

No. 15-35960

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

ANIMAL LEGAL DEFENSE FUND, et al.,

Plaintiffs-Appellees,

v.

LAWRENCE G. WASDEN, in his official capacity as
Attorney General of Idaho,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF IDAHO
CASE NO. 1:14-cv-00104-BLW

**BRIEF OF *AMICI CURIAE* PROFESSORS
BROOKE KROEGER AND TED CONOVER
IN SUPPORT OF AFFIRMANCE**

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STATEMENT OF INTEREST

Amici Curiae Professors Brooke Kroeger and Ted Conover submit this brief pursuant to Federal Rule of Appellate Procedure 29. *Amici* are experts in the area of undercover investigation. Professor Kroeger is a tenured full Professor and the Director of Global and Joint Program Studies at the New York University Arthur L. Carter Journalism Institute, where she has published extensively on the issue of the use of deception in undercover reporting, including a book entitled UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012). Professor Conover is a tenured associate professor at the New York University Arthur L. Carter Journalism Institute, and is known as a journalist for several books involving participatory reporting as well as a number of works facilitated by undercover investigative reporting. His account of surreptitiously becoming a New York state correction officer for ten months, NEWJACK: GUARDING SING SING (2000), won the National Books Critics' Circle Award for General Nonfiction and was a finalist for the Pulitzer Prize. He became a USDA meat inspector and reported on conditions inside a Cargill Meat Solutions slaughterhouse in Nebraska in an article that was a finalist for the National Magazine Award in Reporting in 2014, *The Way of All Flesh: Undercover in an industrial slaughterhouse*, HARPERS (May 2013).

Amici have a strong interest in ensuring that individuals remain able to use undercover methods to investigate and report news that might otherwise remain

unavailable or inaccessible to the public at large, continuing a long American tradition of important journalism conducted using deceptive or other undercover tactics.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), neither party's counsel has authored this brief in whole or in part, nor has any third party contributed money intended to fund the preparation of this brief. All parties to this action have consented to the filing of this brief.

INTRODUCTION

The Idaho legislature enacted Idaho Code § 18-7042 with one goal in mind: to silence a growing movement of citizen-journalists and activists that conduct undercover investigations of agricultural production facilities in order to expose mistreatment and otherwise horrific conditions of animals and workers alike. The District Court properly concluded that this statute unconstitutionally infringed on the First Amendment rights of those subject to the law, and also violated the Equal Protection clause of the Fourteenth Amendment to the Constitution by legislating with animus and intent to silence a specific group of persons.

Amici submit this brief in support of the District Court’s opinion, and write separately to emphasize the chilling and potentially far-ranging effect of a reversal here—which could empower legislatures throughout the nation to impede and criminalize independent investigators and journalists from continuing to use undercover techniques to expose and publish misconduct in industries, sectors, or areas of life that would otherwise remain closed off to the general public and inscrutable. The United States has a proud history of important and impactful journalism that relied on the ability of the journalist to be able to “go undercover” and misrepresent their identity to gather first-hand facts and observations about the conduct at issue. Idaho Code § 18-7042, with blunt force, criminalizes this investigative tac-

tic in one specific industry—unsurprisingly, an industry where journalists have regularly uncovered horrific misconduct worthy of public attention.

This Court should affirm the District Court, and hold that legislatures may not silence a particular group of people seeking to exercise their right to free speech.

ARGUMENT

I. UNDERCOVER JOURNALISM PROVIDES AN IMPORTANT SOCIETAL PURPOSE THAT WOULD BE CRITICALLY UNDERMINED BY IDAHO CODE § 18-7042

American journalists, including some of the most celebrated journalists in recent history, have often relied on the use of deception, misrepresentation, and other practices associated with undercover investigation to uncover or observe facts and practices otherwise obscured from public view. Such journalism has often brought with it serious and impactful change, and is at the core of the freedom of the press and free speech protected in the First Amendment. Idaho Code § 18-7042 criminalizes, among other things, the use of misrepresentation to “enter[] an agricultural production facility,” to “[o]btain records of an agricultural production facility,” to “obtain[] employment with an agricultural production facility ... with the intent to cause economic or other injury,” and separately, entering a private “agricultural production facility that is not open to the public” and “mak[ing] audio or video recordings of the conduct of [that facility’s] operations.” Idaho Code § 18-7042(1)(a)-(d). In other words, Section 18-7042 criminalizes, among other things, the use of deception and misrepresentation in investigating agricultural production facilities.¹ But these tactics are often, and have historically been critical to

¹ In addition to the misrepresentation provision, Plaintiffs-Appellees also challenge the constitutionality of § 18-7042’s prohibition on recording. *Amici* agree with Plaintiffs-Appellees that the recording provision is a content-based restriction

enable accurate and impactful journalism. As a result, by criminalizing such misrepresentations, Idaho Code § 18-7042 substantially impairs the ability of individuals (including journalists) to exercise constitutionally-protected freedoms of speech and the press.

A. Misrepresentation Has Historically Played a Critical Role in Enabling Journalists To Report on Important Issues of Public Interest.

As *amicus* Professor Brooke Kroeger has detailed in her book *Undercover Reporting: The Truth About Deception* (2012) [hereinafter “*Undercover Reporting*”], the history of American journalism is replete with instances in which journalists have used deceptive techniques in the service of journalism’s most important calling to uncover facts and first-hand observations that enabled the particular journalist to tell an accurate and effective story. Some of these investigations have won near-universal acclaim and the profession’s highest honors. A perfect example is the *Washington Post*’s recent expose of the horrific conditions at Walter Reed National Military Medical Center. See Dana Priest & Anne Hull, “Soldiers Face Neglect, Frustration at Army’s Top Medical Facility,” *Washington Post* (Feb. 18, 2007). This investigative series forced the ouster of the hospital’s commander, the secretary of the Army, and the Army’s surgeon general. *Under-*

on expressive activity that violates the First Amendment, but given *amici*’s unique experience and interests, this brief focuses exclusively on the misrepresentation portions of the statute.

cover Reporting at p 3. Congress scheduled special subcommittee hearings on-site at the hospital and invited testimony from some of the reporters' named sources. Three blue-ribbon panels investigated how wounded U.S. soldiers who had served their country valiantly could be treated so badly under the Army's own watch. The *Post's* Walter Reed investigation won the Pulitzer for Public Service in 2008 and is among the most admired and celebrated journalistic achievements of this century. *Id.*

To accomplish their reporting over four months, the reporters did not ask permission from Walter Reed authorities to be on site. *Id.* at pp. 4-6. They identified themselves at the guard gates with driver's licenses as regular visitors. Although neither the newspaper nor the reporters characterized their method as "undercover," which *Post* guidelines expressly prohibit, they did not announce their *Post* affiliation, nor did they declare their actual intention to anyone who might then be obliged to thwart their actual purpose. They avoided unwelcome questions by playing on the common assumptions and expectations of officials who encountered them in the hospital environment. They blended in with the surroundings and made themselves scarce when those who might question their presence or worse, be inclined to kick them out, appeared. They separated so that one could continue reporting if the other got caught. They did not reveal their actual purpose to anyone who would be obliged to report them. They shed cameras and reporters' note-

books so as not to be discovered during routine bag searches and they implored their trusted sources not to disclose their purpose and helped coach them in how to avoid inadvertently exposing them. They waited until four days before the first story in the series ran to reveal themselves to Walter Reed officials. *Id.*

Other similar examples abound. Some of the country's most well-respected publications have used deception—generally in the form of omission or non-disclosure—as part of in-depth investigations into the health conditions at abortion facilities, living conditions in welfare hotels, working conditions in New York sweatshops, the experience of migrant workers, the availability of drugs in prisons, conditions in maximum security prisons, and racial issues at a poultry-processing plant in North Carolina. *See* Augustus St. Clair, “The Evil of the Age,” *New York Times* (Aug. 23, 1871); Philip Shenon, “Welfare Hotel Families: Life on the Edge,” *New York Times* (Aug. 31, 1983); Jane H. Lii, “65 Cents an Hour—A Special Report. Week in Sweatshop Reveals Grim Conspiracy of the Poor,” *New York Times* (Mar. 12, 1995); Neil Henry, “Exploring the World of the Urban Derelict: Inside the Crumbling Walls of Baltimore’s Helping-Up Mission, Where Men Re-count the Legend of Old Louie, Eat Macaroni, and Mumble in Their Sleep,” *Washington Post* (April 27, 1980); Athelia Knight, “Drug Smuggling and Hot Goods: A Ride on Prison Visitors’ Buses,” *Washington Post* (Mar. 4, 1984); and Ben H. Bagdikian, “No. 50061, Inside Maximum Security: Six Days in State Prison

Through the Eyes of a Murderer,” *Washington Post* (Jan. 31, 1972). While some of the facts giving rise to these articles might perhaps have been obtained through non-deceptive means, not all supporting evidence is created equal—first-hand observations provide additional details and verification that other investigative methods may not be able to provide, and can give written work emotional heft that can allow the writer to connect with readers.

In fact, misrepresentation has been employed with particular regularity for investigations involving agricultural production facilities. Indeed, Tony Horwitz of the *Wall Street Journal*, who wrote a Pulitzer-winning piece exposing conditions at a chicken processing plant, see Tony Horwitz, “The Jungle Revisited,” *Wall Street Journal* (Dec. 1, 1994), has explained the unique utility of undercover work when investigating livestock facilities, noting that in his own investigations, while he was able to uncover rumors of horrible conditions in these facilities, “little if any hard evidence was available.” *Undercover Reporting* at 165. Horwitz further emphasized that “it was essential to be able to depict ‘the grindingly repetitive nature of the labor, and the toll that takes on workers.’” *Id.* While Horwitz could have written other types of stories, potentially relying exclusively on non-undercover evidence, he felt that first-hand observations were critical to be able to tell a detailed, balanced, and moving story.

Similarly, the Humane Society regularly uses misrepresentation when it has undercover investigators work at factory farms to uncover examples of animal cruelty and horrific conditions—often in partnership with major media organizations like the *Washington Post*. *Undercover Reporting* at 255. The Humane Society has explained the need for undercover investigation, noting: “There isn’t another way to find out what’s happening.... Whistleblowing is really the only way to get the information.” *Id.* Misrepresentations thus are critical to American journalism, and in particular to journalism involving conditions and practices in agricultural production facilities.

B. By Criminalizing Misrepresentation, Idaho Code § 18-7402 Would Effectively Prohibit Undercover Journalism, and Thus Is Not “Narrowly Tailored” As Required under Strict Scrutiny

By intentionally preventing those like Horwitz and the Humane Society, as well as Plaintiffs-Appellees, from conducting undercover investigations using misrepresentation, Idaho Code § 18-7042 is a content-based restriction that targets and effectively prohibits undercover investigations of agricultural production facilities located in Idaho, and consequently must be subject to strict scrutiny. Because of the severe restrictions (i.e., criminal sanctions) that the statute would place on individuals seeking to exercise their First Amendment rights, the law is clearly not “narrowly tailored” to further a compelling Government purpose, and thus fails under strict scrutiny.

As Plaintiffs-Appellees have documented, Idaho Code § 18-7402’s restrictions on misrepresentation are facially content-based, and were enacted with a content-based animus—each of which would independently require this Court to apply strict scrutiny. Plaintiffs-Appellees’ Answering Brief (“PAB”) at pp. 39-46; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (“[S]trict scrutiny applies either when a law is content based on its face, or when the purpose and justification for the law are content based.”). In particular, Section 18-7402 only criminalizes speech with deceptive content (i.e., misrepresentations), and only such speech relating to agricultural production at that. PAB at pp. 40-42. Additionally, the Idaho legislature has overtly and explicitly acknowledged that § 18-7402 was passed with the intent of silencing a specific group of investigators and activists critical of factory farming practices. *Id.* at pp. 44-46. As a result, the District Court properly applied strict scrutiny when considering the constitutionality of § 18-7402 under the First Amendment. *Reed*, 135 S. Ct. at 2228.

Applying strict scrutiny, it is clear that § 18-7042 is not “narrowly tailored to achieve” a “compelling government interest.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). Even if this Court looks past the stated purposes that truly motivated the Idaho legislature, and considers whether the law is narrowly tailored to protect the property rights of the owners of agricultural production facilities, as

Defendant-Appellant claims, the law is far broader than is necessary to achieve that manufactured purpose.

Idaho already has a number of laws in place that would prohibit an activist from trespassing or otherwise infringing on the property rights of facility owners. None of these existing laws would prohibit the exercise of undercover journalism or investigation in the blunt and barefaced manner done here. If Idaho were truly seeking only to protect property rights of property owners, it could simply enforce existing laws on the books. To the contrary, “the only interest distinctively served by the content limitation is that of displaying the [legislature’s] special hostility towards the particular biases . . . singled out”—i.e., the legislature’s stated intent to curb investigative work into animal cruelty and other misconduct at animal production facilities. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992). In other words, Idaho Code § 18-7042 is not “narrowly tailored” to protect property rights because it goes much further than the property rights at issue (which are already protected at law) and aims squarely at investigative techniques and tactics used by activists and journalists who hold or seek to advance viewpoints with which the legislature disagrees. Consequently, Section 18-7042 fails strict scrutiny review.

II. IDAHO CODE § 18-7042 INSULATES FROM JOURNALISTIC SCRUTINY A SINGLE INDUSTRY THAT HAS LONG BEEN THE SUBJECT OF SUCH ATTENTION, AND THUS VIOLATES THE EQUAL PROTECTION CLAUSE

In addition to a First Amendment violation, the District Court also properly concluded that Idaho Code § 18-7042 violates the Equal Protection Clause by targeting, with particular animus, an identifiable group: citizen activists and journalists seeking to expose animal cruelty. Idaho Code § 18-7042 singles out the agricultural industry for unique protections; Defendant-Appellant defends this classification by specifically citing the long history of important undercover journalism targeted at the agricultural industry. Appellant's Opening Brief ("AOB") at p. 41. But this misguided argument would allow a government to insulate from protections industries and practices that have proven to be particularly deserving of independent scrutiny, solely on the basis that journalists have, in the past, successfully exercised their rights under the First Amendment to uncover and expose misconduct.

As stated above, factory farming and food processing have regularly been the subject of thorough exposés, often supported in bulk by evidence gathered through undercover methods. Two of the most important works of undercover journalism in recent memory, Tony Horwitz's *"The Jungle Revisited,"* *Wall Street Journal* (Dec. 1, 1994), and Charlie LeDuff's *"Who Kills, Who Cuts, Who Bosses Can Depend on Race,"* *New York Times* (June 16, 2000), relied on fact-gathering

tactics similar to those of Plaintiff-Appellees: both authors applied for employment at facilities they intended to investigate, failing to disclose their true purpose in seeking employment. Both pieces won the Pulitzer Prize.

It is perhaps unsurprising, then, that legislatures across the country have responded to these examples of effective journalism, and have pushed back at the behest of the agriculture industry and imposed restrictions like those contained in § 18-7042. Plaintiffs-Appellees have thoroughly documented the explicit and overt hostility towards investigators like themselves that unquestionably motivated the Idaho legislature in passing the law at issue, PAB at pp. 46, 53-54—there can be no doubt that the legislature was predominantly motivated by a clear animus and desire to stop activists and journalists from continuing to publish exposés documenting cruelty and conditions at agricultural production facilities. But even if this Court finds that this stated animus is not sufficient, on its own, to strike down the law, it must conduct a more rigorous version of rational basis review, skeptically reviewing any proffered basis with “careful consideration” of the fit between the classification and the stated government interest. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 448-50 (1985).

Defendant-Appellant defends Idaho Code § 18-7042 by noting that it furthers the rational purpose of protecting the property rights of facility owners, argu-

ing that “[n]o one wants her or his home or property damaged by an interloper; most, indeed likely everyone, want the right to prohibit audio or video recording of activities within the home by invited guests or invitees.” AOB at p. 42. But this highlights precisely the issue at hand—property rights of course are important as a general matter, and there are plenty of laws already on the books (e.g., laws against trespass, invasion of privacy, etc.) that protect these rights. But the only incremental protection that Idaho Code § 18-7042 adds is a prohibition, in the agricultural arena alone, on misrepresentation—otherwise-harmless conduct that is notable only insofar as it enables parties to actually conduct an undercover investigation. In other words, the true government purpose here is only to prevent the speech that follows the misrepresentation—to prohibit a specific group of persons from being able to continue to express their message relating to animal welfare and conditions within agricultural production facilities. “Careful consideration” of this law thus makes clear that the law is not about protecting property interests.

Moreover, the “private property” at issue here, agricultural production facilities, fulfill a unique role closely intertwined with the public welfare. Overriding public health, safety, and ethical considerations govern this nominally private industry of food production and animal care. These public concerns have over the last century led to pervasive government oversight of the food industry, partially motivated by the history of undercover investigations focused on the conditions at

food production facilities. Given the amount of public oversight that already exists in this industry, any purported property interest damaged here would be, at best, incremental: just one more example of oversight over the conditions for the treatment of animals and production of food products at the target facility. In sum, legislatures should not be (and are not) permitted to carve out individual areas of industry in which to silence opposition and critique. The Idaho legislature's animosity towards activists and journalists focused on uncovering misconduct in the agricultural industry thus dooms § 18-7042, and this Court should affirm the opinion below accordingly.

CONCLUSION

Idaho Code § 18-7042 serves a single purpose: to curtail the most historically effective method of investigating and reporting on misconduct at otherwise-closed agricultural facilities. Allowing this law to stand will unconstitutionally burden individuals' First Amendment rights, and in the process, will materially inhibit people from an essential means of conducting meaningful investigative journalism. Moreover, Defendant-Appellee's reasoning defending § 18-7042 could easily be applied in other industries and to other groups of activists or journalists. Allowing legislatures to enact these types of laws will thus serve to chill important and impactful speech in areas of public interest well beyond even those at issue here. Finally, Defendant-Appellant's hypothesized basis for the law cannot sal-

vage a statute so clearly designed, with demonstrated animosity, to silence a particular group. Consequently, *amici* urge this Court to affirm the District Court's grant of partial summary judgment.

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Dated: June 27, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Professors Brooke Kroeger and Ted Conover in Support of Plaintiffs-Appellees and Against Reversal complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,310 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by 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 using the CM/ECF system.

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