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# Future Implications for Ag-Gag Laws

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## FUTURE IMPLICATIONS FOR AG-GAG LAWS

JACQUELYN M. LYONS\*

### I. Introduction

A video begins with a cow lying on her side on a concrete floor, one end of a chain wrapped around her neck and the other attached to a tractor.<sup>1</sup> A man drives the tractor around the floor, down a ramp, and outside onto the ground.<sup>2</sup> This video, which was recorded at the Bettencourt Dairies' Dry Creek Dairy in Idaho, proceeds to show other cows in metal stalls being whipped, punched, and jumped on as they attempt to escape their abusers.<sup>3</sup> Videos like this one are typically recorded by undercover investigators – journalists or animal activists who pose as industry workers to blow the whistle on illegal activities and specifically animal abuse. By acquiring and sharing footage of animal abuse and unsafe working conditions, the undercover investigators hope the public will learn of these atrocities and voice their disapproval of the conditions, prompting the authorities to act and change to occur within the agricultural industry.<sup>4</sup>

Following the release of this video and the ensuing negative publicity, the Idaho Dairymen's Association drafted a bill that proposed to criminalize undercover investigations that exposed these activities on farms, which the Idaho legislature quickly passed into statute on February 14, 2014.<sup>5</sup> However, on August 3, 2015, an

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<sup>1</sup> Torment of Dairy Cows in Undercover Video Leads to Cruelty Charges (Oct 10, 2012 12:26 PM), [http://usnews.nbcnews.com/\\_news/2012/10/10/14343360-torment-of-dairy-cows-in-undercover-video-leads-to-cruelty-charges?lite](http://usnews.nbcnews.com/_news/2012/10/10/14343360-torment-of-dairy-cows-in-undercover-video-leads-to-cruelty-charges?lite).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Animal Legal Def. Fund v. Otter, 2015 U.S. Dist. LEXIS 102640, at \*5 (D. Idaho 2015).

Idaho Federal District Court Judge declared the statute unconstitutional in *Animal Legal Defense Fund v. Otter* on the basis of the First Amendment right to free speech.<sup>6</sup>

Not long before *Animal Legal Defense Fund*, on June 18, 2015, the Supreme Court arguably expanded the definition of content based speech in *Reed v. Town of Gilbert*, thus marking an “important shift toward treating countless laws that regulate speech with exceptional skepticism.”<sup>7</sup> The Court addressed a challenge to a town code that identified specific categories of signs based on their content and subjected those signs to various levels of restriction.<sup>8</sup> In addition to striking down the ordinance under First Amendment free speech principles, Justice Thomas went further to discuss what exactly constitutes content based speech.<sup>9</sup> Analyses of the opinion interpret the ruling to conclude that any law that singles out a topic for regulation discriminates based on content, and is, therefore, subject to strict scrutiny.<sup>10</sup>

This comment will argue that not only are the majority of “ag-gag laws”<sup>11</sup> *per se* unconstitutional, but also that the recent *Animal Legal Defense Fund* decision coupled with the *Reed* decision should prompt the legislative and judiciary systems to reform or strike down the remaining ag-gag laws altogether. Part II of this comment will look generally at how ag-gag laws implicate First Amendment issues. Part III will take an

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<sup>6</sup> *Id.*

<sup>7</sup> Adam Liptak, *Court's Free-Speech Expansion Has Far Reaching Consequences*, NY TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>; U.S. LEXIS 4061, at \*2 (2015).

<sup>8</sup> *Id.* at \*242.

<sup>9</sup> *Id.* at \*245.

<sup>10</sup> See Liptak, *supra* note 7.

<sup>11</sup> Ag-gag refers to state laws that prohibit the act of undercover filming or photography of activity on farms without the owner's consent. Ag-gag laws particularly target undercover journalists or whistleblowers of animal rights abuses at these facilities.

in-depth look into the Idaho statute challenged in *Animal Legal Defense Fund* and pinpoint what the Court specifically identified as unconstitutional. Part IV will consider the impact of the *Reed* decision on ag-gag laws and discuss future implications for existing ag-gag laws that arise from considering *Animal Legal Defense Fund* and *Reed* in tandem, including why the remaining statutes cannot survive strict scrutiny. Part V will conclude by recommending actions that can be taken by the legislature and judiciary system to combat these unconstitutional statutes.

## II. Establishing the Basis for a Constitutional Connection to Ag-Gag Laws

The term ag-gag refers to agricultural operation “gag laws,” or laws that restrict freedom of the press and free speech.<sup>12</sup> While ag-gag laws vary in their structure and specificity, they typically criminalize undercover investigations of any agricultural operations, such as dairy, poultry, and pork farms.<sup>13</sup> The ag-gag laws generally target three categories: (1) dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) photographing or videotaping on agricultural facilities; and (3) the possession or distribution of such videos.<sup>14</sup>

Although ag-gag laws take various forms, they ultimately share a similar goal: to stop whistleblowers from revealing what occurs at agricultural facilities.<sup>15</sup>

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<sup>12</sup> *What is Ag-Gag Legislation?*, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspca.org/animal-cruelty/factory-farms/what-ag-gag-legislation>.

<sup>13</sup> *Id.*

<sup>14</sup> Kevin C. Adam, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1131 (2012).

<sup>15</sup> Traci Hobson, *Factory Farming in America, Part 4: The Proliferation of Ag-Gag Legislation*, IAN SOMERHALDER FOUNDATION, <http://www.isfoundation.com/campaign/factory-farming-america-part-4-proliferation-ag-gag-legislation>.

Objections to these ag-gag statutes largely stem from the First Amendment right to freedom of speech.<sup>16</sup> Indeed, the effect of many of these ag-gag statutes is a suppression of speech of undercover investigators and whistleblowers, which not only affects the treatment and health of farm animals, but also public safety, agricultural worker safety, and the environment.<sup>17</sup> This suppression of speech directly implicates issues under the First Amendment which reads, “Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .”<sup>18</sup> Courts should find that the medium and content of the speech are protected by the First Amendment, and they should utilize a strict scrutiny standard to review ag-gag laws.

First, the medium of video recordings is protected speech under the First Amendment.<sup>19</sup> The Ninth Circuit, in *Cuviello v. City of Oakland*, utilized a framework to specifically identify when the right to videotape was protected by free speech.<sup>20</sup> In *Cuviello*, a group of animal-rights activists were stopped as they stood on an access ramp to photograph and videotape the treatment of circus animals in a public facility.<sup>21</sup> The court ruled that the activists were exercising their right to free speech because they were communicating the treatment of animals to the public, and the public was

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<sup>16</sup> See Kurt Michael Friese, Gagging on the Ag Gag Bill - Industrial Lobbying and Corporate Overreach at Its Finest, HUFFINGTON POST (June 7, 2011), [http://www.huffingtonpost.com/kurt-friese/farm-animal-abuse\\_b\\_872867.html](http://www.huffingtonpost.com/kurt-friese/farm-animal-abuse_b_872867.html).

<sup>17</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*10.

<sup>18</sup> U.S. Const. amend I.

<sup>19</sup> *Cuviello v. City of Oakland*, 2007 U.S. Dist. LEXIS 59833 (N.D. Cal. Aug. 14, 2007), aff'd 434 F. App'x 615 (9th Cir. 2011).

<sup>20</sup> *Id.*

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

interested in this communication, thus confirming the notion that communication via video is a protected medium of speech under the Constitution.<sup>22</sup> Thus, the majority of ag-gag laws, which prohibits videotaping on private agricultural property, implicate issues of protected speech.

Second, the content contained in the video recordings is protected speech under the First Amendment. Under First Amendment analysis, these animal welfare videos do not fall into any of the categories of unprotected speech and should therefore not be infringed upon.<sup>23</sup> The unprotected categories of speech include obscenity<sup>24</sup> incitement,<sup>25</sup> and fighting words.<sup>26</sup> Proponents of ag-gag laws may argue that lies should not be protected speech, however courts have held that lies are not categorically outside First Amendment protection.<sup>27</sup> Accordingly, typical undercover investigation videos that depict the mistreatment of animals and released by journalists and animal rights activists do not fall under any of these traditional unprotected categories.<sup>28</sup>

Third, strict scrutiny should apply under this First Amendment analysis because the ag-gag laws are content based. Laws that are content based must be reviewed under strict scrutiny, and the law must be found to be narrowly tailored to further a compelling governmental interest.<sup>29</sup> Although *Reed* did not deal with the agricultural

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<sup>22</sup> *Id.*

<sup>23</sup> Note: The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare, 17 DRAKE J. AGRIC. L. 645 (2012).

<sup>24</sup> See *Miller v. California*, 413 U.S. 15, 23 (1973).

<sup>25</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>26</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>27</sup> See discussion *infra* Part III.

<sup>28</sup> 17 DRAKE J. AGRIC. L. 645, at 671–72.

<sup>29</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

industry, this decision arguably broadened the scope of the constitutional connection to ag-gag laws. An argument could be made that laws were previously content based if they were adopted to suppress speech that the government disagreed with.<sup>30</sup> However, this decision either modified or confirmed “content based” to mean that any law that singles out a topic for regulation discriminates based on content, and is, therefore, presumptively unconstitutional.<sup>31</sup> This could potentially create a new framework to look at many statutes that target a specific topic, including the agricultural industry. The legislative history of ag-gag statutes strongly indicates that the purpose of the statutes is to suppress speech critical of animal-agricultural practices, thus rendering the statute regulations content based.<sup>32</sup> For example, the Idaho statute was enacted as a reaction to the release of a video depicting animal abuse. Idaho senators compared animal rights investigators to “marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission.”<sup>33</sup> The senator also referred to them as “terrorists,” and stated, “[t]his is the way you combat your enemies” while defending the legislation.<sup>34</sup> It is likely that a video showing an agricultural facility in a positive light would not lead to the same legal action and consequences as negative videos because the “victim” will not incur any losses. However, since a negative video would likely cause the victim to suffer losses due to public outcry from the mistreatment of animals and workers, this negative depiction is the discernable

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<sup>30</sup> See Liptak, *supra* note 7.

<sup>31</sup> Reed v. Town of Gilbert, U.S. LEXIS 4061, at \*2 (2015).

<sup>32</sup> See *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*6–7.

<sup>33</sup> Pls.’ SOF ¶ 8 Dkt. 75.

<sup>34</sup> *Senator Patrick*. Wall Decl., Ex. A, p. 81, Ins. 7–8.

target of the ag-gag laws. This legislative and historical basis for the ag-gag laws implies that the statutes are directly intended to punish animal activists and whistleblowers and are targeting speech that is critical of agricultural production facilities. Therefore, it is likely that courts will find that ag-gag laws single out and regulate the topic of negative views of the agricultural industry, thus triggering a strict scrutiny standard.

Finally, there are public policy concerns that demonstrate the importance of a First Amendment inquiry. Specifically, the story of Upton Sinclair is a “clear illustration” of how ag-gag statutes implicate Constitutional issues grounded in the First Amendment.<sup>35</sup> Sinclair obtained a job in the meat packing industry to obtain information for a novel revealing unsanitary working conditions, which ultimately led to the passage of the Federal Meat Inspection Act and the Pure Food and Drug Act.<sup>36</sup> Under nearly every ag-gag statute today, including the Idaho statute, Sinclair would have been criminally prosecuted for his conduct, either for obtaining employment under misrepresentation or false pretenses or for publishing photographs of the animal facility.<sup>37</sup> This story illustrates how agricultural operations that “affect food and worker safety are not exclusively a private matter.”<sup>38</sup> Without the information obtained by undercover investigators, which is prohibited under the current ag-gag laws, the public will likely never learn of unsanitary or abusive conditions for animals or workers at

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<sup>35</sup> See *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*11.

<sup>36</sup> See *id.*; *National Meat Ass’n v. Harris*, 132 S.Ct. 965, 181 L. Ed. 2d 950 (2012).

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

<sup>38</sup> *Id.*



agricultural facilities. It is not probable that an agricultural facility will permit members of the public to witness animal abuse or unsafe working conditions that occur at their facility.

### III. Legal Analysis of Idaho's Unconstitutional Ag-Gag Law

The Idaho ag-gag statute, Idaho Code §18-7042, criminalizes, “interference with agricultural production.”<sup>39</sup> The statute provides, in pertinent part, that a person commits this crime if the person knowingly: (a) enters an agricultural production facility by force, threat, *misrepresentation* or trespass; (b) obtains agricultural production facility records 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; (d) Enters a private agricultural production facility and, without the facility owner's express consent, *makes audio or video recordings of the conduct of an agricultural production facility's operations*.<sup>40</sup> Violators of the statute face up to one year in jail, and a journalist or whistleblower convicted can be forced to pay damages for twice the economic loss a business suffers as a result of any expose revealing animal abuse or unsafe working conditions.<sup>41</sup>

The court in *Animal Legal Defense Fund* lays out the steps to a First Amendment challenge to ag-gag laws: (1) Plaintiff bears the burden of “demonstrating that the First

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<sup>39</sup> I.C. § 18-7042.

<sup>40</sup> I.C. § 18-7042(1)(a)-(e) (emphasis added).

<sup>41</sup> See *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640.

Amendment applies to the activity he or she claims is protected as expression;"<sup>42</sup> (2) the court analyzes the context in which the expression took place and then determines which First Amendment standard applies;<sup>43</sup> (3) the court then assesses whether the government's justifications for restricting the conduct or speech satisfy the applicable standard.<sup>44</sup>

A. Court found that using misrepresentation to gain access to agricultural facilities is protected by the First Amendment.

First, under the framework of First Amendment ag-gag challenges, the plaintiff must establish that the prohibited activity is protected under the First Amendment.<sup>45</sup> Thus, the Court analyzed whether the "misrepresentation" requirement included in sections (a)-(c) of the statute was a violation of the First Amendment.<sup>46</sup> The *Animal Legal Defense Fund* court utilized the analysis presented in *United States v. Alvarez*.<sup>47</sup> In *Alvarez*, the central issue was whether lies are categorically outside First Amendment protection.<sup>48</sup> The *Alvarez* Court struck down a federal statute that made it a crime to misrepresent or lie about receiving military decorations or medals on the ground that it violated the Free Speech Clause of the First Amendment.<sup>49</sup> The plurality found that "there must be a direct causal link between the restriction imposed and the injury to be prevented."<sup>50</sup>

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<sup>42</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640 (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>43</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985)

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

<sup>45</sup> *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>46</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640.

<sup>47</sup> *Id.*

<sup>48</sup> 132 S. Ct. 2537 (2012).

<sup>49</sup> *Id.*

<sup>50</sup> Alan K. Chen and Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1452 (2015).

The Court explained that they rejected the Government's claim because there was no sufficient link between lies about military awards and the dilution of the public's perception of such honors, which was the asserted harm.<sup>51</sup>

The *Alvarez* holding becomes critical in ag-gag cases because ag-gag laws are framed to punish actions, specifically the recording of video, which occur after a misrepresentation, specifically regarding an individual's identity. Based on the majority of ag-gag laws inclusion of a section requiring misrepresentation to gain employment, agricultural facilities may include questions on employment applications asking if potential employees are pursuing employment in order to make unauthorized recordings.<sup>52</sup> Potential employees could face charges under certain ag-gag statutes<sup>53</sup> just by misrepresenting themselves on this application with the intent to make unauthorized recordings, even if they never actually perform the act of making an unauthorized recording.<sup>54</sup> The *Alvarez* court importantly notes that the public has an interest in false speech being protected by the First Amendment.<sup>55</sup> Moreover, if the government has power to punish false speech, this will lead to a chilling of free speech if the government selectively enforces the law against certain groups.<sup>56</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 569 (2014), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1748&context=peir>.

<sup>53</sup> IOWA CODE ANN. § 910.2(1) (West 2013).

<sup>54</sup> 31 PACE ENVTL. L. REV. 566, 569 (2014).

<sup>55</sup> 132 S. Ct. 2537, 2553 (2012) (“ . . . [T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby “chilling” a kind of speech that lies at the First Amendment’s heart.”).

<sup>56</sup> *Id.*

In *Animal Legal Defense Fund*, the State argues that the *Alvarez* ruling does not apply to the Idaho statute because, unlike in *Alvarez*, the “misrepresentations” in the Idaho statute only becomes criminal when accompanied by a form of conduct such as “entering a facility, acquiring its records, or seeking employment with the express purpose of doing harm to the employer.”<sup>57</sup> The *Animal Legal Defense Fund* court, however, clarified that *Alvarez* did not strike down the statute because it was not accompanied by conduct, but rather because the false statements did not cause a legally cognizable harm.<sup>58</sup> Certain deceptive speech directly causes material harm to those being misled, such as perjury, fraud, and defamation.<sup>59</sup> Since these types of speech can directly cause material harm to individuals, the statutory criminalization of those actions does not violate the First Amendment.<sup>60</sup> The Court clarified that the Idaho statute is not limited to directly harmful misrepresentation, but rather it prohibited all lies used to gain access to property, records, or employment – regardless of whether the misrepresentations themselves cause any material harm.<sup>61</sup> Ag-gag laws reach far beyond laws prohibiting fraud, invasions of privacy, or physical damage, which is harm that is not shielded by free speech.<sup>62</sup> In fact, the criminalized conduct of ag-gag laws does not have to cause any injury other than the recording and exposure of illegal or otherwise repugnant actions.<sup>63</sup>

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<sup>57</sup> *Def’s Resp. Br.* at 9, Dkt. 88.

<sup>58</sup> *Animal Legal Def. Fund*, U.S. Dist. LEXIS 102640, at \*15 (quoting *Alvarez*, 132 S. Ct. at 2545).

<sup>59</sup> *Animal Legal Def. Fund*, U.S. Dist. LEXIS 102640, at \*15.

<sup>60</sup> *Id.* at \*14.

<sup>61</sup> *Id.* at \*15–16.

<sup>62</sup> 68 VAND. L. REV. 1435, 1470 (2015).

<sup>63</sup> *Id.*

In the case of the Idaho statute<sup>64</sup> and likely in the case of many other ag-gag laws, the harm would emerge later from the story or video that is shared with the public, but the harm is not directly caused by the misrepresentation made to gain access to the farm. In fact, the *Animal Legal Defense Fund* Court articulated that exposing this misconduct to the public and “facilitating dialogue on issues of considerable public interest” is precisely the type of speech the First Amendment is designed to protect.<sup>65</sup> Thus, like in *Alvarez*, a court deciding the constitutionality of an ag-gag law will not likely find a sufficient link between misrepresenting oneself to obtain employment and the harm of public disapproval of agricultural industry actions.

The misrepresentation component of the *Animal Legal Defense Fund* case is important, and it has far-reaching implications regarding other ag-gag laws. Common sense can deduce that an agricultural facility owner with abuse occurring on the premises would not welcome an investigator, animal activist, or journalist to step foot on the property or record video of the animal abuse. Therefore, one of the limited ways these individuals can obtain access onto the property is by misrepresenting their identity. If the court upheld the “misrepresentation” prohibitions in this statute, the far-reaching consequences may extend to all investigative journalism altogether.

- B. Court found that the audiovisual recording prohibitions restrict speech protected by First Amendment and discriminate based on content and viewpoint.

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<sup>64</sup> I.C. § 18-7042.

<sup>65</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*17.

Next, the *Animal Legal Defense Fund* Court looked at the audiovisual recording prohibition in Section D.<sup>66</sup> The court decided that the specific provision not only restricted a medium protected by free speech,<sup>67</sup> but also discriminated against speech on content and viewpoint.<sup>68</sup> As established in *Cuvillo*, video recordings are regarded as expressive activities that are entitled to First Amendment protection.<sup>69</sup> Furthermore, *Citizens United v. Federal Elections Commission* held that “laws enacted to control or suppress speech may operate at different parts in the speech process.”<sup>70</sup> The *Animal Legal Defense Fund* Court indicated that prohibiting undercover investigators from recording misconduct in agricultural facilities suppresses a “key type of speech because it limits the information that might later be published or broadcast,” which is often important for animal activists and whistleblowers to establish proof, as well as credibility.<sup>71</sup>

This aspect of the decision is exceedingly important in our society because video recordings exposing illegal or disturbing activity are increasingly prevalent. These types of videos have the purpose and ability to spark outrage, conversation, and eventual steps toward social change and evolution. If recording video of specific activities is not protected speech, this may have unintended consequence of diminishing the very notion of free speech in America. In other words, if a court

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<sup>66</sup> *Id.*

<sup>67</sup> See discussion *supra* Part II.

<sup>68</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*18.

<sup>69</sup> See, e.g., *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010); *American Civil Liberties Union v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

<sup>70</sup> 558 U.S. 310, 336 (2010).

<sup>71</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*18-19.

upholds a statute prohibiting the recording of animal abuse on private property without the consent of the owner, what would stop that same court in upholding a hypothetical statute prohibiting the recording video of violence at a private workplace?

Additionally, the Court found that the ban on audiovisual recordings of *an explicit topic*, specifically the “conduct of an agricultural production facility’s operations,” is particularly dangerous because it is content based.<sup>72</sup> The Court identifies content based laws as laws where “either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment.”<sup>73</sup> The Court concluded that the Idaho statute “target[ed] undercover investigators who intend to publish videos they make through the press and [sought] to suppress speech critical of animal agricultural practices.”<sup>74</sup> Further, the Idaho statute targets speech concerning the conduct of an agricultural production facility’s operations.<sup>75</sup> The plaintiffs claimed that the Idaho statute had the “purpose and effect of stifling public debate about modern agriculture.”<sup>76</sup> The Court agreed, noting that the law plainly sought to “limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of the important First Amendment values.”<sup>77</sup> The court was not persuaded by the argument that the statute regulated conduct as opposed to speech.<sup>78</sup>

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<sup>72</sup> *See id.*

<sup>73</sup> *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009).

<sup>74</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*14.

<sup>75</sup> I.C. § 18-7042.

<sup>76</sup> *Animal Legal Def. Fund*, U.S. 2015 Dist. LEXIS 102640, at \*5.

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at \*15.

The Court illustrated the content based nature of the statute by citing *McCullen v. Coakley*, which upheld a statute that merely restricted speech depending on *where* something was said – specifically an abortion clinic buffer zone – as opposed to *what* was being said.<sup>79</sup> Unlike the statute upheld in *McCullen*, the statute here is directly reliant upon speech in the form of audiovisual recordings collected at agricultural industry facilities.<sup>80</sup> Notably, a violation would not occur if an employee stood inside an agricultural production facility and filmed the owner having a conversation with his spouse, however, if that same employee filmed workers abusing animals, the employee could be prosecuted and face up to a year in jail and be liable for reputational harm to the owner.<sup>81</sup> This highlights the statute’s content based prohibitive effect.

Future courts can also look to *Alvarez* in their analysis of whether or not ag-gag laws prohibit content based speech: “The government’s contention in *Alvarez*, that the Stolen Valor Act is similar to a federal statute prohibiting lying to a government official, supports the conclusion that Ag-Gag laws are content-based restrictions on speech. . . . If a statute criminalizing lying to a government official is considered a content-based restriction, then, naturally, laws criminalizing lying on an employment application are also content-based restrictions.”<sup>82</sup>

C. Court found the statute to be a content based restriction on free speech, and, therefore, applied strict scrutiny.

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<sup>79</sup> 134 S.Ct. 2518 (2014).

<sup>80</sup> I.C. § 18-7042.

<sup>81</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*21.

<sup>82</sup> 31 PACE ENVTL. L. REV. 566, 578 (2014).



Since the *Animal Legal Defense Fund Court* accordingly found that the Idaho statute is a content based restriction on protected speech, the court applied the highest level of constitutional scrutiny: strict scrutiny.<sup>83</sup> To pass strict scrutiny, the legislature must have narrowly tailored the law to further a compelling governmental interest.<sup>84</sup> Thus, the Court discussed the asserted governmental interests of the State in favor of the statute.<sup>85</sup> The State claimed the Idaho statute was passed in order to “protect private property and the privacy of agricultural facility owners.”<sup>86</sup> The Court ultimately found that the State’s interest in protecting personal privacy and private property is an important interest, but these are not compelling interests in the context presented.<sup>87</sup> The court referenced “historic and traditional categories of expression” that have been found to be compelling government interests to protect such as “obscenity, fighting words, defamation, and child pornography.”<sup>88</sup>

Further, the Court relied on *Turner Broadcasting System, Inc. v. F.C.C.*, which stated that it is not enough for the goals of the law to be “legitimate, or reasonable, or even praiseworthy” in order to pass strict scrutiny.<sup>89</sup> “There must be some pressing *public* necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.”<sup>90</sup> The State in *Animal Legal Defense Fund* failed to assert why agricultural production facilities require heightened

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<sup>83</sup> *Memorandum Decision and Order re Motion to Dismiss* at 23-24, Dkt. 68.

<sup>84</sup> See *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

<sup>85</sup> See *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640.

<sup>86</sup> *Id.* at \*11.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*26.

<sup>89</sup> 512 U.S. 622, 680 (1994).

<sup>90</sup> *Id.*

protection from these crimes.<sup>91</sup> Additionally, the Court recognized the public's interest in the safety of food supply, worker safety, and the humane treatment of animals.<sup>92</sup> It would contravene strong First Amendment values to say the State has a compelling interest in affording these heavily regulated facilities extra protection from strict scrutiny. In fact, the Court said that protecting the "private interests of powerful industries" (that produce the public food supply) against "public scrutiny" is not a legitimate government interest.<sup>93</sup>

Furthermore, it is made clear by a combination of the statute's legislative history<sup>94</sup> and overall construction<sup>95</sup> that the statute is aimed at preventing individuals from sharing information about abuse at factory farms to avoid backlash from the public.<sup>96</sup> Yet, certain statutes that have been introduced in states such as Nebraska, Indiana, and Wyoming, and passed in states like Missouri<sup>97</sup> are constructed to portray the idea that the state's main concern is the welfare of the animals at these agricultural facilities. The same argument was made in *Animal Legal Defense Fund*, regarding the Iowa statute.<sup>98</sup> Supporters of the ag-gag law alleged that the undercover investigators failed to report animal abuse to the dairy operator or the authorities, thus "allowing additional animal abuse to occur and depriving the animals of immediate care and

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<sup>91</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*33.

<sup>92</sup> *Id.*

<sup>93</sup> *Turner Broadcasting System*, 512 U.S. 622.

<sup>94</sup> *See supra* note 22.

<sup>95</sup> I.C. § 18-742.

<sup>96</sup> *See supra* note 22.

<sup>97</sup> Miss. State Senate, SB 631.

<sup>98</sup> *See Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640.

treatment.”<sup>99</sup> These states form the law under the pre-text that they want the footage to be turned over right away to prevent any further abuse to the animals. This process prevents the long-term collection of evidence to show patterns of consistent abuse, thereby hindering the prosecution of the abusers at a later time. Animal rights advocates argue this hampers their ability to build a comprehensive case.<sup>100</sup>

Additionally, the practical effect of these statutes is that these videos and long-term investigations are not communicated to the public, thus stifling the free speech of the animal activists and whistleblowers. Moreover, the statute is not narrowly tailored to achieve the protection of privacy because other laws exist that more adequately address this interest.<sup>101</sup> There are existing laws against trespass, fraud, theft, and defamation that adequately protect against the invasion of privacy and are more narrowly tailored to that interest without encroaching on free speech.<sup>102</sup>

#### IV. Utilizing *Reed v. Town of Gilbert* to Strike Down Ag-Gag Laws

While the *Animal Legal Defense Fund* Court did not cite *Reed* in their opinion, it is likely that future courts will look to *Reed* to categorize other ag-gag laws, or the purpose and justification of other ag-gag laws, as content based. Floyd Abrams, a constitutional lawyer, said *Reed* “provides significantly enhanced protection for free speech while requiring a second look at the constitutionality of aspects of federal and state securities

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<sup>99</sup> *Id.* at \*4.

<sup>100</sup> ‘Ag-gag’ Law May Have Hindered Report of Animal Cruelty at Missouri Hog Farm, HARVEST PUBLIC MEDIA (Oct. 2, 2014), <http://harvestpublicmedia.org/article/ag-gag-law-may-have-hindered-report-animal-cruelty-missouri-hog-farm>.

<sup>101</sup> *Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640, at \*11.

<sup>102</sup> *Id.*

laws, the federal Communications Act and many others.”<sup>103</sup> Robert Post, the dean of Yale Law School, said the decision’s logic “endangered all sorts of laws, including ones that regulate misleading advertising and professional malpractice.”<sup>104</sup> Still, others maintain that Reed merely affirmed that the government cannot ban speech based on “the topic discussed or the idea or message expressed” unless it has a compelling interest.<sup>105</sup> Although prominent legal minds differ in their reactions to the decision, most agree that it will have influential and significant effects on laws that regulate speech.<sup>106</sup> Accordingly, *Reed* will likely be utilized in future cases challenging ag-gag laws.

Specifically, if future courts are not persuaded by the application of the content based statute conclusion in *Animal Legal Defense Fund*, they may look to *Reed*. In *Reed*, Justice Clarence Thomas concluded that many laws are now subject to the highest level of review: strict scrutiny.<sup>107</sup> “Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. ... Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny.”<sup>108</sup> Even if speech does not discriminate among viewpoints within a subject matter, a speech regulation targeted at any specific subject matter is content based.<sup>109</sup>

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<sup>103</sup> See Liptak, *supra* note 7.

<sup>104</sup> *Id.*

<sup>105</sup> David A. Cortman, *Supreme Court Decision Ensures Fair Playing Field in Marketplace of Ideas*, JURIST (Aug. 4, 2015, 8:00 AM), <http://jurist.org/hotline/2015/08/david-cortman-freedom-of-speech.php>.

<sup>106</sup> *Id.*

<sup>107</sup> *Reed*, U.S. LEXIS 4061, at \*3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*22.

Prior to *Reed*, courts established that government regulation of speech is content based if the law pertains to specific speech because of the topic, idea, or message restricted. Thus, with this decision, the *Reed* court is at least reaffirming the broad prohibition on content based speech restrictions. *Reed* clarifies further that if a law is content based “on its face,” or draws distinctions based on the message a speaker conveys, it is to be treated as content based.<sup>110</sup> Further, “. . . strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based.<sup>111</sup> Laws that are found to be content based must undergo strict scrutiny by the court.<sup>112</sup>

Since many of the ag-gag laws are worded similarly to the Idaho statute, it is likely that a court will rely on both cases when framing its analysis of what standard applies in an ag-gag challenge. Further, the majority of the ag-gag laws target undercover investigators intending to publish videos of activities at agricultural facilities.<sup>113</sup> In terms of future challenges to statutes that suppress speech that is specifically critical of the animal agriculture, it is more than likely that courts will find that strict scrutiny applies due to content based motives and structure. This type of scrutiny will make it very difficult for these ag-gag laws to survive a First Amendment challenge since Justice Thomas held that any law that singles out a topic for regulation discriminates based on content and is therefore “presumptively unconstitutional.”<sup>114</sup>

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<sup>110</sup> *See id.*

<sup>111</sup> *Id.* at \*19.

<sup>112</sup> *See* discussion *infra* Part II.

<sup>113</sup> *See, e.g., Animal Legal Def. Fund*, 2015 U.S. Dist. LEXIS 102640.

<sup>114</sup> *Reed*, U.S. LEXIS 4061, at \*3.

### A. Why Existing Ag-Gag Laws Cannot Survive Strict Scrutiny

Due to the findings that the Idaho statute is content based, and thus analyzed by the court under the strict scrutiny test,<sup>115</sup> it is likely that the remaining ag-gag statute challenges will be decided similarly. The structure of the remaining ag-gag laws is similar to the Idaho statute, aside from the North Carolina “anti-sunshine” statute.<sup>116</sup>

The Utah statute prohibits gaining access to agricultural operations through misrepresentation, as well as intentionally recording images or sound from the agricultural operation.<sup>117</sup> Since the Utah statute<sup>118</sup> is generally worded the same as the Idaho statute,<sup>119</sup> it will likely be struck down because it is content based, there is no compelling governmental interest behind the statute, and the statute is not narrowly tailored to achieve the asserted interest.

The Iowa,<sup>120</sup> Kansas,<sup>121</sup> North Dakota,<sup>122</sup> and Montana<sup>123</sup> statutes all essentially prohibit individuals from producing, possessing, or distributing photographs, videos, or any recordings they took at an animal facility without permission. It is likely that these statute will undergo strict scrutiny because the specificity of “animal facility” constitutes content based suppression of speech under the framework of *Animal Legal Defense Fund* combined with the broadened category provided by *Reed*. Just as in

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<sup>115</sup> See discussion *supra* Part III.

<sup>116</sup> See discussion *infra*.

<sup>117</sup> UTAH CODE ANN. § 76-6-112(2).

<sup>118</sup> See *id.*

<sup>119</sup> See IDAHO STAT. ANN. § 18-7042.

<sup>120</sup> IOWA CODE ANN. § 910.2(1) (West 2013).

<sup>121</sup> KAN. STAT. ANN. § 47-1827 (West 2013).

<sup>122</sup> N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2013).

<sup>123</sup> MONT. CODE ANN. § 81-30-103 (West 2013).

*Animal Legal Defense Fund*, a court would not likely find the use of a compelling governmental interest because the public interest in knowledge of their food supply and safety is of much greater interest than protecting the agricultural facilities from communal backlash regarding animal abuse. Furthermore, more narrowly tailored privacy laws exist in those states to promote the agricultural facilities' interests in protecting their privacy and property.

The Missouri statute mandates that employees of animal agricultural operations who videotape animal abuse must turn over the footage to law enforcement within 24 hours.<sup>124</sup> Regardless of the motives behind this statute, it is important to address its constitutionality under the First Amendment framework. First, the plaintiff must demonstrate that the First Amendment applies to the activity that is claimed to be protected.<sup>125</sup> As discussed, video communication is protected under the First Amendment,<sup>126</sup> and therefore, the video footage referenced in the statute is protected under the First Amendment freedom of speech principles. However, it is possible that the court's inquiry will end here because the statute is not actually restricting or prohibiting the speech. Rather, the statute requires that "employees of animal agricultural operations who videotape what they suspect is animal abuse must provide the recording to a law enforcement agency within 24 hours."<sup>127</sup> Since Courts have determined that preventing animal cruelty is not a compelling governmental interest,

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<sup>124</sup> Miss. State Senate, SB 631, available at [http://www.senate.mo.gov/12info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=92863](http://www.senate.mo.gov/12info/BTS_Web/Bill.aspx?SessionType=R&BillID=92863).

<sup>125</sup> *Clark*, 468 U.S. 288, at 293 (1984).

<sup>126</sup> *See supra* note 13.

<sup>127</sup> Miss. State Senate, SB 631.

courts are not likely to uphold statutes that require or compel the reporting of animal cruelty.<sup>128</sup> This has additional implications for future ag-gag cases where the State may argue that the content based speech restriction is narrowly tailored to further the compelling governmental interest of preventing animal abuse.

Still, the reporting requirement prevents the collection of evidence to show actual patterns of abuse, thus hindering the prosecution of the abusers.<sup>129</sup> It is likely that the individual will be forced to leave their job at the agricultural facility after they blow the whistle on the organization. If that is the case, the statute has the effect of regulating the extent to which individuals can film the abuse and ultimately limits the message individuals can share with society regarding the particular topic of agricultural industry abuse.

The Wyoming statute makes it a crime to “knowingly or intentionally” record images or sounds of an agricultural operation with concealed devices without the owner’s consent.<sup>130</sup> In this way, the statute will likely undergo, but fail, strict scrutiny because of its similarity to the Idaho, Iowa, Kansas, North Dakota, and Montana statutes. The statute additionally states that anyone who reports the abuse to police within 48 hours is immune from civil liability.<sup>131</sup> While this portion of the statute closely mirrors the Missouri statute, it only does so in a civil sense, and does not afford

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<sup>128</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *United States v. Stevens*, 533 F.3d 218, 226 (2008) (en banc), aff’d U.S. LEXIS 3478 (2010).

<sup>129</sup> ‘Ag-gag’ Law May Have Hindered Report of Animal Cruelty at Missouri Hog Farm, HARVEST PUBLIC MEDIA (Oct. 2, 2014).

<sup>130</sup> WY HB126 (<http://legiscan.com/WY/bill/HB0126>).

<sup>131</sup> *Id.*



any protection from criminal liability. Thus, it still serves to regulate and prohibit free speech that has already been established as protected under free speech principles.

Lastly, a statute in North Carolina, which took effect on January 1, 2016, prohibits individuals from gaining access to the non-public area of their employer's property for the purpose of making secret recordings or removing data or other material.<sup>132</sup> The law is different from any of the previous ag-gag laws because it creates a civil cause of action, allowing a business to sue for damages.<sup>133</sup> This law technically does not criminalize whistleblowers, however, it allows employers to pursue civil charges against employees who take photographs or videos and holds them responsible for any damages incurred, as well as up to \$5,000 per day in punitive damages.<sup>134</sup> Further, the statute does not single-out the agricultural industry,<sup>135</sup> thus it is unlikely that a court would find the statute to be content based. This statute, like the Missouri statute, is slightly more likely to be upheld than the other remaining ag-gag laws, but the potential far-reaching consequences are the same as the other laws.

On January 13, 2016, a complaint was filed in federal court by animal rights and consumer groups, including Animal Legal Defense Fund, People for the Ethical Treatment of Animals, and the Center for Food Safety, claiming the North Carolina ag-

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<sup>132</sup> Will Potter, *Breaking: New Ag-Gag Bill Introduced in North Carolina on Same Day Butterball Worker Pleads Guilty to Cruelty*, GREEN IS THE NEW RED (Apr. 8, 2013), <http://www.greenisthenewred.com/blog/north-carolina-ag-gag-whistleblower-law/6851/>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

gag statute is unconstitutional.<sup>136</sup> The plaintiffs contend that the ag-gag law violates rights to free speech, to free press, to petition our government, and the Equal Protection Clause.<sup>137</sup> The plaintiffs further allege that the statute is not generally applicable, and it would not create liability for all employees.<sup>138</sup> Rather, the statute targets “whistleblowers, such as investigative journalists and activists engaged in undercover investigations, who seek to share information with the public.”<sup>139</sup> In addition, the plaintiffs point out that the North Carolina law, in addition to factory farms, can potentially include other industries such as nursing homes, financial institutions, and daycare centers.<sup>140</sup> Thus, the law has the potential to punish the reporting of abuse or misconduct in any of these places. Further, the complaint alleges that the statute “targets and disproportionately burdens the press.”<sup>141</sup> These infringements are “presumptively unconstitutional, requiring the state to carry a significant burden in order to preserve the statute, which it cannot do here.”<sup>142</sup>

Perhaps indicative of the fate of the North Carolina statute, a similarly written Tennessee statute died in the state’s legislature.<sup>143</sup> The Tennessee statute, similar to the

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<sup>136</sup> Dan Flynn, *Activists Challenge NC’s New ‘Ag-Gag’ Law in Federal Court*, FOOD SAFETY NEWS (Jan. 14, 2016), [http://www.foodsafetynews.com/2016/01/north-carolinas-new-ag-gag-law-challenged-in-federal-court/#.VqBMDz\\_MtMs](http://www.foodsafetynews.com/2016/01/north-carolinas-new-ag-gag-law-challenged-in-federal-court/#.VqBMDz_MtMs).

<sup>137</sup> See Complaint at 1, PETA, et al. v. Cooper, No. 16-cv-25 (N.C. Dist. Ct. Jan. 13, 2016), available at [http://www.centerforfoodsafety.org/files/nc-complaint-file-stamped\\_06044.pdf](http://www.centerforfoodsafety.org/files/nc-complaint-file-stamped_06044.pdf).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 3.

<sup>142</sup> Complaint at 3, PETA, et al. v. Cooper, No. 16-cv-25 (N.C. Dist. Ct. Jan. 13, 2016), available at [http://www.centerforfoodsafety.org/files/nc-complaint-file-stamped\\_06044.pdf](http://www.centerforfoodsafety.org/files/nc-complaint-file-stamped_06044.pdf).

<sup>143</sup> Sarah Damian, *Tennessee’s Ag Gag (Modeled After North Carolina Law) Didn’t Last Long*, FOOD INTEGRITY CAMPAIGN (Feb. 10, 2016), <http://www.foodwhistleblower.org/tennessees-ag-gag-modeled-after-north-carolina-law-didnt-live-long-986/>.

North Carolina statute, aimed to punish whistleblowers who attempted to expose employer wrongdoing in all industries.<sup>144</sup> Animal activists urge the public to see the laws for what they are – attacks on free speech and transparency – even though the agricultural industry attempts to redesign the statutes to look as though they are not.<sup>145</sup> In North Carolina, the legislature failed to pass an ag-gag law twice before because the law singled out factory farm exposes, but they quickly reframed the law to cover all industries.<sup>146</sup> Thus, it appears the legislature eluded the issues implicated when they attempted to regulate content based speech. North Carolina Governor Pat McCrory vetoed the redesigned statute because he feared it would make it more difficult for employees to report illegal activity, but the veto was overruled by the state’s legislature.<sup>147</sup> Even with changes to the content based aspects of the law, the “outcry that follows revelations about factory farms has led to important policy changes.”<sup>148</sup> Important changes include California’s 2008 initiative to ban specific types of confinement of farm animals.<sup>149</sup>

## V. Conclusion

It is likely that the majority of existing ag-gag laws will be found to be unconstitutional if challenged, due to their content based nature (limited to critical

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Editorial Board, *No More Exposes in North Carolina*, NY TIMES (Feb. 1, 2016), [http://www.nytimes.com/2016/02/01/opinion/no-more-exposes-in-north-carolina.html?\\_r=2](http://www.nytimes.com/2016/02/01/opinion/no-more-exposes-in-north-carolina.html?_r=2).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Jesse McKinley, *A California Ballot Measure Offers Rights for Farm Animals*, NY TIMES (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/us/24egg.html>. (An animal rights ballot measure grants California farm animals the opportunity to spread out instead of being confined to restrictive cages).

speech on agricultural activity), however, those laws which merely require the reporting of animal abuse to the authorities will have a tougher time succeeding in a constitutional challenge.

I would recommend that states with the goal to protect privacy at agricultural operations utilize the privacy protection laws already available without prohibiting video recordings. However, if states find it increasingly important to specifically regulate these video recordings, the least intrusive and potentially most constitutional resolution is to require individuals who record animal abuse to turn the footage over to the police after a specified time period without requiring the individual to identify themselves publicly. Under this suggestion, if the individual had obtained employment at the agricultural facility, they could potentially continue their work there after any investigation by the authority. Therefore, the individuals can continue to watch for animal abuse or other infractions, as well as communicate any message about the agricultural industry without statutory-induced suppression. This would alleviate animal activist's concerns that they will not be able to obtain and share long-term documented footage that shows patterns of prolonged animal abuse.

Still, others argue that even reframing the ag-gag laws will still not lead to favorable outcomes, claiming the burden of the laws outweighs the benefit.<sup>150</sup> These opponents argue that the agricultural industry and the state legislatures should make efforts to explain agricultural practices to the public, making the industry more transparent and

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<sup>150</sup> See 45 SUFFOLK U. L. REV. 1129, 1176 (2012).

shifting the focus from the messenger to the message.<sup>151</sup> Nathan Runkle of Mercy for Animals said, “The industry should be teaming up with organizations like ours to put cameras in these facilities, to advocate for mandatory training and have real euthanasia policies, things that would allow the public to trust these operations rather than fear them.”<sup>152</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> Traci Hobson, *Factory Farming in America, Part 4: The Proliferation of Ag-Gag Legislation*, IAN SOMERHALDER FOUNDATION.