

No. 19-1364

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

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

Plaintiffs/Appellees,

v.

**KIMBERLEY K. REYNOLDS, in her official capacity as
Governor of Iowa, TOM MILLER, in his official capacity as
Attorney General of Iowa, and DREW B. SWANSON, in his
official capacity as Montgomery County, Iowa County Attorney,**

Defendants/Appellants.

Appeal from an Order by the United States District Court
for the Southern District of Iowa
Case No. 4:17-cv-00362-JEG-HCA

**BRIEF FOR *AMICI CURIAE* 23 MEDIA ORGANIZATIONS AND
ASSOCIATIONS REPRESENTING JOURNALISTS, WRITERS, AND
RESEARCHERS IN SUPPORT OF PLAINTIFFS-APPELLEES**

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2017—Editorial Writing, The Pulitzer Prizes,
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A Call for USDA Vigilance in Humane Treatment of Food Animals,
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INTEREST OF *AMICI CURIAE*¹

The Reporters Committee for Freedom of the Press and 22 additional *amici* listed below, through undersigned counsel, respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellees.

As representatives of the news media, *amici* have an interest in ensuring that reliable resources are available to gather the news in a way that benefits the public. The ability of sources and whistleblowers to inform journalists of dangerous, illegal, or unethical activities—and to provide documentation of any wrongdoing—without fear of criminal liability is critical to journalists’ ability to report on matters of public concern. *Amici* write to emphasize the public interests at stake in this case and to highlight to the chilling effect on journalists and their sources created by Iowa Code Ann. § 717A.3A.

SUMMARY OF ARGUMENT

Amici agree with the district court’s conclusion that § 717A.3A “has the effect of criminalizing undercover investigations of certain agricultural facilities ... of interest to the general public.” Add. 47. *Amici* further agree with the district court

¹ No party’s counsel authored any part of this brief. No person other than *amici* or their counsel contributed money intended to fund the brief’s preparation or submission.

that § 717A.3A is a content-based regulation of speech that cannot survive the application of strict scrutiny, especially because there is no evidence that the statute is necessary to protect perceived harms to property and biosecurity. Add. 58. By silencing those who wish to investigate and publicize abusive, unsafe, and unsanitary practices at agricultural facilities, § 717A.3A stifles public debate, discourages whistleblowers from coming forward out of fear of prosecution, and values profits and “property rights” over the public’s health and safety. In this manner, § 717A.3A actually *weakens* food safety while chilling free speech.

First, the news media and agricultural facility employees have mutually reinforcing First Amendment interests in informing the public regarding the health and safety of the nation’s food supply. Agricultural workers who witness unsafe agricultural practices and abuse at Iowa agricultural facilities want to disclose information to the general public. At the same time, the media want to inform the public about the safety of the nation’s food supply and the potential for animal and worker abuses. Statutes that criminalize disclosures by sources to the press, and otherwise chill the reporter-source relationship, cut off this virtuous cycle of communication and stymie the interests of news organizations in contributing to debate on a subject of intense public interest. Should this Court overturn the district court’s ruling and revive § 717A.3A, it would strike a severe blow to core First Amendment speech.

Second, the conspiracy provision of § 717A.3A amplifies the chilling effect imposed by the statute by levying potential criminal liability on journalists working with sources to learn more about agricultural facilities. Members of the public cannot themselves monitor all of the agricultural facilities that produce their food. Accordingly, the media play an important independent role in contributing to meaningful public oversight of agricultural industries. The State should not be permitted to use § 717A.3A to chill and censor speech about such an important topic.

Third, news organizations can only do their job effectively if this Court and others make clear that criminalizing the reporter-source relationship is an unconstitutional content-based restriction on First Amendment rights. The owners and operators of agriculture facilities are already protected from unlawful trespass and fraud, and § 717A.3A is not narrowly tailored to be the least restrictive means of achieving these interests. Even if § 717A.3A was not intended to reach constitutionally-protected newsgathering, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.” *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Fourth, while the State argues on appeal that the statute was enacted to “address concerns about protecting Iowa agricultural producers’ private property and bio-security measures,” the timing of the adoption of § 717A.3A and statements by members of the Iowa legislature during the debate and passage of the statute make

clear that it was adopted in reaction to undercover investigations and resulting media coverage that cast an unwanted spotlight on Iowa's agricultural industry. Add. 44-45. The concerns presented by Appellees' challenge to § 717A.3A are thus particularly acute when considered against this backdrop.

ARGUMENT

I. SECTION 717A.3A IMPOSES A CHILLING EFFECT ON SOURCES AND THE REPORTER-SOURCE RELATIONSHIP

Both the media and agricultural facility employees have mutually reinforcing First Amendment interests in disclosing conditions at those facilities to the public. As this litigation vividly illustrates, many whistleblowers want to disclose information about the agricultural facilities where they work. *See* Add. 44-45. At the same time, the media want to report this information to the public which, in turn, wants to receive it. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). There can thus be no doubt that reporters have a First Amendment right to inform the public about food safety.

Reporters rely on both activists and regular members of the public as sources to report about the agricultural industry. Important journalism has relied on whistleblowers, sources who take jobs intending to carry out their employment responsibilities and also observe practices to inform the public, and other witnesses to events or conditions in the public interest. Indeed, sources are the lifeblood of

journalism, and many investigative reports rely on first-hand accounts, documents, photographs, or videos obtained from sources within a government entity, a company, or other organization. Access to documentary materials and first-hand accounts enhances accuracy and credibility in reporting, increases transparency and reader trust, and enriches news stories, allowing reporters to convey more than can be said based on third-hand accounts or the written word alone. Nevertheless, by criminalizing potential sources—or at least causing them to fear criminal prosecution—§ 717A.3A chills the flow of first-hand information between potential sources and journalists, resulting in less public information regarding the safety of our nation’s agriculture.

This reporter-source relationship has long served to safeguard the public interest and prompt reform and improvements that benefit the public at large. In many respects, investigative journalism was born out of Upton Sinclair’s infamous 1906 book on Chicago’s slaughterhouses, *The Jungle*, and the work of his contemporaries. See James O’Shea, *Raking the Muck*, Chi. Trib. (May 21, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-05-21-0605210413-story.html>.

While *The Jungle* is a work of fiction, Sinclair’s story was rooted in extensive research. Sinclair interviewed health inspectors and industry workers, and he went undercover into meatpacking facilities to document unsanitary conditions. 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 the passage of the Pure Food and Drug Act and Meat Inspection Act, both enacted in 1906, which protected the public by instituting vigorous reforms in the meatpacking industry. *Id.*; see also Wallace F. Janssen, The Story of the Laws Behind the Labels, FDA, available at <https://perma.cc/KL3D-AS3S> (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 spirit of public welfare created by *The Jungle* has been prevalent ever since. For example, in the late 1960s, Minneapolis Tribune reporter Nick Kotz published a series of articles that revealed widespread unsanitary conditions in the country’s meatpacking plants. 113 Cong. Rec. 21283-86 (daily ed. Aug. 3, 1967). Kotz’s reporting contributed to the passage of the Meat Inspection Act of 1967, which broadened federal regulation of slaughterhouses in the United States. *Id.* at 21283.

News reporting on agricultural issues has thus achieved substantial impact and has been lauded for it. Indeed, Kotz won a Pulitzer Prize for his reporting, as did Michael Moss of the *New York Times* in 2010 for calling into question the

effectiveness of injecting ammonia into beef to remove E. coli. See 2010—Explanatory Reporting, The Pulitzer Prizes, <https://www.pulitzer.org/prize-winners-by-year/2010>. In 1996, *The News & Observer* (Raleigh, NC) was awarded the Pulitzer Prize for Public Service for the work of journalists Melanie Sill, Pat Stith and Joby Warrick on the environmental and health risks of waste disposal systems used in North Carolina’s growing hog industry. See 1996—Public Service, The Pulitzer Prizes, <https://www.pulitzer.org/winners/news-observer-raleigh-nc>. And, in 2017, Art Cullen of *The Storm Lake Times* (Storm Lake, IA) received the Pulitzer Prize for editorials “fueled by tenacious reporting, impressive expertise and engaging writing that successfully challenged powerful corporate agricultural interests in Iowa.” See 2017—Editorial Writing, The Pulitzer Prizes, <https://www.pulitzer.org/winners/art-cullen>.

Investigative journalism’s independent and objective scrutiny of industry is all the more important because government inspections and oversight can be obstructed and result in incomplete public information. Even journalists seeking access to agriculture facilities face “white-washing” efforts to obscure true conditions. For example, Mark Bittman, a *New York Times* food columnist, tried to arrange tours of several egg, chicken and pork producing facilities during a visit to Iowa in 2011, but was turned down or ignored by all but one hog operation. Mark Bittman, *Banned From the Barn*, N.Y. Times, July 5, 2011, available at

<https://opinionator.blogs.nytimes.com/2011/07/05/banned-from-the-barn/>. The columnist arrived for his tour to find a barn that would normally hold 1,200 pigs with only 200 inside. *Id.* The facility smelled like deodorant, and Bittman suspected the farm had been sanitized prior to his visit. *Id.*

Moreover, at times, government 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) ("House Oversight Hearing"), available at <https://www.govinfo.gov/content/pkg/CHRG-111hhrg65127/pdf/CHRG-111hhrg65127.pdf>. For example, USDA inspector Dean Wyatt repeatedly reported abuses in a Vermont slaughterhouse facility he observed, and rather than taking action against the plant, his supervisors demoted and reprimanded him. *Id.* at 38-39. It was not until the Humane Society of the United States conducted an undercover investigation of the very plant Wyatt complained about that the USDA finally ordered a criminal investigation and shut down the plant. *Id.* at 46, 51. Wyatt said the HSUS footage showed even more egregious violations than he was aware of and captured one of his subordinates, a federal investigator, standing by while plant workers skinned a calf while it was still alive, in violation of the Humane Methods of Slaughter Act. *Id.*; *see also* Associated Press,

Vermont Slaughterhouse Closed Amid Animal Cruelty Allegations (Nov. 3, 2009), available at <https://latimesblogs.latimes.com/unleashed/2009/11/vermont-slaughterhouse-closed-amid-animal-cruelty-allegations.html>. The video shows the investigator saying, “If Doc [Wyatt] knew about this, he would shut you down.” See Cody Carlson, *A Call for USDA Vigilance in Humane Treatment of Food Animals*, Atlantic (Aug. 31, 2012), <https://www.theatlantic.com/health/archive/2012/08/a-call-for-usda-vigilance-in-humane-treatment-of-food-animals/261836/>.

Many of the people and organizations at the center of exposing problems with the food and agriculture industries were eventually praised by government bodies. Legislators honored investigator Dean Wyatt at the congressional hearing as “a principled man, an exemplar of the highest standards” for reporting abuses he witnessed in meat-processing facilities. House Oversight Hearing, *supra*, at 52, 61. The White House invited reporter Nick Kotz to Washington, D.C., to be honored for his investigative journalism leading to the passage of the Meat Inspection Act of 1967. O’Shea, *supra*, at 5. In contrast, by passing § 717A.3A, Iowa legislators seek to punish rather than praise those seeking to uncover issues in the food and agriculture industry.

The threat of criminal liability posed by § 717A.3A deters employees in every Iowa agricultural facility who witness misconduct at their place of employment from going to journalists with proof of wrongdoing and a first-hand account of what they

have witnessed. Even employees who happen upon such information accidentally may be dissuaded from providing it to the media for fear of facing prosecution under the statute under a theory—even if incorrect—that they sought employment for the purpose of sharing instances of wrongdoing with the press or otherwise obtained access to the facility by false pretenses. Because investigative journalists rely on such employees to sound the alarm on risks to public safety and welfare, § 717A.3A impinges on the ability of *amici* to disseminate vital information. These reciprocal First Amendment interests—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))—are severely threatened by statutes like § 717A.3A that muzzle would-be sources and inhibits the media’s ability to shine a spotlight on the agriculture industry.

Worse still, the impact of the chilling effect imposed by § 717A.3A strikes at the heart of the First Amendment’s structural protections of the democratic process. “Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. . . . But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring in the judgment); *see also Garrison v. Louisiana*,

379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”). As Justice Brennan explained in *Richmond Newspapers*, this ensures not only that “debate on public issues [remains] uninhibited, robust, and wide-open,” but also that it is “informed” and thus contributes to “th[e] process of communication necessary for a democracy to survive.” *Id.* at 587-88 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

II. THE SECTION 717A.3A CONSPIRACY PROVISION AMPLIFIES THE CHILLING EFFECT BY CREATING POTENTIAL CRIMINAL LIABILITY FOR JOURNALISTS WHO WORK WITH SOURCES TO GATHER INFORMATION ON AGRICULTURAL FACILITIES

In applying First Amendment doctrine to the facts of this case, *amici* respectfully urge the Court to consider the important, independent role that the media can play in shedding light on the agriculture industry. That is especially the case where, as here, that industry’s disinterest in self-policing and the limitations of government oversight often fail to fully inform the public regarding the safety of the food they consume or the potential for animal abuse. By imposing criminal liability where “[a] person . . . conspires to commit agricultural production facility fraud,” § 717A.3A directly obstructs this important newsgathering process and fails to provide sufficient “breathing space” to safeguard First Amendment freedoms. *N.Y. Times Co.*, 376 U.S. at 272.

Journalists frequently seek out sources for information about newsworthy matters. See Beth Winegarner, *5 tips for journalists who want to do a better job of cultivating sources*, Poynter (June 8, 2012), <https://www.poynter.org/reporting-editing/2012/5-tips-for-journalists-who-want-to-do-a-better-job-of-cultivating-sources/> (advising reporters to “check in with [sources] regularly” and “ask if there have been any developments on a topic you’ve discussed before”). Publication of stories revealing the hidden safety issues and animal abuses in the agriculture industry serves profound public interests. For example, a 2009 investigation at the Hy-Line Hatchery in Iowa revealed hundreds of thousands of unwanted day-old male chicks being funneled by conveyor belt into a macerator to be ground up alive. *Agriculture Industry Defends Itself Over Grisly Iowa Chick Video*, Associated Press (Sept. 5, 2009), available at <https://latimesblogs.latimes.com/unleashed/2009/09/agriculture-industry-defends-itself-over-grisly-iowa-chick-video.html>. And in 2011, an investigation at Sparboe Farms in Iowa exposed hens with gaping, untreated wounds were laying eggs in cramped conditions among decaying corpses. *McDonald’s, Target drop egg supplier after animal cruelty report*, CNN (Nov. 19, 2011), <https://www.cnn.com/2011/11/19/business/sparboe-farms-animal-cruelty/index.html>. It is not clear whether § 717A.3A’s conspiracy provision would apply to a journalist who seeks out a source or accepts information from a source who him- or herself may have violated the statute. However, fearing criminal charges under the

conspiracy provision of § 717A.3A, the press and others who disseminate information in the public interest may be reluctant to rely on sources within an agricultural facility, even if those sources do come forward to share their story. In this manner, § 717A.3A chills the speech of journalists and deprives the public of knowledge about matters of public concern.

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) (when the government deters First Amendment protected expression, the government “has an unmistakable tendency to chill that free play of the spirit” of others). The media can perform their role of informing the public on the safety of agricultural facilities only if their access to credible sources and information is unimpeded by government and industry efforts to target, disrupt, and potentially here, criminalize, the reporter-source relationship.

III. SECTION 717A.3A IS A CONTENT-BASED RESTRICTION SUBJECT TO STRICT SCRUTINY.

Courts like the district court in this case have previously found statutes similar to § 717A.3A to be content-based restrictions warranting strict scrutiny. *See, e.g., Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1196 (9th Cir. 2018) (striking down Idaho’s Ag-Gag statute, which criminalized entry into an agricultural production facility by “misrepresentation” because the provision “regulates protected speech while ‘target[ing] falsity and nothing more’”) (quoting *United*

States v. Alvarez, 567 U.S. 709, 719 (2012); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1209 (D. Utah 2017) (“A law is content based – and therefore subject to strict scrutiny – if determining whether someone violated the law requires looking at what was said.”). Indeed, “[r]estrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007)). To survive such scrutiny, the government’s speech-suppressing measures must be narrowly tailored to the government’s asserted interest, and the burden rests squarely on the government to make that showing. *Reed v. Town of Gilbert*, -- U.S. --, 135 S. Ct. 2218, 2231 (2015). A restriction is not narrowly tailored “if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2003) (striking down provisions of Telecommunications Act of 1996 where less restrictive channel-blocking features available to serve government interest). To survive strict scrutiny, a law must be “actually necessary” to achieve the State’s interests, and may not be over or underinclusive. *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799-804 (2011). And here, a less restrictive means—enforcement of Iowa trespassing laws—is readily available and can preserve the government’s interests. Add. 59-60 & n.16

(“Defendants fail to explain why the trespass law is insufficient to serve the interest of protecting property.”) (citing *McCullen v. Coakley*, 573 U.S. 464, 495-96 (2014)).

Defendants-Appellants instead claim that the First Amendment plays no role here because the § 717A.3A applies only to speech on private property, and therefore speech on agricultural facilities enjoys no First Amendment protection—but this argument finds no support in the case law. In its brief, the State relies on Supreme Court cases that are inapposite to the statute here. *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (First Amendment does not compel owner of shopping center to allow people to protest on the property); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (First Amendment does not compel a store owner to allow employees to protest on the property); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment does not shield a reporter from revealing confidential sources to a grand jury); *Iowa v. Lacey*, 465 N.W.2d 537, 539-40 (Iowa 1991) (First Amendment does not compel a restaurant owner to allow labor union handbilling activities on premises); *see App. Br. 13*. The State’s cases thus concern whether a landowner can remove someone from their property or sue for trespass even when the person wishes to exercise First Amendment rights. The State’s reliance on these cases confuses a landowner’s ability to exclude from their property someone who wishes to speak, with the government’s ability to jail the person for that speech.

But that is not the question here. Here, the question is whether the State can prosecute a person based on their speech on private property, and similarly criminalize the actions by anyone who “conspires” to commit that act. Because no tangible private property right is furthered by § 717A.3A, and protections from trespass are already provided, Iowa fails to advance compelling state interests in criminalizing a number of constitutionally-protected newsgathering activities. 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). Section 717A.3A is susceptible of precisely this concern.

IV. THE IOWA LEGISLATURE IMPERMISSIBLY ENACTED SECTION 717A.3A TO STYMIE CONSTITUTIONALLY PROTECTED NEWSGATHERING

Iowa’s legislature adopted § 717A.3A in the wake of the Iowa Sparboe Farms video, as well as the publication of several other investigations and publications that revealed lapses in safety and animal care in Iowa agricultural facilities. *See Herbert*, 263 F. Supp. 3d at 1198. According to the bill’s sponsors, § 717A.3A was intended “to crack down on activists who deliberately cast agricultural operations in a negative light and let cameras roll rather than reporting abuse immediately,” and to stop “subversive acts” that could “bring down the industry,” including acts committed by “extremist vegans.” *See Lewis Bollard, Ag-Gag: The*

Unconstitutionality of Laws Restricting Undercover Investigations on Farms, 42 *Envtl. L. Rep. News & Analysis* 10960, 10965 (2012); *see also Herbert*, 263 F. Supp. 3d at 1212 (observing State’s asserted interests in Utah Ag-Gag statute on facial challenge differed from “legislative history surrounding the Act,” which “appeare[d] entirely devoid of any reference to an intention by the State to protect the safety of animals or workers” and instead “is rife with discussion of the need to address harm caused by ‘national propaganda groups,’ and by ‘the vegetarian people’ who are ‘trying to kill the animal industry,’ ‘a group of people that want to put [agricultural facilities] out of business.’”).

Legislative action like this, premised on stifling public interest journalism, is unquestionably violative of the First Amendment because, as here, it leads to the adoption of content-based restrictions on speech. *See Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (relying, in part, on legislative history to determine that day laborer provision was content-based). Indeed, “laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger of abuse by the State,’ and so are always subject to at least some degree of heightened First Amendment scrutiny.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (internal citation omitted); *see also Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) (holding state cannot criminalize publication of lawfully obtained, truthful information about a matter of public significance). Section 717A.3A was adopted

by the legislature with the *specific aim* of targeting journalists and their sources who intend to publish information regarding state agricultural facilities, thereby suppressing speech critical of agricultural practices. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (*en banc*) (“A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment.”) (internal citation omitted).

In contrast, other legislative bodies have taken the course of adopting or strengthening legislation to protect our nation’s agriculture and food safety after the exposure of otherwise hidden dangers in our food supply. For example, in 2008, the Humane Society of the United States released an undercover video showing workers at a slaughterhouse in California dragging, kicking, and electro-shocking sick and disabled cows. The video “led the Federal Government to institute the largest beef recall in U.S. history,” and “the video also prompted the California legislature to strength a pre-existing statute governing the treatment of nonambulatory animals and to apply that statute to slaughterhouses regulated under the [Federal Meat Inspection Act].” *National Meat Ass’n v. Harris*, 565 U.S. 452, 458 (2012).

Scrutiny of agriculture facilities leads to better food safety. Silencing the speech of non-government actors such as journalists and their sources with the threat of criminal conviction leaves a federal inspection systems fraught with its own

problems as the lone watchdog over the food the public consumes and the welfare of animals. Iowa's statute should be struck down because the government must encourage, not discourage, third-party oversight of the food industry that has been so influential in providing safer food to the nation.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment.

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Respectfully submitted,

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APPENDIX A

SUPPLEMENTAL INFORMATION ABOUT *AMICI*

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.

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.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles

and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for approximately 110 alternative newspapers in North America. 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 News Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news 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.

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

First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Gannett Co., Inc. is a leading news and information company which publishes *USA TODAY* and more than 100 local media properties. Each month more than 125 million unique visitors access content from *USA TODAY* and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

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 Iowa Newspaper Association is comprised of dedicated professionals who are passionate about quality, success and preserving a free press. The Iowa Newspaper Association has been working for the newspapers of Iowa for nearly a century and today represents 273 newspapers in the state of Iowa.

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.

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 news, culture, sports, lifestyle 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 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 News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

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.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes *POLITICO Magazine*, with a

circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

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.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

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.

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.

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the lengths permitted by Federal Rules of Appellate Procedure 29(a)(5) because it contains 4,137 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 2016 and has a typeface of 14-point Times New Roman.

Dated: June 27, 2019

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