

No. 24-1061

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**In the  
Supreme Court of the United States**

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PROJECT VERITAS, et al.,

*Petitioners,*

v.

NATHAN VASQUEZ, *in His Official Capacity as  
Multnomah County District Attorney, et al.,*

*Respondents.*

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On Petition For A Writ of Certiorari to the  
United States Court of Appeals for the Ninth  
Circuit

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**BRIEF OF AMICUS CURIAE  
LIFE LEGAL DEFENSE FOUNDATION  
IN SUPPORT OF PETITIONERS**

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## INTERESTS OF AMICUS CURIAE<sup>1</sup>

*Amicus* Life Legal Defense Foundation (“Life Legal”) is a California non-profit corporation that provides legal assistance to pro-life advocates. Life Legal is concerned about federal, state and local governments’ abuse of their powers to silence the speech of those with whom they disagree. With the overturning of *Roe v. Wade* and the return of the issue of abortion “to the people and their elected representatives” (*Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022)), the need to protect the speech of pro-life citizens has taken center stage. Life Legal supports preserving all avenues for individuals to practice their constitutional right to freedom of speech and of the press and opposes limitations on those freedoms for the questionable purpose of preserving the right to “conversational privacy” at the expense of robust and truthful reporting.

## SUMMARY OF ARGUMENT

Or. Rev. Stat. § 165.540(1)(c) (“Statute”) is an unconstitutional limitation on undercover reporters’ newsgathering activities. Undercover reporting has existed for well over a century, providing vital information that could not have been obtained through traditional means. These news stories have

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<sup>1</sup> Pursuant to Rule 37, no counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* or its counsel funded it. Counsel for all parties were notified more than ten days prior to the filing of this brief.



exposed wrongdoing by powerful individuals in business and government, heightened public awareness of hidden corruption, held bad actors accountable for their conduct, and spurred much-needed reforms that may not have come about otherwise. Whether a reporter uses a pencil and paper, a computer, a camera, or a secret recording device is immaterial to the level of First Amendment protection afforded. First Amendment protections extend to new as well as old media. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (holding that a California law prohibiting the sale or rental of violent video games to minors could not satisfy strict scrutiny and therefore violated the First Amendment). A brief history of undercover reporting will illustrate the importance of this genre and the need to maintain reporters’ access to all of the tools, traditional as well as modern, that are necessary to conduct their important work.

## ARGUMENT

### **I. Oregon’s Statute Unjustifiably Handicaps Undercover Reporting.**

By prohibiting recording of conversations in any setting without all parties being “specifically informed” of the recording, Oregon Rev. Stat. § 165.540(1)(c) (“Statute”) threatens to undermine the efficacy of investigative journalism. Undercover reporting frequently relies on surreptitious recordings to corroborate its potentially explosive findings.

For well over a hundred years, undercover reporting has served a vital role in shaping public

opinion and bringing about much-needed reforms. The note-taking of the past has its modern equivalent in recordings. Both are types of speech creation, which is entitled to First Amendment protection. *Brown*, 564 U.S. at 792 n. 1 (“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”); *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011) (“[T]he creation and dissemination of information are speech within the meaning of the First Amendment.”) Both modes of expression are entitled to First Amendment protection, because “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” *Brown*, 564 U.S. at 790. As this Court has held, “In this Nation, every writer, actor, or producer, *no matter what medium of expression he may use*, should be freed from the censor.” *Superior Films, Inc. v. Dep’t of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (emphasis added) (reversing state bans on certain motion pictures based on immoral content).

Yet, despite acknowledging the constitutional protection afforded to audio recordings, to speech creation, and to newsgathering (Pet. App.14a – 16a), the lower court dismissed the necessity of secret recordings in some contexts, citing several well-known undercover reporters who did not record (specifically, Nellie Bly, Gloria Steinem, and John Howard Griffin) as proof of its conclusion. The court also offered to the appellants, as a sort of consolation prize, that they still have access to “all the

traditional tools of investigative reporting, including talking with sources, reviewing records, taking photographs, recording videos openly during public and semi-public meetings and events, recording videos that do not capture oral conversations, recording conversations after announcing it is doing so, and making use of Oregon's freedom-of-information laws." Pet. App. 48a.

Because the First Amendment protects the act of speech creation (*Brown, Sorrell*) as well as various types of media (*Brown, Superior Films*, Pet. App. 14a), it logically protects a reporter's choice of media in the act of creating speech. The reporter, not the government, is in the best position to decide the most effective method of pursuing and presenting a particular story.

The Ninth Circuit panel's catalog of investigatory alternatives illustrates this fact. The court failed to consider the reality that corrupt individuals do not wish to be discovered and will deny wrongdoing if they can. As author Brooke Kroeger noted, "[U]ndercover reporting persists because of 'elementary facets of human nature,' the propensity of wrongdoers to avoid comment or lie until confronted with specific evidence to the contrary."<sup>2</sup> Indeed, stonewalling, concealment, and prevarication were the reactions of the targets to the revelations of Bly, one of the reporters in the court's list. See Sec. II.A, *infra*. In light of the human tendency to avoid or shift responsibility, or even to rewrite history in their own minds, undercover

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<sup>2</sup> Brooke Kroeger, *Undercover Reporting: The Truth About Deception*, 256 (2012) (citing attorney John P. Borger), <https://library.oapen.org/bitstream/handle/20.500.12657/31391/1/628774.pdf>.

reporters often choose to employ secret recordings as an effective tool to expose corruption *and* prevent targets from later denying their activities or words. The First Amendment protects the reporters' choice of that method. *Superior Films*, 346 U.S. at 589. If these reporters have to announce in advance that they are recording, they will be unable to compile the "specific evidence" necessary to decisively rebut the defensive lie that is likely to come.

Furthermore, Oregon's Statute has deprived undercover journalists of their choice of using the "medium of expression" (*Id.*) necessary to make their reporting most effective. Sometimes, the proof of wrongdoing resides not in what the targets are apparently *doing*, but rather in what they verbally admit is behind their facially ambiguous conduct. In such cases, audio recording makes more certain and compelling what the video appears to be revealing. *See, e.g.*, Biography of a Bookie Joint, Section II, D, *infra*. Thus, taking video without audio is an inadequate method of capturing and verifying the wrongdoing.

Finally, the Statute is underinclusive if conversational privacy is the goal, which "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. *See also* Pet. for Writ of Certiorari ("Pet. Cert") 31-32 (discussing underinclusiveness of Statute). Oregon does not criminalize the unannounced taking of notes of a conversation, even though publicly exposing conversations based on note-taking could be as much an intrusion into privacy as publishing a recording

of it. As previously stated, the main difference is that, without a recording, the target has the opportunity to falsely deny his statements. Oregon has no valid interest in giving potentially corrupt individuals the opportunity to lie about their activities or statements. It is underinclusive to ban only audio recordings, while allowing note-taking and subsequent disclosure of private conversations, since both are constitutionally protected media, even if they both potentially intrude on “conversational privacy.”

## **II. Undercover Journalism Fills a Necessary Niche in the Field of News Reporting, and the Ninth Circuit Opinion Threatens to Undermine Its Effectiveness.**

A review of famous undercover journalists of the past reveals how important this subset of investigative journalism is to societal reform. They lied about their identities, took careful notes on what they saw and heard and, in modern times, recorded audio and video of their targets’ activities and statements. Powerful societal forces, to say nothing about public apathy, were and continue to be arrayed against them. Therefore, it is critical for undercover journalists not to be stripped of one of the most effective tools for proving their reporting was truthful and accurate.

### A. Nellie Bly – *Ten Days in a Madhouse*

In 1887, Elizabeth Jane Cochrane Seaman (aka “Nellie Bly”), a reporter for Joseph Pulitzer’s *New York World*, assumed the pseudonym Nellie Brown and feigned insanity before police, in court, and in public medical examinations to gain admission to the mental asylum Blackwell’s Island, where she remained for ten days. The subsequent publication in the newspaper of her exposé of the horrible abuse and neglect of insane patients drew outrage. A grand jury investigation resulted in reforms at the asylum.<sup>3</sup> Her report helped spawn the age of undercover journalism.<sup>4</sup>

Nellie’s report included accounts of numerous conversations with women at the temporary home from which she was sent to court;<sup>5</sup> with several doctors who examined her;<sup>6</sup> with other patients in the asylum whom she named;<sup>7</sup> and with staff at the asylum, many of whom she also named. Most of these identified staff treated her poorly and abused her and others by giving them ice cold baths, neglecting to give them warm clothing or adequate food, and choking and beating them.<sup>8</sup>

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<sup>3</sup> Nellie Bly, *Ten Days in a Mad-House* (1887), <https://digital.library.upenn.edu/women/bly/madhouse/madhouse.html>

<sup>4</sup> Arlisha R. Norwood & Mariana Brandman, *Nellie Bly*, National Women’s History Museum (last visited Apr. 18, 2025), <https://www.womenshistory.org/education-resources/biographies/nellie-bly-0>.

<sup>5</sup> Bly, *supra* note 3, at ch. III.

<sup>6</sup> *Id.* at chs. V-VII, IX, XI.

<sup>7</sup> *Id.* at chs. VI, VIII, X-XII.

<sup>8</sup> *Id.* at chs. XI-XIV.

After the *World* reported the story of Bly's harrowing experiences, the institution attempted a cover-up. When the grand jury visited Blackwell's Island, the inmates she had spoken of in her report, with the exception of one, were nowhere to be found, having been transferred elsewhere or discharged. The dismal conditions she described in the kitchen, the poor food quality, the lack of cleanliness and the generally miserable conditions of the establishment had all been amended for the grand jury's visit. Apparently, the asylum had been informed of the visit before it occurred, and thus "[t]he institution was on exhibition, and no fault could be found."<sup>9</sup> Some of the nurses contradicted her story in sworn testimony. Bly lamented, "I hardly expected the grand jury to sustain me, after they saw everything different from what it had been while I was there." Indeed, had it not been for the testimony of one inmate, who corroborated Bly's story, the grand jury would likely not have believed her.<sup>10</sup>

Bly's words underscore the impact that secret recording can have on the success of an undercover assignment. Had that inmate not been there, Bly might not have been believed, and the reforms would not have occurred. The abuse and neglect would have continued.

### **B. Upton Sinclair – *The Jungle***

In 1904, at the behest of the socialist weekly *Appeal to Reason*, Upton Sinclair went undercover for seven weeks to investigate Chicago's

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<sup>9</sup> Bly, ch. XVII.

<sup>10</sup> *Id.*

meatpacking industry. He interviewed various individuals connected with the industry, including health inspectors and workers in the slaughterhouses. These workers smuggled him in so that he could see firsthand the conditions in which they worked. Sinclair's fictional novel *The Jungle* was published in 1906 and described the unsanitary and harmful conditions he had personally observed in the meat-packing plants. As a result, Congress passed the Pure Food and Drug Act and Meat Inspection Act of 1906.<sup>11</sup> This influential work is considered ground-breaking for having opened the eyes of the public and government to the need for better oversight of the food industry. Although critics in his time disparaged Sinclair's work, he was in fact a pioneer in the newly-emerging field of journalists exposing corruption in government and business.<sup>12</sup>

The popular account of Sinclair's exploit and the resulting legislation generally does not mention that his claims were not initially believed by government officials. An investigation by the Bureau of Animal Industry, part of the U.S. Department of Agriculture, reported, "*The Jungle* was mostly lies and exaggerations."<sup>13</sup> Furthermore, President Theodore Roosevelt did not think highly of

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<sup>11</sup> James Diedrick, *The Jungle*, The Encyclopedia of Chicago, (2005),

<http://www.encyclopedia.chicagohistory.org/pages/679.html>.

<sup>12</sup> *Muckraker Journalism*, Encyclopedia Britanica (last updated Feb. 10, 2025), <https://www.britannica.com/topic/muckraker>.

<sup>13</sup> Jesse Greenspan, *7 Things You May Not Know About 'The Jungle'*, History (last updated Feb. 17, 2025), <https://www.history.com/articles/7-things-you-may-not-know-about-the-jungle>.



the so-called “muckrakers,”<sup>14</sup> and he considered Sinclair to be a “crackpot.”<sup>15</sup> He stated: “I have an utter contempt for him [Sinclair]. He is hysterical, unbalanced, and untruthful. Three-fourths of the things he said were absolute falsehoods.”<sup>16</sup>

Nevertheless, because Roosevelt distrusted the close ties between the Department of Agriculture and the meat-packing industry, he sent Labor Commissioner Charles P. Neill and social worker James B. Reynolds to conduct an independent investigation.<sup>17</sup> Their report confirmed Sinclair’s account of conditions. Even so, when the House Committee on Agriculture heard testimony from the two men, Committee members were skeptical and challenged the details of the investigators’ report.<sup>18</sup> Unsurprisingly, the meatpacking industry representative denied the allegations in the Neill-

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<sup>14</sup> *Muckraker Journalism*, *supra* note 12.

<sup>15</sup> Rob Crotty, *Bring Your Big Stick to “The Jungle,”* National Archives (Sept. 20, 2010), <https://prologue.blogs.archives.gov/2010/09/20/bring-your-big-stick-to-the-jungle/>.

<sup>16</sup> Lawrence W. Reed, *Of Meat and Myth*, Mackinac Center for Public Policy (Feb. 13, 2002), <https://www.mackinac.org/4084>.

<sup>17</sup> *The So-Called “Beveridge Amendment” to the Agricultural Appropriation bill (H.R. 18537): Hearings before the Committee on Agriculture*, 59th Congress 261 (1906)

(message of the President of the United States, transmitting the Report of Mr. James Bronson Reynolds and Commissioner Charles P. Neill) (“I deemed it best to have a further immediate investigation by men not connected with the Bureau. . . . It was impossible under the existing law that satisfactory work should be done by the Bureau of Animal Industry.”), <https://babel.hathitrust.org/cgi/pt?id=hvd.hx7dvd&seq=9>.

<sup>18</sup> David Moss & Marc Campasano, *The Jungle and the Debate over Federal Meat Inspection in 1906*, Harvard Business School (last updated Oct. 2017), <https://www.hbs.edu/faculty/Pages/item.aspx?num=50388>.

Reynolds report as “unjust and unfair” and asserted that their business was “conducted in an extremely sanitary, healthful, and cleanly manner.”<sup>19</sup>

Notwithstanding the success of the drive for more federal oversight, even today there are those who consider Sinclair’s story to have been an anti-capitalist myth, that Neill and Reynolds’ report was carelessly written with a pre-determined outcome while the Department of Agriculture’s report was the final word.<sup>20</sup>

This history indicates not only the power of undercover reporting, but also the tenuousness of its success. It was only because of a few honest (we think) men, and the public outcry, that the federal acts were passed. Had these circumstances not existed, *The Jungle* may very well have been dismissed as pure fiction.<sup>21</sup> If Sinclair had had the additional tool of a recording device to confirm his interviews and observations, then there would have been little debate over the veracity, or not, of his claims.

### **C. Jay McMullen/CBS – *Biography of a Bookie Joint***

Jay McMullen was one of the first reporters to produce undercover television documentaries using hidden audio and visual recordings. In 1961, he went undercover in an illegal bookie joint run out of a key shop in Boston. He concealed hidden cameras and microphones in a lunch box and documented police

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<sup>19</sup> *Hearings Before the Committee on Agriculture* 5-6 (statement of Mr. Thomas E. Wilson, of Chicago, Ill.), *supra* note 17.

<sup>20</sup> Reed, *supra* note 16.

<sup>21</sup> *Id.*

entering and leaving the shop while betting was taking place. They ignored a small stove where bookies burned betting slips.<sup>22</sup>

CBS traced complaints against the shop that were squelched by Boston police and forwarded the information gathered to the United States Department of Justice. The DOJ's investigation corroborated by McMullen's audio and video recordings, established that police had been taking payoffs from the bookies, and a crackdown on illegal gambling followed. Author Greg Vitiello noted, "The episode served as an impressive reminder of the press' power to act as advocates for the law."<sup>23</sup> As a result of the airing of the show on CBS, high-ranking Boston police officers were demoted and the police commissioner resigned.<sup>24</sup>

McMullen's recordings were invaluable in corroborating that the officers seen in the footage were really police and not actors and that the footage was not stock.<sup>25</sup> And certainly the audio made clear that the officers were not at the bookie joint to conduct official police business. Reflecting on the work that he did, McMullen stated that he preferred to sit down and talk things over with people, but

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<sup>22</sup> Kroeger, *supra* note 2, at 243.

<sup>23</sup> Greg Vitiello, *Where are the Documentaries of Yesteryear?*, 36 *Television Q.* 7-8 (2006), <https://www.worldradiohistory.com/Archive-Television-Quarterly/TVQ-2006-Spring-Summer.pdf>.

<sup>24</sup> *CBS News Producer Jay McMullen, Early Hidden-Camera User Who Pioneered Investigative Television Journalism, Is Dead at 90*, *Paramount Press Express* (3/10/2012), <https://www.paramountpressexpress.com/cbs-news-and-stations/releases/?view=30985>.

<sup>25</sup> Kroeger, *supra* note 2, at 243.

there was no way to do that with this kind of story.<sup>26</sup> The complicity of the police and the covert nature of the illegal gambling operation would have made it very difficult, if not impossible, to obtain candid responses using overt traditional reporting techniques.

#### **D. ABC's Primetime Live – the Desnick Eye Center**

Seven Primetime Live reporters went undercover in 1993 posing as patients for an ophthalmologist in order to confirm reports that he performed unnecessary cataract surgeries on elderly patients in order to receive Medicare payments. The undercover “patients” made surreptitious video and audio recordings of their visits, recording the conversations they had with eye doctors at the Center. The two testers who were under sixty-five were told they did not need cataract surgery. Four of the five who were over sixty-five and covered by Medicare were told they needed cataract surgery. A professor of ophthalmology consulted by Primetime said none of the four needed cataract surgery and dismissed the possibility that there could be an honest difference of opinion on this question. The Primetime Live episode detailing the apparent fraudulent practices was aired in June 1993. *J.H. Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1348 (7th Cir. 1995) (affirming dismissal of plaintiff clinic’s claims of trespass, fraud, infringement of privacy and illegal wiretapping but reversing dismissal of

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<sup>26</sup> *Id.* at 244.

defamation claim and remanding for further factual development).

Subsequently, Desnick and thirty other Illinois ophthalmologists who worked for him were named in a class action lawsuit charging them with performing unnecessary cataract surgeries and fraudulent advertising.<sup>27</sup> Desnick later sold the Center while under federal investigation.<sup>28</sup>

A video recording, without audio proving that the tester patients had been told they needed cataract surgery, would have given the Center and its doctors the ability to deny the allegedly wrong diagnoses. They could have falsified medical records to cover themselves. It would have been the doctors' word against that of the reporters. This case exemplifies the value of audio recordings to corroborate a reporter's story in a situation where physical evidence may not be available or is subject to falsification.

### **E. Rana Ayyub – *Gujarat Files***

In 2010, Rana Ayyub, a reporter for investigative magazine *Tehelka*, went undercover for eight months in Gujarat, India, to investigate the role of the local government in the 2002 Gujarat anti-Muslim riots which resulted in the deaths of

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<sup>27</sup> Lisa Green, *Desnick Clinics Named in Lawsuit*, Rockford Register Star, Sep. 20, 1996, at 1E, [https://www.molllawgroup.com/files/desnick\\_clinics\\_named\\_in\\_lawsuit.pdf](https://www.molllawgroup.com/files/desnick_clinics_named_in_lawsuit.pdf).

<sup>28</sup> *Old Hospital in Hyde Park is Now a Memory*, CBS News (Apr. 25, 2011, 1:54 PM), <https://www.cbsnews.com/chicago/news/old-hospital-in-hyde-park-is-now-a-memory/>.

790 Muslims and 254 Hindus.<sup>29</sup> Her final report implicated the role of Narendra Modi's government in a series of murders committed to create an image of Modi as a brave Hindu leader being attacked by Muslim extremists. Modi, now Prime Minister of India, was chief minister of Gujarat at the time.<sup>30</sup>

Assuming the identity of a young American woman of Hindu descent, Ayyub covered her body with cameras and recording devices and began mixing with socialites in Gujarat. She eventually gained access to high government officials, including Modi. Her book, *Gujarat Files: Anatomy of a Cover Up*, includes transcripts of conversations with Modi himself, as well as other high-ranking Gujarat officials. Some of these conversations included admissions implicating the officials in anti-Muslim violence in Gujarat.<sup>31</sup>

In particular, the book detailed a conversation with a police officer who was investigating the murder of the Home Minister of Gujarat until his death in 2003. The officer indicated that Modi was behind the murder while confessions from some Muslim men had been procured by torture. The convictions of these 12 Muslim men were overturned by a lower court, but then reinstated by the Supreme Court of India, which was openly dismissive of Ayyub's book. Ayyub appealed to the Court to review

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<sup>29</sup> *Unbreakable: The Rana Ayyub Story*, Rana Ayyub's Newsletter (Rana Ayyub), Sept. 5, 2022, <https://ranaayyub.substack.com/p/unbreakable-the-rana-ayyub-story>.

<sup>30</sup> *An Exclusive Excerpt from My Undercover Investigation, 'Gujarat Files,'* Rana Ayyub's Newsletter (Rana Ayyub), Mar. 26, 2022), <https://ranaayyub.substack.com/p/gujarat-files-excerpt-rana-ayyub-modi>.

<sup>31</sup> *Unbreakable*, *supra* note 29.

the tapes from her investigation, which included much evidence indicating that the twelve individuals were not responsible. The Court never took up her offer.<sup>32</sup>

Undoubtedly because of the existence of the tapes, none of the officials mentioned in the book denied making the statements or sued her for defamation.<sup>33</sup> Yet Modi, who has served as Prime Minister since 2014, has never been formally charged with wrongdoing. Ayyub, however, has been subjected to a campaign of intimidation by Indian authorities, from the police to the tax department.<sup>34</sup>

The end of Rana Ayyub's story has not yet been told, but the tapes, still in her possession, stand as an indictment against a corrupt government and a servile Indian mainstream media too afraid to stand up to power.

### **F. Ken Silverstein – *Their Men in Washington***

In 2007, Ken Silverstein, a contributing editor for Harper's Magazine, wanted to investigate lobbyists in Washington, D.C. to determine whether a prominent Washington lobbying firm would be unethical enough to represent a foreign regime

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<sup>32</sup> Rana Ayyub, *An Appeal to the Supreme Court After Its Haren Pandya Judgment: Examine the "Gujarat Files" tapes as Evidence*, Caravan Magazine (Jul. 11, 2019), <https://caravanmagazine.in/law/appeal-supreme-court-haren-pandya-examine-gujarat-files-rana-ayyub-evidence>.

<sup>33</sup> *Id.*

<sup>34</sup> Billy Perrigo 'While I'm Alive, I'll Keep Speaking.' *Journalist Rana Ayyub's Fight to Expose the Truth in India*, Time (Oct. 22, 2021, 5:52 AM EDT), <https://time.com/6108251/rana-ayyub-india-journalism-modi/>

involved in human rights abuses.<sup>35</sup> He assumed a fake identity as the representative of a natural gas broker and chose Turkmenistan as the rogue regime he would ostensibly be representing. Silverstein hid a tape recorder in the inside pocket of his suit both to document the conversations he would be having and to have a contemporaneous account so that he would not have to rely solely on memory or notes to write or corroborate his reporting. So equipped, he set off to introduce himself to D.C. lobbying firms. The result was “Their Men in Washington: Undercover with D.C.’s Lobbyists for Hire,” published in *Harper’s* July 2007 issue.<sup>36</sup>

The natural gas trade from Turkmenistan was notoriously corrupt and included exporting money offshore for Turkmen authorities by organizations like Silverstein’s fictitious Maldon Group. Turkmenistan itself is a Stalinist-type dictatorship known for human rights abuses. Despite these red flags, two D.C. lobbying firms agreed to represent Silverstein’s interests. They offered to conduct media campaigns, which would include writing op-eds, finding respectable signatories from think tanks or academia or even the government, and planting them in newspapers. To evade federal laws, they would utilize a third party, such as a Turkmen university, to sponsor a visit by a congressional delegation and set up events to bolster the image of Turkmenistan and the natural gas trade to the members of Congress. It would appear to be an independent event, but it would be

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<sup>35</sup> Kroeger, *supra* note 2, at 283.

<sup>36</sup> <https://www.thefreelibrary.com/Their+men+in+Washington%3a+undercover+with+D.C.%27s+lobbyists+for+hire.-a0166002108>.



entirely staged to present the Group's point of view.<sup>37</sup>

When asked if he could have documented his findings using traditional journalistic means, Silverstein responded, "Absolutely not. There is no way. These firms will tell you that they're all on the up and up and they're transparent and they don't do anything duplicitous."<sup>38</sup>

While the piece did not result in any specific legislative reforms, it did much to heighten public awareness of the influence and operations of lobbying firms in D.C. In any case, since the newsworthiness of the story was in what was *said*, rather than in anything that was *done*, it is clear that the option of taking photography or video without sound would have been wholly inadequate as a newsgathering tool. And the fact that Silverstein had recordings to back up his reporting left the lobbying firms without any ability to flatly deny anything that was said. They could only try to provide 'clarification' for their statements.<sup>39</sup>

### **G. James O'Keefe and Hanna Giles – ACORN Sting**

In 2009, independent reporters James O'Keefe and Hannah Giles, posing as a pimp and a prostitute, visited several offices of the publicly funded Association of Community Organizations for Reform Now ("ACORN") seeking help in

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<sup>37</sup> *Id.*

<sup>38</sup> Neal Conan, *Lobbyists Offer Dictators a Door to D.C.*, NPR (Jun. 19, 2007, 10:00 AM ET), <https://www.npr.org/transcripts/11188218>.

<sup>39</sup> *Id.*

establishing a house of prostitution, which would include girls as young as thirteen from El Salvador. The resulting audiovisual recordings captured several employees urging Giles to claim that she worked as a “freelancer,” “performance artist” or “entertainer” rather than as a prostitute. In addition, employees showed her how to claim the underage girls as dependents on her tax return and how best to smuggle them across the U.S.-Mexico border.<sup>40</sup>

When the videos were aired, Congress quickly voted to defund ACORN, and the Census Bureau and the Internal Revenue Service cut ties with them. ACORN attempted to quell the resulting outcry by firing the featured employees, ordering organization-wide training, suspending its housing assistance programs, and engaging an independent auditor. In retaliation, it sued O’Keefe, Giles, and Andrew Breitbart, who had published the videos on the site biggovernment.com, using a Maryland law that required consent in order to create sound recordings.<sup>41</sup> But the power of the audiovisual recordings proved too great for ACORN to salvage its reputation, and it later filed for bankruptcy.<sup>42</sup>

O’Keefe and Giles were unknowns and were operating outside of the mainstream media, so they could not rely on either their own or a media outlet’s reputation to gain public confidence. Indeed, the outrageous statements made by the ACORN

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<sup>40</sup> Justin Pritchard, *How the ACORN ‘Pimp and Hooker’ Videos Came to Be*, Seattle Times (last updated Sept. 23, 2009, 10:31 PM), <https://www.seattletimes.com/nation-world/how-the-acorn-pimp-and-hooker-videos-came-to-be/>.

<sup>41</sup> *Id.*

<sup>42</sup> Kroeger, *supra* note 2, at 250.

employees could very easily have been dismissed as fabrications by politically motivated operatives -- had it not been for the audiovisual recordings. This contemporaneous evidence made the story undeniable and rightly resulted in the backlash against ACORN.

### **III. Audio Recordings Can Provide Vital Corroboration of Explosive Claims of Corruption.**

The Ninth Circuit's statement that hidden recordings are not "indispensable tools' of newsgathering" and that the remaining alternatives to hidden recordings "satisfy the alternative channels requirement" (Pet. App. 48a-49a) does not stand up to scrutiny in light of this history. Not only are surreptitious audio recordings worthy of the same constitutional protection as other methods of documenting a news story, but they also could make the difference between a story lost to history and one that changes the course of history. Nellie Bly and Upton Sinclair were almost disbelieved, and their stories survived because of fortuitous events. McMullen's real-time audiovisual recordings of police corruption and illegal gambling effectively brought down the collusion which allowed those establishments to operate. The Desnick Eye Center closed in the wake of *Primetime Live's* reporting. Rana Ayyub may still be alive only because of the international recognition she has earned, partly because she has the hard evidence to back up her earthshaking claims. Because of that evidence, there is still hope that wrongdoers will one day be brought to justice. Ken Silverstein closed the mouths of

lobbyists, no small feat, in their ability to flatly deny their unethical behavior. And James O’Keefe and Hanna Giles, unknown to the public before their ACORN sting, would likely have been dismissed out of hand with their outrageous-sounding accusations had it not been for the proof of the audiovisual recordings.

As Kroeger notes, “Like almost no other journalistic approach, undercover reporting has a built-in ability to expose wrongs and wrongdoers or perform other meaningful public service. It can illuminate the unknown, it can capture and sustain attention, it can shock or amaze.”<sup>43</sup> Real-time recordings of bad actors admitting to their bad actions heightens undercover reporting’s “narrative dimension. . . that generates . . . an overspill of visceral outrage.”<sup>44</sup> It is indeed “visceral outrage” that this Court has recognized as a legitimate response to First Amendment activity, and a reason for its protection: “It [free speech] may indeed best serve its high purpose when it . . . *even stirs people to anger*. . . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added) (reversing a conviction for disorderly conduct when defendant’s speech was met by an angry and turbulent crowd of protesters). Unannounced audio recording is a critical tool that helps fulfill the media’s purpose in holding corrupt, powerful individuals accountable for their actions.

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<sup>43</sup> *Id.* at Preface xv.

<sup>44</sup> *Id.* at 174.

Oregon's Statute removes a dynamic and indispensable element of undercover reporting, the element that could incite "visceral outrage" and spur the public and government officials to action.

### CONCLUSION

Undercover reporting provides evidence of corruption and abuse in situations where victims or witnesses either would not be believed or are incapable or unwilling to speak out because of fears of retaliation. Audio recording gives voice to these silent victims, renders undeniable the damaging self-incriminating statements caught on tape, and provides a powerful corroboration of what might otherwise be an unbelievable revelation of wrongdoing.

For the foregoing reasons, amicus Life Legal urges the Court to grant the Petition.

Respectfully submitted,

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