

2016 WL 3537329 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

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

v.

Lawrence G. WASDEN, in his official capacity as Attorney General of Idaho, Defendant-Appellant.

No. 15-35960.

June 27, 2016.

On Appeal from the United States District Court for the District of Idaho, Case No. 1:14-CV-00104-BLW

Brief of Amicus Curiae United Farm Workers of America Supporting Plaintiffs-Appellees Urging Affirmance

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***I CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), United Farm Workers of America (“UFW”) certifies that it does not have a parent corporation and that no publicly-held corporation owns 10% or more of its stock.















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*IX STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Counsel for the parties did not author this brief. The parties have not contributed money intended to fund preparing or submitting this brief. No person other than *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this brief.¹


CONSENT OF THE PARTIES

Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for the parties have consented to the filing of this brief.


*1 INTEREST OF THE *AMICUS CURIAE*




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United Farm Workers of America (“UFW”) is the nation's oldest and largest farmworker labor organization. With headquarters in California, UFW serves farmworkers throughout the country, including in Idaho. UFW has thousands of members, many of whom are highly vulnerable migrant and seasonal farmworkers. UFW works to protect the health and safety of farmworkers from occupational injuries due to unsafe working conditions, sexual harassment and violence perpetrated against workers, and violations of labor and human rights. Among other things, UFW assists farmworkers in investigating, documenting, and reporting violations of farmworker rights for purposes of filing complaints with various federal and state agencies, as well as for civil litigation against agricultural employers.

 Idaho Code § 18-7042 (the “Ag-Gag Law”) threatens UFW representatives and farmworkers with criminal liability for taking reasonable steps to investigate, document, and report alleged violations of farmworker rights before filing a formal complaint. Accordingly, UFW and the farmworkers UFW represents have a significant interest in the outcome of this case.

*2 SUMMARY OF ARGUMENT

Plaintiffs-Appellees and other *amici curiae* have already elaborated in depth on why Idaho's Ag-Gag Law violates the First Amendment and Equal Protection Clause. UFW submits this brief in order to illustrate the myriad ways in which the law's unconstitutional restrictions on speech will undermine the ability of farmworkers and UFW representatives to investigate, document and report violations of farmworker rights.  Idaho Code §§ 18-7042(1)(a) and 18-7042(1)(c) criminalize making misrepresentations, including omissions, in order to gain access to an agricultural production facility, whether by obtaining employment or as a visitor. The two provisions would effectively end UFW's ability to conduct on-site investigations into alleged violations of farmworker rights unless UFW discloses in advance its true purpose for seeking access to the workplace -- including the fact of a complaint and the identity of the complaining farmworker -- thereby allowing the facility to hide or alter evidence and subjecting the farmworker to potential retaliation.



 Idaho Code §§ 18-7042(1)(b) and 18-7042(1)(d) criminalize attempts to obtain and preserve evidence of violations of farmworker rights before filing a formal complaint.  Idaho Code § 18-7042(1)(d) criminalizes the creation of audio and video recordings depicting an agricultural business's operations without the business owner's express consent -- even if the purpose for the recording is to ***3 document the *business owner's* violation of farmworker rights.**  Idaho Code § 18-7042(1)(b) criminalizes misrepresentations made in order to obtain agricultural business records. The provision would force UFW and farmworkers to disclose when the true purpose for requesting documents -- such as payroll records or timecards -- is for purposes of filing a complaint, again subjecting the farmworker to potential retaliation.

*4 ARGUMENT

I. INTRODUCTION

Every day, 1.8 million workers go to work in agricultural fields and livestock facilities across the United States.² They are the invisible backbone of our food supply. They toil in the scorching sun to pick the grapes, tomatoes, strawberries, melons, beans and other produce that we put on our dinner tables. They stand shoulder-to-shoulder inside frigid meat processing plants, carving over 100 birds per minute to package the chicken breasts that we serve for dinner.³




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Because of limitations in regulatory enforcement, isolation, educational and language barriers, and immigration status, these workers are uniquely vulnerable to employer mistreatment. UFW seeks to improve conditions for farmworkers by helping them to identify violations and enforce their rights. Among other things, UFW helps to investigate farmworker complaints, as well as to document and obtain evidence before filing a formal complaint. UFW, acting within the protection of the First Amendment, also refers farmworkers to legal counsel who can help to report violations to the relevant government authorities or to file civil litigation. See  *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972);  *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (dissemination of *5 information “concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution”). UFW's assistance helps to ensure that farmworkers' complaints are documented as comprehensively as possible, so that government regulators and the courts can consider alleged violations of farmworker rights on their merits, despite most farmworkers' unfamiliarity with the legal system.

Idaho's Ag-Gag Law criminalizes appropriate efforts to investigate and document violations of farmworker rights. In doing so, the law violates the First Amendment and Equal Protection rights of UFW and farmworkers.

II. IDAHO'S AG-GAG LAW CONFLICTS WITH FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND THE RIGHT TO PETITION THE GOVERNMENT.

Idaho's Ag-Gag Law violates the First Amendment because the law targets speech, not just conduct; the law is overbroad; and the law discriminates based on viewpoint. UFW joins in ALDF's brief at Sections I-IV.

Idaho's Ag-Gag Law also violates the First Amendment rights of UFW and farmworkers by prohibiting them from effectively petitioning the government for redress of violations of farmworker rights. The Petition Clause provides that “Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances.” U.S. Const. amend. I. It guarantees the people's right to seek redress for harms by petitioning courts and government *6 agencies.  *California Motor*, 404 U.S. at 510 (“Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition”);  *Gable v. Lewis*, 201 F.3d 769, 772 (6th Cir. 2000);  *Martin v. City of Del City*, 179 F.3d 882, 887 (10th Cir. 1999). Documentary evidence is critical to convincing government regulators and other fact-finders about the urgency and credibility of farmworker petitions. Idaho's Ag-Gag Law undermines the ability of UFW and farmworkers to obtain and document evidence of violations of farmworker rights before filing a formal petition or otherwise seeking resolution of grievances. The law therefore impermissibly restricts the people's right to *effectively* petition the government for redress of grievances. U.S. Const. amend. I.

III. IDAHO'S AG-GAG LAW VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THE LAW DISCRIMINATES ON THE BASIS OF EXERCISING ONE'S FUNDAMENTAL RIGHT TO SPEECH.

Idaho's Ag-Gag Law violates the Equal Protection Clause of the Fourteenth Amendment because the law discriminates on the basis of speech - a fundamental right -- and targets the expression of particular views. UFW joins in the *amicus* brief of Professor Erwin Chemerinsky (Dkt. No. 32) to avoid repeating his arguments here.

***7 IV. IDAHO'S AG-GAG LAW FURTHER MARGINALIZES ALREADY-VULNERABLE FARMWORKERS BY IMPOSING ADDITIONAL BARRIERS TO INVESTIGATING, DOCUMENTING AND REPORTING VIOLATIONS OF FARMWORKER RIGHTS.**

A. Farmworkers Are Among the Most Vulnerable and Marginalized Workers in the United States.


On paper, a number of rights protect farmworkers, including (among others): the right to a workplace free from known health or safety hazards,⁴ the right to a workplace free from sexual harassment and employment discrimination,⁵ the right to receive a minimum wage for one's labor,⁶ and the right to be free from all forms of labor trafficking.⁷

In practice, farmworkers face a number of hurdles to vindicating their rights. Language and lack of education are significant barriers. Approximately 78 percent of farmworkers were born outside the United States, and 44 percent of farmworkers do not speak any English.⁸ On average, farmworkers have only a *8 seventh-grade education.⁹ Further, most farmworkers are not U.S. citizens: approximately 16 percent are foreign migrant workers and 53 percent are undocumented immigrants.¹⁰ When workers do submit a formal complaint, authorities often view unauthorized farmworkers as complicit criminals because of their immigration status.¹¹ Even foreign migrant workers who come to the United States under the H-2A guest worker program could face deportation because they are authorized to work for only the specific employer on their H-2A visas and cannot seek other employment.¹²

Farmworkers also often have few resources to enforce their rights: the average annual total family income for farmworkers ranges from \$17,500 to \$19,999, without taking into account the even lower incomes of unauthorized workers.¹³ Moreover, fear of loss of employment strongly discourages farmworkers from reporting violations by their employers because few safety nets exist for those who lose their jobs. Only 39 percent of farmworkers are eligible for unemployment insurance, and less than 50 percent of farmworkers are eligible for *9 workers' compensation.¹⁴ Approximately one in six farmworkers live in employer-provided housing; for them, losing their job could mean immediate homelessness for their entire family.¹⁵

These factors leave agricultural workers in a "climate of fear,"¹⁶ where they feel "disposable" and are reluctant to report injuries or health or safety violations.¹⁷ They fear being fired for work-related injuries or even for seeking medical treatment from someone other than the company nurse or doctor.¹⁸ In one report, they describe supervisors discouraging workers from reporting work-related injuries, enduring constant pain, and even choosing to stay in the production line and urinate on themselves rather than provoke the ire of a supervisor by leaving for a restroom break.¹⁹

***10 B. Idaho's Ag-Gag Law Criminalizes Effective Investigation, Documentation, and Petition for Redress of Violations of Farmworker Rights.**

Idaho's Ag-Gag Law exacerbates farmworkers' already perilous position by making it more difficult for farmworkers and UFW representatives to conduct a meaningful investigation into alleged violations of farmworker rights before filing a complaint. For example,  Idaho Code § 18-7042(1)(d) prohibits audio and video recordings depicting "the conduct of an agricultural production facility's operations" "without the facility owner's express consent or pursuant to judicial process or statutory authorization." By its plain terms, the provision would criminalize *all* covert audio and video recordings to document violations of farmworkers' rights.²⁰ Because a recording is lawful under the law only if

created with “the facility owner's express consent,”²¹ the prohibition applies even if (1) the person creating the recording is an employee or otherwise has lawful access to the agricultural production facility and (2) the underlying purpose for creating the recording is to document violations of farmworker rights by the facility owner itself.

***11** The other provisions of Idaho's Ag-Gag Law are equally restrictive. Idaho Code §§ 18-7042(1)(a) and 18-7042(1)(c) would prohibit UFW representatives from gaining access to an agricultural production facility -- whether by obtaining employment or otherwise -- if the entry involves a misrepresentation. Likewise, Idaho Code § 18-7042(1)(b) would prohibit farmworkers from obtaining any records -- even if the subject matter concerns the farmworker's own employment -- so long as the attempt involves a misrepresentation. Taken together, these provisions would criminalize *every* attempt to investigate violations of farmworker rights. Each attempt to gain access to, or request records from, an agricultural production facility necessarily involves some degree of misrepresentation unless the UFW representative or farmworker expressly discloses that the purpose for the request is to document a violation of farmworker rights. *See, e.g., Stewart v. Wyoming Cattle Ranch Co.*, 128 U.S. 383, 386-88 (1888) (holding that material omissions are actionable as “misrepresentations”). The provisions would also expose farmworkers to potential retaliation by employers if UFW investigators were forced to disclose the fact that a worker had complained to UFW, or the identity of the complainant, in order to avoid a misrepresentation for purposes of Idaho's Ag-Gag Law that could lead to criminal punishment.

The potential penalties for violating Idaho's Ag-Gag Law serve as a severe deterrent. Violators face up to a year in prison or a fine of up to \$5,000, or both. ***12** Idaho Code § 18-7042(3). In addition, violators are subject to mandatory restitution of twice the amount of damages incurred by the victim (*i.e.*, the agricultural production facility). Idaho Code § 18-7042(4). Mandatory restitution, in particular, has perverse effects. For example, an undercover investigation into violations of farmworker rights may result in a court or agency assessing fines and other penalties against an employer. Yet by its terms, the mandatory restitution provision would require the victimized farmworker (or UFW representative) to indemnify -- and, because of the double-damages provision, *reward* -- the employer for its own illegal conduct.

V. IDAHO'S AG-GAG LAW WOULD PERPETUATE VIOLATIONS OF FARMWORKER RIGHTS BY BLOCKING UFW AND FARMWORKERS FROM INVESTIGATING, DOCUMENTING AND REPORTING COMMON VIOLATIONS.

A. Health and Safety Violations

Agriculture ranks among the most dangerous industries in the United States. The fatality rate for agricultural workers is the highest of any private industry group -- seven times higher than the fatality rate for all other workers.²² Likewise, the injury rate for agricultural workers is over 40 percent higher than the rate for all workers.²³ Farmworkers suffer more chemical-related injuries and illnesses than ***13** any other workforce nationwide because they regularly experience exposure to high levels of pesticides without proper training or protective equipment.²⁴ Meat and poultry processing is also notoriously dangerous. One out of every seven poultry workers is injured on the job -- more than double the average for all private industries²⁵ -- because teams of workers must work with sharp hooks and knives in dangerously tight spaces as chicken carcasses rush by on processing lines at speeds of up to 10,500 chickens per hour.²⁶ These statistics only tell a fraction of the story. OSHA administrators and independent researchers have found a common corporate practice of underreporting injuries of all kinds. One estimate puts the undercount of nonfatal occupational injuries as

high as 69 percent.²⁷ Some of these deaths and injuries result from the inherent dangers in agriculture, but far too often industry employers set workplace policies that unduly add to and exacerbate those inherent risks.


Two recent tragedies serve to illustrate the point. Randy Vasquez worked as a milker for the Riverview Ranch Dairy in Mabton, Washington. On the night of February 24, 2015, Mr. Vasquez jumped into a tractor and attempted to drive *14 across the farm. He was found dead the following morning, trapped underneath the tractor. It had overturned in six feet of cow manure. According to the coroner, Mr. Vasquez died of “asphyxiation due to inhalation of dairy waste water sludge.”²⁸ Less than a year later, a similar accident happened. Ruperto Vazquez-Carrera was last seen before sunrise on February 16, 2016. He was driving a feed truck where he worked at the Sunrise Organic Dairy in Paul, Idaho. He was found dead later that day submerged in a large, 20-acre manure pond.²⁹ These deaths could have easily been prevented had the dairy farms installed fencing or some other protective safeguard around the manure pits, or adequate lighting to make the manure pits more visible at night. But the farms failed to take reasonable steps to protect their workers from the significant hazards, and two innocent people died as a result.

OSHA has primary responsibility for enforcing federal laws requiring employers to provide a workplace free of known health and safety hazards. But OSHA cannot sufficiently protect workers all by itself. OSHA is responsible for *15 inspecting 7 million workplaces but lacks the resources to do so effectively.³⁰ According to one estimate, it would take OSHA 115 years to inspect each workplace in the country just once.³¹ Because of its limited resources, OSHA relies heavily on employees to report credible workplace hazards. OSHA prioritizes complaints if the complaint demonstrates that there are reasonable grounds to believe that there is a safety or health hazard or other violation of an OSHA standard.³² The more credible the complaint, the more likely OSHA is to investigate the workplace at issue.³³ As a result, it is crucial that the initial complaint be as comprehensive and detailed as possible.

Idaho's Ag-Gag Law will undermine an already inadequate system for enforcing farmworker safety. As Section IV.B above notes, the law would cripple UFW's ability to gain access to agricultural facilities for the purpose of verifying and documenting farmworker complaints of unsafe working conditions. Moreover, it would deprive UFW and farmworkers of valuable tools to depict the nature and severity of safety and health violations, namely audio and video recordings and other credible documentation of actual conditions.

*16 UFW relies on access to worksites and the ability to make or obtain records of safety conditions to vindicate farmworker rights. After a string of heat-related deaths in the agricultural fields of California, for example, UFW undertook a comprehensive investigation of the enforcement of California's heat illness prevention laws.³⁴ UFW organizers went out to the fields and documented heat conditions and workers' access to shade and water. They took photographs of unsafe workplaces and maintained records of the actions of regulators and employers. UFW found that well over 156,000 farmworkers at 8,400 California farms toiled in manifestly unsafe conditions due to heat and that Cal/OSHA³⁵ systemically ignored worker complaints or otherwise failed to conduct investigations, issue citations, or collect penalties from employers for these heat-related hazards.³⁶ Based on its investigation, UFW brought two lawsuits against Cal/OSHA alleging failures to protect farmworkers from heat illness and heat-related death.³⁷ UFW and Cal/OSHA negotiated a settlement of the two lawsuits *17 which established more effective, timely and consistent inspections of farm and other outdoor worksites under California's heat illness prevention regulations.³⁸

Individual workers have also used these tools to combat abuse of their right to a safe workplace. In *Rodriguez v. Carlson*, 943 F. Supp. 1263, 1270-71 (E.D. Wash. 1996), a group of migrant workers used videotapes to depict various health and

safety violations, including so-called “housing” provided by employers that was made of tents, tarps and cardboard.³⁹ Under Idaho's Ag-Gag Law, these migrant workers would have committed criminal acts.  Idaho Code § 18-7042(1)(d).

B. Sexual Harassment and Violence

The extent of sexual violence and harassment against agricultural workers is inherently difficult to determine, but reputable reports and anecdotal evidence suggest that sexual harassment and violence -- which includes offensive comments, grabbing, touching, humiliation, and repeated inappropriate propositions -- is ***18** rampant.⁴⁰ For example, farmworker complaints to the Equal Employment Opportunity Commission (“EEOC”)⁴¹ have referred to agricultural fields as the “field *de calzon*” [field of panties] and the “green motel” due to supervisors' routine rape of female farmworkers in the fields.⁴² In Iowa, migrant workers and undocumented immigrants said the problem is so pervasive that they believed it was standard practice to exchange sex for job security in the United States.⁴³

Statistics corroborate these reports. One survey of Mexican immigrant farmworkers found that 80 percent of women farmworkers in California's Central Valley experienced some form of sexual harassment.⁴⁴ Virtually all of the women who reported experiencing sexual harassment also experienced sexist comments and degrading insults.⁴⁵ ASISTA, a legal and advocacy group dedicated to helping immigrant survivors of sexual assault, surveyed women working in Iowa meatpacking plants. Forty-one percent said they had experienced unwanted touching, and thirty percent reported receiving sexual propositions.⁴⁶

***19** These numbers likely understate the true extent of the problem because the rate of reporting rape or sexual assault is particularly low in the Latino community. According to a recent survey of sexual assault among Latinas, only 6.6 percent of Latinas who had experienced sexual victimization (defined to include sexual assault, attempted sexual assault, and fondling/forced touch) reported that they had contacted the police, and only 21 percent reported that they had sought formal help of any kind.⁴⁷

The nature of the work also heightens the vulnerability of female farmworkers. Agricultural workers face geographic isolation that results from working in vast rural farms and fields, contributing to a culture of fear and lawlessness.⁴⁸ Remote fields and orchards embolden potential attackers and leave female farmworkers far away from help or witnesses. Many women report their attacks took place in remote almond or apple orchards or vast hidden groves of tall bushes, trees, or grapevines.⁴⁹

***20** Moreover, in agriculture, farmworker women depend almost entirely on men for continued employment.⁵⁰ Foremen, or *mayordomos*, have significant responsibility at agricultural production facilities, including hiring and training workers, setting wages, allocating work assignments, and arranging housing and transportation for migrant workers.⁵¹ Reports indicate that foremen commonly view the possibility of sexual relations with subordinates as a perk of the job.⁵² Some accuse *mayordomos* of intentionally assigning women to work in remote parts of the field in order to isolate the women and make them more susceptible to sexual assault by men.⁵³

Women farmworkers often feel that they have no recourse when sexual harassment or violence occurs. Human Rights Watch reports that farmworkers who lodge complaints of abuse often experience retaliation in the form of job loss, more difficult or dangerous job assignments, lower pay, or even more violence.⁵⁴ One in six workers live at their worksites

and also face potential homelessness for their families. Moreover, survivors of sexual assault face significant barriers to *21 justice.⁵⁵ Law enforcement and prosecutors may opt not to pursue investigations and prosecutions. Some attribute this inaction to prejudice and misconceptions regarding undocumented immigrants.⁵⁶ Others cite practical difficulties in pursuing cases, such as scant or lost evidence, or lack of witnesses.⁵⁷

Unable to rely on authorities, farmworkers often turn to UFW to investigate claims and assist in filing civil suits. For example, in *EEOC v. Giumarra Vineyards Corporation*, a teenage female farmworker experienced sexual harassment at Giumarra Vineyards, one of the largest growers of table grapes in the nation.⁵⁸ The man made sexual advances, made abusive and offensive sexual comments, and inappropriately touched the victim.⁵⁹ A group of farmworkers complained to their employer about the abuse in an effort to help and intervene. Only one day after lodging the complaint, the vineyard retaliated. Giumarra Vineyards fired the teenage victim and each of the others who filed the complaint.⁶⁰ UFW representatives investigated the claims and referred these *22 victims of harassment and retaliation to a local attorney. The EEOC later brought an action against the vineyard alleging the employer violated Title VII. The EEOC secured a favorable settlement where Giumarra Vineyards agreed to devote \$350,000 to resolve the case and implement preventative measures throughout its facilities, such as sexual harassment training and notices of workers' rights.⁶¹ UFW's investigation and referral of this case was vital to enforce the rights of these vulnerable workers, but, as discussed in Section IV.B above, UFW could not continue to investigate such claims under Idaho's Ag-Gag Law. Nor could workers experiencing repeat harassment or retaliation record such interactions.

C. Labor Trafficking

The law defines labor trafficking as the “obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁶² Although labor trafficking is prohibited under federal and Idaho state law,⁶³ it remains a serious problem in the United States. Since 2007, there have been over 4,500 reported instances of labor trafficking in the United States, involving over 8,000 victims.⁶⁴ *23 The agriculture industry is especially susceptible to labor trafficking, and it ranks as one of the top five sectors for forced labor in the United States.⁶⁵

Idaho is hardly immune from the practice. Earlier this year, an Idaho-based tree cutting company, Pure Forest, settled a civil case involving labor trafficking charges.⁶⁶ According to the complaint, Pure Forest brought migrant workers into the U.S. through the H-2B visa program⁶⁷ under false promises of a 40-hour work week with good pay and free lodging.⁶⁸ Instead, the company confiscated the workers' passports and took them to a remote work location in the Sierra Nevada.⁶⁹ Pure Forest forced the workers to sleep in a crowded tent and charged them for sleeping bags.⁷⁰ The company forced the workers to plant trees and spray dangerous chemicals without proper equipment for 12 to 13 hours a day, six days a *24 week, while illegally deducting expenses for travel, their visas, food, and a separate \$60 cooking fee from their pay, consuming nearly the workers' entire paychecks.⁷¹ Pure Forest supervisors were always armed and constantly threatened the workers with physical violence.⁷² Trapped in a remote part of a foreign country where they did not speak the language, the workers escaped only when Pure Forest determined it no longer needed their services and boarded the workers on a bus back to Mexico.⁷³ UFW is currently conducting an investigation into another labor trafficking operation in Idaho involving dairy farms abusing the visa system and workers.

The agriculture industry is especially prone to labor trafficking as a result of the geographic isolation of work.⁷⁴ In one case, *U.S. v. Kaufman*, farm owners forced mentally ill persons to perform hard manual labor on their farm, often in the nude, for years before children on a school bus happened to notice there were *naked men working in the fields*.⁷⁵ Most labor trafficking victims suffer under conditions not readily visible across a field, and they are further vulnerable due to language barriers and immigration status. Employers and traffickers often *25 confiscate victims' identification, force the victims to live onsite, and forbid them from leaving their work places, limiting their access to the surrounding community.⁷⁶

For example, in *John Does I-V v. Rodriguez*, farm labor contractors illegally smuggled dozens of farmworkers into the United States and forced them to live in squalid, insect-infested labor camps, without access to safe drinking water and only two showers for 40 workers. Amended Complaint at 11, No. 06-cv-00805 (D. Colo. Nov. 2, 2006), ECF No. 7. The workers were told that they owed the traffickers \$1,300 in fees for getting them into the U.S. and could not leave their employment until they paid back that debt. *Id.* Despite working 12 hours a day, the workers made almost no money, because their trafficker deducted for rent, transportation, and for “bathroom cleaning,” even though three out of four toilets were not functional.⁷⁷ The workers were isolated and under constant surveillance. Even when they were out working in the fields, their trafficker would watch them with binoculars to make sure they didn't escape, and at night their trafficker would drive around the labor camp -- which was already surrounded by a chain link fence -- to prevent workers from leaving. Amended Complaint at 12-15, *Rodriguez*, No. 06-cv-00805. Eventually, the workers were able to escape with the help of a nun, *26 who was supposed to be on the labor camp only to lead prayers, and an attorney for a legal aid service, who videotaped the workers and helped them seek civil and criminal redress.⁷⁸ Under Idaho's Ag-Gag Law, the nun and attorney who helped the workers seek justice would have committed criminal acts.

In 2015, UFW launched a Forced Labor Program to address labor trafficking, debt peonage and slavery in U.S. agriculture. This program uses education, outreach and collaboration with law enforcement to support reporting, investigation and prosecution of labor and human rights violations. UFW's first documented labor trafficking case involved a group of workers in rural Idaho. UFW is currently investigating the allegations and otherwise assisting the victims to prosecute their case. But, as discussed above, UFW could not continue to investigate those claims under Idaho's Ag-Gag Law.

D. Wage Theft

The FLSA⁷⁹ and the AWPAA⁸⁰ require employers to pay agricultural workers a minimum wage. Nevertheless, wage theft is rampant. For example, a 2012 survey of New Mexico farmworkers found that over two-thirds experienced wage theft in 2011, and nearly half were paid less than the minimum wage.⁸¹ One of the *27 most widespread practices is paying farmworkers “piece-rates,” which means that the farmworker is paid a set amount for each piece of crop harvested.⁸² Piece-rates often fail to pay farmworkers the minimum wage; although the law requires employers to make up the difference, many do not. For example, a 2009 study found that Oregon farmworkers paid on “piece-rate” basis earned less than the minimum wage 90 percent of the time and on average received 37 percent less than the minimum wage.⁸³




The lax regulation of the agriculture industry encourages wage theft and leaves workers to enforce their right to lawful pay on their own. The agriculture industry is exempt from many worker regulations, including many FLSA protections.⁸⁴ The National Labor Relations Act (“NLRA”) also excludes farmworkers, denying them the right to

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collective bargaining.⁸⁵ Moreover, there is little government enforcement of the current regulations, and the penalties for violations are low. In 2008, less than 1 percent of the investigations conducted by *28 the Department of Labor involved alleged wage theft under the AWP, and the average penalty was a paltry \$342.⁸⁶

Absent effective government enforcement, farmworkers must rely on civil litigation in order to receive their agreed-upon wages for all hours worked. UFW assists many farmworkers each year in investigating wage theft complaints before formal litigation. A number of these have resulted in major class action wage and hour litigation brought on behalf of tens of thousands of farmworkers, including suits against Delano Farms, Gerawan Farming, Giumarra Vineyards, and Sunview Vineyards.

The class action against Delano Farms is particularly instructive. As a result of UFW's pre-suit investigation, the complaint was able to include detailed factual allegations regarding the myriad ways in which the defendants engaged in wage theft, including: (a) forcing farmworkers to work "off-the-clock" organizing tables, wheelbarrows, trays, packing material, bags, boxes and other materials and equipment essential for the harvest; (b) forcing farmworkers to work "off-the-clock" by attending training before the official, recorded start of the work day; (c) forcing farmworkers to work "off-the-clock" by cleaning up or finishing packing boxes after the official, recorded end of the work day; (d) forcing farmworkers to work "off-the-clock" by requiring them to arrive before the start of the work day *29 and wait for their designated foremen to arrive; (e) forcing farmworkers work "off-the-clock" by carrying out certain tasks at home without compensation; (f) forcing farmworkers to purchase and/or maintain tools and equipment at their own cost; (g) failing to provide farmworkers with accurate itemized wage statements; and (h) failing to maintain accurate time-keeping records.⁸⁷

Contemporaneous video recordings of actual workplace conditions can be crucial to proving a wage theft claim. For example, in  *Chavez v. IBP, Inc.*, No. 01-cv-5093, 2005 WL 6304840 (E.D. Wash. May 16, 2005), meat processing employees relied on videotapes to prove their claims. Specifically, the employees' video recordings proved that employees removed their equipment before entering the cafeteria for lunch, which entitled them to back pay for the time it took to remove the equipment.⁸⁸ Indeed, surreptitious recordings have proven crucial to vindicating important labor and employment rights across a wide variety of companies and industries. See, e.g.,  *Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015) (listing dozens of cases). Yet under Idaho's Ag-Gag Law these workers would have committed criminal acts.  Idaho Code § 18-7042(1)(d).

*30 VI. CONCLUSION

Farmworkers are often invisible but face many dangers as a result of industry indifference, predatory employers, and insufficient enforcement. Recording, documenting, and reporting misconduct gives farmworkers a voice to speak out against workplace violations and abuses, educate the government and the public, seek change to public policy, and assert their rights under the law. Organizations like UFW help farmworkers get their message out credibly and effectively, *with evidence*, to obtain redress and justice. To continue to do so effectively, UFW needs to be able to send members onsite to investigate complaints without revealing its motivation and subjecting the complainants to retaliation. Farmworkers need the ability to document dangerous conditions at their workplaces, record abusive interactions with employers and supervisors, and preserve evidence for presentation to an agency or court.

Idaho's Ag-Gag Law serves business interests that want to silence farmworkers and farmworker-interest organizations *precisely to thwart their right to petition government and to seek redress for violations by those business interests*. Idaho's Ag-

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Gag Law would strip farmworkers and organizations like UFW of their ability to effectively investigate and document violations of farmworker rights, in violation of farmworkers' and organizations' First Amendment rights to speak freely and petition the government for redress. The *31 Ag-Gag Law's content-based discrimination against unpopular speech opposite to powerful agribusiness owners also violates farmworkers' and UFW's Equal Protection rights under the Fourteenth Amendment.

For these reasons, and the reasons Plaintiffs-Appellees and fellow *amici* state, this Court should affirm the District Court's ruling that Idaho's Ag-Gag Law is unconstitutional and void.

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Respectfully submitted,

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Footnotes

- 1 Attorneys from Fenwick & West LLP prepared this brief *pro bono* on behalf of UFW. Fenwick & West LLP discloses that Ilana Rubel, a partner of the firm, is a member of the Idaho House of Representatives and voted on  Idaho Code § 18-7042 when it was a bill before the Idaho Legislature. Ms. Rubel did not participate in any way in the engagement of UFW or in the preparation or submission of this brief.
- 2 *Cultivating Fear*, Human Rights Watch (May 15, 2012), at 15, https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.
- 3 *Unsafe at These Speeds*, Southern Poverty Law Center (Feb. 28, 2013), at 5, https://www.splcenter.org/sites/default/files/Unsafe_at_These_Speeds_web.pdf.
- 4 See, e.g., Occupational Safety and Health Act of 1970 (“OSHA”), 29 U.S.C. § 651 *et seq.*
- 5 See, e.g., Title VII of the Civil Rights Act of 1964 (“Title VII”),  42 U.S.C. § 2000e *et seq.*
- 6 See, e.g., Fair Labor Standards Act (“FLSA”)  29 U.S.C. § 206; Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) 29 U.S.C. § 1822.
- 7 See, e.g., Trafficking Victims Protection Act of 2000,  22 U.S.C. § 7102 (9)(B); Racketeer Influenced and Corrupt Organizations Act (“RICO”),  18 U.S.C. § 1964(c); Human Trafficking, Idaho Code § 18-8602(2).

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Dep't of Labor, *A Demographic and Employment Profile of United States Farm Workers: Findings from the National Agricultural Workers Survey (NAWS) 2001-2002*, Research Report No. 9 (March 2005).

Id.

Id.

National Institute of Justice, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases* (April 2012), at 184.

See *Hidden Slaves: Forced Labor In The United States*, Human Rights Center, University of California, Berkeley (Sept. 2004), <http://www.freetheslaves.net/wp-content/uploads/2015/03/Hidden-Slaves.pdf> [hereinafter, "Hidden Slaves"].

Human Rights Watch, *supra* note 2, at 18.


Id.

Inventory of Farmworker Issues and Protections in the United States, Bon Appétit Management Company (Mar. 31, 2011), at 23, http://www.bamco.com/content/uploads/2016/06/farmworkerinventory_updated2016.pdf.


Southern Poverty Law Center, *supra* note 3, at 4.

Injustice on Our Plates, Southern Poverty Law Center (Nov. 7, 2010), at 23, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf.

Southern Poverty Law Center, *supra* note 3, at 3.

Id.; see also  *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-33 (5th Cir.1985) ("[F]arm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations.").

Idaho permits electronic recording of conversations with the consent of at least one party to the conversation. Idaho Code § 18-6702.

The prohibition also exempts recordings created "pursuant to judicial process or statutory authorization,"  Idaho Code § 18-7042(1)(d), but nothing indicates that the exemption applies to recordings created before, and for the purpose of, a lawsuit or administrative complaint.

OSHA Safety and Health Topics: Agricultural Operations, Dep't of Labor, <https://www.osha.gov/dsg/topics/agriculturaloperations/> (last visited June 27, 2016).

Id.

Id.; Farmworker Justice, *Exposed and Ignored: How Pesticides are Endangering our Nation's Farmworkers* (2011), at 5-6.

Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants, Human Rights Watch (Jan. 24, 2005), at 36, <https://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

Id.; Southern Poverty Law Center, *supra* note 3, at 32.

See J. Paul Leigh et al., *An Estimate of the U.S. Government's Undercount of Nonfatal Occupational Injuries*, 46 J. Occupational & Env'tl. Med. 10, 16 (2004).

Jeff Johnson, *Mourn Randy, Fight for Dairy Workers' Safety*, The Stand (Apr. 7, 2015), <http://www.thestand.org/2015/04/mourn-randy-fight-for-dairy-workers-safety/>.

Another Dairy Worker Drowns in a Manure Lagoon in Less Than a Year, United Farm Workers (Mar. 11, 2016), <http://action.ufw.org/page/speakout/idaho>.

OSHA Factsheet: OSHA Inspections, Dep't of Labor, https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf (last visited June 27, 2016).

Human Rights Watch, *supra* note 25, at 28.

OSHA: Federal OSHA Complaint Handling Process, Dep't of Labor, <https://www.osha.gov/as/opa/worker/handling.html> (last visited June 27, 2016).



Id.

Complaint at 1-3, *Bautista v. Cal. Dep't of Occupational Safety & Health*, No. BC-494056, 2012 WL 5305185 (L.A. Cnty. Super. Ct. Oct. 18, 2012) ("*Bautista I*").


Cal/OSHA is the California state agency with primary responsibility for enforcing California's occupational health and safety laws.

Complaint at 1-3, *Bautista II*.

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- 37 *Id.*; see also Complaint, *Bautista v. Cal. Dep't of Occupational Safety & Health*, No. BC-418871 (L.A. Cnty. Super. Ct. Jul. 30, 2009) (“*Bautista I*”).
- 38 *Better Enforcement of Farm-Worker Heat Rules as UFW and Brown Administration Settle Lawsuit*, United Farm Workers (June 11, 2015), http://www.ufw.org/_board.php?mode=view&b_code=heat_news&b_no=17192&page=1&field=&key=&n=320. The 2005 California heat regulations -- which were the first of their kind in the nation -- were enacted only after UFW and others submitted documentary evidence of the dangerous conditions under which farmworkers toil.
- 39 *Rodriguez v. Carlson* involved violations of the AWPFA, which requires employer-provided housing for migrant workers to comply with federal and state health and safety standards. 29 U.S.C. § 1823(a).
- 40 Southern Poverty Law Center, *supra* note 17, at 42-44.
- 41 The EEOC has primary responsibility for enforcing federal laws prohibiting employment discrimination and sexual harassment.
- 42 Human Rights Watch, *supra* note 2, at 23.
- 43 Southern Poverty Law Center, *supra* note 17, at 46.
- 44 *Id.*
- 45 Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 Violence Against Women 237, 240 (2010).
- 46 Bernice Yeung & Grace Rubenstein, *Female Workers Face Rape, Harassment in US Agriculture Industry*, Center for Investigative Reporting (June 25, 2013), <http://cironline.org/reports/female-workers-face-rape-harassment-us-agriculture-industry-4798>.
- 47 Human Rights Watch, *supra* note 2, at 77.
- 48 Joseph S. Guzmán, *State Human Traffic Laws: A New Tool to Fight Sexual Abuse of Farmworkers*, 46 Colum. Hum. Rts. L. Rev. 288, 297 (citing Human Rights Watch, *supra* note 2, at 21).
- 49 Guzmán, *supra* note 49, at 297 (citing Waugh, *supra* note 45, at 245).
- 50 Southern Poverty Law Center, *supra* note 17, at 46.
- 51 Human Rights Watch, *supra* note 2, at 22.
- 52 *Id.*
- 53 *Frontline: Rape in the Fields* (PBS television broadcast June 25, 2013), <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>.
- 54 Human Rights Watch, *supra* note 2, at 46-48.
- 55 *I Used to Think the Law Would Protect Me*, Human Rights Watch (July 7, 2010), <https://www.hrw.org/report/2010/07/07/i-used-think-law-would-protect-me/illinois-failure-test-rape-kits>.
- 56 Human Rights Watch, *supra* note 2, at 77.
- 57 *Id.*
- 58 Complaint at 4-5, No. 1:09-cv-02255, 2009 WL 8747241 (E.D. Cal. Dec. 29, 2009); see also, Press Release, EEOC, *Giumarra Vineyards Sued by EEOC for Sexual Harassment and Retaliation Against Farm Workers* (Jan. 13, 2010), <https://www.eeoc.gov/eeoc/newsroom/release/1-13-10.cfm>.
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 See Trafficking Victims Protection Act of 2000,  22 U.S.C. § 7102(9)(B).
- 63 See *id.*; RICO,  18 U.S.C. § 1964(c); Human Trafficking, Idaho St. § 18-8602(2).
- 64 See Labor Trafficking, National Human Trafficking Resource Center, <https://traffickingresourcecenter.org/type-trafficking/labor-trafficking> (last visited June 27, 2016).
- 65 See Hidden Slaves, *supra* note 12.
- 66 See Notice of Settlement, *John Doe I v. Pure Forest, LLC*, No. 2:14-cv-00879 (E.D. Cal. Jan. 14, 2016), ECF No. 30.
- 67 U.S. Citizenship and Immigration Services offers temporary visas for nonimmigrant, temporary workers to come to the United States lawfully for seasonal work. H-2B visas are available for non-agricultural workers, but, Idaho's Ag-Gag

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Law is so broadly written that a lumber business would likely fall under the statute. See  Idaho Code § 18-7042(2) (a) (“ ‘Agricultural production’ means activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses and includes without limitation...(iv) Planting, irrigating, growing, fertilizing, harvesting or producing...horticultural...crops, ...nursery stock, and other plants, plant products, plant byproducts, plant waste and plant compost...”).

68 See Complaint ¶¶ 11-13, 16, *John Doe I v. Pure Forest, LLC*, No. 2:14-cv-00879, 2014 WL 1593351 (E.D. Cal. Apr. 8, 2014), ECF No. 1.

69 *Id.* ¶¶ 14, 19-22.


70 *Id.* ¶¶ 15, 20.

71 *Id.* ¶¶ 23-41.

72 *Id.*

73 *Id.* ¶ 43.

74 See *Hidden Slaves*, *supra* note 12.

75  *U.S. v. Kaufman*, 546 F.3d 1242, 1246 (10th Cir. 2008); see also *U.S. v. Kaufman*, No. CRIM.A.04-40141-01, 2005 WL 2304345, at *1 (D. Kan. Sept. 21, 2005).

76 See generally *Hidden Slaves*, *supra* note 12.

77 Felisa Cardona and Kevin Vaughan, *Fields of Fear for Colorado Illegal Farm Laborers*, *Denver Post*, May 16, 2009.

78 *Id.*

79  29 U.S.C. § 206.

80 29 U.S.C. § 1822.

81 *Human Rights Alert: New Mexico's Invisible and Downtrodden Workers*, New Mexico Center on Law and Poverty, http://www.fronterasdesk.org/sites/default/files/field/docs/2013/07/Report-FINAL-PDF-2013-06-28_1.pdf (last visited June 27, 2016).

82 *U.S. Department of Labor Enforcement in Agriculture*, Farmworker Justice, [https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport201%20\(1\).pdf](https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport201%20(1).pdf) (last visited June 27, 2016).

83 *Id.*

84  29 U.S.C. § 207.

85  29 U.S.C. § 152(b).

86 *Weeding Out Abuses*, Farmworker Justice and Oxfam America (2010), <http://www.oxfamamerica.org/static/media/files/weeding-out-abuses.pdf>.

87 Class Action Complaint, *Arredondo, et al. v. Delano Farms Co.*, No. 1:09-cv-01247 (E.D. Cal. July 17, 2009), ECF No. 2.

88  *Chavez*, 2005 WL 6304840, at *15.

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