

United States Court of Appeals
For The Eighth Circuit
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April 20, 2023

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RE: 22-3464 Animal Legal Defense Fund, et al v. Kimberly Reynolds, et al

Dear Counsel:

The amicus curiae brief of the Reporters Committee for Freedom of the Press and 17 Media Organizations has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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CNL

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District Court/Agency Case Number(s): 4:21-cv-00231-SMR

No. 22-3464

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

**ANIMAL LEGAL DEFENSE FUND; PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.; BAILING OUT BENJI; FOOD &
WATER WATCH; and IOWA CITIZENS FOR COMMUNITY
IMPROVEMENT,**

Plaintiffs-Appellees,

v.

**KIMBERLY REYNOLDS, in her official capacity as Governor of Iowa;
BRENNA BIRD, in her official capacity as Attorney General of Iowa;
VANESSA STRAZDAS, in her official capacity as Cass County Attorney;
CHUCK SINNARD, in his official capacity as Dallas County Attorney; and
ANTHONY JANNEY, in his official capacity as Washington County
Attorney,**

Defendants-Appellants.

Appeal from an Order by the United States District Court
for the Southern District of Iowa
Case No. 4:21-cv-00231-SMR-HCA

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE**

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**CORPORATE DISCLOSURE STATEMENTS
AND CIRCUIT RULE 26.1A DISCLOSURE STATEMENTS**

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

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

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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.

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC; The Center for Investigative Reporting (d/b/a Reveal); Freedom of the Press Foundation; Gannett Co., Inc.; The Intercept Media, Inc., publisher of The Intercept; International Documentary Association; The Media Institute; National Freedom of Information Coalition; National Press Photographers Association; The New York Times Company; The News Leaders Association; News/Media Alliance; Online News Association; Pro Publica, Inc.; Society of Environmental Journalists; Society of Professional Journalists; and Student Press Law Center. Full descriptions of the amici are provided in Appendix A to this brief.

As news media outlets and organizations that defend the First Amendment and newsgathering rights of the press, amici have a strong interest in ensuring that reporters have access to newsworthy information. News organizations rely on photographs and audio and video recordings obtained from sources like Plaintiffs-Appellees to report about the agricultural industry, including animal facilities, and to shed light on safety, sanitation, and other conditions in that industry. In the past, sources have informed journalists of dangerous, illegal, or unethical activities in the agricultural industry—and provided photo and video documentation of that wrongdoing—so that journalists could, in turn, inform the public.

By exposing sources and journalists alike to potential criminal liability, Iowa Code § 727.8A (“Section 727.8A” or the “Act”) chills newsgathering and reporting on matters of public concern. Amici respectfully submit this brief in support of Plaintiffs-Appellees to emphasize the public interests at stake in this case and to highlight the chilling effect of the Act on journalists and their sources.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this amici brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici declare that:

1. No party’s counsel authored the brief in whole or in part;
2. No party or party’s counsel contributed money intended to fund preparing or submitting the brief; and
3. No person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

From Upton Sinclair more than a century ago to numerous Pulitzer Prize winners in recent years, journalists have a long and proud history of investigating and reporting on abusive, unsafe, and unsanitary conditions in the agriculture industry. In particular, journalists have utilized audio and video recordings and photos to shed light on the conditions inside agricultural facilities. Such reporting, among other things, has helped spur several pieces of landmark legislation designed to ensure our food supply is safe.

Section 727.8A is the third attempt by the Iowa legislature to criminalize investigations into conditions at agricultural facilities. The Act imposes criminal liability on any person “knowingly plac[ing] or us[ing] a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property.” The Act’s reach is extremely broad. Indeed, it is not limited to the agricultural facilities but also applies, for example, to “railway property.” Iowa Code § 716.7(2)(a)(5). And the Act’s penalties are especially harsh: a first offense is considered an aggravated misdemeanor, punishable by up to two years in jail and a fine between \$855 and \$8,540. By threatening journalists and sources with such severe penalties, the Act discourages newsgathering and reporting, ultimately stifling the free flow of information to the public.

Amici agree with Plaintiffs-Appellees and the district court that the Act does not pass constitutional muster under intermediate scrutiny, much less strict scrutiny. *See Animal Legal Def. Fund v. Reynolds*, No. 4:21-cv-00231-SMR-HCA, 2022 WL 4998999, at *9–10 (S.D. Iowa Sept. 26, 2022) (hereinafter, the “Order”); Resp. Br. of Pls.-Appellees at 40–47. The creation and dissemination of photos and video and audio recordings are First Amendment protected speech. Order, 2022 WL 4998999, at *7. News reports about animal facilities often rely on photographs and recordings provided by sources. By criminalizing the taking of photographs and making of recordings, the Act chills the very journalism that has previously spurred positive changes in the agricultural industry, including legislation to ensure safer workplaces and a safer food supply. Moreover, contrary to Defendants-Appellants’ arguments, the Act’s chilling effect alone is an injury-in-fact sufficient to support Plaintiffs-Appellees’ Article III standing.

For the reasons herein, amici respectfully urge this Court to affirm the district court’s order finding that the Act is unconstitutional and awarding summary judgment to Plaintiffs-Appellees.

ARGUMENT

I. The Act infringes upon constitutionally protected newsgathering rights.

The district court correctly held that the challenged provisions of Section 727.8A must withstand scrutiny under the First Amendment. As the district court

stated, the “First Amendment analysis applies when speech is implicated by a law even if the law ‘*generally* functions as a regulation of conduct.’” Order, 2022 WL 4998999, at *8 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (emphasis in original)). Moreover, as Plaintiffs-Appellees correctly note, Resp. Br. of Pls.-Appellees at 15–16, Defendants-Appellants’ claim that speech protections must be subordinated to concerns about private property is unsupported. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 176 (2002) (“[I]t would be puzzling if regulations of speech taking place on another citizen’s private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite.”).

Defendants-Appellants’ argument that the newsgathering activities targeted by Section 727.8A are not protected by the First Amendment is also incorrect. Section 727.8A prohibits the expressive conduct of taking photos and making audio and visual recordings in a wide array of locations, including at agricultural facilities and on railway property. In doing so, it interferes with the ability of journalists to gather and report news of significant public concern and chills constitutionally protected speech between reporters and sources.

- A. The Act unconstitutionally abridges the right to take photos and make audio and visual recordings.

Contrary to Defendants-Appellants' argument, *see* Defs.-Appellants' Opening Br. at Section III, Section 727.8A regulates speech as well as conduct. The First Amendment's scope "encompasses a range of conduct related to the gathering and dissemination of information," *Molina v. City of St. Louis*, 59 F.4th 334, 346 (8th Cir. 2023) (citation omitted), and prohibits the government from "limiting the stock of information from which members of the public may draw," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978). Photographs and audiovisual recordings have long been recognized to be a "significant medium for the communication of ideas" entitled to full constitutional protection. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Thus, as this Court has recognized, the First Amendment protects the taking of photographs and making of video and audio recordings. *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) ("The acts of taking photographs and recording videos are entitled to First Amendment protection because they are an important stage of the speech process that ends with the dissemination of information about a public controversy."); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) ("[V]ideos are a form of speech that is entitled to First Amendment protection.").

Indeed, in *Ness* this Court held that an ordinance that prohibited "tak[ing] a photograph or otherwise record[ing] a child" in a city park was unconstitutional to

the extent it prohibited taking photos and videos for purposes of informing the public—an act “analogous to news gathering.” 11 F.4th at 922–23. The Court reached this conclusion assuming, *arguendo*, that “the ordinance on its face does not aim at the suppression of speech.” *Id.* at 923. Because “the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the ‘speech process,’ and thus qualifies itself as speech protected by the First Amendment.” *Id.*

Here, Section 727.8A similarly curtails the speech process by imposing liability for “knowingly plac[ing] or us[ing] a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property.” The Fourth, Ninth, and Tenth Circuits have found similar restrictions unconstitutional. Most recently, in *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc.*, the Fourth Circuit held that a North Carolina statute that prohibited “[k]nowingly or intentionally placing on the employer’s premises an unattended camera or electronic surveillance device and using that device to record images or data” impermissibly “burden[ed] newsgathering and publishing activities” in violation of the First Amendment. 60 F.4th 815, 821, 828 (4th Cir. 2023). Acknowledging that “the right to publish a recording would be ‘largely ineffective, if the antecedent act of *making* the recording is wholly unprotected,” the Fourth Circuit held that the

First Amendment “safeguard[s] the right to gather information as a predicate to speech.” *Id.* at 829 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)).

In *Western Watersheds Project v. Michael*, the Tenth Circuit considered a challenge to two Wyoming statutes—Wyo. Stat. Ann. §§ 6-3-414(c) and 40-27-101(c)—that imposed civil and criminal liability on any person who “[c]rosses private land to access adjacent or proximate land where he collects resource data.” 869 F.3d 1189, 1191 (10th Cir. 2017). In reversing the district court’s finding that the challenged statutes were not entitled to First Amendment protection, the Tenth Circuit held that the collection of resource data, including photography, “constitutes the protected creation of speech.” *Id.* at 1195–96 (“An individual who photographs animals . . . is creating speech in the same manner as an individual who records a police encounter.”). On remand, the lower court struck down the statutes as facially unconstitutional. *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1189 n.7 (D. Wyo. 2018) (“If . . . First Amendment rights were extinguished” upon “stepp[ing] foot on private property, the State could, for example, criminalize any criticism of the Governor, or any discussion about the opposition party, or any talk of politics whatsoever, if done on private property. This runs directly afoul of the First Amendment[.]” (quoting *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1209 (D. Utah 2017))).

Similarly, in 2018, the Ninth Circuit struck down nearly all provisions of an Idaho statute prohibiting the recording of undercover video at agricultural facilities. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). In doing so, the Ninth Circuit also reaffirmed that audio and video recording is constitutionally protected expression. *Id.* at 1203 (“It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity[.]”).

These decisions are in keeping with the broad consensus among federal appellate courts that the First Amendment protects the taking of photographs and the creation of video and audio recordings. *See Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) (holding that, for the First Amendment to have meaning, it must not only protect “actual photos, videos, and recordings,” but also “the act of creating that material”); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (recognizing that because “there is no fixed First Amendment line between the act of creating speech and the speech itself,” the Constitution “protects the act of making film” (quoting *Alvarez*, 679 F.3d at 596)).

Moreover, protecting speech about matters of public interest, including about the affairs of government, is a core purpose of the First Amendment. *See Turner*, 848 F.3d at 689 (explaining that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs” (quoting

Mills v. Alabama, 384 U.S. 214, 218 (1966)); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest” in the context of a man who “was videotaping people on the streets of Seattle,” including police, during a public protest march). Speech about conditions at agricultural facilities—which can touch on issues ranging from food safety and workers’ rights to environmental impacts and ethical treatment of animals—is undeniably a matter of legitimate public concern. It is, accordingly, vital that First Amendment scrutiny properly be applied to speech about agricultural facilities, including the taking of photographs and the making of video and audio recordings at such facilities. Section 727.8A “restricts the capture of such recordings or photographs, rendering the remaining steps in the protected video production process impossible.” Order, 2022 WL 4998999, at *7. Accordingly, it “regulates protected speech and . . . implicates the First Amendment.” *Id.* at *8.

B. The Act chills protected speech on matters of public concern.

The Act’s criminal penalties chill the flow of protected speech from sources to reporters and hamper the press’s ability to report on matters of public concern. Unlike the punishment for trespass alone, which is a simple misdemeanor punishable by thirty days in jail and a fine of \$105 to \$855, Iowa Code §§ 716.7, 716.8, a violation of Section 727.8A faces far more severe punishment: a first

offense is considered an aggravated misdemeanor, punishable by up to two years in jail and a fine between \$855 and \$8,540—a penalty more excessive than that applied to individuals who “knowingly trespass[]” with “the intent to commit a hate crime,” who are charged with a lesser “serious misdemeanor.” Iowa Code § 716.8(3).

Moreover, unlike so-called “ag-gag” laws that only restrict recording at agricultural facilities, *see, e.g.*, Utah Code Ann. § 76-6-112, Section 727.8A is broader; it extends to any person who is “committing a trespass as defined in section 716.7,” which includes trespass onto a wide array of properties, including “railway property.” Iowa Code § 716.7(2)(a)(5).

The breadth of Section 727.8A is troubling. A reporter or photographer who stands on a railway with a recording device to cover a train derailment, traffic accident, or other newsworthy matter faces the prospect of up to twenty-three more months in prison than an individual who trespasses on a railway property without a recording device. Such excessive penalties chill not only the activities of journalistic sources—including sources like Plaintiffs-Appellees—but also journalists’ own photography and recording of newsworthy events.

Indeed, the specter of prosecution under Section 727.8A threatens to stifle future reporting on railway accidents like those previously covered by Iowa news outlets. *See, e.g.*, Andrew Mollenbeck, *Train Derailment Spills Asphalt Into Creek*

Near Hampton, KCCI (Sept. 5, 2022), <https://perma.cc/B652-4TDZ> (featuring video footage and photos taken at site of train derailment); KWQC Staff, *Crews Respond to Train Derailment in DeWitt, Friday*, KWQC (Feb. 24, 2023), <https://perma.cc/ZEK3-85XV> (same). And, as Defendants-Appellants concede, if a law identical to Section 727.8A existed in Ohio, journalists taking photos or recording video while reporting on the derailment of a Norfolk Southern train that spilled toxic chemicals in East Palestine, Ohio, could be subjected to criminal prosecution and punishment if such photos or videos were captured while on railway property. See Defs.-Appellants’ Opening Br. at 47–48. The Act’s overbreadth increases the possibility that sources such as Plaintiffs-Appellees and members of the news media “will refrain from engaging further in the protected activity” “rather than risk punishment for [their] conduct in challenging the statute Society as a whole then would be the loser.” *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

Section 727.8A applies heightened penalties for trespass solely due to the use of a recording device—a device that assists in the creation of speech. As the district court noted, there are already laws in place in Iowa that “cover many of the instances where use of a video camera or electronic surveillance would raise issues relating to privacy concerns,” thus “beg[ging] the question what the Act was

intended to accomplish beyond targeting [] expressive activities.” Order, 2022 WL 4998999, at *10. By stifling constitutionally protected activities, Section 727.8A is “insufficiently tailored compared to its burden on speech,” *id.*, and threatens to eliminate the kind of vital investigative reporting in the public interest.

C. Reporters rely on the receipt of information and documentation from sources to inform the public about agricultural facilities.

As the Supreme Court has recognized, “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.” *Mills*, 384 U.S. at 219. Moreover, “a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Section 727.8A undermines these fundamental principles by damming the flow of valuable information to the press and, therefore, to the public.

The sources of our nation’s food supply and working conditions of agricultural workers are, without question, matters of legitimate public concern. Indeed, there are numerous examples of journalism about the agricultural industry prompting reform and improvements that have benefitted the public at large—a real-world example of how “[s]unlight is . . . the best of disinfectants.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People’s Money* 62 (1933)); *see, e.g.*, Michael Grabell, *Exploitation and Abuse at the Chicken Plant*,

New Yorker (May 1, 2017), <https://perma.cc/8EWP-9VFY> (uncovering the “harsh and at times illegal [working] conditions” at Case Farms, which Grabell described as “among the most dangerous workplaces in America”); Ted Conover, *The Way of All Flesh*, Harper’s (May 2013), <https://perma.cc/C7JF-7XZ5> (chronicling illegal and inhumane practices at a Cargill facility, including the use of electric prods on cattle being organized for slaughter); Michael Pollan, *Power Steer*, N.Y. Times Mag. (Mar. 31, 2002), <https://perma.cc/762E-HDP9> (reporting on the conditions in which commercial cattle are raised).

Reporters regularly rely on photographs, as well as video and audio recordings, obtained from sources—including sources like Plaintiffs-Appellees—in order to gather news and information, and keep the public informed. Access to such documentary materials enhances the accuracy and credibility of reporting, increases transparency and reader trust, and enriches news stories, allowing reporters to convey more than can be said based on the written word alone.

For example, in 2016, several news outlets reported on the results of Plaintiff-Appellee ALDF’s undercover investigation of a “puppy mill” in New Mexico. *See, e.g., Animal Legal Defense Fund Wants New Mexico Kennel Shut Down*, KRQE (Feb. 29, 2016), <https://perma.cc/Z6KG-CXC5>. Using a hidden camera, ALDF’s investigator produced what ALDF called “a video that shows it all”: “Waste and urine, mangy fur, long nails and dogs left out in freezing

temperatures can be seen.” *Id.* Following that investigation and resulting news coverage, the United States Department of Agriculture (USDA) opened an investigation into the breeder. Jessica Oh, *Breeder Who Sold Dogs to Coloradans Under Investigation*, KUSA 9 News (Mar. 5, 2016), <https://perma.cc/B9SZ-DLR6>.

Similarly, earlier this year, several news outlets reported on conditions at the Farmer John meatpacking plant in Vernon, California—the largest pork producer in the world at the time. *See, e.g.*, Andy Greenberg, *Spy Cams Reveal the Grim Reality of Slaughterhouse Gas Chambers*, *Wired* (Jan. 18, 2023), <https://perma.cc/R3ET-FEQX>. The reporting incorporated video footage obtained from an animal rights activist that revealed cruel conditions within the facility, including the use of carbon dioxide to suffocate pigs before slaughter. *Id.* This footage contradicted the pork industry’s claims that “the gas chambers in which pigs are prepared for slaughter [are] ‘animal friendly,’ ‘stress free’ and ‘painless.’” Nicholas Kristof, *Spy Cams Show What the Pork Industry Tries to Hide*, *N.Y. Times* (Feb. 4, 2023), <https://perma.cc/F27D-ZLT5>.

In another example, USA Today included a still from a video provided by the Humane Society of the United States in its reporting on the settlement of a lawsuit brought by the federal government and the Humane Society against a California meatpacking plant under the federal False Claims Act. Michael Winter, *Calif. meat packer to pay \$317M over abuse, recall*, USA Today (Nov. 16, 2012),

<https://perma.cc/MP4T-MYNC>. The video, recorded by the Humane Society in 2007, “showed workers using electric prods, high-pressure hoses and forklifts to force so-called downer cattle to walk or be taken to slaughter,” a practice that “raised concerns about possible contamination with mad cow disease.” *Id.* The caption to the photograph included with USA Today’s article explained that it showed a “‘downer’ dairy cow too sick or injured to walk” at the plant. *Id.*

Without this type of reporting, and the documentary evidence that supports it, the public is left only with information the agricultural industry chooses to provide. Indeed, if sources like Plaintiffs-Appellees are chilled from providing photographs and audio and visual recordings to reporters (because they face criminal penalties for doing so), news outlets will be forced to rely solely on images and recordings provided by agricultural companies, those taken outside of animal facilities, or stock images—if they use images or recordings at all. The availability of only limited, selective, and incomplete information would give agricultural companies near-complete control over the “the stock of information” the public receives. In contrast, the photographs and audio and visual recordings that sources provide to reporters ensure that the public gets a more complete picture of the practices and conditions at agricultural facilities.

II. Plaintiffs-Appellees have standing to challenge the Act.

Contrary to Defendants-Appellants' arguments, Defs.-Appellants' Opening Br. at Section II, the Act's chilling effect on the exercise of Plaintiffs-Appellees' First Amendment rights is sufficient to establish Article III standing. *See* Resp. Br. of Pls.-Appellees at 18–26; *see also Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (holding that the plaintiff had standing “even if the plaintiff has not engaged in the prohibited expression as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences”); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (holding that a plaintiff may bring a pre-enforcement challenge where she “has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder” (citation omitted)). Indeed, courts have consistently found that plaintiffs have standing to bring a pre-enforcement challenge to ag-gag laws even when the plaintiffs do not have precise plans for how they intend to violate the law at a specific time in the future.

Within this Circuit, the U.S. District Court for the Southern District of Iowa found that plaintiffs, including ALDF, had standing for a pre-enforcement challenge to Iowa's ag-gag law and held that the law was an unconstitutional

content-based speech restriction. *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901 (S.D. Iowa 2018) (denying motion to dismiss and holding that plaintiffs had standing); 353 F. Supp. 3d 827 (S.D. Iowa 2019) (granting plaintiffs' motion for summary judgment and striking down the law); 8 F.4th 781 (8th Cir. 2021) (affirming in part, reversing in part, but concluding that plaintiffs had standing).

Similarly, in 2017, the U.S. District Court for the District of Utah struck down that state's ag-gag law as an unconstitutional infringement on First Amendment rights. *Herbert*, 263 F. Supp. 3d at 1213. Following Tenth Circuit precedent, the district court held that the plaintiffs, which again included ALDF, had standing to bring the suit based on the chilling effect of the statute. As the court explained: "[T]o establish standing to sue based on a chilling effect on speech, a plaintiff must demonstrate only a present desire, *though no specific plans*, to engage in such speech." *Id.* at 1200 (emphasis in original) (citation and internal quotation marks omitted); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) ("It makes no sense to require plaintiffs simultaneously to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'").

And, in a case closely analogous to this one, the Fourth Circuit considered a pre-enforcement challenge by eight public-interest plaintiffs, including ALDF, to North Carolina’s ag-gag law, N.C. Gen. Stat. § 99A-2. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App’x 122 (4th Cir. 2018) (unpublished). There, as here, the plaintiffs concretely alleged that they planned to carry out investigations in the future at certain farms but had not made specific plans to violate the law. *Id.* at 127–28. The Fourth Circuit held that the plaintiffs had standing because they had conducted undercover investigations in the past, the law prohibited their planned activities, and the plaintiffs had a reasonable fear that the law would be enforced against them. *Id.* at 130. The plaintiffs thus had “an actual and well-founded fear that the [act] will be enforced, and ha[ve] in fact self-censored [themselves] by complying with the [act], incurring harm all the while.” *Id.* at 131 (citation omitted).

The same is true here. The Act punishes Plaintiffs-Appellees for taking photos or recording videos at agricultural facilities, chilling the exercise of their First Amendment rights. The stifling of those rights in turn chills and deters journalists from engaging in newsgathering activity and reporting about conditions in the agriculture industry—issues of paramount public interest and concern. Because Plaintiffs-Appellees have suffered an injury in fact based on the chilling effect of the Act, they have standing to sue under Article III.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to affirm the district court's order.

Dated: April 19, 2023

Respectfully submitted,

/s/ Bruce D. Brown

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APPENDIX A
STATEMENTS OF INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Freedom of the Press Foundation (“FPF”) is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

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

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 Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all

sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

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 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.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in

September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper’s circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

The Online News Association is the world’s largest association of digital journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and

support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Pro Publica, Inc. (“ProPublica”) is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

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.

CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, do hereby certify that the foregoing brief of amici curiae: (1) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,377 words; (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font; and (3) complies with 8th Cir. R. 28A(h) because the brief has been scanned for viruses and is virus-free.

Dated: April 19, 2023

/s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2023, I electronically filed this amici curiae brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: April 19, 2023

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