

No. 15-35960

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANIMAL LEGAL DEFENSE FUND, et al.,

Plaintiffs-Appellees,

v.

LAWRENCE G. WASDEN,

Defendant-Appellant.

United States District Court, District of Idaho
Honorable B. Lynn Winmill
Case No.: 1:14-cv-00104-BLW

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 22 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES**

Bruce D. Brown (bbrown@rcfp.org)
Counsel of Record
Gregg P. Leslie
Michael J. Lambert
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
RULE 29(C)(5) CERTIFICATION	1
CORPORATE DISCLOSURE STATEMENTS	1
SOURCE OF AUTHORITY TO FILE BRIEF	4
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	5
INTRODUCTION.....	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. Idaho’s “ag-gag” statute infringes on the First Amendment rights of journalists who want to inform the public about food safety.....	7
A. Investigations by journalists into agriculture facilities have long played a vital role in ensuring food safety.....	9
B. Idaho’s “ag gag” statute chills future investigations into the agriculture industry.....	12
II. The First Amendment protects speech on matters of public concern by subjecting restrictions to strict scrutiny, which is not satisfied by this statute.....	13
A. Speech on matters of public concern in which the public has a right to know, including through audio and video recordings, warrants the highest degree of protection.....	13
B. Idaho’s “ag-gag” statute is a content-based restriction on speech that does not survive strict scrutiny.....	17
CONCLUSION	23
STATEMENT OF RELATED CASES	23

TABLE OF CONTENTS *(continued)*

	<u>Page</u>
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 15-35960.....	24
CERTIFICATE OF SERVICE	25
APPENDIX A: STATEMENTS OF INTEREST	26
APPENDIX B.....	30

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>ACLU of Illinois v. Alvarez</i> , 679 F.3d 583 (7th Cir. 2012)	14
<i>City of Renton v. Playtime Theatres</i> , 475 U.S. 41 (1986)	17
<i>City of San Diego v. Roe</i> , 543 U.S. 77 (2004)	15
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	15
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	14
<i>ETW Corp. v. Jireh Publ'g, Inc.</i> , 332 F.3d 915 (6th Cir. 2003).....	14
<i>Garrison v. State of La.</i> , 379 U.S. 64 (1964).....	17
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936).....	8
<i>Klendienst v. Mandel</i> , 408 U.S. 753 (1972)	16
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	16
<i>Miami Herald Pub. Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	8
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	8
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue</i> , 460 U.S. 575 (1983)	8
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	13, 20
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	15
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	15
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1982)	17
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015).....	18, 19
<i>Roth v. United States</i> , 354 U.S. 476 (1957)	8
<i>Spelson v. CBS, Inc.</i> , 581 F. Supp. 1195 (N.D. Ill. 1984)	15
<i>Turner Broad. Sys. Inc. v. FCC</i> , 512 U.S. 622 (1994)	17
<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012)	20
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	22

TABLE OF AUTHORITIES *(continued)*

	<u>Page(s)</u>
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).	16
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952).....	13
 Statutes	
Idaho Code Ann. § 18-4801 (2014).....	19
Idaho Code Ann. § 18-7008 (2014).....	19
Idaho Code Ann. § 18-7011 (2014).....	19
<i>Idaho Code Ann.</i> § 18-7042 (2014).....	passim
Idaho Code Ann. § 9-338 (2011)	22
 Other Authorities	
113 Cong. Rec. 21283–86 (1967)	10
<i>2001 – Investigative Reporting</i> , The Pulitzer Prizes, www.pulitzer.org/archives/6487.....	11
<i>2010 – Explanatory Reporting</i> , The Pulitzer Prizes, http://www.pulitzer.org/archives/8819	11
<i>Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov’t Reform</i> , 111th Cong. (2010).....	12
<i>Food Safety, Agriculture Fact Book</i> , USDA (2001–2002), http://www.usda.gov/factbook/chapter9.htm.....	19
James Diedrick, <i>The Jungle</i> , Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin Keating, & James R. Grossman, eds. 2005), <i>available at</i> http://www.encyclopedia.chicagohistory.org/pages/679.html.....	9
James O’Shea, <i>Raking the Muck</i> , Chi. Trib., May 21, 2006, <i>available at</i> http://bit.ly/18TwTjR	9

TABLE OF AUTHORITIES *(continued)*

	<u>Page(s)</u>
<i>The 2008 Pulitzer Prize Winners: Investigative Reporting</i> , The Pulitzer Prizes, http://www.pulitzer.org/citation/2008-Investigative-Reporting	11
Wallace F. Janssen, <i>The Story of the Laws Behind the Labels</i> , Food and Drug Admin., http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm (last updated Dec. 14, 2011) (originally published in <i>FDA Consumer</i> , June 1981)	9

RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(c)(5), *amici* states that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amici*, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENTS

The parties to this amicus brief are: The Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, California Newspaper Publishers Association, Californians Aware, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Freedom of the Press Foundation, Idaho Press Club, The Idaho Statesman, International Documentary Assn., Investigative Reporting Workshop at American University, The Media Consortium, MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, Online News Association, PEN American Center, Radio Television Digital News Association, Society of Professional Journalists, Student Press Law Center, and Tully Center for Free Speech.

Pursuant to Fed. R. App. P. 26.1, *amici* disclose as follows:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

California Newspaper Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

Dow Jones is a Delaware corporation with its principal place of business in New York. News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones. Ruby Newco, LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company directly owns 10% or more of the stock of Dow Jones.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

The Idaho Press Club is a not-for-profit corporation that has no parent company and issues no stock.

The Idaho Statesman Publishing, LLC (The Idaho Statesman) is owned by The McClatchy Company which has no parent corporation but is publicly traded on the NYSE under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the stock of The McClatchy Company.

The International Documentary Association is an non-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The Media Consortium has no parent corporation and no stock.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

PEN American Center has no parent or affiliate corporation.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. 29(a), all parties to this appeal have given consent for *amici* to file this brief. *See also* Ninth Circuit Advisory Committee Note to Rule 29-3.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici, all of whom are engaged in newsgathering or represent the interests of journalists and publishers, have an interest in ensuring that reliable resources are available to them so that they may gather the news in a way that benefits the public and serves as a watchdog on the agriculture industry.

The Reporters Committee for Freedom of the Press is joined in this brief by American Society of News Editors, Association of Alternative Newsmedia, California Newspaper Publishers Association, Californians Aware, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Freedom of the Press Foundation, Idaho Press Club, The Idaho Statesman, International Documentary Assn., Investigative Reporting Workshop at American University, The Media Consortium, MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, Online News Association, PEN American Center, Radio Television Digital News Association, Society of Professional Journalists, Student Press Law Center, and Tully Center for Free Speech. Descriptions of all parties to this brief are given more fully in Appendix A.

INTRODUCTION

Amici, filing in support of Plaintiffs-Appellees Animal Legal Defense Fund, et al. (“ALDF”) urge this Court to affirm the district court’s order granting ALDF’s motion for summary judgment. The district court properly found Idaho Code Ann. § 18-7042, known as Idaho’s “ag-gag” statute, unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. *Amici* write to stress the First Amendment concerns of the news media if the statute is allowed to remain in effect.

SUMMARY OF ARGUMENT

By criminalizing audio and video recording at agriculture facilities, the Idaho “ag-gag” statute weakens food safety while stifling free speech. Journalists and the whistleblowers who serve as their sources have long been credited with advancing the safety of the food the public consumes, and while federal inspections have drastically improved the safety of food in the past century, problems within the inspection system leave a gap in food safety that journalists and others have filled. The Idaho statute poses a substantial risk of criminalizing lawful — and constitutionally protected — newsgathering activity and chilling the very journalism that has previously led to positive changes and a healthier food supply.

Amici also emphasize the importance of protecting speech of public concern criminalized by the statute. The public has a right to receive pertinent information about the treatment of animals, the environmental impact of the agriculture industry, and the safety of employees and the public food supply.

Furthermore, Idaho’s “ag-gag” statute is a content-based restriction that does not survive strict scrutiny. The law targets speech based on its communicative content — namely, recording the “conduct of an agricultural production facility’s operations.” Idaho Code Ann. § 18-7042(1)(d) (2014). The state’s proffered interests of protecting property rights are not compelling, and the law is not narrowly tailored. Thus, as the district court correctly concluded, Idaho’s “ag-gag” statute should be struck down as unconstitutional under the First Amendment.

ARGUMENT

I. Idaho’s “ag-gag” statute infringes on the First Amendment rights of journalists who want to inform the public about food safety.

Idaho’s “ag-gag” statute conflicts with the principle that the First Amendment protects — and even encourages — the press to act as a watchdog and challenge the status quo. The Idaho statute criminalizes journalistic actions that have previously led to positive social change and chills the same type of investigative reporting in the future.

As the U.S. Supreme Court has found, “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”

Mills v. Alabama, 384 U.S. 214, 219 (1966). The Founders envisioned the press as a means to freely challenge authority without government restraint. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protections given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)) (An “‘untrammelled press [is] a vital source of public information,’ . . . and an informed public is the essence of working democracy.”). Quoting Thomas Jefferson, the Court wrote that “[where] the press is free, and every man able to read, all is safe.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 260 (1974). Further, “any other system that would supplant private control of the press with the heavy hand of government intrusion – would make the government the censor of what the people may read and know.” *Id.*

The Idaho statute does specifically what the Court warns against — it grants the government control over the press and censors information to be disseminated to the public. Criminalizing journalism on food and agriculture safety limits the press from investigating and questioning the food industry. Where it should be extending the leash, the Idaho government instead muzzles the watchdog.

A. Investigations by journalists into agriculture facilities have long played a vital role in ensuring food safety.

The watchdog role of the press in protecting the public's interest in a safe food supply and the conditions under which that food is produced has a long and time-honored history. Upton Sinclair's famous 1906 exposé on Chicago's slaughterhouses, *The Jungle*, and his contemporaries' works were among the early works of investigative journalism. See James O'Shea, *Raking the Muck*, Chi. Trib., May 21, 2006, available at <http://bit.ly/18TwTjR>. Although his novel is centered around a fictitious Lithuanian immigrant, Sinclair conducted extensive research, interviewing health inspectors and workers and going undercover into the meatpacking facilities to witness the unsanitary conditions firsthand. James Diedrick, *The Jungle*, Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin Keating, & James R. Grossman, eds. 2005), available at <http://www.encyclopedia.chicagohistory.org/pages/679.html>. Sinclair's work is credited with aiding passage of the Pure Food and Drug Act and Meat Inspection Act, both enacted in 1906, which instituted vigorous reforms in the meatpacking industry. *Id.*; see also Wallace F. Janssen, *The Story of the Laws Behind the Labels*, Food and Drug Admin., <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm> (last updated Dec. 14, 2011) (originally published in *FDA Consumer*, June 1981) ("A single chapter in Upton Sinclair's novel, *The Jungle*, precipitated legislation expanding federal meat regulation to provide continuous

inspection of all red meats for interstate distribution, a far more rigorous type of control than that provided by the pure food bill.”).

The type of reform that followed publication of *The Jungle* has repeated itself numerous times in the century that followed. In the late 1960s, Nick Kotz, reporter for the *Minneapolis Tribune*, wrote a series of stories revealing widespread unsanitary conditions in the country’s meatpacking plants. 113 Cong. Rec. 21283-86 (1967). His investigative reporting contributed to the passage of the Meat Inspection Act of 1967, which extended the reach of federal regulation to cover not only meat that crossed state borders but all slaughterhouses and meat-processing facilities in the United States. *Id.* at 21283. During a congressional session leading to the passage of the Act, Sen. Walter Mondale thanked Kotz for bringing the issue to Congress’s attention, saying “the press must take a major share of the credit for action in this area.” *Id.*

Kotz and a number of journalists since have won Pulitzer Prizes for their reporting on such issues. Tony Horwitz of *The Wall Street Journal* won the prize in 1995 for stories about working conditions for low-wage workers, including an article on the dangers facing workers at poultry facilities that he reported on while employed at two such places. See *The 1995 Prize Winner in National Reporting*, <http://www.pulitzer.org/winners/tony-horwitz>. Michael Moss of the *New York Times* won in 2010 for calling into question the effectiveness of injecting ammonia

into beef to remove E. coli. *See 2010 – Explanatory Reporting*, The Pulitzer Prizes, <http://www.pulitzer.org/archives/8819>. Numerous others — such as David Willman with the *Los Angeles Times*, who reported on the missteps of the Food and Drug Administration in approving the diabetes pill Rezulin — have won Pulitzer Prizes for their investigative reporting on consumer safety and federal regulatory oversight. *See 2001 – Investigative Reporting*, The Pulitzer Prizes, www.pulitzer.org/archives/6487; *The 2008 Pulitzer Prize Winners: Investigative Reporting*, The Pulitzer Prizes, <http://www.pulitzer.org/citation/2008-Investigative-Reporting> (awarding the prize to the *Chicago Tribune* staff for reporting on “faulty governmental regulation of toys, car seats and cribs, resulting in the extensive recall of hazardous products and congressional action to tighten supervision” and *New York Times* reporters “for their stories on toxic ingredients in medicine and other everyday products imported from China, leading to crackdowns by American and Chinese officials”).

The government’s inspection system itself is often flawed, which makes independent observation and verification even more important. At times inspection teams are short staffed, and inspectors can be undermined by their supervisors or choose to turn a blind eye to problems. *See generally Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight*

& *Gov't Reform*, 111th Cong. (2010). USDA inspector Dean Wyatt repeatedly reported abuses in a Vermont facility he observed, and rather than taking action against the plant, his supervisors demoted and reprimanded him. *Id.* at 38-39. They told him “to drastically reduce the amount of time [he] spent on humane handling enforcement because [he] was finding too many problems.” *Id.* at 38.

Many of the people and organizations at the center of unveiling problems within the food industry were eventually praised by government bodies. The White House invited reporter Nick Kotz to Washington, D.C., for his investigative journalism that led to the passage of the Meat Inspection Act of 1967. O’Shea, *supra*. However, by passing the “ag-gag” statute, the Idaho legislators have punished rather than praised those seeking to uncover issues in the food and agriculture industry.

B. Idaho’s “ag gag” statute chills future investigations into the agriculture industry.

The Idaho statute is certain to have a chilling effect on future speech. Because of the law, journalists who pursue the types of investigations that lead to beneficial changes in the food industry will have to be excessively cautious in their actions for fear they will be jailed or fined for doing their jobs. If they take steps to ensure they do not violate this broad law in any way, they will miss the story that should be told. The limits this places on newsgathering is an improper restriction on speech and diminishes the marketplace of ideas. *See Wieman v. Updegraff*, 344

U.S. 183, 195 (1952) (Frankfurter, J., concurring) (writing that when the government deters First Amendment protected expression, the government “has an unmistakable tendency to chill that free play of the spirit” of others). Idaho’s statute closes off the “breathing space” the First Amendment needs to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Journalistic scrutiny of agricultural production facilities can only lead to better food safety. Silencing the speech of journalists and the whistleblowers who act as their sources with the threat of criminal conviction leaves a federal inspection system fraught with its own problems as the lone watchdog over the food the public consumes. Idaho’s statute should be struck down because the government must not discourage journalists from providing the same searching examination of the food industry that has resulted in safer food to the nation for over 100 years.

II. The First Amendment protects speech on matters of public concern by subjecting restrictions to strict scrutiny, which is not satisfied by this statute.

A. Speech on matters of public concern in which the public has a right to know, including through audio and video recordings, warrants the highest degree of protection.

Idaho legislators apparently misunderstand the purpose of journalists and other organizations investigating agriculture operations. During a committee hearing, an Idaho Senator compared those seeking to uncover issues within the

agriculture industry to terrorists, saying the bill was “the way you combat your enemies.” ER 5. In reality, investigative journalists share the same concerns as the state representatives — making sure the American people can safely consume food placed on their dinner tables. In order to guarantee that food safety news reaches the public, the law must safeguard the capturing, dissemination, and receipt of this valuable information.

The creation of audio and video recordings is entitled to First Amendment protection. *See ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”).

By barring journalists and their sources from scrutinizing the agriculture industry through audio or video recordings, Idaho Code Ann. § 18-7042 restricts speech of public concern from entering the marketplace of ideas. Speech of public concern lies “at the heart of the First Amendment,” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985), and occupies the “highest

rung of the hierarchy of First Amendment values,” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Courts protect speech on matters of public concern because “freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964). Speech of public concern is speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community” or when it is a “subject of general interest and of value and concern to the public.” *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

In this case, the Idaho “ag-gag” statute squarely suppresses speech relating to topics of universal importance — the safety of employees and the public food supply, the treatment of animals, and the impact of the agriculture industry on the environment. The agriculture industry affects the health of consumers through the safety of the food it produces and the health of employees through workplace conditions. Discussion of public health is clearly valuable speech protected under the First Amendment. *See Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1206 (N.D. Ill. 1984) (“There may be no more serious or critical issue extant today than the health of human beings. Given the frailty of human existence, any controversy on the subject must be afforded wide open discussion and criticism so that individuals

may make well educated health care choices.”). There is also significant community concern regarding the treatment of animals and how the agriculture industry affects the environment. Idaho’s attempt to gag these areas of substantial public interest violates the First Amendment’s commitment to encouraging speech on matters of public concern.

The U.S. Supreme Court has found that the public has a heightened and independent First Amendment right to *receive* information, independent of the speech interests of journalists and other advocates. “[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). *Virginia Pharmacy* explained that this precept was “clear from the decided cases,” *id.*, such as *Klendienst v. Mandel*, 408 U.S. 753, 762-63 (1972), where again the Court referred to a broadly accepted right to “receive information and ideas,” and *Martin v. City of Struthers*, 319 U.S. 141 (1943), where the Court wrote:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.

Martin, 319 U.S. at 143 (internal citations omitted). Where petitioners have a constitutionally protected interest in communicating with the public, the public has

a corresponding constitutional interest in receiving the communications in order to fully realize its own political freedoms. *See Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

Because members of the public cannot themselves monitor all of the production facilities that produce their food, they rely on investigative journalists, food safety organizations, federal regulators, and whistleblowers to inform them about the safety of the food they eat. The government should not be allowed to use a statute to censor speech about such an important topic under the First Amendment. Under Idaho’s “ag-gag” statute, these journalistic investigations and publications would be nearly non-existent, and public knowledge of and debate on this important matter of concern would be stunted.

B. Idaho’s “ag-gag” statute is a content-based restriction on speech that does not survive strict scrutiny.

Content-based restrictions on speech are presumptively unconstitutional under the First Amendment. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). Governments are prohibited from restricting speech based on its content because content-based laws threaten to “manipulate the public debate through coercion rather than persuasion,” *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994), and permit governments to “drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). Content-based

laws are only constitutional if they survive strict scrutiny, which requires the laws to be narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

In *Reed*, the U.S. Supreme Court struck down the town of Gilbert’s sign code because it was a content-based regulation. The Court defined content-based regulations as “those that target speech based on its communicative content.” *Id.*

It noted that:

This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227.

It is clear Idaho’s “ag-gag” statute directly regulates the content of speech. Using the U.S. Supreme Court’s definition from *Reed*, Idaho’s “ag-gag” statute is content based because it regulates speech “by particular subject matter” — namely, “conduct of an agricultural production facility’s operations.” *Reed*, 135 S. Ct. at 2227; Idaho Code Ann. § 18-7042(1)(d). While the law prohibits speech concerning the operations of an agricultural production facility, the law says nothing about other speech at agricultural production facilities. For example, as the district court explained, recording a private conversation between an

agricultural production facility owner and a spouse would not violate the law, while recording animal abuse, a topic of significant public importance, would violate the law. ER 15. Thus, Idaho’s “ag-gag” law is a content-based regulation because it “target[s] speech based on its communicative content.” *Reed*, 135 S. Ct. at 2226. Accordingly, in order to survive a constitutional challenge, the law must be narrowly tailored to serve compelling state interests. *Id.* at 2222.

The Idaho government asserts the “ag-gag” statute “protects against unwarranted intrusions on legitimate property interests.” Def Br. at 17. However, with respect to the privacy interests of agricultural producers, the government has already done the calculation and decided that food safety requires some intrusion into production facilities. Plant operations are highly scrutinized by the federal government, with inspectors regularly visiting the premises, observing operations, testing meat products, and examining livestock. *See Food Safety, Agriculture Fact Book*, USDA (2001–2002), <http://www.usda.gov/factbook/chapter9.htm>.

Additionally, the owners and operators of agriculture plants are already protected by laws of general applicability from activities that are truly designed to interfere with their operations. Idaho has trespass, conversion, fraud, and defamation laws sufficient to protect these interests and address acts by individuals or organizations that overstep legal bounds. Idaho Code Ann. §§ 18-7008, 18-7011, 18-4801 (2014).

Even assuming Idaho's asserted state interest provides some public benefit, it does not meet the high bar required of content-based law. Content-based regulations have generally been permitted in only a few specifically identified categories of speech, including (1) advocacy intended, and likely, to incite imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech that presents a grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (citations omitted). Idaho's proffered interest of protecting property rights certainly does not fall into any of those categories.

No matter the state interest asserted, Idaho's ag gag statute is not narrowly tailored to be the least restrictive means of achieving these interests. A blanket gag on all image and audio recording of agricultural operations is overly broad and unnecessary, criminalizing a number of constitutionally protected newsgathering activities. Though a law may have some valid applications, the court must consider whether it may be overbroad as applied in any given situation, infringing on otherwise protected speech. As the Supreme Court has recognized, we must be aware of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). Idaho's "ag-gag" statute is

susceptible of precisely that. A plain reading of the statute suggests it criminalizes the recording of crops being sprayed by pesticides, Idaho Code Ann. § 18-7042(2)(a)(iii); empty fields being plowed in preparation for planting, § 18-7042(2)(a)(ii); an old barn being repaired, § 18-7042(2)(a)(i) (“maintenance and repair of an agricultural production facility”); and perhaps even a home gardener planting tomatoes in his yard, § 18-7042(2)(a)(iv) (all “planting” and “growing”). An “[a]gricultural production facility” is essentially defined as any place where “agricultural production” takes place — even public land. § 18-7042(2)(b).

The statute prohibits anyone from entering “an agricultural production facility” and making an audio or video recording “without the facility owner’s express consent.” § 18-7042(1)(d). There are plenty of scenarios where journalists enter property and record with implied consent or with the consent of someone who is not the owner, and they should not be criminally penalized for it. Under the statute, it is a crime for a reporter to record an interview with an employee, potentially even a manager, of a facility — whether it be a meat-processing plant, a beekeeping facility, or a plant nursery — because the manager gave consent, but the owner did not. *See id.* Likewise, it is a crime for a news crew to film the owner spreading seeds in an open field while standing on the edge of the land, even if the owner gave implied consent by willingly answering questions after knowing he was being filmed. *See id.*

It is equally of concern that the statute criminalizes “obtain[ing] records of an agricultural production facility by force, threat, misrepresentation or trespass,” § 18-7042(1)(b), and the statute includes publicly owned operations in the definition of an “agricultural production facility,” § 18-7042(2)(b). This means someone who seeks to obtain public records under the state’s public records act could apparently be criminally prosecuted if he is accused of misrepresenting himself, perhaps by telling an agency he wants to use the information for personal use but then publishes it on his blog. Yet the intent of the requester generally should not matter under Idaho’s statute, and officials are, in fact, prohibited from making any “inquiry” of the requesters except in limited circumstances. Idaho Code Ann. § 9-338(5) (2011).

Even if not intended to reach constitutionally-protected newsgathering, the validity of an overreaching statute cannot be saved by the assumption — or even the promise — that the government will enforce it narrowly. As the Supreme Court held in its case concerning the distribution of videos depicting animal cruelty: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *United States v. Stevens*, 559 U.S. 460, 480 (2010). Idaho’s statute cannot be upheld, even if the government asserted it would tailor its use of the statute and would not

prosecute journalists and their sources for engaging in newsgathering and dissemination.

Ultimately, Idaho's "ag-gag" statute is unconstitutional as a content-based restriction not narrowly tailored to serve a compelling state interest.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to uphold the district court's ruling.

Respectfully submitted,

s/ Bruce D. Brown
Bruce D. Brown
Counsel of record for amicus curiae
Gregg P. Leslie
Michael J. Lambert
The Reporters Committee for Freedom of
the Press

STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any related cases pending in this Court.

Dated: June 27, 2016

s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record for amicus curiae
The Reporters Committee for Freedom of
the Press

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R.
APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE
NUMBER 15-35960**

I certify that this brief complies with the length limits set forth at Ninth Circuit Rule 32-1. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,963 words.

s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record for amicus curiae
The Reporters Committee for Freedom of
the Press

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit and delivered by operation of the CM/ECF system to the counsel of record.

s/ Bruce D. Brown

Bruce D. Brown

Counsel of Record for amicus curiae

The Reporters Committee for Freedom of
the Press

APPENDIX A: STATEMENTS OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, American Society of News Editors (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and newspaper websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public’s rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron’s, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world’s largest newsgathering operations, with more than 1,800 journalists in

nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

The Idaho Press Club is a statewide association of working journalists from all media whose mission is to promote excellence in journalism, freedom of expression and freedom of information.

The Idaho Statesman is the most widely read newspaper in the state of Idaho.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate

accountability, ranging widely from the environment and health to national security and the economy.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

Online News Association (“ONA”) is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial

integrity and independence, journalistic excellence and freedom of expression and access.

PEN American Center is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators (“PEN”). PEN has approximately 4,300 members and is affiliated with PEN International, the global writers’ organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN International was founded in 1921, in the aftermath of the First World War, by leading European and American writers who believed that the international exchange of ideas was the only way to prevent disastrous conflicts born of isolation and extreme nationalism. Today, PEN works along with the other chapters of PEN International to advance literature and protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

APPENDIX B

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for American Society of News
Editors*

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for Association of Alternative
Newsmedia*

Lynn Oberlander
General Counsel, Media Operations
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Jim Ewert, General Counsel
Nikki Moore, Legal Counsel
California Newspaper Publishers
Association
2701 K St.
Sacramento, CA 95816

Marcia Hofmann
*Counsel for Freedom of the Press
Foundation*
25 Taylor Street
San Francisco, CA 94012

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816
Counsel for The Idaho Statesman

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036
*Counsel for Dow Jones & Company,
Inc.*

James Cregan
Executive Vice President
MPA – The Association of Magazine
Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Charles D. Tobin
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006
Counsel for The National Press Club

Katherine Glenn Bass
588 Broadway, Suite 303
New York, NY 10012
Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
*Counsel for Radio Television Digital
News Association*

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
*Counsel for National Press
Photographers Association*

Bruce W. Sanford
Mark I. Bailen
James Romoser
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
*Counsel for Society of Professional
Journalists*

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006

Frank D. LoMonte
Student Press Law Center
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association