No. 19-1364

United States Court of Appeals

For the Eighth Circuit

ANIMAL LEGAL DEFENSE FUND, et al.,
Plaintiffs – Appellees,

— v. —

KIMBERLY K. REYNOLDS, Governor, et al.,
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF FOR *AMICI CURIAE* SCHOLARS OF FIRST AMENDMENT AND INFORMATION LAW IN SUPPORT OF PLAINTIFFS–APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amici* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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PRELIMINARY STATEMENT

Iowa Code § 717A.3A (the "Act") broadly prohibits anyone from gaining access to an "agricultural production facility" under "false pretenses." The Act is a transparent effort to stop adverse reporting on the practices of Iowa's meat packers, food processors, and other key actors in our food supply chain by outlawing the time-honored practice of undercover reporting at their facilities. It is patently unconstitutional.

Amici are scholars of First Amendment and information law who submit this brief to underscore that the Act's criminalization of traditional newsgathering activity violates the First Amendment. Plaintiffs-appellees argue that the Act is subject to strict scrutiny because it discriminates based on content and viewpoint. The Act is independently subject to strict scrutiny because its purpose and effect is to prohibit newsgathering. It was enacted to impede undercover reporting on the quality, safety, and ethical practices of slaughterhouses, industrial farms, and other food processing facilities, and does so powerfully.

Newsgathering is protected by the First Amendment because, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). While the Supreme Court has yet to fully delineate the contours of the constitutional protection of newsgathering, it has made clear that the First Amendment protects against laws that target the activities of journalists and unduly burden their newsgathering. Criminal laws that

impact the press are subject to heightened scrutiny if they are not "generally applicable" and impose more than "incidental effects on [the press's] ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

The Iowa Act is intended to target the press and its burden on newsgathering is far from merely incidental. The Iowa legislature's stated purpose is to frustrate newsgathering at agricultural production facilities by outlawing the practice of undercover reporting at these facilities. The Act outlaws this legitimate and long-standing method of newsgathering precisely because it has been an extraordinarily effective—perhaps the *most* effective—means of reporting true, newsworthy stories that gain strong public attention. Iowa may not seek to silence such reporting by imposing targeted prohibitions on newsgathering methods needed to produce it. The district court properly held that its effort to do so through the Act violates the First Amendment.

This Court should affirm that holding, making clear that the Act violates the First Amendment's protection of both "speech" and "the press." In an era when the legitimacy of the press is routinely attacked for political gain, it is vitally important to recognize that the First Amendment protects the process of gathering the news and not just its dissemination. Where, as here, a criminal prohibition is imposed on a traditional newsgathering method in order to suppress disfavored reporting, that prohibition must necessarily be subjected to strict judicial scrutiny. The district

court opinion should be affirmed because the Act cannot withstand the heightened scrutiny the First Amendment demands.

INTEREST OF AMICI CURIAE AND CONSENT TO FILE

Amici Curiae are 24 scholars of First Amendment and information law, who have an interest in preserving robust constitutional protections for those who gather and report the news. *Amici* have diverse views regarding the proper application of the First Amendment, but all agree that the Act's criminalization of the use of deception to gather news about agricultural facilities in Iowa is unconstitutional. Each *amicus* is identified in the Appendix. Petitioners-Appellees consent to the filing of this brief and Defendants-Appellants do not oppose it.

SUMMARY OF ARGUMENT

The Act cannot survive the heightened judicial scrutiny required because it criminalizes traditional newsgathering activity for the purpose and with the effect of preventing news reports disfavored by the Iowa legislature.

1. Newsgathering is protected under the First Amendment. Criminal laws that single out a newsgathering technique for punishment, or that are meant to suppress the ability of the press to report certain stories, are subject to heightened judicial scrutiny. The Iowa Act does both. It is subject to heightened scrutiny because it criminalizes the use of deception in the course of undercover reporting about Iowa's agricultural facilities and does so to prevent unfavorable news reports about the conditions and practices at these facilities.

2. The Act does not escape First Amendment scrutiny simply because its burden on newsgathering is achieved by punishing misrepresentations made to gain entry to an agricultural facility. Even knowingly false speech is entitled to First Amendment protection in certain circumstances. The practice of undercover reporting, which necessarily involves some degree of deception, is plainly such a protected circumstance. Undercover reporting is a time-honored means of gathering the news that has been essential to reporting stories of enormous social consequence—from the abuses of slavery, to conditions inside sweatshops and slaughterhouses, to political corruption and many other topics. Iowa may not criminalize false statements by an undercover investigator in order to suppress true and newsworthy reporting on agricultural production facilities.

3. The Act cannot survive any level of First Amendment scrutiny. The state has waived any argument that the Act can survive strict scrutiny, and fails in any event to advance a sufficiently compelling interest to survive such scrutiny. As the district court found, the Act was motivated by a desire to suppress speech and does not effectively advance any interest unrelated to the suppression of expression. These facts alone doom the Act under any potentially applicable First Amendment test, whether strict or intermediate scrutiny. While Iowa has offered up concerns about biosecurity or physical security as pretextual justifications for the Act, its prohibitions are not actually crafted to address those supposed concerns. Instead, in purpose and effect, the Act serves to suppress critical news about factory farms by

criminalizing an effective and time-honored technique for gathering that news. It was properly struck down by the district court.

ARGUMENT

I. THE ACT IS SUBJECT TO HEIGHTENED SCRUTINY BECAUSE ITS PURPOSE AND EFFECT IS TO BURDEN NEWSGATHERING ACTIVITY

The First Amendment serves as a key guardian of our democratic order by protecting the expression of unpopular ideas, facilitating vigorous public debate, and promoting the search for truth on matters of public concern. The First Amendment protects both the "freedom of speech" and freedom "of the Press." Courts have long understood that these First Amendment protections extend not just to the publication of the news, but to the process of gathering the news as well. Laws like the Iowa Act that target newsgathering activity and impose more than an incidental impact on the ability of the press to seek out the news are subject to heightened judicial scrutiny under the First Amendment.

A. The First Amendment Protects the Act of Newsgathering

The First Amendment was adopted to prevent "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 422 (1868). It seeks "to ensure that the individual citizen can

effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), and to make public debate well informed—capable of advancing knowledge, discovering truth, and allowing rational decisions. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967); *Bridges v. California*, 314 U.S. 252, 277-78 (1941).

The First Amendment has thus long been construed to broadly protect the "free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). This protection extends fully to information about private corporate actors, such as the operators of agricultural facilities, because "[f]ree discussion concerning the conditions in industry" is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thomas v. Collins* 323 U.S. 516, 532 (1945) (citations omitted).

To fulfill the constitutional objective of a well-informed citizenry capable of self-government, the First Amendment protects not only the right to communicate, but also the right to seek out information of public concern. As the Supreme Court recognized in *Branzburg,* "news gathering is not without its First Amendment protections." 408 U.S. at 707 (1972). In casting the deciding vote in *Branzburg*, Justice Powell wrote separately to underscore the First Amendment's protection of

the process of gathering news and concluded: "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* at 710 (Powell, J., concurring).

In our constitutional scheme, the press serves as an agent of the public by disseminating important information of public concern—it provides "the means by which the people receive the free flow of information and ideas essential to intelligent self-government." *Saxbe v. Washington Post Co.,* 417 U.S. 843, 863 (1974) (Powell, J., dissenting). The ability of the press to "function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). Thus, to ensure the press can perform its critical function, it "is not only protected when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news." William J. Brennan, *Address,* 32 Rutgers L. Rev. 173, 177 (1979).

The Supreme Court has repeatedly affirmed this principle. In first recognizing the constitutional dimension of the public right of access to government proceedings in *Richmond Newspapers, Inc. v. Virginia*, the Court observed:

> It is not crucial whether we describe this right to attend criminal trials, to hear, see, and communicate observations concerning them as a "right of access" or a "right to gather information" for we have recognized that "without some

> protection for seeking out the news, freedom of the press could be eviscerated."

448 U.S. 555, 576 (1980) (quoting *Branzburg*, 408 U.S. at 681); *cf., Bartnicki v. Vopper*, 532 U.S. 514 (2001) (upholding right to publish newsworthy materials obtained lawfully by the press); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (same).

The Court has similarly held that efforts to impede the ability of the press to report the news by imposing upstream burdens on the process of publishing it are equally subject to First Amendment scrutiny. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, for example, the Court invalidated on First Amendment grounds a use tax on ink and paper that substantially burdened the ability of newspapers to publish. 460 U.S. 575, 582-83 (1983); *see also Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 234 (1987) (striking down law that differentially taxed magazines). As these Supreme Court precedents make plain, the First Amendment restricts a state's ability to "effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

More recently, the Court reaffirmed the First Amendment's protection for the precursors of speech, holding that states may not restrict a person's ability to obtain information as a means to limit subsequent, disfavored speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). That case concerned a law that sought to

impede certain forms of commercial marketing by restricting access to data needed to carry out that marketing. *Id.* at 558-59. The Iowa Act is even more clearly offensive to the Constitution because it aims to impede publication of news by restricting a traditional newsgathering activity, conduct that lies at the very heart of the First Amendment's protections.

Other circuit courts have similarly recognized that because gathering the news is a necessary prerequisite to publishing it, constitutional protection of newsgathering is essential to avoid media timidity and to preserve an unimpeded flow of information to the public. *See, e.g.*, *In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018) (gag order interfered with "legitimate news gathering activities" that "underlie the proper functioning of the First Amendment"); *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018) (recognizing that "newsgathering qualifies for First Amendment protection") (quotation omitted); *PG Pub. Co. v. Aichele*, 705 F.3d 91, 98 (3d Cir. 2013) (same); *Leigh v. Salazar*, 677 F.3d 892, 897–98 (9th Cir. 2012) (same); *In re The Wall St. Journal*, 601 F. App'x 215, 218 (4th Cir. 2015) (recognizing injury to First Amendment newsgathering rights).

The protection of newsgathering is also at the heart of recent cases recognizing a constitutional right to record. Every circuit court of appeals to have addressed the issue has found that the First Amendment protects a right to record photographs or video because the right to publish "would be insecure, or largely

ineffective, if the antecedent act of *making* the recording is wholly unprotected." *Am. Civil Liberties Union of Ill.*, 679 F.3d at 595.[1] These decisions recognize that the First Amendment protects "a range of conduct" related to the gathering of information. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Looked at conversely, if the First Amendment afforded no protection to the gathering of newsworthy information, the government could prevent valuable information from being published simply by targeting acts that are necessary to the creation of the protected speech itself. *See* Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029, 1052-54 (2015); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process."); *Richmond Newspapers*, 448 U.S. at 580 (access to certain information is a "fundamental right"); *id.* at 583 (Stevens, J., concurring) ("[A]n arbitrary interference with access to important information" is itself "an abridgment of the freedoms of speech and of the press.").

[1] *See also, e.g.*, *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("[T]he First Amendment protects the act of making film, as there is no fixed First Amendment line between the act of creating speech and the speech itself.") (quotation omitted); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017); *Glik*, 655 F.3d at 82; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995).

Simply put, while the specific scope of the Press Clause remains a debated issue,[2] longstanding precedent and clear First Amendment objectives leave no doubt that newsgathering activity is protected by the First Amendment and may not intentionally be punished without heightened judicial scrutiny. This constitutional protection extends to newsgathering whether it occurs on public or on private property. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) (content discrimination presumptively impermissible "on private property or in a traditional public forum"); *accord Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (regulation of signs on private property subject to strict scrutiny); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (invalidating statute prohibiting certain symbols on "public or private property").

B. The Act Is Subject to Heightened Scrutiny Because It Targets and Uniquely Burdens Newsgathering About Agricultural Facilities

The First Amendment does not immunize newsgathering activity from all regulation. Specifically, it does not exempt journalists from liability for torts and crimes committed in the course of gathering the news, so long as liability is imposed under "generally applicable laws" that do not target the press or otherwise have more than "incidental effects" on the ability to gather the news. *See Cohen,* 501 U.S. at 669.

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[2] *Compare, e.g.*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012) *with* Sonja West, *The 'Press,' Then and Now*, 77 Ohio St. L. J. 49 (2016).

In *Cohen*, the Supreme Court rejected a newspaper's effort to advance a First Amendment defense to a promissory estoppel claim under Minnesota law. The Court held that "generally applicable" laws, with only "incidental effects" on the ability of the press to gather the news, do not offend the First Amendment. *Id.* This limitation is critical to the holding in *Cohen*. It incorporates the Court's specific finding that the tort of promissory estoppel, as applied in Minnesota, "does not target or single out the press" and "would otherwise be enforced" against all citizens. *Id.* at 670, 672. It also reflects the Court's assessment that making reporters liable for breach of their promises would not have any material impact on their ability to gather and report the news. *See id.* at 671-72.

Consistent with *Cohen,* a state law that does target journalists or is intended to impair their ability to gather the news remains subject to heightened judicial scrutiny under the First Amendment. This conclusion is also compelled by cases such as *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* which prohibit regulations that impose differential burdens on the press either generally, or as to individual press entities. In *Minneapolis Star,* the Court invalidated the challenged tax on ink and paper because it singled out for taxation newspapers in general, and a few large newspapers in particular. While the statute did not directly prohibit any newspaper from publishing, it did impose a substantial burden on the ability of particular newspapers to operate by taxing an essential precursor to publication: ink and paper. Because the tax was not a content based

regulation, the Court applied the same standard to assess it that would apply to a non-content based restriction on speech itself. The Court held that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest," and that this interest must be "unrelated to suppression of expression." *Minneapolis Star & Tribune Co.*, 460 U.S. at 582, 585; *see also Arkansas Writers Project*, 481 U.S. at 227-34. Indeed, this scrutiny must be particularly strict where the purpose of a law that burdens newsgathering is to suppress news reporting on a particular subject. As the Supreme Court has repeatedly made clear, laws are subject to the strictest scrutiny "when the purpose and justification for the law are content based," even if the law is not obviously "content based on its face." *Reed*, 135 S. Ct. at 2228.

The Iowa Act is subject to First Amendment scrutiny because its purpose and effect is to impede undercover reporting—a potent and long-accepted method of gathering the news. This impediment is not merely the "incidental effect" of a generally applicable law directed at some other end, but is the intended effect of a law enacted to frustrate reporting on Iowa's agricultural facilities.

Iowa enacted the Act in direct response to a series of exposés that drew national attention to cruel treatment of animals at industrial farms in the state. *See Animal Legal Defense Fund v. Reynolds*, 353 F. Supp. 3d 812, 816-17 (S.D. Iowa 2019). To get those stories, investigators had obtained employment at factory farm operations under false pretenses and then surreptitiously recorded video once on

the job.[3] The footage recorded by these undercover investigators depicts vicious abuse of pigs, piglets, and other animals. *See id.*

The legislation was proposed to protect Iowa factory farms from further embarrassment and bad publicity by prohibiting undercover reporting. At least one state senator made the point explicitly: "What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name." *Id*. at 817 (quoting Mike Wesier, *Iowa May be First to Ban Secret Video on Farms*, Sioux City Journal, May 22, 2011).[4]

The law as ultimately enacted provides that a person commits a crime if he or she:

> (a) Obtains access to an agricultural production facility under false pretenses [or]
>
> (b) Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.

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[3] *See* Anne-Marie Dorning, *Iowa Pig Farm, Accused on Animal Abuse*, ABC News, June 29, 2011, https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009; People for the Ethical Treatment of Animals, *Mother Pigs and Piglets Abused by Hormel Supplier*, https://investigations.peta.org/mother-pigs-piglets-abused-hormel-supplier/.

[4] Available at https://bit.ly/2kYYA9L.

Iowa Code § 717A.3A (2012). These provisions criminalize precisely the journalistic methods that investigators had successfully used to obtain the troubling video footage of animal treatment at factory farms.

Particular features of the law's text itself reveal its purpose of targeting such investigative reporting. In particular, the law does not cover run of the mill "resume fraud" but requires an *intent* to commit an unauthorized act in the future. This requirement is uniquely shaped to target those who seek to engage in undercover investigations. By contrast, a person who lies to conceal multiple convictions for animal abuse would not violate the statute.

Both the language of the Act and its legislative history thus make plain that the law was enacted to suppress negative stories about factory farms by making undercover investigations of them illegal. The Act's effect on newsgathering on this subject is not "incidental," but rather is the primary objective of the law. Its prohibition on deception exacts a targeted and burdensome toll on the press for the purpose of suppressing news about agricultural production facilities. The Act is subject to the most stringent First Amendment scrutiny because it singles out a particular industry—and therefore a particular subject matter—for its restriction on newsgathering.

II. THE ACT'S PROHIBITION ON DECEPTION AS A MEANS OF NEWSGATHERING IS SUBJECT TO HEIGHTENED SCRUTINY

The Act is intended to outlaw undercover reporting so as to suppress disfavored and embarrassing reports. The fact that the Act achieves this end by

directly regulating false statements used as a means to gain access or employment does not make it less offensive to the First Amendment—it makes it more so. The Supreme Court has made clear that prohibitions on false speech independently trigger First Amendment scrutiny. That is particularly true here, where deception is deployed by investigative reporters as part of a time-honored method of uncovering the truth on matters of intense public interest.

A. Even False Speech Is Entitled to Protection Absent Circumstances Not Present Here

The Supreme Court has flatly rejected the proposition that First Amendment protection does not extend to false statements. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality op.); *id.* at 2551 (Breyer, J., concurring). To the contrary, the Supreme Court pointedly refused the Solicitor General's plea to recognize a "general exception to the First Amendment for false statements." *Id.* at 2544. For false speech—just like other speech—"the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 2543 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

The Supreme Court recognized First Amendment protection for false statements so as to prevent the government from criminalizing "an endless list of subjects the National Government or the States could single out." *Id.* at 2547. The government would have a potent tool to suppress discussion on particular matters if it had the power to regulate deception, untethered from any separate harm not

related to the suppression of speech. For this reason, a majority of the Court in *Alvarez* held that false statements are presumptively *protected* under the First Amendment, outside of contexts involving legally cognizable harms such as defamation, lies to government investigators, perjury, or fraud.

A plurality of four Justices wrote that content-based regulations of false speech are subject to strict scrutiny and a showing of genuine "specific harm," requiring the government to show that the restriction is actually necessary to achieve a compelling interest and that "a direct causal link [exists] between the restriction imposed and the injury to be prevented." *Id.* at 2548-49. Two concurring Justices would have used a somewhat different standard of scrutiny, assessing "whether the statute works speech-related harm that is out of proportion to its justifications." *Id.* at 2551 (Breyer, J., concurring).

Whichever test governs, the Act remains subject to heightened First Amendment scrutiny. It criminalizes false statements made to gain access to or employment with an agricultural production facility. And it does so without requiring any showing of actual, non-speech related harm to any legitimate interests of an employer, proprietor, or the State of Iowa. Much as courts understand that the First Amendment guards against tort liability for false speech that is not aimed at invading a legally cognizable right that the tort in question seeks to protect, the Iowa Act's imposition of liability for deceptive speech that is unrelated to any legally cognizable privacy or property interest of an agricultural

facility infringes on First Amendment protected speech. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (requiring heightened standard of proof in libel action by public official); *Desnick v. Am. Broadcasting Co.*, 44 F.3d 1345,1352, 1355 (7th Cir. 1995) (liability for trespass does not extend to a reporter's deceptive entry and filming of a professional setting).

As applied to individuals engaged in efforts to gather news, the Act's ban on deception strikes directly at the core of First Amendment protections for reporting on matters of public concern. The First Amendment protection of deception applies *a fortiori* where the deception is used to gather news required for an open and informed discussion of public affairs. The First Amendment does not allow the government free rein to impose targeted prohibitions on deception as a means to suppress truthful reporting on particular, disfavored subjects. Thus, the Act violates the First Amendment twice over: it uses an unconstitutional means—criminalizing false statements—to achieve the unconstitutional ends of impeding newsgathering.

B. The Use of Deception is a Time-Honored Newsgathering Tactic That is Essential to Report Certain Stories of Public Concern

The use of undercover reporting is a longstanding technique for gathering information on important stories that would otherwise have been difficult or impossible to report.[5] Using deception and pretense is not essential for every news

[5] *See generally* Brooke Kroeger, *Undercover Reporting: The Truth About Deception* (2012); Brooke Kroeger, Deception for Journalism's Sake: A Database, NYU Libraries, http://undercoverreporting.org.

story, but experience shows that there are occasions when it is the only way to get the news.

This has long been true with respect to investigations into potentially illegal practices in employment, housing, public accommodations, and consumer fraud. For example, there is a proud tradition of using undercover "testers" to uncover evidence of racial discrimination or other illegal bias in housing and employment. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). To do their work, such "testers" must necessarily conceal their true identities and purpose, just like undercover reporters who wish to expose abuses at slaughterhouses and factory farms.

The history of investigative journalism is full of examples of important stories that would have been impossible to tell without undercover reporting. For example, Northern activists and journalists reported on conditions of slaves in the South by concealing their work as reporters.[6] One undercover journalist for the *New York Tribune* provided wrenching detail of the sale of 436 black men, women, children, and infants at a slave auction near Savannah, Georgia in 1859.[7] The reporter, Mortimer Thompson, writing under the pen name Q.K. Philander

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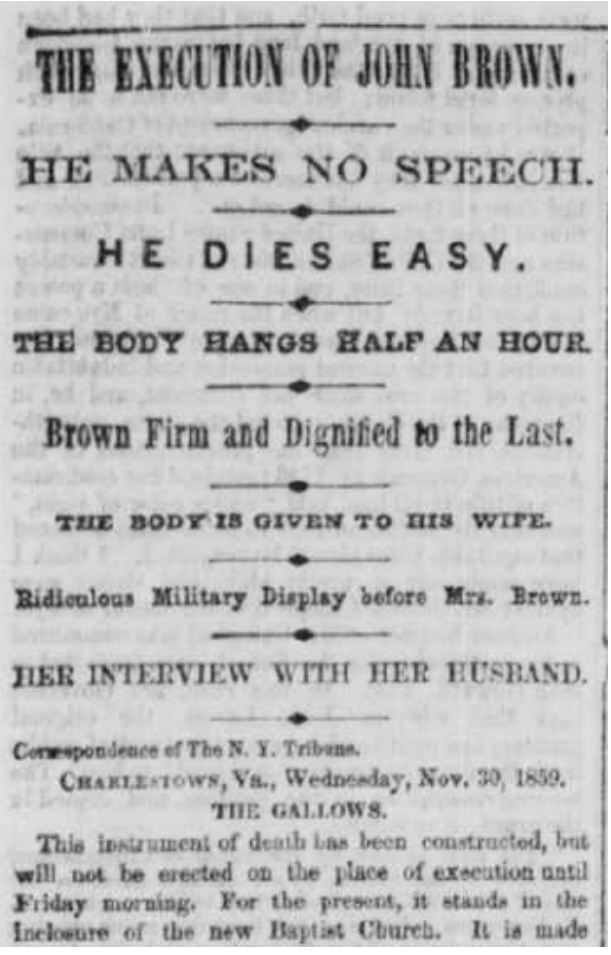
[6] *See generally*, Reporting Slavery – the New York Tribune, Deception for Journalism's Sake: A Database, http://sites.dlib.nyu.edu/undercover/reporting-slavery-new-york-tribune.

[7] *American Civilization Illustrated: A Great Slave Auction*, *i*, Mar. 5, 1859, at 5, http://sites.dlib.nyu.edu/undercover/american-civilization-illustrated-mortimer-thomson-new-york-tribune.

Doesticks, described the need to conceal his identity and the means by which he did so:

> Your correspondent was present at an early date, but as he easily anticipated the touching welcome that would, at such time, be officiously extended to a representative of *The Tribune* . . . and not desiring to be the recipient of a public demonstration from the enthusiastic Southern populations . . . he did not placard his mission and claim his honors. Although he kept his business in the background, he made himself a prominent figure in the picture, and, wherever there was anything going on, there was he in the midst. At the sale might have been seen a busy individual, armed with pencil and catalogue, doing his utmost to keep up all the appearance of a knowing buyer. [*See supra* note 7.]



THE EXECUTION OF JOHN BROWN.

HE MAKES NO SPEECH.

HE DIES EASY.

THE BODY HANGS HALF AN HOUR.

Brown Firm and Dignified to the Last.

THE BODY IS GIVEN TO HIS WIFE.

Ridiculous Military Display before Mrs. Brown.

HER INTERVIEW WITH HER HUSBAND.

Correspondence of The N. Y. Tribune.

CHARLESTOWN, Va., Wednesday, Nov. 30, 1859.

THE GALLOWS.

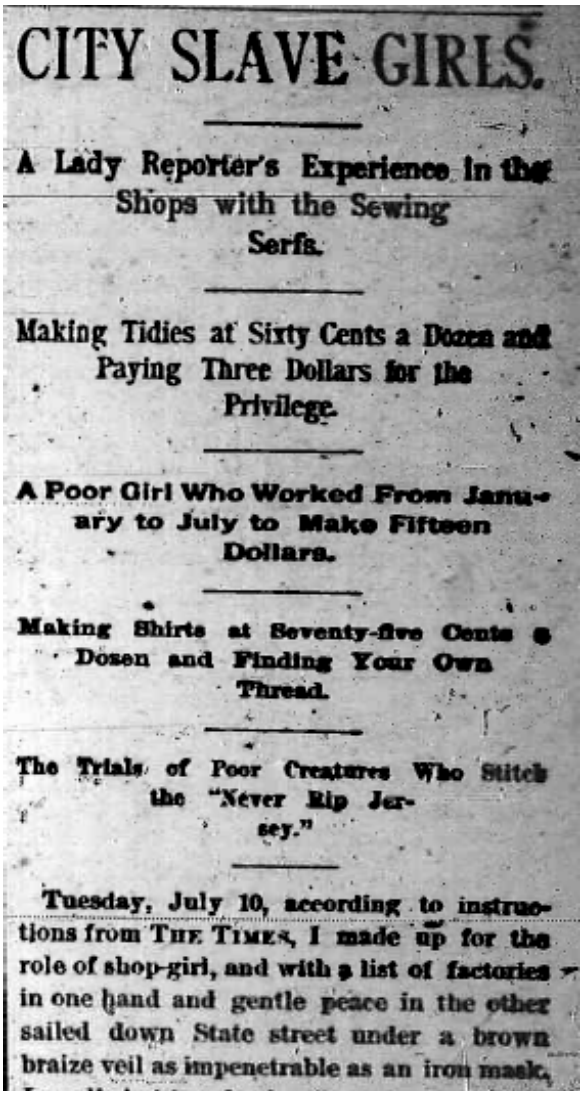
This instrument of death has been constructed, but will not be erected on the place of execution until Friday morning. For the present, it stands in the Inclosure of the new Baptist Church. It is made

A few months later, another journalist went undercover to report on the execution of John Brown, the prominent abolitionist who advocated for armed insurrection to free slaves.[8] After secession, anonymous journalists filed

[*Left*] Excerpt from New York Daily Tribune, Dec. 3, 1859, by Henry S. Olcott, who attended the execution of abolitionist John Brown by volunteering for a Virginia militia charged with guarding Brown's body. See supra *note 8.*

[8] *The Execution of John Brown*, N.Y. Tribune, Dec. 3, 1859, at 7, http://sites.dlib.nyu.edu/undercover/execution-john-brown-unsigned-new-york-tribune.

dispatches reporting on the pro-slavery rebellion in the Southern states.[9]



CITY SLAVE GIRLS.

A Lady Reporter's Experience in the Shops with the Sewing Serfs.

Making Tidies at Sixty Cents a Dozen and Paying Three Dollars for the Privilege.

A Poor Girl Who Worked From January to July to Make Fifteen Dollars.

Making Shirts at Seventy-five Cents a Dozen and Finding Your Own Thread.

The Trials of Poor Creatures Who Stitch the "Never Rip Jersey."

Tuesday, July 10, according to instructions from THE TIMES, I made up for the role of shop-girl, and with a list of factories in one hand and gentle peace in the other sailed down State street under a brown braize veil as impenetrable as an iron mask.

Since this time, journalists have engaged in undercover reporting in order to tell all manner of stories. To take but a few examples, in 1960 Gloria Steinem wrote an undercover exposé on the lives of "Playboy Club Bunnies."[10] In 1978, the Chicago Sun-Times published a series of blockbuster stories that exposed corruption by local city officials based on reporting by undercover journalists who surreptitiously

[*Left*] Excerpt from article exposing sweatshop conditions in Chicago garment factories, written by undercover journalist Nell Nelson. See City Slave Girls, Chicago Times, July 30, 1888, http://sites.dlib.nyu.edu/undercover/i-city-slave-girls-nell-nelson-chicago-daily-times; http://nelson.newtfire.org/1888-07-30.html.

[9] *See, e.g.*, Albert Richardson, *The Pro-Slavery Rebellion*, N.Y. Tribune, Mar. 23, 1861, at 6, http://sites.dlib.nyu.edu/undercover/i-pro-slavery-rebellion-louisiana-albert-richardson-new-york-daily-tribune; Albert Richardson, *The Pro-Slavery Rebellion*, N.Y. Tribune, Mar. 25, 1861, at 6, http://sites.dlib.nyu.edu/undercover/ii-pro-slavery-rebellion-louisiana-albert-richardson-new-york-daily-tribune.

[10] Gloria Steinem, *A Bunny's Tale*, Show: The Magazine of the Arts (May 1963), http://dlib.nyu.edu/undercover/i-bunnys-tale-gloria-steinem-show-magazine.

operated a popular tavern.[11] In 1981, a journalist for the Los Angeles Herald-Examiner went undercover to report a 16-part series on the working conditions in the city's garment-industry sweatshops.[12] In 2016, Mother Jones magazine published an account of paramilitary militias on the U.S. border by a reporter who went undercover to join one.[13]

In particular, journalists have long gone undercover to report on conditions in the nation's meat and agricultural production facilities. These industries—the specific beneficiaries of the Act at issue—provide prime examples of corporate powers that have become subjects of legitimate public debate as a result of the kind of reporting that Iowa seeks to make a crime. At the turn of the 20th century, eyewitness accounts of the meat-packing industry, including Upton Sinclair's novel *The Jungle* (1906), triggered a nationwide debate that within months helped to create a regulatory regime to protect public health and worker safety.[14] Sinclair

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[11] Pamela Zekman & Zay N. Smith, *Our 'bar' uncovers payoffs, tax gyps*, Chicago Sun-Times, Jan. 8, 1978, http://dlib.nyu.edu/undercover/i-our-bar-uncovers-payoffs-tax-gyps-mirage-chicago-sun-times.

[12] Merle Linda Wolin, *Sweatshop: Undercover in the Garment Industry*, L.A. Herald-Examiner (1981), http://sites.dlib.nyu.edu/undercover/sweatshop-merle-linda-wolin-los-angeles-herald-examiner.

[13] Shane Bauer, *I went undercover with a border militia. Here's what I saw.*, Mother Jones, Nov./Dec., 2016, https://www.motherjones.com/politics/2016/10/undercover-border-militia-immigration-bauer/.

[14] *See, e.g.*, David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic (Jan. 24, 2016), http://www.theatlantic.com/politics/archive/2016/01/how-teddy-roosevelt-invented-spin/426699/; Karen Olsson, *Welcome to The Jungle*, Slate

spent weeks undercover in Chicago's meatpacking plants to research the novel, which exposed the harsh, inhumane, and unsanitary working conditions in the industry.[15] The novel was a bestseller, producing an unprecedented reaction from the public.[16] In direct response, Congress swiftly enacted the Federal Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (codified as amended at 21 U.S.C. §§ 601-695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (codified as amended at 21 U.S.C. §§ 301-399f), both of which recognized the strong public interest in the safety of the nation's food supply.[17] The food production industry remains subject to regulation today by both the Department of Agriculture and the Food and Drug Administration.

Journalists and researchers have continued to use undercover methods to report on conditions at animal production facilities, taking advantage of the possibilities of new recording technologies to revive old debates. In California, for example, where there are no "ag-gag" restrictions on reporting like those that Iowa has enacted, undercover investigators have documented and exposed unsanitary,

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(July 7, 2006), http://www.slate.com/articles/arts/books/2006/07/welcome_to_the_jungle.html.

[15] *See* David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic (Jan. 24, 2016), http://www.theatlantic.com/politics/archive/2016/01/how-teddyroosevelt-invented-spin/426699/.

[16] *See* Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 83-91 (2012).

[17] *See* Greenberg, *supra* note 15.

unsafe, and inhumane practices that persist in some slaughterhouses. For example, one investigator obtained video of "inhumane handling of non-ambulatory disabled cattle."[18] The video depicts attempts to forcibly move animals with electric prods and forklifts:

[Above] A still from the undercover video.

This video has been viewed millions of times and has sparked thousands of online comments.[19]

Beyond simply exposing troubling practices, this reporting revealed a potentially serious health risk—"downed" cattle, unable to move under their own power, can be suffering from mad cow disease.[20] The release of the reporting

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[18] Humane Society of the United States, *Rampant Animal Cruelty at California Slaughter Plant* (Jan. 30, 2008), https://www.humanesociety.org/news/rampant-animal-cruelty-california-slaughter-plant.

[19] Humane Society of the United States, *Slaughterhouse Investigation: Cruel and Unhealthy Practices*, YouTube (Jan. 30, 2008), https://www.youtube.com/watch?v=zhlhSQ5z4V4.

[20] *See* Matthew L. Ward, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. Times (Mar. 13, 2008), http://www.nytimes.com/2008/03/13/business/13meat.html.

spurred major distributors to end affiliations with producers,[21] resulted in suspension of the facility's operations by the USDA, and prompted a subpoena and Congressional hearing for the company's CEO.[22] The incident also motivated broad support for food safety reform, culminating in passage of a USDA rule completely banning the slaughter of downed cattle. 9 C.F.R. § 309.3 (2009).[23]

If the investigative methods practiced by all of these journalists—from the antebellum South to Northern sweatshops to contemporary industrial farms—were unprotected, the core rights to speak and write on public issues could themselves have been stifled. The government may not suppress news on matters of public

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[21] *See, e.g.*, Anna Schechter, *Tyson Foods Changes Pig Care Policies After NBC Shows Undercover Video*, NBC News (Jan. 10, 2014), http://investigations.nbcnews.com/_news/2014/01/10/22245308-tyson-foods-changes-pig-care-policies-after-nbc-shows-undercover-video; M.L. Johnson, *DiGiorno, Supplier Drop Dairy Farm Over Abuse*, USA Today (Dec. 10, 2013), http://www.usatoday.com/story/money/business/2013/12/10/digiorno-supplier-drop-dairy-farm-over-abuse/3969615/; Cynthia Galli, Angela Hill & Rym Momtaz, *McDonald's, Target Dump Egg Supplier After Investigation*, ABC News (Nov. 18, 2011), http://abcnews.go.com/Blotter/mcdonalds-dumps-mcmuffin-egg-factory-health-concerns/story?id=14976054; Melissa Allison, *Costco Stops Buying Pork from Farm Shown in Undercover Video*, Seattle Times (July 1, 2011), http://old.seattletimes.com/html/businesstechnology/2015486505_costco02.html.

[22] U.S. Dep't of Agriculture, Statement by Secretary of Agriculture Ed Schafer Regarding Animal Cruelty Charges Filed at Hallmark/Westland Meat Packing Company (Feb. 15, 2008), 2008 WLNR 3037854; *see also* Ward, *supra* note 20.

[23] U.S. Dep't of Agriculture, Agriculture Secretary Tom Vilsack Announces Final Rule for Handling of Non-Ambulatory Cattle (Mar. 14, 2009), 2009 WLNR 4948153.

concern simply by targeting the process of reporting so as to make it unlawful to do the research that necessarily underlies such news.

Iowa has attempted to do just that on behalf of factory farms. The Act makes first-hand, undercover reporting of agricultural production facilities a crime. Enacting this kind of targeted prohibition on a journalistic method in order to prevent embarrassing reports on a particular subject from ever being written is simply anathema to the First Amendment.

III. THE ACT CANNOT SURVIVE THE HEIGHTENED SCRUTINY REQUIRED BY THE FIRST AMENDMENT

As explained above, the Act is subject to heightened judicial scrutiny because it uniquely and purposely impedes the press's ability to gather the news by punishing constitutionally protected speech that is essential to undercover reporting. Whether evaluated under strict scrutiny or some lesser level of heightened scrutiny, the Act does not pass constitutional muster.

As a threshold matter, the State fails to advance any argument for how the Act could survive strict scrutiny, and thus waives this argument. *See* Appellants' Brief at 42-46. The argument in any event would be fruitless. Without any evidence that journalists' investigative activities caused, or genuinely threaten to cause, specific danger to the safety of Iowa's food production or the security of its agricultural workers and facilities, the state lacks a compelling interest in suppressing newsgathering activity. *See Alvarez*, 132 S. Ct. at 2544. The state's desire to avoid negative news coverage of an industry with a vital impact on our

food supply is not compelling, and any legitimate governmental interest could be accomplished through a less speech-restrictive means, such as through counterspeech. *Id.* at 2549-2551 (plurality op.) (emphasizing that government "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.").

Even under a less exacting level of scrutiny, the Act cannot survive. A law that restricts speech by regulating conduct must further "an important or substantial governmental interest" that is "unrelated to the suppression of free expression," and any "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Additionally, as applied to laws regulating deception in particular, the law may not "work[] speech-related harm that is out of proportion to its justifications." *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring). The Act plainly does not satisfy such scrutiny. The legislative history makes plain that the Iowa legislature intended to stop adverse reporting about the conditions and practices of food processors. *See* Statement of Undisputed Facts at ¶¶ 78-82. By definition, such an unconstitutional interest is neither a legitimate governmental interest nor unrelated to the suppression of speech. Indeed, even under the weakest standard of scrutiny, an actual motivation of hostility towards the press invalidates an otherwise facially valid statute. *See United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534-36 (1973).

The state now argues that the Act serves its interests in protecting "biosecurity" and "private property"—but these manufactured justifications are pure sophistry. *See Reynolds*, 353 F. Supp. 3d at 825. The district court rightly recognized that these were not the real reasons for the legislative action, or that the legislature at least was *also* seeking to suppress negative reporting about agricultural businesses in Iowa. *Id.* at 824-26. Indeed, the statutory text and undisputed legislative history make clear that the Act's very point is to suppress reporting on a subject of great public concern. *Id.*

As the district court also correctly recognized, the state "produced no evidence that the prohibitions of [the Act] are actually necessary to protect perceived harms to property and biosecurity." *Id.* at 825. To the contrary, the Act's prohibitions are "[n]ot only . . . unnecessary to protect the state's [asserted] interests, [but] also an under-inclusive means by which to address them," which "raise[s] 'serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id.* at 826.

At bottom, the purpose and effect of the Act is to suppress critical news about factory farms by criminalizing a method of newsgathering that investigators have long and effectively used to report on matters of intense public interest concerning this vitally important industry. The district court properly concluded that the First Amendment does not tolerate this restraint.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29 of the Federal Rules of Appellate Procedure because it is 6,495 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font.

/s/ Francesca L. Procaccini
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June 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on June 27, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Once the brief has been reviewed and filed by the Clerk of Court, counsel will deliver paper copies to the Court and counsel for all parties, in accordance with Local Rule 28A.

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June 27, 2019