out, a whistleblower can anticipate negative performance reviews, denials of bonuses, harassment, threats, investigations, unfair scrutiny, transfers, and blacklisting. Now, the Idaho statute at hand seeks to add criminal prosecution to the list.

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[11] Whistleblower Investigation Data, U.S. Dept. of Labor, Occupational Health and Safety Administration, www.whistleblowers.gov/wb_data_FY05-15.pdf.

[12] *Id.*

These threats successfully prevent many employees from reporting wrongdoing. Studies have shown that fear of retaliation and a belief that nothing will be done to address the problem are the primary reasons people do not report misconduct internally. According to a 2005 National Business Ethics Survey, for example, the most frequent reasons workers gave for failing to report misconduct were that they believed their employer would fail to take corrective action (59% of respondents) and they feared retaliation (46% of respondents).[13]

There are unique hurdles for whistleblowers in the agricultural sector – corporate behemoths conduct the majority of business, creating additional obstacles for employees who dare to stand up to wrongdoing. Moreover, workers are often low-wage earners and members of marginalized groups; many are immigrants who do not speak English. These workers are routinely exploited because of their status. They are afraid to ask for a bathroom break[14] much less to speak out about food safety or humane handling violations. It is where these conditions exist that undercover investigations offer the most valuable insight. Investigators are able to disclose abuses – whether they be related to animal

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[13] Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, Ethics Resource Center, 5 (2012), erc.webair.com/files/u5/reportingFinal.pdf.

[14] *See, e.g.,* Oxfam America, No Relief: Denial of Bathroom Breaks in Poultry, (May 2016), www.oxfamamerica.org/static/media/files/No_Relief_Embargo.pdf.

welfare, public health, or worker rights – without suffering from the confines that limit traditional agricultural workers.

In the agricultural industry, powerful corporations exert tremendous pressure to keep their employees quiet, consequently allowing systemic wrongdoing to continue unabated. The work of Plaintiffs-Appellees has shone a light on that secretive world and exposed wrongdoing. Those who report misconduct and workplace violations in this area should be encouraged to come forward and should not be punished when they do.

Whistleblowing protections are needed now more than ever. Armed with only a small mobile device and an internet connection, in the last decade journalists, activists, and whistleblowers have exposed illegal practices in agriculture production facilities by recording and publicizing those practices, stirring a robust public debate about the conditions under which our nation's food is produced.

For instance, in 2008, the Humane Society of the United States (HSUS) sent an undercover investigator into the Westland/Hallmark Meat Company and later released video that showed employees introducing sick and diseased cattle ("downer cows") into the nation's meat supply. The Hallmark case led to the

largest recall of ground beef in history and a $155 million settlement.[15] Around that same time, Dr. Dean Wyatt, a Public Health Veterinarian with the USDA Food Safety and Inspection Service, reported to his superiors that animals were being mistreated at a processing plant in Oklahoma. He was ignored and eventually transferred to Vermont. Once there, he witnessed similar violations at a different plant, but after his reports were again ignored, HSUS conducted another undercover investigation and released a video documenting the abuse. The video was the proof that vindicated Dr. Wyatt's claims, and he later presented testimony to Congress on disregard for regulatory enforcement within the industry.[16] Because of his testimony, the USDA increased its efforts to improve humane handling protocol and established a Humane Handling Ombudsman to address both industry and government concerns.

Whistleblowers serve as citizen watchdogs to close the loop between regulators and Congress and to provide key voices in the current public debate about practices in the mass-produced food industry. As Justice Brandeis famously wrote, "Publicity is justly commended as a remedy for social and industrial

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[15] Associated Press, *California: Deal Reached in Suit Over Animal Abuse*, N. Y. Times, Nov. 27, 2013, www.nytimes.com/2013/11/28/us/california-deal-reached-in-suit-over-animal-abuse.html?ref=westlandhallmarkmeatcompany.

[16] Cody Carlson, *A Call for USDA Vigilance in Treatment of Food Animals*, The Atlantic, Aug. 31, 2012, www.theatlantic.com/health/archive/2012/08/a-call-for-usda-vigilance-in-humane-treatment-of-food-animals/261836/.

diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[17] Idaho, however, has chosen to dim the lights, muffle the debate, and punish those who expose wrongdoing.

C. Idaho Enacted its "Ag-Gag" Law in Response to Industry Efforts to Prevent Future Whistleblowing Disclosures

In 2012, Mercy for Animals released a video of workers abusing cows at the Bettencourt Dairies' Dry Creek Dairy in Hansen, Idaho. The reaction was swift and, on the surface, unambiguous. The owners of the dairy stated they were unaware of the abuse, were very upset by what the video showed, and would use the video as a training tool for their employees.[18] The workers who abused the animals were prosecuted, and the dairy industry teamed with Idaho schools to offer training in proper care of animals.[19]

Despite taking these initial positive steps for consumers, an industry trade association wrote and sponsored legislation that, had it been law at the time, would have criminalized the very investigation that uncovered the abuse at the Dry Creek

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[17] Louis D. Brandeis, Other People's Money 92 (Frederick A. Stokes Co. 1914).

[18] *See Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1015 (D. Idaho 2014) (No. 14-104) (citing Stephanie Zepelin, *Dairy Owner Speaks Out After Release of Shocking Undercover Video*, http://www.ktvb.com/home/Dairy-owner-speaks-out-after-release-of-shocking-undercover-video-173632071.html).

[19] *See Id.* (citing Associated Press, After Abuse, Idaho Schools Offer Dairy Training, http://www.ktvb.com/home/Dairy-owner-speaks-out-after-release-of-shocking-undercover-video-173632071.html).

Dairy. The bill passed the Idaho legislature quickly and was signed by the Governor on February 28, 2014. The legislation created a new state crime – “interference with agricultural production.” Idaho Code § 18-7042. The law provided unjustified protections and redundant property rights to an industry which had only months previously demonstrated its vulnerability to rampant abuse and illegality. While Defendant-Appellant argues that the law was spurred by “malicious property destruction” and “death threats” (Appellant Br. at 11) – actions that are unquestionably already covered by existing state laws – the sweeping extent of the law belies its true purpose: to quash any and all criticism of wrongful agricultural practices.[20]

If upheld, the law will silence those who wish to publicize abusive, unsafe, and unsanitary practices in an industry that plays a critical role in public health. More specifically, it will discourage whistleblowers from coming forward out of fear of prosecution, it conflicts with federal law and policy that encourages whistleblowing as a much needed gap-filler in government oversight, and it values profits at the expense of the public’s health.

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[20] *See* Ted Genoways, *Gagged by Big Ag*, Mother Jones, July-Aug. 2013 www.motherjones.com/environment/2013/06/ag-gag-laws-mowmar-farms (tracing the origins of ag-gag laws - meant to prohibit covert video or audio recording of animal agriculture facilities - directly to the efforts of “meat industry lobbyists”).

ARGUMENT

A. Idaho Code § 18-7042(1)(a)-(d) Violates the First Amendment, Will Chill Whistleblowing, and will Allow the Agricultural Industry to Function Unchecked

Idaho Code § 18-7042 will chill employees from exercising their First Amendment right to free speech. As the District Court correctly observed, such a chill with have dramatic consequences in an industry where "food production and safety are matters of the utmost public concern." Opinion and Order at 21. Rather than encouraging reform in an industry proved to be riddled with abuse, the state of Idaho, buttressed by industry support, chose to silence those who would work to hold the industry accountable. This blatant form of government censorship must not stand; if ever there was a time to defend free speech rights, it is now.

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) (Citations omitted).

The United States has not always recognized the right to free speech in the employment context. Before 1959 there were no occupational free speech rights in the public or private sectors. Corporate employees were long governed by the traditional "at-will" rule of the master-servant doctrine – an employee could be

fired for any reason or for none. There was no option for legally-protected dissent. That changed in 1959, when California courts in *Petermann v. International Brotherhood of Teamsters,* 174 Cal.App.2d 184 (1959) first established a "public policy exception" to the at-will doctrine, permitting corporate workers to file tort lawsuits for damages. In 1968, the Supreme Court recognized rights for government employees under the First Amendment in *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) ("While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."). Today the free speech of employees within the public and private sectors is well-accepted and indeed encouraged by federal whistleblower protections laws.

The Idaho law at issue in this case would undermine these protections, making whistleblowers in the agricultural industry sitting ducks to industry attack. The prohibitions enumerated in Idaho Code § 18-7042(1)(a)-(c) ensure that each time a whistleblower considers disclosing or does disclose wrongdoing, they are vulnerable to criminal prosecution. Even the "bona fide" employee would face scrutiny; their reasons for seeking employment, political ideologies and methods of discovering abuse called into question each time they dared to make a disclosure. Idaho Code § 18-7042(1)(d), which prohibits making audio or video recordings,

fares no differently. To criminalize the very act of disclosing wrongdoing inescapably implicates whistleblowers. (*Compare with* Appellant's Br. at 11, (explaining that "whistleblower status is irrelevant.")).

B. Idaho Code § 18-7042(1)(a)-(d) Criminalizes Whistleblowing

The criminalization of whistleblowers is a timeless defense used against those who challenge abuses of power. This so-called "smokescreen syndrome" seeks to discredit, or at least obfuscate dissent by shifting attention to the source's motives, professional competence, values and personal life, or any other vulnerability that can eliminate the threat, or at least dilute it by clouding the issue.

Congress recognizes the threat of this syndrome and has legislated accordingly. Under the recently passed, Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended in scattered sections of 18 U.S.C.), for example, an individual cannot be held criminally or civilly liable for disclosure of a trade secret made in confidence to a federal, state or local government official, or to an attorney for the sole purpose of reporting or investigating a suspected legal violation. This is a significant whistleblower-based reform law because it prevents the trade secrets doctrine from being used to cover up corporate misconduct. It protects whistleblowers from any form of harassment, including civil "slap suits" or criminal actions to retaliate.

In contrast, Idaho Code § 18-7042(1)(a)-(d) provides companies with a state-sanctioned roadmap on how to undermine dissent. Defendant-Appellant's brief all but admits this: "Whatever value the publication may have, however, says nothing relevant for First Amendment purposes about the means used to gather the information collected." (Appellant Br. at 9). Under this law, the whistleblower's message will be lost.

Defendant-Appellant also argues that Idaho's law has nothing to do with silencing dissent. They argue that policing the boundaries of agricultural facilities is justified and necessary. Though maintaining that "whistleblower" status is irrelevant to the law, they ultimately fault whistleblowing for "malicious property destruction" and "death threats to blameless Idaho dairy owners and employees." (Appellant Br. at 11) This argument is flawed; it is a smokescreen. In the absence of evidence of reckless or irresponsible whistleblowers, they focus instead on the harm committed by members of the public once they have learned of industry abuses. To punish the messenger because public opinion slights the bad actor is nonsensical.

Similarly misplaced is Defendant-Appellant's argument that an agricultural company should have a right to be protected from "being surveilled." (Appellant Br. at 33). What, perhaps, Defendant-Appellant means to say is that agricultural facilities deserve to be protected from *effective* surveillance. Agricultural industries

are subject to state and federal oversight to prevent distribution of unsafe foods and the inhumane treatment of animals. As such, they are already the subject of government surveillance. Cameras and video surveillance are staples in the facilities where GAP whistleblowers work. The problem remains that facilities know where these cameras are and thus know how to avoid being recorded. There are limits to on-site surveillance equipment and to federal food inspection. Even where government oversight exists, there are simply not enough inspectors to inspect all actions and food products. Whistleblowers, when permitted, fill this void, serving as needed watchdogs to supplement government regulation.

C. The Audio and Visual Speech at Issue in Idaho Code § 18-7042(1)(d) is Critical to Shining Light on Abuses in the Agricultural Industry

Not only does this law open truth-tellers to criminal prosecution, but Idaho Code § 18-7042(1)(d) – the recording provision – takes away a whistleblower's ability to prove that the wrongdoing they observed took place. This provision will have a particularly negative impact on whistleblowing. Under the subsection, a person commits a crime if she knowingly "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." *Id.*

The sweep of this provision is breathtaking. Unlike most of the other methods of committing "interference with agricultural production," to convict a

defendant under §18-7042(1)(d), the State does not need not to prove that the defendant entered a production facility under false pretenses or trespass. The State is also relieved of proving an intent to injure or harm. Therefore, anyone who has permission to be on the property – from a tourist to an electrical subcontractor to an in-house employee – who makes a recording of the "conduct . . . of the facility's operations," without authorization, could be prosecuted and convicted. This provision strikes at the heart of speech that is protected by the First Amendment.

As effective as Upton Sinclair's *The Jungle* was in the era of print media, video and audio recordings have an even greater impact in the social media era. Recordings made by employees without the knowledge or consent of their employers, those who are targeted by this law, are especially potent and reliable, since the recorded behavior is untainted by the employer's knowledge that the company's conduct is being memorialized. Not only this, but the conventional odds are overwhelmingly uneven when an individual challenges institutional abuse of power. Legal rights, without proof, are inadequate to make a difference. Charging ahead alone, without corroboration from supporting witnesses or evidence, is almost certain to fail.

Whistleblowers' ability to collect and preserve concrete, smoking-gun evidence of wrongdoing makes them an especially effective and beneficial aide to law enforcement. To this end, the courts and agencies charged with administering

the various whistleblower laws have interpreted these laws to protect not only the reporting of violations, but also the collection of evidence of those violations. *See, e.g., United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998) (interpreting the False Claims Act 's anti-retaliation provision); *Haney v. N. Am. Car Corp*., 81-SDW-1, slip op. at 4 (Sec'y June 30, 1982) (interpreting Safe Drinking Water Act whistleblower provision to protect employee 's tape recording of evidence of violation); *Mosbaugh v. Georgia Power Co*., 91-ERA-1 and 11, slip op. at 7-8 (Sec'y Nov. 20, 1995) (employee's secret tape recording of evidence protected under Energy Reorganization Act whistleblower provision). Photographs and audiovisual recordings, given their self-authenticating nature, are a uniquely powerful form of evidence. *See ACLU v. Alvarez*, 679 F.3d 585, 607 (7th Cir. 2012) (characterizing audiovisual recordings as an irreplaceable form of speech with no adequate substitute).

Over the last ten to fifteen years, video evidence has provided some of the strongest proof of violations that affect public health and safety. In addition to the Humane Society's Hallmark investigations and Dr. Wyatt's disclosure of abuse at processing plants in two states, videos shot by employees of henhouses have increased awareness of battery cages and have led to laws barring inhumane

practices.[21] More recently, undercover video vindicated GAP whistleblower complaints that a pilot safety program performed in certain hog slaughter plants – intended to cut costs and allow for faster line speeds – was being ineffectively executed. USDA meat inspectors confided to GAP that the faster line speeds made it nearly impossible to inspect carcasses for contamination.[22] However, without video evidence of abuses they described, little was accomplished. Last fall, undercover video of the so-called "HIMP"[23] kill process spurred a USDA investigation into the plant and prompted 60 members of Congress to urge the USDA to delay proposed rulemaking that would implement HIMP in U.S. hog slaughter plants across the country.[24] The video showed abuses committed out of sight from inspectors and hidden from on-site surveillance. This would not have happened without undercover *video evidence* of the conditions in the plant.

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[21] Stuart Pfeiffer, *California's egg-farm law prompts a push for national standards*, L.A. Times, May 27, 2012, articles.latimes.com/2012/may/27/business/la-fi-egg-farms-20120527; s*ee also* Cal. Health & Safety Code §§25990-25994 (West 2015), Mich. Comp. Laws Ann. § 287.746(g) (2015).

[22] *See* GAP's Food Integrity Campaign, USDA Hog Inspector Affidavits, www.foodwhistleblower.org/campaign/wtf-hormel/#affidavits.

[23] HIMP stands for "HACCP-Based Inspection Models Project."

[24] Letter from members of Congress to Secretary Tom Vilsack (Jan. 19, 2016), http://delauro.house.gov/images/pdf/1.19.16HogHIMPLetter.pdf

The benefit of video evidence is not limited to animal welfare in the agriculture industry. When laws prevent recording, they stop environmental whistleblowing, public health whistleblowing and workers' rights whistleblowing. Without an employee's 'right to tell,' consumers are necessarily deprived of their 'right to know.' Unrelated to agriculture, but related to public health, video evidence of mistreatment at nursing homes has led to laws that encourage the use of cameras in long-term care facilities. [25]

The Court should not be persuaded by Defendant-Appellant's claim that the Idaho statute is one of general applicability that regulates only conduct, not speech. Any purported distinction between the act of making a recording and the expression that the recording contains is artificial and unavailing. The recording of sound and images is not done for its own sake; it is the first step in a process that results in the communication of a message to others. In this way, the act of 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." *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). Neither is the law content-neutral. Any law that suppresses, disadvantages, or imposes

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[25] *See, e.g.*, Debra Cassens Weiss, *'Granny cam' law aimed at curbing nursing-home abuse takes effect in Oklahoma*," ABA Journal, Nov. 20, 2013, www.abajournal.com/news/article/granny_cam_law_aimed_at_curbing_nursing-home_abuse_takes_effect_in_oklahoma.

differential burdens on speech because of its content is subject to strict scrutiny. *Turner Broad. v. FCC*, 512 U.S. 622, 642 (1994). "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *United States v. Eichman*, 496 U.S. 310, 315 (1990).

Here, Idaho Code §18-7042(1)(d) applies only to one type of content: recordings showing activities inside "agricultural production facilit[ies]." And because agricultural facility owners are given a veto power, authorizing only positive depictions of their company's operations, the necessary effect of the law is to burden speech that is negative or critical. For this reason, Defendant-Appellant's argument that the law is merely a "location-based restriction on recording" (Appellant's Br. at 28-29) must fail. The manifest purpose of this provision is to regulate speech because of the message it conveys and to tip the scales to one side of the public debate.

This is surely why Idaho has targeted videotaping and has made it a crime to report a crime. The effect of this subsection, and all of Idaho Code § 18-7042(1), on whistleblower activity will be immense. It is unconstitutional and the District Court's decision should be affirmed.

CONCLUSION

When whistleblowers are afraid to come forward, those who are of a mind to violate the law can do so without fear of exposure. Incentives are perverted,

oversight breaks down, and the public's health and workers' safety are at greater risk. For these and the aforementioned reasons, GAP respectfully urges this Court to affirm the District Court's decision.

Respectfully submitted this 23rd day of June, 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,347 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I certify that 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 it has been prepared in a proportionally spaced typeface – Times New Roman, 14-point – using Microsoft Word 2013.

Dated: June 23, 2016

/s/ Sarah L. Nash
Sarah L. Nash

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June 2016, 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.

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.

/s/ Sarah L. Nash
Sarah L. Nash