

No. 15-35960

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**In the United States Court of Appeals  
for the Ninth Circuit**

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ANIMAL LEGAL DEFENSE FUND, et al.,

*Plaintiffs-Appellees,*

v.

LAWRENCE G. WASDEN,  
Attorney General of the State of Idaho

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the District of Idaho

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**BRIEF OF AMICI CURIAE  
FOOD LAW & POLICY SCHOLARS**  
in Support of Plaintiffs-Appellees Animal Legal Defense Fund, et al.

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## Corporate Disclosure Statement

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel hereby certifies that this amici brief is filed on behalf of 15 food scholars, collectively referred to as the “Food Law and Policy Scholars.” These amici speak as individuals and therefore have no parent corporation or shareholders who are subject to disclosure.

Respectfully submitted,

Dated: June 28, 2016

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## **Amici Identity, Interest, & Authority to File**

### **1. Identity of the Food Law & Policy Scholars**

The “Food Law & Policy Scholars” consist of the following 15 scholars. *See* Addendum (biographies). These scholars study “the basis and impact of those laws and regulations that govern the food and beverages we grow, raise, produce, transport, buy, sell, distribute, share, cook, eat, and drink.”<sup>1</sup> Each scholar speaks for themselves. The scholars’ institutional affiliations are provided merely for identification purposes:

- **Alison Peck**, Professor of Law, West Virginia University College of Law (Morgantown, WV).
- **Baylen J. Linnekin**, Adjunct Professor of Law, George Mason University Law School (Arlington, VA).
- **Diana R. H. Winters**, Associate Professor of Law, Indiana University Robert H. McKinney School of Law (Indianapolis, IN).
- **Erika George**, Professor of Law, University of Utah S.J. Quinney College of Law (Salt Lake City, UT).
- **Gabriela Steier**, Adjunct Professor of Law, Duquesne University School of Law (Pittsburgh, PA).
- **Guadalupe T. Luna**, Professor Emeritus, Northern Illinois University College of Law; Professor of Law, Indiana Tech Law School (Fort Wayne, IN).

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<sup>1</sup> Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field’s Origins & First Decade*, 2014 WIS. L. REV. 557, 584 (2014).

- **Jayesh Patel**, Adjunct Professor and Director, Food Law Clinic, Michigan State University School of Law (East Lansing, MI); President and Managing Attorney, Street Democracy.
- **Laurie Beyranevand**, Associate Professor of Law & Associate Director of the Center for Agriculture & Food Systems, Vermont Law School (South Royalton, VT).
- **Michele Simon**, President, Eat Drink Politics & Visiting Faculty, University of the Pacific, Food Studies Program (Stockton, CA).
- **Nicole Negowetti**, Policy Director, The Good Food Institute (Washington, DC).
- **Samuel Wiseman**, Professor of Law, Florida State University College of Law (Tallahassee, FL).
- **Sarah Schindler**, Professor of Law, University of Maine School of Law (Portland, ME).
- **Steph Tai**, Associate Professor of Law, University of Wisconsin Law School (Madison, WI).
- **Timothy Lytton**, Distinguished University Professor and Professor of Law, Center for Law, Health & Society at Georgia State College of Law (Atlanta, GA).
- **Vanessa Zboreak**, Professor of Practice, Wake Forest University School of Law (Winston-Salem, NC).

## 2. Interest of the Food Law & Policy Scholars

This case is about whether Idaho Code § 18-7042, also known as Idaho's "ag-gag" law, violates (*inter alia*) the First Amendment's guarantee of free speech. The Food Law & Policy Scholars are interested in this case because § 18-7042, by design, prevents consumers from learning about how

their food is produced. The law achieves this by criminalizing undercover investigative practices that enable journalists, whistleblowers, and activists to inform interested consumers about what really goes on behind closed doors at livestock and agricultural processing facilities.

The district court recognized as much in striking down Idaho's ag-gag law under the First Amendment. (*See* ER:6-7.) At the same time, the district court focused primarily on the law's operation as an unjustifiable restraint on the free speech of journalists, whistleblowers, and activist organizations. The amici agree with this decision but also believe Idaho's ag-gag law unconstitutionally burdens the free speech rights of consumers. The amici seek to help the Court understand this burden.

### **3. Authority of the Food Law & Policy Scholars to File**

The Food Law & Policy Scholars file this amici brief under Fed. R. App. P. 29(a) with the consent of the parties in this case. The Scholars also affirm under Fed. R. App. P. 29(c)(5) that no party nor counsel for any party in this case either: (1) wrote this brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only the Scholars, including their counsel, have contributed money to fund the preparation and submission of this brief.

## Summary of the Argument

Consumers decide what to eat based on a litany of political, religious, economic, dietary, and ethical commitments that affect them, their families, and their communities. Many consumers cannot honor these commitments, however, without access to information about how food is produced – an interest that First Amendment law both recognizes and protects.

To this end, consumers rely on journalists, whistleblowers, and activists for vital information about how food is produced (e.g., the treatment of livestock, pesticide use, etc.). Ag-gag laws, in turn, neuter this source of information by effectively banning journalists, whistleblowers, and activists from conducting or sharing the results of undercover investigations at agricultural and livestock processing facilities.

Here, the district court found that Idaho Code § 18-7042, also known as Idaho's ag-gag law, violated the First Amendment rights of journalists, whistleblowers, and activists. This Court should affirm that decision. At the same time, the Court should note how Idaho's ag-gag law also impedes consumers' First Amendment rights. This law ultimately denies consumers a marketplace of ideas in which they are free to weigh competing voices and decide for themselves the truth about food production.

## Argument

### 1. Food production is a subject of major political, religious, economic, dietary, and ethical concern to consumers.

The central importance of food in American society is indisputable. As renowned food critic M.F.K Fisher once put it: “First we eat, then we do everything else.”<sup>2</sup> This is why Americans spent approximately \$43.3 billion on organic food in 2015.<sup>3</sup> It is why Americans decide on average 4.5 times per week to dine out at a restaurant.<sup>4</sup> And it is why “television has succeeded in turning cooking into a spectator sport.”<sup>5</sup>

The subject of food production is no exception to this reality. More and more Americans are deeply concerned about where their food comes from and want to learn more about how it is produced. This concern extends beyond food safety issues. Consumers want to know everything they can about food production – including, specifically, how livestock are

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<sup>2</sup> KAORI O’CONNOR, *THE NEVER-ENDING FEAST: THE ANTHROPOLOGY & ARCHAEOLOGY OF FEASTING* 15 (2015) (quoting Fisher).

<sup>3</sup> See Press Release, Organic Trade Ass’n, U.S. Organic Sales Post New Record of \$43.3 Billion in 2015 (May 19, 2016), <https://www.ota.com/news/press-releases/19031>.

<sup>4</sup> See Zagat Staff, *The State of American Dining in 2015*, ZAGAT (Jan. 20, 2015), <https://www.zagat.com/b/the-state-of-american-dining-in-2015>.

<sup>5</sup> Michael Pollan, *Out of the Kitchen, Onto the Couch*, N.Y. TIMES MAG., July 29, 2009, <http://nyti.ms/1V99cMe>.



treated before they become food.<sup>6</sup> This knowledge ultimately informs consumers' lives in a variety of ways that matter to them, their families, and their communities. The following analysis illustrates this point in political, religious, economic, dietary, and ethical terms.

*Politics:* For many consumers, eating is a political act. Consider the local food movement, which is supported by consumers who care about how “control of the farming industry by large multinational corporations has had negative consequences for many small farmers.”<sup>7</sup> This movement thus seeks through public hearings<sup>8</sup> and farmers' markets<sup>9</sup> alike “to remind

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<sup>6</sup> See, e.g., CONSUMER REPORTS NAT'L RESEARCH CTR., FOOD LABELS SURVEY 2 (2014), <http://www.greenerchoices.org/pdf/ConsumerReportsFoodLabelingSurveyJune2014.pdf> (“[T]he vast majority of consumers prioritize . . . good living conditions for animals[.]”).

<sup>7</sup> Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy & Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 55 (2008); see also Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHICAGO L. REV. DIALOGUE 16, 19 (2015) (describing the way that eating functions as a political act).

<sup>8</sup> See, e.g., Abigail Curtis, *Food-Fight: Why the Debate Over Food Sovereignty Continues*, BANGOR (ME.) DAILY NEWS, Mar. 28, 2016, <http://bdn.to/y3n6> (detailing the legislative efforts of local-food-movement supporters to amend Maine's constitution to establish that “every individual has a ‘natural and unalienable right to food’”).

<sup>9</sup> See, e.g., Samantha Melamed, *As the Local-Food Movement Matures, Farmers' Markets Face More Competition*, PHILADELPHIA INQUIRER, June 9, 2016, [http://www.philly.com/philly/food/20160609\\_As\\_local-food\\_movement\\_matures\\_farmers\\_markets\\_face\\_more\\_competition.html](http://www.philly.com/philly/food/20160609_As_local-food_movement_matures_farmers_markets_face_more_competition.html).

a generation of industrial eaters of their connections to farmers and farms.”<sup>10</sup> The animal-welfare movement has convinced many consumers to oppose eating farm animals that were mistreated while being raised or slaughtered.<sup>11</sup> The animal-rights movement has led some consumers to support bans on foods like foie gras (i.e., the fatty liver of a duck or goose) because of those consumers’ opposition to the manner in which those foods are produced (e.g., force-feeding ducks or geese). *See, e.g., Ass’n des Eleveurs de Canards et D’Oies du Quebec v. Harris*, 79 F. Supp. 3d 1136, 1138 (C.D. Cal. 2015) (litigation over California’s foie-gras sales ban).

**Religion:** Faith and food go hand in hand. The Jewish law of kashrut, for example, places many limits on what food may be eaten as well as how food may be prepared. *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2d Cir. 2002). These limits require rabbinical supervision of animal slaughter, forbid the eating of pork, and forbid the combination

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<sup>10</sup> MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: THE SEARCH FOR A PERFECT MEAL IN A FAST-FOOD WORLD* 259 (2011).

<sup>11</sup> *See, e.g., ANIMAL WELFARE INSTITUTE, CONSUMER PERCEPTIONS OF FARM ANIMAL WELFARE* 1 (2016), [https://www.awionline.org/sites/default/files/uploads/documents/fa-consumer\\_perceptionsoffarmwelfare\\_-112511.pdf](https://www.awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf) (compiling results from numerous public polls, surveys, and studies showing that American consumers “are increasingly aware of, and concerned about, how animals raised for food are treated”).

of meat and milk.<sup>12</sup> Consumers who follow these rules thus need to know how their food is produced. *See, e.g., Wallace v. ConAgra Foods*, 920 F. Supp. 2d 995 (D. Minn. 2013) (litigation over kosher production of beef). So, too, do Hindu consumers, for whom the “cow [is] a sacred religious symbol” – a reality that has previously sparked Hindu protests over the undisclosed use of beef derivatives in the production of seemingly vegetarian food items.<sup>13</sup> *Bal v. Holder*, 471 F. App’x 704, 704 (9th Cir. 2012).

**Economics:** Price is not the only thing that matters to consumers in buying food. For example, consumers are often willing to pay more to advance “fair trade” – a “socially responsible food movement that seeks to lift farmers in the developing world out of poverty by offering them a premium for crops like coffee, cocoa and bananas.”<sup>14</sup> Consumers are also often willing to pay more to “buy American” – a cause that Congress embraced by requiring country-of-origin labels on food. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J.,

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<sup>12</sup> *See* TIMOTHY D. LYTTON, *KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD* 7 (2013).

<sup>13</sup> *See, e.g., McDonald’s to Settle Suits on Beef Tallow in French Fries*, N.Y. TIMES, Mar. 9, 2002, <http://nyti.ms/1L01cgt>.

<sup>14</sup> William Neuman, *A Question of Fairness*, N.Y. TIMES, Nov. 23, 2011, <http://nyti.ms/1YoZgDg>.

concurring). These labels pushed consumers to decide to “buy a higher percentage of American-made products, which in turn help[ed] American manufacturers, farmers, and ranchers.” *Id.* And consumers are often willing to pay more for food that is free of genetically modified (“GMO”) ingredients. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 154 (2010) (noting that consumers who prefer organic food want food companies to conduct tests to ensure “contaminated seed” does not enter “the organic market”). The price of food still matters to consumers, of course, but issues like fair trade, country of origin, and GMO ingredients reveal the broader economic values that also motivate consumers in the checkout line.

**Diet:** Consumers frequently make dietary choices based on how food is produced. This can be seen in the organic food revolution,<sup>15</sup> through which millions of consumers have expressed their dietary preference for fruit, vegetables, and meat that have been produced without “synthetic pesticides, growth hormones and antibiotics.”<sup>16</sup> Dietary concerns are also evident in the popularity of the “Paleolithic diet,” which shuns processed

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<sup>15</sup> See Elaine Pofeldt, *The Organic Food Revolution That Is Minting Millionaires*, CNBC, May 6, 2016, <http://cnb.cx/1rsR1cn>.

<sup>16</sup> Scott Faber, *Demand for Organic Food Growing Faster than Domestic Supply*, BAY JOURNAL, Mar. 1, 2006, [http://www.bayjournal.com/article/demand\\_for\\_organic\\_food\\_growing\\_faster\\_than\\_domestic\\_supply](http://www.bayjournal.com/article/demand_for_organic_food_growing_faster_than_domestic_supply).

and sugar-rich foods in favor of foods that are “high in fat and low in carbohydrates.” *Cooksey v. Futrell*, 721 F.3d 226, 230 (4th Cir. 2013). And dietary concerns permeate consumer debates over the merits of GMO foods<sup>17</sup> – debates that have spurred both studies touting the safety of GMO foods<sup>18</sup> and the passage of laws requiring the labeling of GMO foods. *See, e.g., Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 594–96 (D. Vt. 2015) (detailing Vermont’s labeling law for GMO foods).

**Ethics:** From beliefs about veganism to sustainability to animal rights, consumers bring many ethical concerns to the kitchen table – beliefs that are redefining modern food production. Veganism has created an American market for plant-based meat substitutes that will be worth \$1.1 billion by 2020.<sup>19</sup> Sustainable-food activists have “convinced more

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<sup>17</sup> See Alison Peck, *Does Regulation Chill Democratic Deliberation? The Case of GMOs*, 46 CREIGHTON L. REV. 101, 139–45 (2013).

<sup>18</sup> See NAT’L ACADEMY OF SCIENCE, GENETICALLY ENGINEERED CROPS: EXPERIENCES & PROSPECTS (2016) (prepublication copy), <http://www.nap.edu/read/23395/chapter/1>.

<sup>19</sup> See Michele Simon, *U.S. Meat Substitutes Market to Grow, Experts Find*, PLANT BASED FOODS ASSOCIATION (Apr. 26, 2016), <https://www.plantbasedfoods.org/u-s-meat-substitutes-market-to-grow-experts-find/>; see also, e.g., Kate Murphy, *Rethinking Eating*, N.Y. TIMES, Aug. 23, 2014, <http://nyti.ms/1mAVktz> (“Josh Tetrick, the vegan chief executive of San Francisco-based Hampton Creek . . . has created an egg substitute using protein extracted from the Canadian yellow pea.”).

Americans to watch what they eat” so as to “encourage farmers to grow more diverse crops, reward conservation practices and promote local food networks.”<sup>20</sup> Research shows that four out of every five consumers want “[b]etter living conditions for animals” being raised for food.<sup>21</sup> The list goes on. The bottom line is that ethical concerns about food production have “altered consumer behavior and reshaped the competitive landscape.”<sup>22</sup>

In summary: Food production is a matter of political, religious, economic, dietary, and ethical importance to consumers. The food industry, in turn, seeks to capitalize on this. This may be seen in corporate slogans like “Food With Integrity”<sup>23</sup> and public statements that “[m]ore and more consumers today care about how their food is made, sourced, handled, and prepared.”<sup>24</sup> Consumers subsequently rely on the marketplace of ideas to help them sort out the truth of these messages. This marketplace cannot

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<sup>20</sup> Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES, Mar. 21, 2009, <http://nyti.ms/1S6CF6U>.

<sup>21</sup> CONSUMER REPORTS NAT’L RESEARCH CTR., *supra* note 6, at 5.

<sup>22</sup> Hans Taparia & Pamela Koch, Opinion, *A Seismic Shift in How People Eat*, N.Y. TIMES, Nov. 6, 2015, <http://nyti.ms/1iIiqCw>.

<sup>23</sup> See *Food With Integrity*, CHIPOTLE MEXICAN GRILL, <https://www.chipotle.com/food-with-integrity> (last visited June 15, 2016).

<sup>24</sup> Open Letter by Ron Schaich, Founder, Chairman & CEO of Panera Bread (June 15, 2015), <https://www.panerabread.com/content/dam/panerabread/documents/ron-letter-to-america-june15.pdf>.

function, however, without a diversity of voices speaking to how food is produced. That is where the First Amendment comes into play.

**2. Consumers have a core First Amendment interest in access to information about food production.**

Because food production is a matter of political, religious, economic, dietary, and ethical concern to consumers, “restriction[s] on access to information” about this subject raise serious First Amendment concerns. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (internal punctuation omitted). Put another way, consumers have a First Amendment right to hear and act on what journalists, whistleblowers, and activists want to tell consumers about the realities of modern food production.

Now more than ever, consumers are exercising this right. “Research commissioned by the food industry confirms that consumers are demanding more transparency at every level of food production.”<sup>25</sup>

Consumers have a core free-speech interest in being able to access information about food production from every possible source. The First Amendment protects this interest in three main ways.

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<sup>25</sup> Nicole Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1373 (2015) (citing studies performed by the Center for Food Integrity and the U.S. Farmers and Ranchers Alliance).



*First*, the purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (internal quotation marks omitted). This marketplace includes significant space for everything that consumers believe about what they should eat and how food should be produced – ideas that often inspire fierce debates, social movements, and even new laws.<sup>26</sup> Within this marketplace, “the right to hear – the right to receive information – is no less protected by the First Amendment than the right to speak. . . . [I]t would be a barren marketplace of ideas that had only sellers and no buyers.” *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (internal citation and quotation marks omitted). It is therefore particularly problematic when the state enacts restrictions on speech in an effort to control “the way in which . . . information might be used or disseminated” by information-hungry consumers. *Sorrell*, 564 U.S. at 568.

*Second*, the First Amendment protects the “consumer’s interest in the free flow of commercial information.” *Va. State Bd. of Pharmacy v. Va.*

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<sup>26</sup> See, e.g., *Put Your Ethics Where Your Mouth Is*, N.Y. TIMES MAG., Apr. 20, 2012, <http://www.nytimes.com/interactive/2012/04/20/magazine/ethics-eating-meat.html> (detailing a controversial essay contest sponsored by the *New York Times* on whether eating meat is ethical).



*Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Information about food production fits this bill – be it the origin of a pound of coffee, the dietary regimen of cattle, or the methods used by fisherman to catch particular types of fish.<sup>27</sup> This commercial information enables consumers to make “intelligent and well informed” decisions about what kinds of food to buy (or not buy) in our nation’s “predominantly free enterprise economy.” *Id.* This information also enables consumers to form “intelligent opinions” about how agriculture, food manufacturing, and food distribution in our nation ultimately “ought to be regulated or altered.” *Id.*

*Third*, the First Amendment is especially protective of true speech. Hence, “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publ’g*, 443 U.S. 97, 102 (1979). The same applies to truthful information about food production, be it the literal or proverbial “making of sausage . . . something from which the fastidious person would often be well advised to avert his or her gaze.” *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 309 n.21 (6th Cir. 2001). The First Amendment thus favors the dignity

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<sup>27</sup> See CONSUMER REPORTS NAT’L RESEARCH CTR., *supra* note 6, at 2 (“A range of environmental, safety and social concerns are imperative to most US consumers when purchasing food . . .”).

of consumers above “state interests that seek to keep people in the dark for what the government believes to be their own good.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

Taken together, the First Amendment’s protection of (1) the marketplace of ideas, (2) commercial speech, and (3) true speech establish that consumers have a right to hear and act on information about food production. “It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.” *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998). And that public discourse is necessarily best served through more speech (not less), since “[s]unlight is . . . the best of disinfectants.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

### **3. Consumers rely on journalists, whistleblowers, and activists for vital information about food production.**

Consumers’ core First Amendment interest in access to information about food production is about more than just prices, labels, and the results of government inspections. Such information alone still leaves consumers in the dark about many key aspects of food production and lacking a way to verify information provided by government and food-industry sources.

Consumers therefore also rely on journalists, whistleblowers, and activists in order to make “intelligent and well informed” decisions about food production. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

The most widespread manner that journalists and activists have informed consumers about food production is by exposing agricultural malpractice. “As far back as the publication of [Upton Sinclair’s] *The Jungle*, which documented the horrific conditions inside Chicago meatpacking plants in the early 20th century, the public has relied on journalists and activists to expose dangerous abuses and misconduct” in the food industry.<sup>28</sup> That watchdog role continues to this day. Consider a 2007 Humane Society investigation at a Chino, California slaughterhouse that “revealed abuse of downer cows.”<sup>29</sup> This investigation resulted in “criminal charges, the largest meat recall in U.S. history, and a California ballot initiative banning intense farm confinement practices.”<sup>30</sup>

Another way that journalists and activists inform consumers about food production is by helping consumers gauge the truth of food labeling

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<sup>28</sup> Editorial Board, Editorial, *No More Exposés in North Carolina*, N.Y. TIMES, Feb. 1, 2016, <http://nyti.ms/1Q6aOUa>.

<sup>29</sup> Negowetti, *supra* note 25, at 1351.

<sup>30</sup> *Id.*

and advertising directed at consumers' political, religious, economic, dietary, or ethical values. For example, in January 2015, the animal rights group Direct Action Everywhere released "disturbing video of laying hens at a farm in Northern California that supplies eggs to Whole Foods and Organic Valley, among other retailers and distributors."<sup>31</sup> Since then, another animal rights group, People for the Ethical Treatment of Animals (PETA), has filed a class action lawsuit against Whole Foods, alleging that the "chain's attempts to monitor how its suppliers treat their animals are a 'sham' . . . . [a]nd that its customers are paying for it."<sup>32</sup>

Whistleblowers also enhance consumer awareness about food production. Take lean finely textured beef ("LFTB"), an "ammonia-treated ground beef filler" colloquially referred to as "pink slime."<sup>33</sup> Until recently, LFTB was used in many foods – a fact many consumers did not know.<sup>34</sup> Then, a former manager at a leading LFTB producer spoke out about how

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<sup>31</sup> Stephanie Strom & Sabrina Tavernise, *Animal Rights Group's Video of Hens Raises Questions, But Not Just for Farms*, N.Y. TIMES, Jan. 8, 2015, <http://nyti.ms/1BLpz90>.

<sup>32</sup> J. Moyer, *Whole Foods' Expensive, 'Humanely Treated' Meat Is a 'Sham,' PETA Lawsuit Claims*, WASH. POST, Sept. 22, 2015, <http://wpo.st/tCLh1>.

<sup>33</sup> Michele Simon, *The Man Who Blew the Whistle on 'Pink Slime,'* GRIST, Mar. 15, 2012, <http://grist.org/scary-food/the-man-who-blew-the-whistle-on-pink-slime/>.

<sup>34</sup> See *id.*

LFTB is made.<sup>35</sup> Media investigations followed<sup>36</sup> and several grocery chains decided to drop LFTB, citing “customer concerns as one of the primary reasons for the change.”<sup>37</sup> While food experts continue to debate the merits of LFTB,<sup>38</sup> the public revelation of LFTB’s ubiquity has enabled consumers to better make their own choices in the marketplace. And federal authorities have recognized this insofar as they have moved to expand federal protections for whistleblowers in the food industry.<sup>39</sup>

Consumers likewise recognize and appreciate the vital information that journalists, whistleblowers, and activists have to share about how food is made. This information is consequently “an important driver of public opinion on animal welfare issues.”<sup>40</sup> It is also why some “[c]onsumers are

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<sup>35</sup> See *id.*

<sup>36</sup> See, e.g., Jim Avila, *Where You Can Get ‘Pink-Slime’ Free Beef*, ABC NEWS, Mar. 9, 2012, <http://abcn.ws/1PBrmUE>.

<sup>37</sup> Jim Avila, *Safeway, SUPERVALU, & Food Lion to Stop Selling ‘Pink Slime’ Beef*, Mar. 21, 2012, <http://abcn.ws/1OxRyEO>.

<sup>38</sup> See Philip M. Boffey, Editorial, *What If It Weren’t Called Pink Slime?*, N.Y. TIMES, May 12, 2012, <http://nyti.ms/M4uOHP> (arguing that LFTB is, in fact, “safe, nutritious and relatively inexpensive”).

<sup>39</sup> See Tim Devaney, *Food Workers Receive Whistleblower Protections*, THE HILL, Apr. 18, 2016, <http://thehill.com/regulation/labor/276693-food-workers-receive-whistleblower-protections>.

<sup>40</sup> Baylen Linnekin, *How Ag Gag Laws Suppress Free Speech and the Marketplace of Ideas*, REASON, Sept. 2, 2012, <http://reason.com/archives/2012/09/01/ag-gag-laws-suppress-free-speech-marketp>.

walking away from America's most iconic food brands."<sup>41</sup> And these food companies are taking notice. When activists recently released a video showing "mistreatment of chickens at Perdue, an agribusiness giant," Perdue saw fit to "praise[] the undercover investigation and subsequent police involvement."<sup>42</sup> Some agribusinesses, however, have lobbied state legislatures to go in a different direction: censorship.

#### **4. Ag-gag laws impede consumer access to journalists, whistleblowers, and activists as sources of vital information about food production.**

In the face of staggering revelations by journalists, whistleblowers, and activists about serious problems in the food industry, the agribusiness lobby and supportive state legislators have "push[ed] for the passage of so-called 'ag-gag' laws."<sup>43</sup> These laws ban the use of information-gathering activities like hidden cameras that enable journalists, whistleblowers, and activists to conduct undercover investigations of agricultural facilities.<sup>44</sup> So

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<sup>41</sup> Taparia & Koch, *supra* note 22.

<sup>42</sup> J. Moyer, *Man Arrested After Undercover Video Reveals Alleged Abuse at Perdue Chicken Supplier*, WASH. POST, Dec. 11, 2005, <http://wpo.st/CnLh1>.

<sup>43</sup> Editorial Board, *supra* note 28 (addressing North Carolina's passage of an ag-gag law).

<sup>44</sup> See Richard Opperl, *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES, Apr. 6, 2013, <http://nyti.ms/14NLboi> ("[A] dozen or so state legislatures have . . . proposed or enacted bills that would make it illegal to

far, eight states have passed ag-gag laws: Montana, North Dakota, Utah, Iowa, Missouri, North Carolina, Kansas, and Idaho.<sup>45</sup>

Though the exact terms of these laws vary, they all share the same basic purpose: to impede the ability of journalists, whistleblowers, and activists to reach consumers with information derived from undercover investigations of agricultural facilities. These laws thus raise serious First Amendment concerns.<sup>46</sup> Consider Idaho's ag-gag law, Idaho Code § 18-7042, whose constitutional validity is at issue here. The Idaho legislator who drafted § 18-7042, Dan Steenson, described this law as necessary to protect Idaho agribusinesses in "the court of public opinion" from "self-appointed so-called [activist] investigators who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse." (ER:5 (quoting Steenson).)

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covertly videotape livestock farms, or apply for a job at one without disclosing ties to animal rights groups.").

<sup>45</sup> See *Ag-Gag Legislation by State*, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (ASPCA), <http://www.aspca.org/animal-protection/public-policy/ag-gag-legislation-state> (last visited June 18, 2016) (providing a state-by-state survey of ag-gag laws).

<sup>46</sup> See Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 64 n.354 (2016) ("Content-based recording statutes, such as bans on recording industry practices on industrial farms, raise even more acute concerns about governmental efforts to restrict the conveyance of information by targeting the front end of the speech process.").

The legislative history of North Carolina’s ag-gag law also reflects this same sentiment, with one of the law’s sponsors admitting that the law’s purpose was “to stop people who would go ‘running out to a news outlet.’”<sup>47</sup> This helps to explain why ag-gag laws tend to include provisions that explicitly ban covert video recordings at agricultural facilities.<sup>48</sup> Many agribusiness interests want to ensure that consumers never see such videos, which often reveal animal abuse. Idaho’s ag-gag law certainly reflects this intent, with legislator Steenson defending the law as necessary to prevent activists from “assum[ing] the role of prosecutor in the court of public opinion by publishing edited recordings and advocating that the farmer’s customers go elsewhere.” (ER:5 (quoting Steenson).)

At this point, it is important to recognize that ag-gag laws live up to their name – they are enforceable against journalists, whistleblowers, and activists, thereby hindering consumer access to vital information about food production. In February 2013, animal rights activist Amy Meyer

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<sup>47</sup> Editorial Board, *supra* note 28.

<sup>48</sup> *See, e.g.*, Kansas Stat. Ann. § 47-1827(c)(4) (penalizing non-consensual “enter[ing] [of] an animal facility to take pictures by photograph, video camera or by any other means”); Idaho Code § 18-7042(d) (penalizing non-consensual “audio or video recordings of the conduct of an agricultural production facility’s operations”); Utah Code Ann. § 76-6-112(2)(a), (d) (penalizing non-consensual audio or video recordings).



became “the first [person] to be charged under Utah’s [ag-gag] law.”<sup>49</sup> Meyer was arrested “[w]hile standing on public property adjacent to a slaughter-house . . . after she videotaped a sick cow being pushed by a track loader.”<sup>50</sup> Utah prosecutors later dropped the case following intense media scrutiny.<sup>51</sup> Nevertheless, Meyer has noted the “fear” instilled by her ordeal and the “chilling effect” that has followed “on the gathering and disseminating of information in the public interest.”<sup>52</sup>

Meyer is not alone in this concern. Cody Carlson, a former Mercy for Animals investigator, echoes the same view.<sup>53</sup> Carlson once “used a hidden camera to take extensive documentation of what [he] saw over the six weeks [he] worked at [a] Pennsylvania factory farm.”<sup>54</sup> Carlson observes that under many ag-gag laws today, this would be illegal.<sup>55</sup>

In this manner, ag-gag laws stifle the free flow of information about food production issues from journalists, whistleblowers, and activists to

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<sup>49</sup> Negowetti, *supra* note 25, at 1353.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Amy Meyer, Opinion, ‘Ag-gag’ Laws Will Deter Reporting on Animal Abuse, WASH. POST., June 7, 2013, <http://wapo.st/15UwzBR>.

<sup>53</sup> Cody Carlson, *How State Ag-Gag Laws Could Stop Animal-Cruelty Whistleblowers*, THE ATLANTIC, Mar. 25, 2013, <http://theatlantic.com/28If4fW>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

consumers. “Since 1998, animal activists have conducted at least seventy-six undercover investigations at egg, pork, chicken, beef, dairy, deer, duck, turkey, and fish farms across the nation.”<sup>56</sup> Consumers now stand to lose access to this information thanks to ag-gag laws like the one at issue here. This is because under these laws, journalists, whistleblowers, and activists can no longer afford to gather or disseminate this information.

**5. By impeding consumer access to vital information about food production, ag-gag laws distort the marketplace of ideas and violate the First Amendment.**

As noted above, ag-gag laws make it much harder for consumers to hear what journalists, whistleblowers, and activists have to say about food production. That reality alone raises significant First Amendment concerns. But there is an even bigger First Amendment problem at play here when one considers the other voices in the marketplace of ideas that benefit from this form of censorship: agribusinesses and the government.

As noted in Part I, agribusinesses are well aware of the political, religious, economic, dietary, and ethical concerns that consumers bring to the kitchen table. Hence, “General Mills [is] drop[ping] all artificial colors and flavors from its cereals. Perdue, Tyson and Foster Farm have begun to

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<sup>56</sup> Negowetti, *supra* note 25, at 1350.

limit the use of antibiotics in their chicken. Kraft [has] declared it [i]s dropping artificial dyes from its macaroni and cheese.”<sup>57</sup> Through these decisions and advertising campaigns to match, many agribusinesses seek to reinvent their public image and relationship with consumers. And in “an uninhibited marketplace of ideas,” consumers are free to weigh these commercial messages against any information generated by journalists, whistleblowers, and activists to the contrary, thus enabling the “truth . . . [to] ultimately prevail.” *McCullen*, 134 S. Ct. at 2529.

But with ag-gag laws in place, consumers only get to hear the food industry’s side of the story – or the government’s, for that matter. The government promotes a number of messages to help agribusinesses, including the beef check-off program and its ubiquitous tagline: “Beef. It’s what’s for dinner.” *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–61 (2005) (“The message set out in the beef promotions is . . . the message established by the Federal Government.”). Ordinarily, consumers would be free to weigh these government messages against speech from journalists, whistleblowers, and activists exposing problems in the beef industry. Ag-gag laws, however, deter journalists, whistleblowers, and activists from

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<sup>57</sup> Taparia & Koch, *supra* note 22.

releasing their most potent message on this score: undercover video of livestock production facilities and slaughterhouses.

This distortion of the marketplace of ideas has already begun to take its toll. A recent study published in *Food Policy* reveals that consumers lose trust in farmers upon learning about ag-gag laws.<sup>58</sup> This reaction thereby exposes the hollowness of legislative assertions that ag-gag laws are needed to prevent journalists, whistleblowers, and activists from casting farmers or agribusinesses in a false light. (See, e.g., ER:5 (quoting various Idaho legislators to this effect).) Ag-gag laws in fact have the opposite effect, making it easier for consumers to believe that agribusinesses have something to hide.<sup>59</sup> The only way out of this trap is to embrace the First Amendment: the remedy “is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

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<sup>58</sup> J.A. Robbins, et al., *Awareness of Ag-Gag Laws Erodes Trust in Farmers & Increases Support for Animal Welfare Regulations*, 61 *FOOD POLICY* 121, 121 (2016); see also Andrew Amelinckx, *New Study Finds “Ag-Gag” Laws Erode Trust in Farmers*, *MODERN FARMER* (Mar. 29, 2016), <http://modernfarmer.com/2016/03/ag-gag-laws-erode-trust-farmers/>.

<sup>59</sup> See Charlie Arnot, *Ag-Gag Challenged: Opening Barn Doors Best Approach to Building Trust*, *CENTER FOR FOOD INTEGRITY (CFI) BLOG* (Aug. 10, 2015), <http://www.foodintegrity.org/2015/08/ag-gag-challenged-opening-barn-doors-best-approach-to-building-trust/> (“[U]sing state laws to barricade the barn door doesn’t build public trust.”).

## Conclusion

Consumers want to know where their food comes from and how it is produced. Journalists, whistleblowers, and activists play a vital role in meeting this informational demand through undercover investigations at livestock and agricultural processing facilities. Recognizing this reality, states like Idaho have enacted ag-gag laws that effectively criminalize such investigations, enabling agribusinesses and the government to monopolize the marketplace of ideas on food-production issues. The First Amendment does not permit this. The Court should use this case to make that reality clear, and thereby vindicate the core political, religious, economic, dietary, and ethical commitments that consumers bring to food.

Respectfully submitted,

Dated: June 28, 2016

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The undersigned certifies under Fed. R. App. P. 32(a)(7)(C) that this *amicus curiae* brief complies with all the applicable type-volume limitations, and typeface and type-style requirements set forth under Rule 32(a). This brief was prepared using a proportionally spaced font (Book Antiqua). Exclusive of portions exempted by Fed. R. App. P. 32(a)(7)(B)(III) and the attached Addendum of Amici Scholar Biographies, this amici brief contains 5,452 words, according to the word-count function of the word processor (Microsoft Word 2010) that was used to prepare this brief.

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Food Law & Policy Scholars

## Certificate of Service

The undersigned certifies that on June 28, 2016, he caused this document – Brief of *Amici Curiae* Food Law & Policy Scholars in Support of Plaintiffs-Appellees Animal Legal Defense Fund, et al. – to be filed electronically with the Clerk of the Court using the CM/ECF System. The CM/ECF System will send notice to counsel for all parties. The undersigned also certifies that counsel for all parties are registered ECF Filers, and thus will be served by the CM/ECF System.

Dated: June 28, 2016

**SUBBARAMAN PLLC**

By:     /s/Mahesha P. Subbaraman      
Mahesha P. Subbaraman

Counsel for *Amici Curiae*  
Food Law & Policy Scholars

## **Addendum: Amici Scholar Biographies**

**Alison Peck** is Professor of Law at West Virginia University College of Law, where she teaches Agriculture & Food Law, Property Law, and Administrative Law. Her scholarship has appeared in the *Missouri Law Review*, the *UMKC Law Review*, the *Georgetown International Environmental Law Review*, and other publications. She has been quoted as an expert on agriculture and food law in the *New York Times* and *WIRED* and has appeared as a featured guest on Chicago Public Radio's Worldview. She holds a J.D. from Yale Law School and an LL.M. in agriculture and food law from the University of Arkansas School of Law.

**Baylen Linnekin** is an adjunct professor at George Mason University's Antonin Scalia Law School, where he teaches Food Law & Policy. He holds a J.D. from Washington College of Law and an LL.M. in agricultural and food law from University of Arkansas Law School. Linnekin's work has appeared in the *Wisconsin Law Review*, the *Hastings Constitutional Law Quarterly*, the *Chapman Law Review*, and elsewhere. His book *Biting the Hands that Feed Us: How Fewer, Smarter Laws Would Make Our Food System More Sustainable* is forthcoming from Island Press. He serves on the board of the Academy of Food Law & Policy.

**Diana R. H. Winters** is an Associate Professor at the Indiana University McKinney School of Law, where she joined the faculty in August of 2012. She teaches Torts, Health Law and Policy, and Food Law, and her research focuses on food law and the interaction between different levels of regulatory authority. Winters's work has appeared or is forthcoming in the *Ohio State Law Journal*, the *Indiana Law Journal*, the *Tulane Law Review*, and other publications.

**Erika George** is Professor of Law at University of Utah's S.J. Quinney College of Law. She teaches constitutional law, international human rights law, international environmental law and seminar courses on corporations and human rights. She earned her B.A. from the University of Chicago and her J.D. from Harvard Law School. She also holds an M.A. in International Relations from the University of Chicago. Her current research explores the



responsibilities of multinational corporations to respect international human rights and various efforts to hold corporations accountable for alleged rights violations. She is the author of Incorporating Rights, forthcoming from Oxford University Press.

**Gabriela Steier** is Co-Founder of Food Law International (FLI) and Editor-in-Chief of two forthcoming textbooks. She is a barred attorney and focuses on food safety, policy, animal welfare and GMO issues domestically and in the European Union. Gabriela is an LL.M Fellow in Food and Agriculture Law at the Vermont Law School. She also joined the Duquesne University School of Law as an Adjunct Professor teaching “food law and policy” in 2015. As Visiting Professor at the University of Perugia, Italy, she also teaches EU-US comparative food law at the Department of Political Sciences.

**Guadalupe T. Luna** is Professor Emeritus from Northern Illinois University College of Law and Professor of Law at Indiana Tech Law School, where she joined the faculty in August 2012 as a founding faculty member. She has taught Agricultural Law since 1992 and also teaches Property Law and Remedies. Her research focuses on agricultural labor, protecting independent owner-operators of small farming operations, and land property studies following the United States war with Mexico. Professor Luna’s extensive agricultural-based scholarship has appeared in various law reviews including the *Harvard Latino Law Review* and the *Wisconsin Law Review*.

**Jayesh Patel** is an adjunct professor at Michigan State University’s College of Law, directing its Food Law Clinic, a transactional clinic seeking systems-level solutions to food security, food sovereignty, and food justice issues in poor and underserved communities. He is also president of Street Democracy, a nonprofit legal services organization working toward equitable access to the machinery of government.

**Laurie J. Beyranevand** is a Professor of Law and Senior Fellow of Food Law and Policy for the Center for Agriculture and Food Systems at Vermont Law School. She received a B.A. from Rutgers College in 1999 and a J.D. from Vermont Law School in 2003. Laurie is an appointed member of

the Academic Programs Committee for the Food and Drug Law Institute, and formerly served as an Executive Committee Member of the Agriculture and Food Law Section of the American Association of Law Schools. She is admitted to both the New York and Vermont State Bars, as well as the U.S. District Court, District of Vermont.

**Michele Simon** has 20 years of experience in food and beverage law and policy. She offers legal advice to food companies on federal regulatory compliance for labeling and marketing. In addition to her law degree from University of California, Hastings College of the Law, Michele has a master's degree in public health from Yale University. She practices in California, working "of counsel" to Handel Food Law. She is also executive director of the Plant Based Foods Association, a trade group representing the nation's leading plant-based foods companies, and recently taught at the University of the Pacific's Food Studies Program.

**Nicole Negowetti** is Policy Director of The Good Food Institute, a nonprofit focused on creating a sustainable, humane, and healthy food supply. She served as an Associate Professor of Law at the Valparaiso University School of Law from 2011-2016. As a law professor, her teaching and research focused on food law and policy, agricultural law, and sustainability. In particular, Nicole is the author of the article *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345 (2015), cited in this brief.

**Samuel Wiseman** is the McConnaughay and Rissman Professor at Florida State University College of Law, where his teaching schedule includes Food Law. He holds a J.D. from Yale Law School. Professor Wiseman's work on food issues has appeared in the *American Journal of Law & Medicine*, the *Food and Drug Policy Forum*, and the *Seattle University Law Review*, among others.

**Sarah Schindler** is a tenured Professor at the University of Maine School of Law where she teaches courses including Property, Local Government, and Animal Law. Her research focuses on land use, sustainable development, and sustainable food systems. Her work has appeared in the *Yale Law Journal*, the *University of Chicago Law Review*

*Dialogue*, the *George Washington Law Review*, the *Wisconsin Law Review*, and others. Before Maine Law, Professor Schindler practiced land use and environmental law at Morrison and Foerster in San Francisco, and served as a law clerk to the Honorable Will Garwood of the U.S. Court of Appeals for the Fifth Circuit.

**Steph Tai** is an associate professor at the University of Wisconsin Law School and conducts research and teaches in the area of food systems law. Steph's research, in particular, examines issues of sustainability, consumer preferences, third-party certification systems, interagency collaboration, and scientific uncertainty and controversy in the governance of food production and provision. Her research has been published in journals such as the *Wisconsin Law Review*, the *Southern California Law Review*, and the *American Journal of Law and Medicine*.

**Timothy D. Lytton** is a Distinguished University Professor and Professor of Law at Georgia State University, where he teaches courses in administrative law, regulatory science, and torts. His research focuses on food regulation in the areas of food safety, labeling, nutrition, and school lunch programs. He is the author of a leading book on kosher certification, *Kosher: Private Regulation in the Age of Industrial Food* (Harvard Univ. Press 2013) and is currently working on a book about the U.S. food safety system, *Outbreak: Foodborne Illness and the Evolving Food Safety System* (under contract with Univ. of Chicago Press).

**Vanessa Zborek** is Professor of Practice at Wake Forest University School of Law, where she developed the first course offered at the law school in Food Law and Policy. She also teaches Administrative Law, Sustainability Law and Policy, Evidence, Public Law, and Legal Writing. Her research primarily focuses on land use, animal agriculture, and environmental justice.