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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANIMAL LEGAL DEFENSE FUND, *et al*., Plaintiffs,	)	**CASE NO. 1:14-CV-00104-BLW**
v.	)	**PLAINTIFFS' RESPONSE TO IDAHO DAIRYMEN'S ASSOCIATION'S AMICUS CURAIE BRIEF**
C. L. "BUTCH" OTTER, in his official capacity as Governor of Idaho, *et al*., Defendants.	)	

INTRODUCTION

On June 20, just two full business days before the scheduled hearing on the motion to dismiss in this case, the Idaho Dairymen's Association ("IDA") filed a 21-page *amicus curiae* brief. Dkt 56-1. Because the brief is framed largely as a second motion to dismiss and raises

numerous new legal challenges to Plaintiffs' claims, Plaintiffs' interests could be substantially prejudiced if they are not given a chance to respond to the brief in writing.

ARGUMENT

I. THE PROHIBITED MISREPRESENTATIONS ARE PROTECTED SPEECH

Contrary to the IDA's assertions, Dkt. 56-1 at 6-8, the types of misrepresentations the plaintiffs intend to engage in are protected speech. As activists, journalists, and investigators, plaintiffs misrepresentations are designed to gain access to agricultural facilities for the purpose of exposing unlawful conduct. They do not wish to harm the owners of agricultural operations by defrauding them of money, stealing trade secrets, or theft. Misrepresentations that are designed to *cause* material harm to another are not protected by the First Amendment. *United States v. Alvarez,* 132 S.Ct. 2537, 2546 (2012). When the misrepresentation does not cause financial or property loss, or otherwise effect a material harm on the deceived party, the speech is protected. *Id*. 2546-48.[1] Accordingly, in many instances misrepresentations in order to gain "offers of employment" will constitute unprotected speech. *Id*. at 2547. Lying about being a doctor or a lawyer, or claiming to have specialized training or experience, would, for example, be unprotected speech. These lies go to the essential function of the job; a lie about being qualified to diagnose disease or operate heavy equipment is *material* and unprotected. But a law criminalizing misrepresentation is facially content-based, *id*. at 2548, and must satisfy the "most exacting scrutiny." *Id*. A content-based law is only permissible if the restriction is necessary to protect a compelling government interest of avoiding material, harm-causing misrepresentations.

Plaintiffs assert a willingness to misrepresent in only a few limited ways: (a) affirmatively misrepresenting or omitting political or journalistic affiliations; (b) affirmatively

[1] Although the ultimate consequence of the plaintiffs' actions may lead to economic injury from third parties, who may no longer choose to do business with agricultural operations after learning the ugly details of their practices, that is not the type of material harm that *Alvarez* contemplates.

misrepresenting or omitting certain educational backgrounds (such as journalism degree from Stanford, or a political science doctorate[2]). Such misrepresentations may enable the person to gain access to the facility, just as Upton Sinclair gained such access, but they do not *cause any material harm* to the deceived party. Any falsified recording or other speech that flows from such access would provide compensatory and potentially punitive damages to the injured party through a defamation claim. Likewise, *any disclosure* of trade secrets and any *facilitation of terrorism* or any *contamination of the food supply* can be (and already are) criminalized whether the entry is predicated upon deception or not, and satisfy strict scrutiny.

At this stage of the litigation the Plaintiffs have alleged a desire to gain access through misrepresentations as to things like political affiliation. The IDA, as it does with most of Plaintiffs factual allegations, ignores the motion to dismiss standard and suggests that it is unlikely that employment in Idaho agricultural facilities will be conditioned on political, ideological, or journalistic affiliation disclosures. Dkt. 56-1 at 12-13. For reasons that will become obvious when we reach the discovery stage, IDA's statements in this regard are not fully candid. Witnesses and documents will confirm that IDA itself has specifically advised *its own* members to require employees and applicants to disclose animal rights affiliations. Political or idealogical misrepresentation is de facto required for employment.

In sum, the misrepresentations at issue do not amount to the sort of fraud that falls outside of the First Amendment. *Alvarez,* 132 S.Ct. at 2553-54 (Breyer, J., concurring). The criminalization of lies has in virtually every instance been limited so as to "require[] proof of injury" such that the subset of criminalized lies are those "where specific harm is more likely to occur." *Id*. The publication of a story or a video that merely reveals conditions present in

[2] *See, e.g.*, Timothy Pachirat, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT, Yale 2011.

industrial agriculture in a truthful, accurate, and non-defamatory manner can never be said to have "caused actual injury." *Id*. The IDA would like the causal chain of wrongdoing to run to the whistle-blower, but the very cases they rely upon demonstrate that the exposure of truthful information is not the *cause of harm*.[3] *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). None of the cases cited by the IDA provide any contrary authority.[4]

II. IDA ERRONEOUSLY REGARDS RECORDING AS NON-SPEECH

In an effort to avoid the obvious implications of the facially content-based restrictions in section 1(d) of the statute, the IDA takes the extreme position that audiovisual recording is not expressive activity covered by the First Amendment. Dkt. 56-1 at 9. They argue, for example, that recording lacks "communicative elements" or an "intent to convey a particularized message." *Id*. This position is even more extreme than the State's untenable suggestion that the law is one of general application and is flatly contradicted by the numerous cases recognizing

[3] Both the IDA and the State rely on *Houchins v. KQED*, 438 U.S. 1 (1978) in support of the view that Plaintiffs First Amendment claims do not warrant relief. Both fail to acknowledge that Justice Stewart's concurring opinion is the narrowest ground, and therefore controlling precedent. The Stewart concurrence is key because it holds that when the press is present at a location it must be afforded more "flexible and frequent" access, including the use of recording equipment. *Id*. at 17-18 (Stewart, J., concurring). In support of this conclusion, the controlling opinion recognizes that it is no "constitutional accident" that the First Amendment speaks "separately of freedom of speech and freedom of press." *Id*. at 17. Even if there is no general right for the press to engage in news gathering, it would break no new constitutional ground to hold that a non-material misrepresentation as to political affiliation (or journalistic motive) used to gain access to a non-intimate, industrial business setting is protected by the freedom of press, at least subject to a balancing of the government interests and the newsworthiness of the issue. *Cf. Bartnicki v. Vopper*, 532 U.S. 524, 536 (2001) (balancing private versus public interest in First Amendment case).

[4] The IDA places considerable emphasis on the "duty which an agent owes to his principal." Dkt. 56-1 at 8. The existence of a general agency relationship or private contract that might allow one to recover *wages paid* to a disloyal employee has no bearing on whether the state can criminalize misrepresentations about political affiliations. Agency principles have no bearing on the constitutional concerns arising out of a scheme of criminalization that favors a single industry.

recording activity as speech. As Judge Posner recently recognized in a majority opinion, "it should be clear by now . . . [that a law which] specifically targets a communication technology; the use of an audio recorder – a medium of expression . . . [is a law] leveled against the expressive element of an expressive activity." *ACLU v. Alvarez*, 679 F.3d 583, 602-03 (7th Cir. 2012). The IDA makes much of the fact that law allows memorializing perception by other means, such a note-taking, Dkt. 56-1 at 12, 20-21, but nothing in the *legal theory* it presents would prohibit restrictions on taking contemporaneous notes on what one sees at an agricultural facility without explicit consent of the owner. The IDA takes refuge only in the fact the statute does not yet prohibit it. Just as the First Amendment would preclude a prohibition on note taking without an owner's consent, so to the audiovisual capture prohibition.

Depending on where the recording takes place, what the purpose of the recording is, and what the governmental interests at stake are, a recording restriction may or may not be constitutional – peeping tom statutes or prohibitions on filming in a nuclear facility, for example, are not analogous to an ag gag law – but there can be no doubt that recording is expressive activity.[5] Indeed, the legislators supporting the law, including the sponsor of the bill, made about a dozen references to the fact that because of these recordings alone an "owner is automatically found guilty in the court of public opinion without any due process."

III. PLAINTIFFS STATE AN OVERBREADTH CLAIM

[5]By considering all three factors – location of the recording, government interest, and purpose of the recording – it is also easy to distinguish the supercilious reference to audiovisual bans in movie theaters. The government interest in prohibiting recording of movies is constitutionally grounded – the copyright protections of Article I, for example, and the recording purpose is purely financial or business related and not for purposes of public debate. The reference to the Idaho law governing interceptions of communications is misleading because that statute – as Plaintiffs request in this case – provides for a one-party consent exception. So long as one party to the recorded conversation consents, the law is not violated.

The IDA levels three main attacks against the overbreadth challenge: (1) they argue again that recording activity is not expressive activity; (2) they reject without explaining that certain lies would be criminalized under the statute; and (3) they resort to a dictionary in an effort to supply a definition that conflicts with the statutory language. As to the first point, it must be noted that the IDA suggests that section 1(d) comports with the First Amendment because it does not prohibit traditional note-taking or other means of "gathering the information." Dkt. 56-1 at 12. Of course, once it is acknowledged that recording is a form of expressive activity, audiovisual speech for YouTube no less than traditional note-taking for a newspaper story warrants constitutional scrutiny.

Second, the IDA asserts in flat contradiction of the plain terms of the statute, which apply to any "misrepresentation" to gain access, unmodified by the constitutionally significant term "material", that many of the lies identified in Plaintiffs opposition to the Motion to Dismiss, Dkt. 23 at 9-10, do not qualify for "criminal liability" under the statute. Recognizing that the statute is at odds with *Alvarez*, the IDA asserts that "these subsections should be read to require" the missing elements *Alvarez* requires. Dkt. 56-1 at 7. But like the Stolen Valor Act in *Alvarez*, the statute before this Court does not contain those limitations. *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) ("The statute before us lacks any such limiting features."). Contrary to the IDA's suggestion, this Court ought not simply assume those missing elements to exist, but must instead accept the statute as written.

Finally, the IDA labels as absurd Plaintiffs' illustrative example of how the law criminalizes the recording of one's child in the restaurant of a non-public country club. Dkt. 56-1 at 13. Far from absurd, the example is dictated by the plain text of the statute. Section (1)(d) criminalizes recordings in any "*agricultural production facility* that is not open to the public."

Section 2(b) defines agricultural production facility that is "being used for *agricultural production*." And 2(a) defines *agricultural production* "without limitation" to include any "processing and packaging [of] agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities." The Boise area hosts at least a dozen "private" clubs or stores or agricultural facilities that engage in processing or packaging animal products, not the least of which are Costco and several private, dining country clubs. The IDA may now regret the breadth of this statute, which necessarily includes processing and packaging food, but the resort to Webster's Dictionary in an effort to overcome clear statutory language is as futile as it is transparent.[6]

IV. THE LAW IS CONTENT-BASED

The IDA argues that the content-based inquiry must turn exclusively on the face of the statute, and must not take account of legislative motive. Dkt 56-1 at 15-18. To support this view they rely on overruled and outdated precedent; the clear weight of apposite authority contradicts their argument.

The principle cases relied upon by the IDA do not support their position. They quote *Berger v. City of Seattle*, 512 F.3d 582, 590 (9th Cir. 2008), to argue that illicit legislative motive is irrelevant, but they fail to inform this Court that the panel decision in *Berger* was *overturned by the en banc court* and the quoted reasoning disregarded. *Berger v. City of Seattle*, 569 F.3d 1029, 1051-52 (9th Cir. 2009) (en banc) (applying *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986) and explicitly considering the non-speech suppressing motives of the legislature). Equally unpersuasively, the IDA concludes their summary of the law in this area by providing lengthy quote from *U.S. v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* has been largely

[6] *See, e.g., United States v. Lettiere*, 640 F.3d 1271, 1274-75 (9th Cir. 2011) (summarizing the "well-settled principle that, for purposes of statutory interpretation, the language of the statute is the first and, if the language is clear, the only relevant inquiry.").

discredited by the Supreme Court's recent decision in *U.S. v. Windsor*, 133 S.Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (lamenting that the Court has now fully abandoned the once "familiar principle" from *O'Brien* that "illicit legislative motive" is irrelevant). Even in First Amendment cases, since the Court decided *O'Brien* it has repeatedly acknowledged that the legislature's motive is the primary determinant of content neutrality. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 719 (2000); *United States v. Eichman*, 496 U.S. 310, 315 (1990). The other authority relied on by the IDA is similarly dated or distinguishable[7], but more importantly, Supreme Court doctrine firmly supports the view that examining legislative motive is one of the accepted means of assessing whether a law is content-based.[8]

V. THE EQUAL PROTECTION AND PREEMPTION CLAIMS ARE COGNIZABLE

Plaintiffs allege that this law was motivated at least in part by animus towards animal rights groups. Dkt. 1 at 49. At this point those allegations must be taken as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and this allegation, if proven, dictates that the normal deference to legislative determinations evaporates. Dkt. 23 at 14-20. Plaintiffs have identified a clear

[7] *See, e.g.*, Dkt. 56-1 at 15 (quoting *ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006)). The *City of Las Vegas* case in a portion not quoted by the IDA the Court emphasized that the plaintiff had *not presented* evidence of illicit motive. The holding is not that illicit motive may not be considered, but rather that it was not put at issue in that case. *City of Las Vegas*, 466 F.3d at 793 (affirming that there was "*no evidence in the record* that the ordinance was designed to suppress certain ideas that the City finds distasteful" (emphasis added)).

[8] *See e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that "plainly illegitimate" motives invalidate an otherwise valid statute); Id. (noting that in this case there is no record of "bias or censorship" based motives); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2663 (2011) (considering both the purpose and practical effect of a law); *Turner Borad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (recognizing a content-based "purpose may be sufficient in certain circumstances to show a regulation is content-based"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989). ("The government's purpose is the controlling consideration"); *Bartnicki*, 532 U.S. at 526 ("we look to the purpose behind the regulation"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

operational and facial classification – whistle-blowers in agricultural facilities versus whistle-blowers in any other industry – and, regardless, rational basis review applies to *all statutes* not subject to heightened scrutiny. Moreover, when heightened rational basis applies, at the very least, the burden shifts to the government to show that the law would have been passed even without the illicit motive, and that the fit between the law and the legitimate government interest is adequate. *Id*.; *see also City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 448-50 (1985) (shifting burden to government to show an adequate fit for a law despite the clear existence of a legitimate government interest that was served by the law). If the Defendants are able to provide factual justification for singling out one industry, and penalizing one type of whistle-blowing, then the law may be sustained. But as with most instances where burden shifting applies, factual development is necessary. The Plaintiffs have alleged a cognizable claim under the Fourteenth Amendment and dismissal is inappropriate at this stage.

Plaintiffs also state a cognizable obstacle preemption claim. IDA asserts that FCA supports "official government investigation[s]." Dkt. 56-1 at 21. To the extent the IDA is characterizing every investigation that precedes an "action by a private person", 31 U.S.C. § 3730(b), as an official government investigation that is not subject to the ag gag law, then this Court could hold that every undercover investigation implicating a federal contract is preempted, which would effectively exempt all facilities with federal contracts from the scope of the ag gag law. More likely, the IDA has misread the FCA and does not concede that every private action without government involvement amounts to "statutory authorization" under I.C. § 18-7042(1)(d). If so, then the substantial conflict between state and federal objectives remains.

VI. IDA's CONSTRUCTION OF SECTION 1(e) IS NOT BINDING

The IDA maintains that the Plaintiffs challenge to I.C. § 18-7042(1)(e) is predicated on an erroneous interpretation of the section that fails to recognize that 1(e) is limited to physical

injuries or physical damage to property. Dkt. 56-1 at 2, 5-6. While the IDA's interpretation of this section is reasonable enough, there is no statutory definition of these terms and no general canon of criminal statutory construction in Idaho that compels this conclusion. If there was a clear rule that every adjective modifying one criminal element in a statute also modifies the alternative element, or something similarly unequivocal, and if the case law in Idaho made clear that property damage could not be construed as including economic injury, then this section might not present constitutional implications. However, Idaho does not have such a rule of statutory construction, and the case law in Idaho does not speak to (or foreclose) the possibility that economic harm could be characterized as "physical damage or injury," which is significant given case law in other jurisdictions that similar lack such a general cannon of statutory construction. *See, e.g., Martco Ltd. v. Wellons, Inc.,* 588 F.3d 864, 879 (5th Cir. 2009) (construing textual requirements of property damage to include lost profits or economic harm). Without an interpretation of this statute holding that it is unconstitutional as applied to economic harm, this section threatens to chill the very activities Plaintiffs have alleged a desire to engage in. Accordingly, it would be premature to dismiss the claims as to this section at this stage.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

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Respectfully submitted,

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