



ALDF v. OTTER

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Idaho Code Section 18-7042

- A person commits the crime of interference with agricultural production if the person knowingly:
 - (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, **misrepresentation** or trespass;
 - (b) Obtains records of an agricultural production facility by force, threat, **misrepresentation** or trespass;
 - (c) Obtains employment with an agricultural production facility by force, threat, or **misrepresentation** with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
 - (d) Enters an agricultural production facility **that is not open to the public** and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, **makes audio or video recordings of the conduct of an agricultural production facility's operations....**



Statutory Summary

- Targets Two Types of Activity
 - Crime to make a misrepresentation when requesting a tour, obtaining records, or seeking employment
 - Crime to videotape or audio-record at an ag facility without permission
 - (In addition to normal tort/trespass type actions)
- Penalty
 - Felony Offense punishable by up to a year in prison
 - Liable for twice business economic loss



ALDF Legal Challenge

- ALDF argued that Section 18-7042 has the purpose and effect of stifling public debate about agriculture by:
 - (1) Criminalizing employment-based undercover operations;
 - (2) Criminalizing investigative journalism and whistleblowing.
- Constitutional Challenges
 - First Amendment
 - Equal Protection Clause
- Federal Preemption



Idaho Law Unconstitutional

- Idaho Federal District Court
 - Section 18-7042 violates the First Amendment
 - Section 18-7042 Violates the Equal Protection Clause



First Amendment Background

- Overview
 - 1st Amendment: protects freedoms of speech, press, religion
 - Extended to States under incorporation doctrine by *Gitlow v. NY* (1925)
 - Government shall make “no law” abridging the freedom of speech
 - Some categories of “low-value” speech are not protected: defamation, libel, obscenity, fraud.



First Amendment Analysis

- Is it Speech? Or Conduct?
- Is it Content-Based?
- Does the Gvmt have ample justification?
 - If CB, strict scrutiny: compelling governmental interest and narrowly tailored
 - If not CB, a balancing test of sorts: must be a substantial governmental interest, must be narrowly tailored, and must leave open alternative avenues for communication.
 - Time, Place, and Manner restrictions are ok, *i.e.*, no speech within a reasonable abortion-clinic buffer zone.



United States v. Alvarez

- Xavier Alvarez attended a water district meeting, and introduced himself: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor."
- The Stolen Valor Act of 2005 makes it a crime to falsely claim receipt of military decorations or medals.
- Penalties increased for the Medal of Honor



United States v. Alvarez (Plurality)

- Stolen Valor Act violates the First Amendment
 - Government argued that false speech was entitled to no protection.
 - Court disagreed, holding that a statute that targets falsity, **and nothing more**, had not been decided by case law; precedent concerned cases about defamation, fraud, or another legally cognizable harm.
 - Stolen Valor Act sought to control and suppress all false statements on this one subject in almost limitless times and settings without regard to whether the lie was made for the purpose of material gain.



United States v. Alvarez (Concurrence)

- False statements enjoy little 1st Amendment protection, but not zero.
- False statements are less likely than true factual statements to make a valuable contribution to the marketplace of ideas; government often has good reason to prohibit such speech.
- Applied a balancing test or “Intermediate Scrutiny”
 - examine the fit between statutory ends and means, taking into account the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the statute will tend to achieve those objectives, and whether there are other, less restrictive alternatives. “Intermediate scrutiny” describes this approach. Although the Court has frequently said or implied that false factual
 - Statute Fails Under 1st Amendment because too broad



United States v. Alvarez (Dissent)

- False speech is not entitled to First Amendment protection.



Two Questions in *Otter*

- Do the misrepresentation provisions violate the First Amendment under *Alvarez*?
- Do the recording provisions violate the First Amendment, at least as applied to employees?



Otter: Content-Based Restrictions

- § 18-7042 is “is a content-based restriction” to which the highest level of scrutiny applies.
 - § 18-7042 “targets undercover investigators who intend to publish videos they make through the press and seeks to suppress speech critical of animal agricultural practices.”
 - Not intended to protect private property



Misrepresentation Provisions Violate 1st Am.

- *Otter* Court: *Alvarez* held that the government may criminalize false statements only when those statements themselves cause a “legally cognizable harm.”
 - Here, however, Idaho has done nothing to show the lies it seeks to prohibit cause any legally cognizable harm.
 - Section 18-7042 does not limit its misrepresentation prohibition to false speech amounting to actionable fraud, defamation, conversion, or trespass.
 - Rather, it sweeps into its prohibition all lies used to gain access to property, records, or employment—regardless of whether the misrepresentations themselves cause any material harm.



Suspect (Highly!) Because ...

- *Alvarez* plurality: false claims “made to . . . secure moneys or other valuable considerations, **say offers of employment,**” are not protected.
- If you count votes, 5 Justices found false statements to have little (or no) speech value.
- There is no question of harm, here: Trespass is the quintessential harm to private property.
- If such actions can constitutionally be treated as a tort, they can constitutionally be treated as a crime.



The Recording Provision

- *Otter*: Unconstitutional because audio-visual recordings are “purely expressive activity”
 - § 18-7042 facially discriminates based on content because it only targets speech concerning the “conduct of an agricultural production facility’s operations”
 - The evidence also indicates that § 18-7042’s underlying purpose is to silence animal activists.



Suspect Because ...

- Law concerning audio-visual is more nuanced than Court let's on.
- Legislative history probably off-limits because of *O'Brien*.



Unsettled Law Re: Videotaping

- No Supreme Court decision directly addresses a photographer/videographer's First Amendment rights.
 - 1st Amendment has been extended to conduct “sufficiently imbued with elements of communication”
 - *Hurley* (1995): “To achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed.”
 - Such speech (or conduct like videotaping) is protected in the “public forum.”
 - Even so, as the ACLU website explains: On private property, the owner can set the rules regarding videotaping.



Content Neutral?

- Idaho: content neutral because it does not regulate speech based on what is said (*i.e.* content) but instead on where it is said, *i.e.* at an agricultural production facility.
 - In *McCullen*, the Supreme Court held that buffer zones outside of abortion clinics are content neutral. “Whether petitioners violate the Act depends not on what they say . . . but simply on where they say it.”
 - § 18-7042 prosecuted only if content of ag operations.



Strict Scrutiny

- No compelling interest
 - Court misreads *Alvarez* (again!)
 - No compelling interest in protecting private property.
- Not narrowly tailored
 - Other laws already sufficiently protect these interests, fraud, trespass, etc.
 - Counter-speech



Equal Protection

- General Framework
 - Suspect Class = Heightened Scrutiny
 - Non-suspect Class = Rational Basis Review
- Is there a classification?
 - Court: Section 18-7042 discriminates on its face by classifying between whistleblowers in the agricultural industry and whistleblowers in other industries.
- Rationally related?
 - The State contends that the purpose of § 18-7042 is to protect the private property of agricultural facility owners by guarding against such dangers as trespass, conversion, and fraud. **But the State fails to explain** why already existing laws against trespass, conversion, and fraud do not already serve this purpose
 - Likewise, **the State fails to provide a legitimate explanation** for why agricultural production facilities deserve more protection from these crimes than other private businesses.



Real Rational Basis Review

- State need not proffer explanation
- It is “entirely irrelevant” what end the government is actually seeking
- Statutes can be based on “rational speculation unsupported by evidence or empirical data.”
- Courts obligated to seek out conceivable reasons for validating challenged laws
- Courts can hypothesize legitimate interests.



Key to the Decision

- Animal agriculture is a heavily-regulated industry and food production and safety **are matters of the utmost public concern.**
- “Speech on matters of public concern . . . is at the heart of the First Amendment's protection.”
- Substantive Due Process Review:
 - “The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws ... because they may be unwise, improvident, or out of harmony with a particular school of thought.”



Bottom-Line

- Misrepresentation provisions are aimed at specific torts/ crimes and satisfy the *Alvarez* harm standard.
- Videotaping provision may be content-based, and thus may require some special justification.
- To the extent, the Court suggests a First Amendment right to lie to video on private property, incorrect. This would be inconsistent with trespass and fraud statutes.



Thank you!

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