

The Reporters Committee for Freedom of the Press and 17 additional *amici* identified herein respectfully seek leave of the Court to file the attached memorandum in support of Plaintiffs' motion for summary judgment. Plaintiffs have consented to the filing of this memorandum; Defendants do not oppose it.

“District courts have long been permitted to allow *amicus* appearances at their discretion.” *Vigil v. Am. Tel. & Tel. Co.*, Civil No. C-1476, 1969 U.S. Dist. LEXIS 9584, at *1 - 2 (D. Colo. Sept. 9, 1969). “Because an *amicus curiae* participates only for the benefit of the court, and is not a party to the litigation, the court has the sole discretion to determine the fact, extent, and manner of participation by the amicus.” *Kane County, Utah. v. United States*, 934 F. Supp. 2d 1344, 1347 (D. Utah 2013) (internal quotation marks omitted). “District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective than can help the court beyond the help that lawyers for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotations omitted).

The judges of this Court have frequently exercised their discretion to allow *amicus* participation to provide additional perspective and proper ventilation of legal issues, particularly in cases raising broader public policy concerns or constitutional issues. *See, e.g., Utah v. United States*, No. 2:05-CV0-540, 2012 U.S. Dist. LEXIS 63545 *1 (D. Utah May 4, 2012); *United States v. Moesser*, No. 2:09-CR-842 TS, 2010 U.S. Dist. LEXIS 123271, at *18-20 (D. Utah Nov. 19, 2010); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1256 (D. Utah 2004); *Kennard v. Leavitt*, 246 F. Supp. 2d 1177, 1182 (D. Utah 2002).

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

Additional *amici* are as follows: The Salt Lake Tribune, Deseret News Publishing Company, KSL Broadcast Group, KSTU Fox 13, ABC4 Utah/CW30, City Journals, and the Utah Headliners Chapter of the Society of Professional Journalists (“SPJ”) (collectively, the “Utah News Media Amici”), as well as the Association of American Publishers, Inc., California Newspaper Publishers Association, First Amendment Coalition, the Investigative Reporting Workshop, National Press Photographers Association, National Public Radio, Inc., The Newspaper Guild – CWA, North Jersey Media Group Inc., Stephens Media LLC, and Student Press Law Center. The Utah News Media Amici include Utah-based news organizations that gather and report news and information to the general public, including on issues related to agriculture operations and food safety. SPJ is a voluntary, not-for-profit professional association of news reporters, editors, photographers, publishers, and owners of various news organizations throughout the State of Utah. SPJ works to protect the constitutional rights of freedom of the press, to preserve the public’s right to know, and to require that the public’s business be conducted in public.

Amici respectfully suggest that the attached memorandum may be of assistance to the Court in considering the significant First Amendment and newsgathering issues raised by Plaintiffs’ motion for summary judgment. *Amici*’s memorandum provides a broader historical

and legal context to explain why the Utah “ag-gag” statute infringes on constitutionally protected newsgathering rights and why the law is unconstitutional as a content-based restriction on speech.

WHEREFORE, *Amici* respectfully request that the Court grant their motion for leave to file the *amicus curiae* memorandum submitted herewith.

Respectfully submitted this 7th day of June 2016,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ANIMAL LEGAL DEFENSE FUND,)
PEOPLE FOR THE ETHICAL)
TREATMENT OF ANIMALS, and)
AMY MEYER,)
)
Plaintiffs,)
)
v.)
)
GARY R. HERBERT, in his official capacity)
as Governor of Utah; SEAN D. REYES, in)
his official capacity as Attorney General of)
Utah,)
Defendants.)

**MEMORANDUM OF THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 17
OTHERS AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Case No. 2:13-cv-00679-RJS

Judge Robert J. Shelby

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST..... v

DISCLOSURE STATEMENT vi

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

 I. Utah’s “ag-gag” statute infringes on the First Amendment rights of those who want to inform the public about food safety..... 2

 A. Investigations by journalists and other organizations into agriculture facilities have long played a vital role in ensuring food safety..... 3

 B. Utah’s “ag-gag” statute chills future investigations into the agriculture industry..... 7

 II. The First Amendment protects speech on matters of public concern by subjecting restrictions to strict scrutiny, which is not satisfied by this statute..... 8

 A. Speech on matters of public concern in which the public has a right to know warrants the highest degree of protection. 8

 B. Utah’s “ag-gag” statute is a content-based restriction on speech that does not survive strict scrutiny..... 11

CONCLUSION..... 16

APPENDIX A: DESCRIPTION OF AMICI..... 17

APPENDIX B: ADDITIONAL COUNSEL..... 23

TABLE OF AUTHORITIES

Cases

City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)..... 11

City of San Diego v. Roe, 543 U.S. 77 (2004) 9

Connick v. Myers, 461 U.S. 138 (1983)..... 9

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 9

Garrison v. State of La., 379 U.S. 64 (1964) 11

Grosjean v. American Press Co., 297 U.S. 233 (1936) 3

Klendienst v. Mandel, 408 U.S. 753 (1972)..... 10

Martin v. City of Struthers, 319 U.S. 141 (1943) 10

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 3

Mills v. Alabama, 384 U.S. 214 (1966) 3

Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983)..... 3

NAACP v. Button, 371 U.S. 415 (1963)..... 8, 14

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)..... 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 9

R.A.V. v. City of St. Paul, 505 U.S. 377 (1982) 11

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)..... 11, 12, 13

Roth v. United States, 354 U.S. 476 (1957)..... 3

Spelson v. CBS, Inc., 581 F. Supp. 1195 (N.D. Ill. 1984)..... 10

Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994)..... 11

United States v. Alvarez, 132 S. Ct. 2537 (2012) 14

United States v. Stevens, 559 U.S. 460 (2010)..... 15

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)..... 10

Wieman v. Updegraff, 344 U.S. 183 (1952) 8

Statutes

Utah Code Ann. § 76-6-112 passim

Other Authorities

113 Cong. Rec. 21283–86 (1967)..... 4, 5

2001 – *Investigative Reporting*, The Pulitzer Prizes, www.pulitzer.org/archives/6487 5

2010 – *Explanatory Reporting*, The Pulitzer Prizes, <http://www.pulitzer.org/archives/8819> 5

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)..... 5, 6, 7

David Brown, *USDA Orders Largest Meat Recall in U.S. History*, Wash. Post, Feb. 18, 2008, available at <http://wapo.st/182ZgvW> 6, 7

Food Safety, in *Agriculture Fact Book*, USDA (2001–2002), <http://www.usda.gov/factbook/chapter9.htm>..... 13

Hearing on H.B. 187 Before the H. Law Enforcement & Criminal Justice Standing Comm., at 0:44:15, 1:04:12 (Feb. 14, 2012), audio available at <http://bit.ly/1hgtHHk> 8, 13

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>..... 4

James O’Shea, *Raking the Muck*, Chi. Trib., May 21, 2006, available at <http://bit.ly/18TwTjR>. 4, 7

Press Release, *Statement by Secretary of Agriculture Ed Schafer Regarding Animal Cruelty Charges Filed Against Employees at Hallmark/Westland Meat Packing Company* (Feb. 15, 2008), <http://1.usa.gov/18321ft>..... 7

Press Release, *Statement by Secretary of Agriculture Ed Schafer Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall*, USDA (Feb. 17, 2008), <http://1.usa.gov/1830APr> 6

The 2008 Pulitzer Prize Winners: Investigative Reporting, The Pulitzer Prizes,
<http://www.pulitzer.org/citation/2008-Investigative-Reporting> 5

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Dec. 14, 2011) (originally published in *FDA Consumer*, June 1981) 4

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press and 17 additional *amici* listed below, through undersigned counsel, respectfully submit this memorandum as *amici curiae* in support of Plaintiffs. Plaintiffs have consented to the filing of this memorandum; Defendants do not oppose it.

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 and serve as a watchdog on the agriculture industry. Laws should not criminalize newsgathering and chill debate on matters of public concern. Rather, the marketplace of ideas must remain robust to ensure unfettered speech and press rights.

In addition to the Reporters Committee, the *amicus* parties are: The Salt Lake Tribune, Deseret News Publishing Company, KSL Broadcast Group, KSTU Fox 13, ABC4 Utah/CW30, City Journals, the Utah Headliners Chapter of the Society of Professional Journalists (“SPJ”), the Association of American Publishers, Inc., California Newspaper Publishers Association, First Amendment Coalition, the Investigative Reporting Workshop, National Press Photographers Association, National Public Radio, Inc., The Newspaper Guild – CWA, North Jersey Media Group Inc., Stephens Media LLC, and Student Press Law Center. Each is described more fully in Appendix A.

DISCLOSURE STATEMENT

ABC4 Utah/CW30 is owned by the Nexstar Broadcasting Group, Inc, based in Irving, Texas. As of April 29, 2016, no publicly held corporation owned 10% or more of the stock of Nexstar Broadcasting Group, Inc.

The Association of American Publishers, Inc. is a nonprofit organization that has no parent and issues no stock.

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

City Journals' parent company is Loyal Perch Media, LLC, a Utah limited liability company. No publicly held corporation owns 10% or more of the stock of Loyal Perch Media, LLC.

The parent company of Deseret News Publishing Company, publisher of the Deseret News, is Deseret Management Corporation. No publicly held corporation owns 10% or more of the stock of Deseret Management Corporation.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

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

KSL Broadcast Group is owned by Bonneville International Corporation. No publicly held company owns 10% or more of Bonneville International Corporation.

KSTU Fox 13 is owned by Local TV, LLC. Local TV LLC owns and/or operates 21 broadcast television stations in the United States. No publicly held corporation owns 10% or more of Local TV, LLC.

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

National Public Radio, Inc. is a privately supported, not-for-profit membership organization that has no parent company and issues no stock.

The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

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

The Salt Lake Tribune's parent company is MediaNews Group, based in Denver, Colo. No publicly held company owns 10% or more of the stock of the parent company.

Stephens Media LLC is a privately owned company with no affiliates or subsidiaries that are publicly owned.

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

The Utah Headliners has no parent corporation and no publicly held corporation owns 10% or more of its stock.

INTRODUCTION

Amici, filing in support of Plaintiffs, urge this Court to grant Plaintiffs’ motion for summary judgment and strike Utah Code Ann. § 76-6-112, known as Utah’s “ag-gag” statute, as unconstitutional. Plaintiffs are challenging Utah’s “ag-gag” statute’s constitutionality under the First and Fourteenth Amendments to the U.S. Constitution. *Amici* write to stress the First Amendment concerns of the news media if the statute is allowed to remain in effect.

SUMMARY OF THE ARGUMENT

By criminalizing audio and image recordings at agriculture plants, the Utah “ag-gag” statute weakens food safety while stifling free speech. Journalists and organizations that conduct investigations into agriculture facilities have long been credited with advancing the safety of the food the public consumes. Federal inspections have drastically improved the safety of food in the past century, but problems within the inspection system leave a gap in food safety that journalists and animal rights organizations have filled. The Utah statute poses a substantial risk of criminalizing lawful — and constitutionally protected — newsgathering activity and chilling the very journalism and whistleblowing that has previously led to positive changes and a healthier food supply.

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

Furthermore, Utah’s “ag-gag” statute is a content-based restriction that does not survive strict scrutiny. The law targets speech based on its communicative content — namely, recording

an “agriculture operation.” Utah Code Ann. § 76-6-112(1) (West 2012). The state’s proffered interests of private property rights and preventing trespass and fraud are not compelling, and the law is not narrowly tailored. In fact, the law is overbroad in prescribing criminal penalties for constitutionally protected activities. Thus, Utah’s “ag-gag” statute should be struck down as unconstitutional under the First Amendment.

ARGUMENT

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

Utah’s “ag-gag” statute conflicts with the principle that the First Amendment protects — and even encourages — the press and other organizations to act as a watchdog and challenge the status quo. The law criminalizes four types of whistleblowing activity intended to inform the public about food safety and other agricultural concerns: 1) recording an image or sound by “leaving a recording device on the agriculture operation” without consent from the owner; 2) obtaining “access to an agriculture operation under false pretenses;” 3) applying for employment “with the intent to record an image of, or sound from, the agriculture operation” while knowing that the operation prohibits such recording and actually recording such an image or sound; and 4) recording an image or sound without the consent of the owner while committing criminal trespass. Utah Code Ann. § 76-6-112(2)(a)-(d). The Utah statute criminalizes actions that have previously led to positive social change and chills the same type of investigative reporting in the future.

As the U.S. Supreme Court has found, “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.” *Mills v. Alabama*, 384 U.S. 214

(1966). The Founders envisioned the press as an entity that could freely challenge authority without government restraint. *See Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protections given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)) (An “untrammelled press [is] a vital source of public information, . . . and an informed public is the essence of working democracy.”).

Reciting Thomas Jefferson, the Court wrote that “[where] the press is free, and every man able to read, all is safe.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 260 (1974). Further, “any other system that would supplant private control of the press with the heavy hand of government intrusion — would make the government the censor of what the people may read and know.” *Id.*

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

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

The watchdog role of the press in protecting the public’s interest in a safe food supply and the conditions under which food is produced has a long and time-honored history. Upton Sinclair’s infamous 1906 exposé on Chicago’s slaughterhouses, *The Jungle*, and his contemporaries’ works were among the early examples of investigative journalism. *See James*

O'Shea, *Raking the Muck*, Chi. Trib., May 21, 2006, available at <http://bit.ly/18TwTjR>.

Although his novel is centered around a fictitious Lithuanian immigrant, Sinclair conducted extensive research, interviewing health inspectors and workers and going undercover into the meatpacking facilities to witness the unsanitary conditions firsthand. James Diedrick, *The Jungle*, Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin Keating, & James R. Grossman, eds. 2005), available at <http://www.encyclopedia.chicagohistory.org/pages/679.html>. Sinclair's work is credited with aiding passage of the Pure Food and Drug Act and Meat Inspection Act, both enacted in 1906, which instituted vigorous reforms in the meatpacking industry. *Id.*; see also Wallace F. Janssen, *The Story of the Laws Behind the Labels*, Food and Drug Admin., <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm> (last updated Dec. 14, 2011) (originally published in *FDA Consumer*, June 1981) ("A single chapter in Upton Sinclair's novel, *The Jungle*, precipitated legislation expanding federal meat regulation to provide continuous inspection of all red meats for interstate distribution, a far more rigorous type of control than that provided by the pure food bill.").

The spirit of reform that followed the publication of *The Jungle* has repeated itself numerous times since then. In the late 1960s, Nick Kotz, reporter for the *Minneapolis Tribune*, wrote a series of stories revealing widespread unsanitary conditions in the country's meatpacking plants. 113 Cong. Rec. 21283–86 (1967). His investigative reporting contributed to the passage of the Meat Inspection Act of 1967, which extended the reach of federal regulation to cover not only meat that crossed state borders but all slaughterhouses and meat-processing facilities in the United States. *Id.* at 21283. During a congressional session leading to the passage of the Act,

Sen. Walter Mondale thanked Kotz for bringing the issue to Congress's attention, saying "the press must take a major share of the credit for action in this area." *Id.*

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

The government's inspection system itself is often flawed, which makes independent observation and verification even more important. At times inspection teams are short staffed, and inspectors can be undermined by their supervisors or choose to turn a blind eye to problems. *See generally Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2010). USDA inspector Dean Wyatt repeatedly reported abuses

in a Vermont facility he observed, and rather than taking action against the plant, his supervisors demoted and reprimanded him. *Id.* at 38-39. They told him “to drastically reduce the amount of time [he] spent on humane handling enforcement because [he] was finding too many problems.” *Id.* at 38. It was not until the Humane Society of the United States (HSUS) 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 (statement of Dr. Dean Wyatt, FSIS Supervisory Public Health Veterinarian). Wyatt said the HSUS footage showed even more egregious violations than he was aware of and even captured one of his own 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.* The video shows the investigator saying, “If Doc [Wyatt] knew about this, he would shut you down.” *Id.*

The video from Vermont was not the first time HSUS succeeded in exposing abuses in meat-processing plants. HSUS released a video in 2008 from the Hallmark Meat Packing plant in California, showing workers use electric shocks, high-intensity water sprays, and forklifts to push cows that were too sick to stand on their own. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, Wash. Post, Feb. 18, 2008, available at <http://wapo.st/182ZgvW>. The USDA prohibits the slaughter of animals that cannot walk in part because of concerns the cow might be infected with bovine spongiform encephalopathy, commonly known as “mad cow disease,” which could spread to humans who consume the meat. *Id.*; Press Release, *Statement by Secretary of Agriculture Ed Schafer Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall*, USDA (Feb. 17, 2008), <http://1.usa.gov/1830APr>. As a result of the HSUS video, 143 million pounds of beef were recalled — a full two years’ worth of production from

the plant, which was the largest meat recall in U.S. history. Brown, *supra*. Additionally, the USDA suspended production at the plant, and felony animal cruelty charges were brought against two employees. Press Release, *Statement by Secretary of Agriculture Ed Schafer Regarding Animal Cruelty Charges Filed Against Employees at Hallmark/Westland Meat Packing Company* (Feb. 15, 2008), <http://1.usa.gov/18321ft>.

Many of the people and organizations at the center of unveiling problems within the food industry 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. *Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter, supra*, at 52, 61. The White House invited reporter Nick Kotz to Washington, D.C., for his investigative journalism that led to the passage of the Meat Inspection Act of 1967. O’Shea, *supra*. However, by passing the “ag-gag” statute, the Utah legislators have punished rather than praised those seeking to uncover issues in the food and agriculture industry; when plaintiff Amy Meyer attempted to document slaughterhouse abuses in plain sight from public property, the government charged her under Utah’s “ag-gag” statute. Compl. ¶ 22.

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

The Utah “ag-gag” statute is certain to have a chilling effect on future speech. Because of the law, journalists who pursue the types of investigations that lead to beneficial changes in the food industry will have to be excessively cautious in their actions for fear they will be jailed or fined for doing their jobs. If they take steps to ensure they do not violate this broad law in any

way, they will miss the story that should be told. The limits this places on newsgathering is an improper restriction on speech and diminishes the marketplace of ideas. *See Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (writing that when the government deters First Amendment protected expression, the government “has an unmistakable tendency to chill that free play of the spirit” of others). The First Amendment requires “breathing space to survive;” instead, Utah’s statute chokes speech prior to dissemination. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Scrutiny of agriculture production facilities can only lead to better food safety. Silencing the speech of non-government actors such as journalists with the threat of criminal conviction leaves a federal inspection system fraught with its own problems as the lone watchdog over the food the public consumes. Utah’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.

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

A. Speech on matters of public concern in which the public has a right to know warrants the highest degree of protection.

Utah legislators apparently misunderstand the purpose of journalists and organizations investigating agriculture operations. John Mathis, sponsor of the bill in the Utah House of Representatives, characterized the goals of those who report on the agriculture industry as “us[ing] propaganda to raise money” and “mak[ing] slick advertising and shut us down.” *Hearing on H.B. 187 Before the H. Law Enforcement & Criminal Justice Standing Comm.*, at 0:44:15, 1:04:12 (Feb. 14, 2012), *audio available at* <http://bit.ly/1hgtHHk>. In reality,

investigative journalists are motivated by the same concerns as the government regulators themselves — making sure the American people can safely consume the food that is placed on their dinner tables. In order to guarantee this food safety news reaches the public, the law must protect the dissemination and receipt of this valuable information.

By barring journalists from scrutinizing the agriculture industry and food safety, Utah Code Ann. § 76-6-112 restricts speech of public concern from entering the marketplace of ideas. Speech of public concern lies “at the heart of the First Amendment,” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985), and occupies the “highest rung of the hierarchy of First Amendment values,” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Courts protect speech on matters of public concern because “freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964). Speech of public concern is speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community” or when it is a “subject of general interest and of value and concern to the public.” *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

In this case, the Utah “ag-gag” statute squarely suppresses speech relating to topics of universal importance — the safety of employees and the public food supply, the treatment of animals, and the impact of the agriculture industry on the environment. The agriculture industry affects the health of consumers through the safety of the food it produces and the health of employees through workplace conditions. Discussion of public health is clearly valuable speech protected under the First Amendment. *See Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1206 (N.D.

Ill. 1984) (“There may be no more serious or critical issue extant today than the health of human beings. Given the frailty of human existence, any controversy on the subject must be afforded wide open discussion and criticism so that individuals may make well educated health care choices.”). There is also significant community concern regarding the treatment of animals and how the agriculture industry affects the environment. Utah’s attempt to gag these areas of substantial public interest violates the First Amendment’s commitment to encouraging speech on matters of public concern.

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

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

Martin, 319 U.S. at 143 (internal citations omitted). Where petitioners have a constitutionally protected interest in communicating with the public, the public has a corresponding constitutional interest in receiving the communications in order to fully realize its own political

freedoms. *See Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

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

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

Content-based restrictions on speech are presumptively unconstitutional under the First Amendment. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). Governments are prohibited from restricting speech based on its content because content-based laws threaten to “manipulate the public debate through coercion rather than persuasion,” *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994), and permit governments to “drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). Content-based laws are only constitutional if they survive strict scrutiny, which requires the laws to be narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

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

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

Id. at 2227.

It is clear Utah’s “ag-gag” statute directly regulates the content of speech, prescribing penalties for recording “agriculture operations,” which is defined in the law as “private property used for the production of livestock, poultry, livestock products, or poultry products.” Utah Code Ann. § 76-6-112(1). One of the statute’s provisions creates criminal liability if a person “knowingly or intentionally records an image of, or sound from, the *agricultural operation*.” Utah Code Ann. § 76-6-112(2)(a) (emphasis added). Another provision criminalizes “applying for employment at an agricultural operation with the intent to record an image of, or sound from, the *agricultural operation*.” Utah Code Ann. § 76-6-112(c)(i) (emphasis added). Using the U.S. Supreme Court’s definition from *Reed*, Utah’s “ag-gag” statute is content based because it regulates speech “by particular subject matter” — namely, “*agriculture operations*,” which the law defines as “private property used for the production of livestock, poultry, livestock products, or poultry products.” *Reed*, 135 S. Ct. at 2227; Utah Code Ann. § 76-6-112(1). While the law prohibits speech concerning “private property used for the production of livestock, poultry, livestock products, or poultry products,” the law says nothing about recordings made at other

types of property. Utah Code Ann. § 76-6-112(1). Thus, Utah’s “ag-gag” law is a content-based regulation because it “target[s] speech based on its communicative content.” *Reed*, 135 S. Ct. at 2226. Accordingly, in order to survive a constitutional challenge, the law must be narrowly tailored to serve compelling state interests. *Id.* at 2222.

The Utah government asserts its interests are “protecting private property rights” and preventing “trespass and fraud.” Defs’ Br. at 12-13. Neither of these interests are compelling. First, Utah’s “ag-gag” statute does not extend the ability of landowners to control activities on their property. The statute ends up only punishing those critical of the property’s use and intending to expose an injustice to the public. Utah Rep. John Mathis said, “I don’t see much difference between my barn and my house” and likened recordings in agriculture facilities to placing a recording device under a married couple’s bed. *Hearing on H.B. 187, supra*, at 0:43:35, 0:56:05. But the two are not comparable. With respect to the privacy interests of agriculture producers, the government has already done the calculation and decided that food safety requires some intrusion into production facilities. Plant operations are highly scrutinized by the federal government, with inspectors regularly visiting the premises, observing operations, testing meat products, and examining livestock. *See Food Safety, in Agriculture Fact Book, USDA (2001-2002)*, <http://www.usda.gov/factbook/chapter9.htm>.

Second, the owners and operators of agriculture plants are already protected from activities designed to interfere with their operations. Utah has trespass and fraud laws sufficient to protect these interests and address acts by individuals or organizations that overstep legal bounds. Utah Code Ann. § 76-6-206, 76-6-501, 76-6-1102.

Because no tangible private property right is furthered by the law and protections from trespass and fraud are already provided in law, Utah fails to advance compelling state interests. Although Utah's two state interests may provide some public benefit, they do not meet the high bar required of content-based law. Content-based regulations have generally been permitted in only a few specifically identified categories of speech, including (1) advocacy intended, and likely, to incite imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech that presents a grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (citations omitted). Utah's proffered interests of protecting property rights and preventing trespass and fraud certainly do not fall into any of those categories.

Regardless of Utah's state interests, Utah's ag gag statute is not narrowly tailored to be the least restrictive means of achieving these interests. A gag on images and audio recordings of agriculture operations is overly broad and unnecessary, criminalizing a number of constitutionally-protected newsgathering activities. Though a law may have some valid applications, the court must consider whether it may be overbroad as applied in any given situation, infringing on otherwise protected speech. As the Supreme Court has recognized, we must be aware of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). Utah's "ag-gag" statute is susceptible of precisely that. An "agriculture operation" is broadly defined as "private property used for the production of livestock, poultry, livestock products, or poultry products." Utah Code Ann. § 76-6-112(1).

This expansive definition suggests the statute controls a wide array of land. The statute prohibits anyone from “leaving a recording device on the agriculture operation” and “record[ing] an image of, or sound from the agriculture operation” without consent from “the owner of the agriculture operation, or the owner’s agent.” § 76-6-112(2)(a). There are scenarios where journalists enter property and record with implied consent, and they should not be criminally penalized for it. Under the law, it could be a crime for a news crew to film the owner spreading seeds in an open field while standing on the edge of the land, even if the owner gave implied consent by willingly answering questions after knowing he was being filmed. These are not hypothetical concerns. Draper City Police charged Plaintiff Meyer under the ag-gag statute for standing on public property and filming what appeared to be abusive activity of a farm worker toward a sick cow. Compl. ¶ 22.

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

Ultimately, Utah’s “ag-gag” statute is unconstitutional as a content-based restriction not narrowly tailored to serve a compelling state interest.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant Plaintiffs' motion for summary judgment and strike Utah Code Ann. § 76-6-112 as unconstitutional.

Respectfully submitted this 7th day of June 2016.

/s/ Bruce D. Brown

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APPENDIX A: DESCRIPTION OF AMICI

ABC 4 Utah (KTVX) is the ABC television affiliate serving the Salt Lake City television market. ABC 4 Utah is the home to favorite ABC programming as well as more local programming than any other station in Salt Lake City. Utah's CW 30 (KUCW) is the CW television affiliate serving the Salt Lake City television market.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to advance the interest of all Californians in the transparency of government operations.

City Journals is the publisher of several city journals throughout Utah including the Draper Journal, the Sandy Journal, the Midvale Journal, the Murray Journal, the Holladay Journal, the Cottonwood Heights Journal, the South Salt Lake City Journal, the Sugar House Journal, the Taylorsville Journal, the West Valley City Journal, the West Jordan Journal, the South Jordan Journal, the South Valley Journal, and the Ogden Source.

The Deseret News (www.deseretnews.com) is the first news organization and the longest continuously operating business in the state of Utah. It offers news, information, commentary, and analysis from an award-winning and experienced team of reporters, editors, and columnists. Its mission is to be a leading news source for faith- and family-oriented audiences in Utah and around the world.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

KSL Broadcast Group is owned by Bonneville International Corporation and operates KSL-TV, KSL.com, and KSL Newsradio. Founded in 1964, Bonneville International's heritage traces its early roots to KSL Radio, which first went on the air in May of 1922 (originally as KZN) in Salt Lake City, and to KSL-TV, which had its on-air debut in 1949. Bonneville currently owns and operates nine radio stations in the Los Angeles, Seattle, Phoenix, and Salt Lake City markets. Bonneville is headquartered in Salt Lake City. KSL Broadcast Group provides leadership that builds up, connects, informs and celebrates Utah's communities and families.

KSTU Fox 13 broadcasts 55 hours of locally produced newscasts a week in the Salt Lake City, Utah market. KSTU also provides local news and information on its website, fox13now.com.

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

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each

week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including NPR.org and NPR's applications, which see more than 30 million unique visitors each month. National Public Radio, Inc. has no parent company and issues no stock.

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 advertising, business, circulation, editorial, maintenance and related 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.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

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

representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Salt Lake Tribune has been Utah's news source since 1871, and its website sltrib.com reaches between 150,000 and 200,000 readers each day.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the *Las Vegas Review-Journal*.

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

The Utah Headliners Chapter of the Society of Professional Journalists ("SPJ") is a voluntary, not-for-profit professional association of news reporters, editors, photographers, publishers and owners of various news organizations throughout the State of Utah. SPJ works to protect the constitutional rights of freedom of the press, to preserve the public's right to know, and to require that the public's business be conducted in public.

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