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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al.,	
Plaintiffs,	Case No. 1:14-cv-00104-BLW
-v-	
C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho, and LAWRENCE G. WASDEN, in his official capacity as Attorney General of Idaho,	
Defendants.	

BRIEF OF AMICUS CURIAE

CENTER FOR CONSTITUTIONAL RIGHTS

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STATEMENT OF INTEREST

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has protected the rights of marginalized political activists for over forty years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). CCR's First Amendment work continues to this day. *See e.g., In re NSA Telecomms. Records Litig.*, 522 Fed. Appx. 383 (9th Cir. 2013); *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014); *United States v. Buddenberg,* No. 09-00263-cr, 2010 U.S. Dist. LEXIS 78201 (N.D. Cal. July 12, 2010).

ARGUMENT

The State of Idaho has the right to protect the agricultural industry and the property of its citizens. But this right does not trump the freedom of speech and expression enjoyed by all Idaho's citizens and visitors. Idaho may not, even in the name of protecting property, ban speech about the agricultural industry, nor outlaw misrepresentations made to investigate that industry. I.C. § 18-7042 is no ordinary criminal law, prohibiting unlawful conduct. Instead, it is a content- and viewpoint based statute which would broadly prohibit the First Amendment protected acts of video and audio-recording and making misrepresentations that do not amount to fraud. As such the law must be subjected to strict scrutiny and, because it cannot survive such exacting analysis, must be struck down as incompatible with the First Amendment to the Constitution of the United States of America.

I. I.C. § 18-7042 Regulates Speech based on Content and Viewpoint

I.C. § 18-7042 impermissibly discriminates on the basis of content and viewpoint. The law discriminates on the basis of content by targeting speech about the agricultural industry. Even worse, it discriminates on the basis of viewpoint by privileging speech that is supportive of such industry and criminalizing certain speech that is opposed to that industry. And even if I.C. § 18-7042 were, as the State argues, limited to regulating speech that is connected to unlawful conduct, it would still engage in unconstitutional content and viewpoint discrimination.

Content-based regulation is impermissible because it allows the Government to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 391 (1992) (finding regulation to be impermissibly content-based because it proscribed speech based on subject matter). Viewpoint-based restrictions are an even more dangerous form of content-based discrimination, because they represent the Government picking sides in a disputed issue. *See Rosenberger v. Rector,* 515 U.S. 819, 829 (1995). The First Amendment is offended by both kinds of regulations because directly or indirectly, they suggest that "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks omitted). While this showing may be based upon explicit or implicit legislative intent, a content-based purpose is not necessary. *Id.* at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id*. at 642-43.

A law is content based when, "by its very terms, [it] singles out particular content for differential treatment." *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). This is so

even if the law at issue has a legitimate, non-content-based purpose.[1] *Id; see also Reed v. Town of Gilbert*, 587 F.3d 966, 975 (9th Cir. 2009). The State would avoid this reality by boldly proclaiming that "Section 18-7042(1) *says nothing about the content of any audio or video recording*." Defendants' Reply to Response to Motion to Dismiss, Dkt. No. 35, at 6 (emphasis added). But this is untrue: Section 18-7042(1)(6) explicitly singles out for punishment audio and video recordings "*of the conduct of an agricultural production facility's operations.*" *See* I.C. § 18-7042(1) (d) (emphasis added). An employee who, without the owner's consent, films animals being abused on a farm may be punished under the law; the same employee, who without consent films the owner's children, may not.

That I.C. § 18-7042 cannot be analyzed as content-neutral is further corroborated by analysis of how it will be enforced. Though not always dispositive, it is "persuasive evidence" that a law is content-based if law enforcement officials must view the material in question to determine whether it is prohibited. *See G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1078 (9th Cir. 2006); *Reed*, 587 F.3d at 976. In enforcing Idaho's law, law enforcement personnel would certainly need to view suspect video or audiotape to determine whether it captures agricultural operations and thus is prohibited. This assessment of content would not be limited to the "content-neutral elements of who is speaking … and when an event is occurring." *Reed*, 587 F.3d at 979. Thus, I.C. § 18-7042 is content-based.

[1] Amici agree with Plaintiffs that I.C. § 18-7042 is content-based because of the legislature's clear purpose of silencing animal activists, *see* Memorandum in Support of Plaintiffs' Opposition to Motion to Dismiss, Dkt. No. 23, at 12-13; *see also, Valle Del Sol Inc., v. Whiting*, 709 F.3d 808 (9th Cir. 2013) (relying on legislative history regarding purpose of Arizona's day laborer solicitation ban in finding statue content-based). However, given the law's facially discriminatory nature, it must be analyzed as a content-based law even if the Court were to disregard Plaintiffs' allegations regarding the legislature's discriminatory motive.

That § 18-7042(1)(d) regulates the *manner* in which information about agricultural operations may be gathered (and thus disseminated), does not lessen its discriminatory nature. *See Berger,* 569 F.3d at 1050-51 (rule regarding manner in which street performers may solicit nonetheless content-based due to its prohibition on "communicating a particular set of messages."). As the Circuit explained, a "performer at the Seattle Center need not rely on a sign … to express his or her views on a political candidate; she can use her voice," but a solicitor is limited in the ways she may communicate her message. *Id.* at 1051. Here too, animal activists are limited in the manner (through audio and visual recording) by which they can communicate their "particular" message.

The State defends I.C. § 18-7042 as punishing only trespass and conversion without regard to any particular expressive content. *See* Defendants' Reply to Response to Motion to Dismiss, Dkt. No. 35, at 6-7. But a similar argument was made and rejected by the Circuit in *Valle Del Sol Inc., v. Whiting*, 709 F.3d 808 (9th Cir. 2013), a First Amendment challenge to Arizona's law prohibiting day laborer solicitation from a stopped car that is impeding traffic. *Id.* at 814, 819-20. The defendants argued that the law was content-neutral because it was enacted to ameliorate the traffic problems created when day-laborers congregate and solicit employment from passing vehicles. *Id.* at 820. But while Arizona could certainly legislate to promote traffic safety, the "mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content." *Id.* at 820, *quoting ACLU of Nev. v. City of Las Vegas,* 466 F.3d 784, 793 (9th Cir. 2006); *see also, Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires"), *United States v. Eichman*, 496 U.S. 310, 315 (1990).

Section 18-7042(1)(d) is not the only problematic provision of the statute; section (1)(c) is impermissibly viewpoint-based. As shown in section II.B, below, misrepresentations are protected by the First Amendment, but even if they are not, or if I.C. § 18-7042 is interpreted to prohibit only those misrepresentations amounting to fraud, its viewpoint-based discrimination is still impermissible.

In *R.A.V.*, for example, the ordinance at issue criminalized "fighting words" that the speaker "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380-81. The Court made clear that even though "fighting words" are generally unprotected by the First Amendment, the Government may not choose to criminalize only a subset of unprotected speech using content- or viewpoint-based discrimination. *Id.* at 391-94. As the Supreme Court elaborated in *Virginia v. Black*, the Government may only make such distinctions within a category of speech that is generally unprotected when the distinction is drawn for the same reasons that the category of speech is unprotected as a general matter. 538 U.S. 343, 361-63 (2003). Thus, in *Black*, burning a cross with the intent to intimidate could be criminalized because the category of "true threats" is unprotected precisely because of its intimidating nature, and burning a cross is simply one especially pernicious mode of intimidating speech. *Id.* at 363.

I.C. § 18-7042 is more like *R.A.V.* than *Black*, in that it criminalizes a subset of misrepresentations made to gain employment with an agricultural production facility *with the intent to cause economic or other injury*. Illustrated simply, an animal rights protestor who misrepresents his past employment, and is hired at a facility with the purpose of exposing unlawful animal abuse and shutting the plant down, can be prosecuted. An individual who lies about past employment simply to get a paying job cannot; nor could an animal industry

supporter, who similarly misrepresents his past with the goal of videotaping pristine conditions to further public support of agriculture. Unlike the statute in *Black*, such viewpoint discrimination cannot be justified by the reason fraud may be proscribed in the first place. Because I.C. § 18-7042 does not single out a type of fraud that is particularly pernicious, *see Black*, 538 U.S. at 363, but rather proscribes misrepresentations distinguishable only in that they support a specific viewpoint, the law discriminates, and must be subjected to strict scrutiny.

II. I.C. § 18-7042 Criminalizes Protected Speech

Both the press and private individuals regularly employ undercover investigations to uncover public and private corruption or other bad dealing, exposing, among hundreds of other things, conditions in nursing homes, mental institutions, hospitals, and day care facilities; commercial dishonestly by medical providers, restaurants, auto repair business; and racial and other illegal discrimination in housing, employment, and elsewhere. *See* Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 746-47 (1999). Without question, this undercover reporting plays an important societal role, acting as a surrogate where the public has neither the time nor the access to observe or investigate wrongful conduct but nevertheless has an important interest in conduct affecting its health and safety. *See* Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL OF RS. J. 1145, 1153 (1996); *see also* Lewis Bollard, *Ag-gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10975 (2012) (collecting cases describing the importance of undercover investigations).

Undercover investigations typically involve two central actions—obtaining access and video-recording. The Idaho legislature, at the behest of powerful agricultural interests, seeks to criminalize both aspects of the investigative process,[2] but both restrictions run afoul of the First Amendment.

A. I.C. § 18-7042(1)(d)'s Prohibition on Audio and Video Recording Unacceptably Restrains Protected Speech

I.C. § 18-7042(1)(d), prohibiting audio or visual recording of agricultural facilities' operations, quells speech, not conduct. The State's only argument on this point is that the section protects property rights. Defendants' Reply to Response to Motion to Dismiss, Dkt. No. 35, at 4-5. However, the provision does not regulate *access* to facilities but rather the communication of information from the facilities. Its prohibition is not limited to access obtained through trespass or other unlawful methods. I.C. § 18-7042(1)(d) prohibits all audio and video recording done without permission of the facility's owner, even to an invitee whose access is acquiesced to, or any other otherwise lawful and permitted presence. I.C. § 18-7042(1)(d), which contains no scienter requirement, nor even a requirement of entry on false pretenses, serves only to silence a primary mode of conveying information about the operation of agricultural production facilities

[2] *See also* Peter Moskowitz, *Idaho Governor Signs 'Ag-Gag' Bill Into Law; Law criminalizes secretly filming on farms; animal rights groups say abuse will now go unexposed*, ALJAZEERA AMERICA, Feb. 28, 2014, http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-aggagbillintolaw.html; Josh Loftin, *Filming on farms banned by proposed Utah law,* ASSOCIATED PRESS, Feb. 26, 2012, http://www.deseretnews.com/article/765554350/Filming-on-farms-banned-by-proposed-Utah-law.html; Cindy Galli and Randy Kreider, *'Ag Gag': More States Move to Ban Hidden Cameras on Farms*, ABC NEWS, Mar. 15, 2013, http://abcnews.go.com/Blotter/states-move-ban-hidden-cameras-farms/story?id=18738108; Richard A. Oppel Jr., *Taping of Farm Cruelty is Becoming the Crime*, THE NEW YORK TIMES, Apr. 6, 2013, http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html.

and to limit the public's ability to receive this information. As such, this provision directly targets speech.

Creating a recording is "included with 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). The stages of speech relating to recordings are so intertwined as to be nearly inseparable, and the protection accorded them is even more apparent when, as in this case, the subject of recording is a matter of public interest. This is because videotaping unsafe conditions is indistinguishable from "commenting" and "speaking" on such conditions, and videotapes, like other statements "'speak' for themselves." *Cirelli v. Town of Johnston Sch. Dist*., 897 F. Supp. 663, 666 (D.R.I. 1995) (teacher's videotaping of school conditions protected by First Amendment); *see also Scott v. Harris*, 550 U.S. 372, 379 n.5 (2007) (videotape of police chase "speak[s] for itself"); *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011) (videotaping of public officials discharging their duties is protected by the First Amendment and this protection is "fundamental and virtually self-evident"); *Demarest v. Athol/Orange Cmty. TV, Inc*., 188 F. Supp. 2d 82, 92-95 (D. Mass. 2002) ("At base, plaintiffs had a constitutionally protected right to record matters of public interest" which ran contrary to a provision requiring all persons filmed to sign a release form); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (First Amendment right to record matters of public interest); and *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) (First Amendment right to videotape police conduct).

B. I.C. § 18-7042 Criminalizes Misrepresentations Protected by the First Amendment

I.C. § 18-7042's prohibitions on misrepresentation cannot even plausibly be framed as prohibitions on conduct, despite the State's attempt to cast them as such. Defendants' Reply to

Response to Motion to Dismiss, Dkt. No. 35, at 4-5. The law's prohibitions on misrepresentation are restrictions on pure speech.

I.C. § 18-7042 criminalizes two types of misrepresentation. I.C. § 18-7042 (1)(a) punishes misrepresentation made in connection with obtaining access to an agricultural facility without regard for whether it causes actual injury or damage. I.C. § 18-7042 (1)(c) punishes misrepresentation made to obtain employment "with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers." The First Amendment unquestionably protects the right of investigators to use misrepresentation as a means to gain access to "agricultural facilities."

False statements that do not constitute defamation, fraud, or perjury are fully protected speech. *United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012). "It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed." *United States v. Alvarez*, 617 F.3d 1198, 1203 (9th Cir. 2010) *aff'd*, 132 S. Ct. 2537 (2012). "The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or social utility of the ideas and beliefs which are offered." *Meyer v. Grant*, 486 U.S. 414, 419 (1988) (internal quotation marks omitted). "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting John Stuart Mill, On Liberty 15 (Oxford: Blackwell 1947)).

Investigators' misrepresentations made to obtain access do not fall within the traditional categories of unprotected false statements — defamation, fraud, or perjury. While the State refers to these misrepresentations as fraudulent, that use appears to be colloquial, not legal. Unprotected fraud requires more than a misrepresentation; it requires, among other things,

materiality, proximate cause, reliance, and injury. *Alvarez*, 132 S. Ct. at 2554; *see also Bryant Motors, Inc. v. Am. States Ins. Cos.*, 800 P.2d 683, 686 (Idaho Ct. App. 1990) (stating the elements of common law fraud in Idaho as "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge about its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury"). I.C. § 18-7042 (1)(a) & (c) seek to remove various elements of this test and criminalize misrepresentation itself. The First Amendment does not allow such a shortcut.

Misrepresentation by undercover investigators has been deemed a newsgathering exercise, *see Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.,* 306 F.3d 806, 819 (9th Cir. 2002), that is subject to First Amendment protections. *See Leigh v. Salazar*, 677 F.3d 892, 897-98 (9th Cir. 2012) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Such protection extends to the "unconventional news-gatherer [ ] equal to those of an employee of a mainstream television station." *See Fordyce v. City of Seattle*, 840 F. Supp. 784, 791 (W.D. Wash. 1993) (citing *Branzburg*, 408 U.S. at 704 and *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977)), *rev'd in part on other grds,* 55 F.3d 436 (9th Cir. 1995).

In *Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995), the seminal case on the issue of undercover investigators' use of misrepresentation to gain access to newsworthy material, reporters sent undercover patients to obtain service at an ophthalmologist's offices and secretly videotaped employees giving exams. *Id.* at 1348. The reporters told the ophthalmologist that they would not cast him in a negative light. *Id*. Judge Posner, writing for the Seventh Circuit, affirmed the dismissal of the ophthalmologist's fraud claim, stating that the

reporters' actions to expose misconduct were not fraudulent. *Id*. at 1352. Following *Desnick*, courts have subsequently determined that investigators' misrepresentations in pursuit of a news story generally fall short of fraudulent conduct. *See Pitts Sales v. King World Prods*., No. 04-cv-60664, 2005 U.S. Dist. LEXIS 42197, at *14 (S.D. Fla. July 29, 2005), *see also Ouderkirk v. PETA*, No. 05-cv-10111, 2007 U.S. Dist. LEXIS 29451, at *65 (E.D. Mich. Mar. 29, 2007) ("[T]elevision shows….often conduct undercover investigations to reveal improper, unethical, or criminal behavior. Often, these investigations involve misrepresentations and deception by the investigators. The Court cannot conclude that an undercover investigation is "intolerable" in contemporary society."); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 819 (9th Cir. 2002) ("when a member of the print or broadcast press commits an intrusion in order to gather news, the public's interest in the news may mitigate the offensiveness of the intrusion.") Even in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), a case upon which the State relies, the court denied the plaintiff's fraud claim for failure to meet all of the elements of common law fraud. *Id*. at 514. Because misrepresentations in the context of undercover activities do not generally implicate fraudulent conduct, they fall well within the scope of First Amendment protection.

III. I.C. § 18-7042 Cannot Survive Strict Scrutiny

As a content- and viewpoint-based restriction on speech and expressive conduct, and as a restriction on protected speech and activity including audio and visual recording and making misrepresentations, I.C. § 18-7042 can only stand if it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, *Inc.,* 529 U.S. 803, 813 (2000). If a less restrictive alternative would serve the State's purpose, the legislature must use that alternative. Amici submit that the State has not, and cannot, make that showing.

When faced with laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content," the Supreme Court applies "the most exacting scrutiny." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Here, Defendants are unable to articulate a narrowly tailored and compelling government interest to support the law. As justification for section 18-7042(1)(d)'s ban on certain types of expression, the State claims it is protecting owners' interest in safeguarding their property from those who seek to trespass and gain entry through misrepresentation. But section 18-7042(1)(d) is not narrowly tailored to achieve that interest because it includes no requirement that entry into a facility be gained by fraudulent or subversive means; speech by legitimate employees or members of the public who properly gain entry is prohibited by the provision. Nor is there any intent requirement to the recording provision. Further, although recordings are uniquely powerful as tools for sharing information or ideas,[3] given the stated interest of deterring or preventing trespass, it is unclear why the legislature chose to exclude photography from the prohibition.

Moreover, other laws and regulations specifically targeting trespass and misrepresentation—including those already on the books—could be applied to fully accomplish the purported state interest without burdening speech. Instead, I.C. § 18-7042(1)(d) is so broad that it effectively bars an entire medium of speech on a particular topic. As noted by the Supreme Court "[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . . The danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). This dangerous suppression of speech is

[3] That the power of a recording is unique can be attested to by the billion people who used the video site YouTube in a given month or who upload 100 hours of video footage every minute. Reuters, "YouTube says has 1 billion monthly active users," March 21, 2013, http://www.reuters.com/article/2013/03/21/us-youtube-users-idUSBRE92K03O20130321.

apparent here and will have a long lasting impact on the ability to communicate as well as the public's right to know information relating to agricultural safety and worker and animal welfare. This court should enjoin the enforcement of I.C. § 18-7042.

Respectfully submitted this 21st day of May, 2014,

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