CRAIG H. DURHAM, ISB No. 6428
Durham Law Office, PLLC
910 W. Main Street, Suite 328
Boise, Idaho, 83702
T: 208-345-5183
F: 208-906-8663
craig@chdlawoffice.com

JEFFERY GULLEY*
Government Accountability Project
Food Integrity Campaign
1612 K Street, NW, Suite 1100
Washington, DC 20006
T: 202-457-0034, ext.127
jefferyg@whistleblower.org
**Pro Hac Vice Application Pending*

Attorneys for Amicus Curiae Government Accountability Project

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, et al.,

Plaintiffs,

v.

C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho, and LAWRENCE G. WASDEN, in his official capacity as Attorney General of Idaho,

Defendants.

Case No. 1:14-cv-00104-BLW

BRIEF OF AMICUS CURIAE GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Government Accountability Project (GAP) is an independent, nonpartisan, and nonprofit organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for the effective implementation of whistleblower protections throughout industry, international institutions and the federal government, focusing on issues involving national security, food safety, and public health.

GAP defines a "whistleblower" as an employee who discloses information that she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. Typically, whistleblowers speak out to parties that can influence and rectify the situation. These parties include the media, organizational managers, hotlines, or legislative and Congressional members or staff.

GAP defends whistleblowers and offers legal assistance where disclosures affect the public interest. For over 37 years, GAP has represented major whistleblowers who have exposed gross injustices under every presidential administration since the group's inception. GAP is at the forefront of advocating for whistleblower rights and protections, having seen retaliation against such individuals ranging from professional demotions to criminal prosecutions.

In this case, GAP supports Plaintiffs and opposes Defendants' Motion to Dismiss. Idaho Code § 18-7042(1) will have a chilling effect on whistleblowers throughout Idaho's agricultural and food production industry, thwarting the will of Congress to protect

whistleblowers and endangering the health and safety of workers and consumers. GAP has a strong interest in being heard on this issue and in preventing that outcome.

SUMMARY OF THE ARGUMENT

Contrary to Defendants' claim that "the law *actually* passed has nothing to do with speech or employee whistleblowers" (Dkt. 12-1, p. 2) (emphasis in original), Idaho Code § 18-7042(1) has everything to do with penalizing disfavored speech and quieting whistleblowers. Most critically, Idaho Code § 18-7042(1)(d) – the provision that criminalizes unauthorized audiovisual recording – bans an entire medium of expressive communication and targets a particular viewpoint on a matter of public concern. It will chill whistleblowers from documenting and reporting workplace violations and punish, as criminals, those who do. It cannot withstand strict scrutiny under the First Amendment.

Given its self-authenticating nature, audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate a whistleblower who is otherwise disbelieved or ignored. There are no sufficient alternative means for this type of communication.

Additionally, as alleged by Plaintiffs, the new statutory scheme conflicts with federal laws that encourage whistleblowing and protect whistleblowers from retaliation. The threat of a prosecution under state law for conduct that is protected under federal law is not speculative or farfetched, and the federal pre-emption claim is ripe for this Court's review.

BACKGROUND

I. Whistleblowers Serve a Vital Function in Our Representative Democracy

Whistleblowing has a long tradition in this country of fostering transparency and accountability in government and industry, resulting in legislative and regulatory change that benefits workers, consumers, and the public. Because employees often stand in the best position to see wrongdoing in the workplace, they play a unique and vital role in helping the government detect workplace fraud, abuses, and violations of law that would otherwise go undetected.

More than 150 years ago, during the Civil War, Congress recognized that the Government needed help in ferreting out corruption by government contractors. In 1863, the False Claims Act was enacted, which included a qui tam provision that empowered – essentially deputized – employee insiders to curb contractor corruption on the Government's behalf. 31 U.S.C. § 3729 – 3733. Often regarded as the government's most effective tool for combating contracting fraud, the Act was an early acknowledgement that whistleblowing can promote good governance, efficiency, transparency, and accountability. It survives, with strengthened whistleblower protections, to this day.

In recognition of the important role of whistleblowers, Congress has increasingly included whistleblower provisions in recent major federal legislation. In 1986, Congress re-visited the False Claims Act to include a provision that prohibited retaliation against employee whistleblowers, which was extended in 2009 to include agents and contractors. 31 U.S.C. § 3730(h). In 1989, the Whistleblower Protection Act was enacted to protect federal employees from adverse employment actions based on their

disclosure of misconduct or corruption in the workplace. 5 U.S.C. § 2302. In 2002, following a cascade of high-profile corporate fraud scandals that culminated in the collapse of Enron, Congress passed the Sarbanes-Oxley Act, which imposed new or enhanced reporting and accountability standards for public companies, and included provisions that prohibit retaliation against whistleblowers who report securities fraud. 18 U.S.C. § 1514A.

In 2011, after a string of high-profile cases of food-borne illnesses sickening hundreds, the Food Safety Modernization Act (FSMA) was signed into law to give the Government more power to combat contamination in the nation's food supply. To assist in that mission, FSMA contains strong protections for employees who disclose violations of the Food, Drug & Cosmetics Act by companies are engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food." 21 U.S.C. § 399d.

The federal policy is clear: employees who document and report misconduct and workplace violations in this industry should be protected and encouraged to come forward, not punished if they do. Whistleblowers fill a vital gap in the regulatory apparatus when the regulatory system fails, due to lack of will, funding, or oversight, and they create accountability where private industry may have no incentive to police itself.

These and other protections are needed now more than ever. Armed with only a small mobile device and an internet connection, in the last decade journalists, activists, and whistleblowers have exposed illegal practices in agriculture production facilities by

recording and publicizing those practices, stirring a robust public debate about the conditions under which our nation's food is produced.

Whistleblowers provide key voices in that debate, closing the enforcement loop between regulators and Congress. In passing this law, however, Idaho has chosen to dim the lights, muffle the debate, and punish those who expose wrongdoing.

II. Cause and Effect: Idaho's Enactment of an "Ag-Gag" Law

In 2012, Mercy for Animals Dairy released a video of workers abusing cows at the Bettencourt Dairies' Dry Creek Dairy in Hansen, Idaho. The reaction was swift and, on the surface, unambiguous. The owners of the dairy stated they were unaware of the abuse, were very upset by what the video showed, and would use the video as a training tool for their employees.[1] The workers who abused the animals were prosecuted, and the dairy industry teamed with Idaho schools to offer training in proper care of animals.[2]

Despite taking these initial positive steps for public consumption, an industry trade association wrote and sponsored legislation that, had it been law at the time, would have criminalized the very investigation that uncovered the abuse at the Dry Creek Dairy. The bill passed the Idaho legislature quickly and was signed by the Governor on February 28, 2014. The legislation creates an entirely new crime – "interference with agricultural production." Idaho Code § 18-7042(1)(d).

---

1 Stephanie Zepelin, "Diary Owner Speaks Out After Release of Shocking Undercover Video," http://www.ktvb.com/home/Dairy-owner-speaks-out-after-release-of-shocking-undercover-video-173632071.html.

2 Associated Press, "After Abuse, Idaho Schools Offer Diary Training," http://www.ktvb.com/news/After-abuse-Idaho-schools-offer-dairy-training-224793632.html.

This new law will silence those who wish to publicize abusive, unsafe, and unsanitary practices in an industry that has a critical role in public health. More specifically, it will discourage whistleblowers from coming forward out of fear of prosecution. In this way, it conflicts with federal law and policy that encourages whistleblowing as a much needed gap-filler in government oversight and values profits at the expense of the public's health and safety.

ARGUMENT

I. Idaho Code § 18-7042(1)(d) Targets a Means of Expression and a Message, Will Chill Whistleblowing, and Violates the First Amendment

Because each subsection in the statute sets out a different method of committing "interference with agricultural production," and because the statute contains a severability clause, Idaho Code §18-7042(2), the constitutionality of each subsection must be examined on its own merits. While GAP is confident that Plaintiffs and amici will press many other procedural and substantive arguments, GAP wishes to be heard here on Idaho Code § 18-7042(1)(d) – the recording provision – which will have a particularly negative impact on whistleblowing. Under that subsection, a person commits a crime if she knowingly "enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations." *Id*.

A. Banning Audio and Visual Recording Strikes at the Heart of Speech that is protected by the First Amendment

The sweep of this provision is breathtaking. Unlike most of the other methods of committing "interference with agricultural production," to convict a defendant under Idaho Code §18-7042(1)(d) the State does not need to prove that the defendant entered a production facility under false pretenses or trespass. The State is also relieved of proving an intent to injure or harm. Therefore, anyone who has permission to be on the property – from a tourist to an electrical subcontractor to an in-house employee – who makes a recording of the "conduct . . . of the facility's operations," without authorization, could be prosecuted and convicted. This provision strikes at the heart of the First Amendment.

(1) *Idaho Code §18-7042(1)(d) regulates speech, not conduct*

The Court should not be persuaded by Defendants' wave-of-the-hand dismissal that the statute is one of general applicability that regulates only conduct, not speech. Any purported distinction between the act of making a recording and the expression that the recording contains is artificial and unavailing. The recording of sound and images is not done for its own sake; it is the first step in a process that results in the communication of a message to others. In this way, the act of 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." *American Civil Liberties Union v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

Defendants also fail to acknowledge that "regulation of a medium [of expression] inevitably effects communication itself." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (invalidating an ordinance banning residential signs). The Supreme Court has held that conduct that *facilitates* speech, such as monetary contributions to political candidates, is protected by the First Amendment. *See*, *e.g.*, *Citizens United v. Federal Elections Comm'n*, 130 S.Ct. 876, 896 (2010) ("laws enacted to control or suppress speech may operate at different parts in the speech process."). As the Seventh Circuit has aptly put it,"[c]riminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast — whether to the general public or to a single family member or friend — and thus burdens First Amendment rights." *Alvarez*, 679 F.3d at 597; *see also Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (finding a violation of a defendant's First Amendment rights for a prosecution based on the recording of police officers).

(2) *Idaho Code §18-7042(1)(d) is not content-neutral*

Any law that suppresses, disadvantages, or imposes differential burdens on speech because of its content is subject to strict scrutiny. *Turner Broadcasting v. Federal Communications Commission*, 512 U.S. 622, 642 (1994). "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *United States v. Eichman*, 496 U.S. 310, 315 (1990).

Here, Idaho Code §18-7042(1)(d) applies only to one type of content: recordings showing activities inside agricultural production facilities. It does not ban recordings of any other subjects at any other places. And because the law gives agricultural facility

owners veto power, effectively turning them into state-backed censors, the necessary effect of the law is to burden speech that is negative or critical. Therefore, the manifest purpose of this provision is to regulate speech because of its content and the message it conveys, and to tip the scales to one side of the public debate. Consequently, the Court must view Idaho Code §18-7042(1)(d) through a strict scrutiny lens.

In an attempt to avoid this conclusion, Defendants rely on several cases that stand for the unremarkable proposition that news gathers are subject to a state's generally applicable laws, citing *Houchins v. KQED*, *Inc*., 438 U.S. 1 (1978), *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991), and *Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 194 F.3d 505 (4th Cir. 1999). Defendants' reliance on these cases is misplaced. Idaho Code § 18-7042(1)(d) is not a law of general applicability because it targets certain types of speech. But even If the Court were to conclude that Idaho Code § 18-7042(1)(d) is generally applicable, it must still review the provision with heightened scrutiny because the burden on expression is not incidental and unintended, as in *Cowles*, *Food Lion*, and other cases of that sort, but is the inevitable consequence of this law. *See Food Lion*, 194 F.3d at 521-22 (citing *Barnes v. Glen Theatre Inc*., 501 U.S. 560 (1991), as supporting the principle that a generally applicable law that burdens expressive conduct is still subject to heightened scrutiny.)

For these reasons, Idaho Code § 18-7042(1)(d) must be justified by a compelling State interest and must be narrowly tailored to advance that interest. It cannot survive that level of review.

(3) *Idaho Code § 18-7042(1)(d) is not narrowly tailored to further a compelling state interest, and the speech it prohibits is of core significance*

Regardless of whether the State has an interest protecting the property and privacy of agricultural production facility owners, as Defendants' claim, Idaho Code § 18-7042(1)(d) is not narrowly tailored to further that interest. There is no requirement that, for criminal liability, the person who records the activity first gain access by false pretenses or trespass. Indeed, there is no requirement that the person making the audio or visual recording have any intent to interfere with the property owner's interests. The law does not penalize only those recordings that are intentionally false, and, in any event, Idaho has civil laws, such as defamation, that are much better suited to remedying the harms from those violations.

Instead, the law completely prohibits the use of an entire medium that is potent and has played an irreplaceable role in helping whistleblowers expose workplace fraud, abuses, and violations of law. The effect of this subsection, which effectively makes it a crime to document and report a crime, on whistleblowing will be immense. Indeed, this is surely why the agricultural industry sought its implementation.

B. <u>There is No Adequate Alternative for Audio and Visual Recording</u>

Audiovisual recording is a uniquely powerful means of communication. *See Alvarez*, 679 F.3d at 607. As effective as Upton Sinclair's *The Jungle* was in the era of print media, video and audio recordings have an even greater impact in the modern era. Recordings made by employees without the knowledge or consent of their employers, those who are targeted by this law, are especially reliable, since the recorded behavior

is untainted by the employer's knowledge that the company's conduct is being memorialized.

Video evidence has provided some of the strongest proof of violations that affect public health and safety. For instance, in 2008, the Humane Society of the United States (HSUS) released video recorded by employees working in the Westland/Hallmark Meat Company that showed workers introducing sick and diseased cattle ("downer cows") into the nation's meat supply. The video led to the largest recall of ground beef in history and a $155 million settlement under the False Claims Act.[3]

Around that same time, Dr. Dean Wyatt, a Public Health Veterinarian with the USDA Food Safety and Inspection Service, repeatedly reported to his superiors that animals were being mistreated at a processing plant in Oklahoma. He was ignored and eventually transferred to Vermont. Once there, he witnessed similar violations at a different plant. After his reports were again ignored by the agency, he tipped off HSUS, which conducted an investigation and released a video documenting the abuse. Armed with video that vindicated his disclosures, Dr. Wyatt was asked to present testimony to Congress concerning systemic disregard for the law within the industry and the agency tasked with overseeing it.[4] Supported by this video, Dr. Wyatt's compelling testimony

3 Associated Press, "California: Deal Reached in Suite Over Animal Abuse," *New York Times*, November 27, 2013, http://www.nytimes.com/2013/11/28/us/california-deal-reached-in-suit-over-animal-abuse.html?ref=westlandhallmarkmeatcompany.

4 Cody Carlson, "A Call for USDA Vigilance in Treatment of Food Animals," *The Atlantic*, August 31, 2012, http://www.theatlantic.com/health/archive/2012/08/a-call-for-usda-vigilance-in-humane-treatment-of-food-animals/261836/.

led to changes in the agency's approach to enforcing the laws governing treatment of animals in slaughter facilities.

In addition to these investigations, videos shot by employees of henhouses have increased awareness of battery cages and have led to laws barring inhumane practices.[5] Unrelated to agriculture, but related to public health, video evidence of mistreatment at nursing homes has led to a law that encourages the use of cameras in long term care facilities.[6]

Idaho Code § 18-7042(1), undercuts the viability of this important variety of speech, threatening to undo the significant contributions made by whistleblowers discussed above and prevent future debate and oversight of this industry's conduct by the public and the government. It is unconstitutional, and the Court should enjoin its enforcement.

II. Plaintiffs' Pre-emption Claim is Ripe for this Court's Review

In their Motion to Dismiss, Defendants argue that Plaintiffs have not stated a ripe claim that Idaho Code § 18-7042(1) is pre-empted by the whistleblower protections in the federal False Claims Act, the Clean Water Act, and Food Safety and Modernization Act. (Dkt. 12-1, pp. 17-19.) In support, they assert that "[w]hether such preemption

5 Stuart Pfeiffer, "California's egg-farm law prompts a push for national standards," *Los Angeles Times*, May 27, 2012, http://articles.latimes.com/2012/may/27/business/la-fi-egg-farms-20120527.

6 Debra Cassens Weiss, "'Granny cam' law aimed at curbing nursing-home abuse takes effect in Oklahoma," *ABA Journal*, November 20, 2013, http://www.abajournal.com/news/article/granny_cam_law_aimed_at_curbing_nursing-home_abuse_takes_effect_in_oklahoma.

claims will ever arise is, at best, uncertain and, more realistically, farfetched." (*Id*. at 18.) Contrary to this argument, the conflict between these laws is real.

These federal statutes have been interpreted, by the courts and administrative agencies charged with their enforcement, as protecting an employee's right to gather evidence, including audio and video evidence of their employers' wrongdoing. The False Claims Act's anti-retaliation provision, 31 U.S.C. § 3730(h), has been construed to protect the gathering of evidence of an employer's fraud. *See*, *e.g*., *United States ex. rel. Yesudian v. Howard Univ*., 153 F.3d 731, 740 (D.C. Cir. 1998). Similarly, the Department of Labor, which administers the anti-retaliation provisions of Food Safety Modernization Act and Clean Water Act has held that collecting evidence of wrongdoing is protected activity for which the employer may not retaliate. *See*, *e.g*., *Mosbaugh v. Georgia Power Co*., 91-ERA-1 and 11, slip op. at 7-8 (Sec'y Nov. 20, 1995) (secret tape recording of evidence protected); *Haney v. North American Car Corp*., 81-SDW-1, slip op. at 4 (Sec'y June 30, 1982) (tape recording of evidence protected). These laws would obviously be thwarted if, though protected from termination or other adverse employment actions, whistleblowers would nonetheless be subject to criminal prosecution for the very same protected conduct.

Moreover, a worker's affiliation with the HSUS or any group in no way diminishes the apparent conflict between Idaho Code § 18-7042(1)(d) and the whistleblower protection laws cited by Plaintiffs. In determining whether an employee is covered under one of those laws, the only relevant questions are whether the worker was an "employee" of a covered employer, and whether they engaged in protected activity. Similarly, the Department of Labor has explicitly stated that an employee's motive is

irrelevant in determining whether that employee is protected by these whistleblower provisions. *See Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-03 (ARB Sept. 29, 2006).

Plaintiffs have alleged that they intend to engage in activity that would violate Idaho Code § 18-7042(1). Accordingly, there is nothing "farfetched" about one or more of these Plaintiffs potentially gathering evidence in a manner that would be simultaneously protected by federal law and illegal under state law. The pre-emption claim is ripe for this Court's review.

CONCLUSION

When whistleblowers are afraid to come forward, those who are of a mind to violate the law can do so without fear of exposure. Incentives are perverted, oversight breaks down, and the public's health and workers' safety are at greater risk.

GAP respectfully requests that this Court deny Defendants' Motion to Dismiss, reach the merits of Plaintiffs' claims, and grant them the relief that they are seeking.

Submitted this 1st day of May, 2014.

/s/ Craig H. Durham
Craig H. Durham
Durham Law Office, PLLC

/s/ Jeffery Gulley
Jeffery Gulley*
Government Accountability Project
Food Integrity Campaign
**Pro Hac Vice Application Pending*

Attorneys for Amicus
Government Accountability Project

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May 2014, I electronically filed this Brief with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Justin Marceau
jmarceau@law.du.edu

Matthew Liebman
mliebman@aldf.org

Matthew Strugar
matthew-s@petaf.org

Paige M. Tomaselli
ptomaselli@centerforfoodsafety.org

Richard Alan Eppink
reppink@acluidaho.org

Maria E. Andrade
mandrade@andradelegal.com

Thomas C. Perry
tom.perry@gov.idaho.gov

Cally A. Younger
cally.younger@gov.idaho.gov

Clay R. Smith
clay.smith@ag.idaho.gov

Carl Withroe
carl.withroe@ag.idaho.gov

Bruce D. Brown
bbrown@bakerlaw.com

Charles A. Brown
CharlesABrown@cableone.net

David P. Claireborne
david@sawtoothlaw.com

Daniel Steenson
dan@sawtoothlaw.com

/s/Craig H. Durham
Craig H. Durham