FINALLY A SOLUTION? HOW *ANIMAL LEGAL DEFENSE FUND V. OTTER* COULD AFFECT THE CONSTITUTIONALITY OF IOWA'S AG-GAG LAW

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I. INTRODUCTION

Legislation that is often referred to by state legislatures as "Animal Research," and "Production Protection Act,"[1] or "Agricultural Operation Interference Act"[2] are generally bills that provide protection to farming operations by prohibiting employees and others from taking photographs or videos of the facility's operations. In 2011, *New York Times* Opinionator Mark Bittman coined the term "ag-gag" when describing these bills, which were being introduced in several states.[3] As video recording and photography have become more readily available, ag-gag legislation has become a priority for state legislators looking to prevent whistleblowers from conducting undercover investigations at agricultural production facilities. Supporters of ag-gag legislation argue the legislation is necessary to protect their state's agricultural industry from dishonest activists. On

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1. *See* MONT. CODE ANN. § 81-30-103 (2015); s*ee* KAN. STAT. ANN. § 47-1825 (2016).
2. *See* UTAH CODE ANN. § 76-6-112 (LexisNexis 2016).
3. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM) http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0 (explaining how ag-gag laws being proposed in several states are unfair, considering photographers and videographers take on the role of regulating the industry).

the other hand, challengers of the legislation argue undercover investigations play a vital role in revealing conditions inside food production facilities, bringing greater transparency to consumers.[4] As a result, several animal rights activist groups have "fought back," alleging ag-gag laws are unconstitutional.

Several states have passed ag-gag legislation, including Kansas,[5] Montana,[6] North Dakota,[7] Iowa,[8] Utah,[9] Missouri,[10] Idaho,[11] and North Carolina.[12] Ag-gag laws have existed for nearly three decades but only recently have been challenged in court. On August 3, 2015, Chief Judge B. Lynn Winmill of the United States District Court for the District of Idaho, issued the first opinion of its kind, *Animal Legal Defense Fund v. Otter*.[13] In *Otter*, the Animal Legal Defense Fund (ALDF) and other activist groups challenged Idaho's ag-gag law in federal court claiming violations of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as claiming that the state law was preempted by three federal laws.[14]

Utah also currently faces a similar attack on its ag-gag law in the federal

4. Brief of the Reporters Committee for Freedom of the Press and 15 Others as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment at 2, Animal Legal Def. Fund v. Wasden, No. 1:14-cv-00104-BLW (D. Idaho 2014) [hereinafter Brief] (highlighting that, "[i]n many respects, investigative journalism was born out of Upton Sinclair's infamous 1906 exposé on Chicago's slaughterhouses, *The Jungle*, and his contemporaries' works. Although his novel is centered around a fictitious Lithuanian immigrant, Sinclair conducted extensive research, interviewing health inspectors and workers and going undercover into the meatpacking facilities to witness the unsanitary conditions firsthand. Sinclair's work is credited with aiding passage of the Pure Food and Drug Act and Meat Inspection Act, both enacted in 1906, which instituted vigorous reforms in the meat packing industry.")

5. KAN. STAT. ANN. §47-1825 (2016).

6. MONT. CODE ANN. § 80-30-101 (2015).

7. N.D. CENT. CODE § 12.1-21.1-03 (2016).

8. IOWA CODE § 717A.3A (2016).

9. UTAH CODE ANN. § 76-6-112 (Lexis Nexis 2016).

10. MO. REV. STAT. § 578.405.1 (2015).

11. IDAHO CODE § 18-7042 (2016).

12. N.C. GEN. STAT. § 99A-2 (2016).

13. *See generally* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).

14. Civil Rights Complaint at 46-48, Animal Legal Def. Fund v. Otter, No. 1:14-cv-104 (D. Idaho 2014) [hereinafter Civil Rights Complaint, Idaho] (arguing the retaliation prohibition in the False Claims act, the employee protection provision of the Food Safety Modernization Act, and the employee protection provision of the Clean Water Act preempted the Idaho ag-gag law) (citing False Claims Act, 31 U.S.C. § 3730(h) (2012)); *see also* Food Safety Modernization Act, 21 U.S.C. § 399d (2012); Clean Water Act, 33 U.S.C. § 1367 (2012).

court case, *Animal Legal Defense Fund v. Herbert*.[15] *Herbert* is the result of the nation's first known ag-gag prosecution of Amy Meyer, who on February 8, 2013, decided to visit Dale Smith Meatpacking Company in Draper City, Utah.[16] Once arriving across the street from the Dale Smith Meatpacking Company, Ms. Meyer began to record what she saw but was asked by the slaughterhouse manager to leave.[17] When she refused, the police were called, and she was charged under Utah's ag-gag statute.[18] While the charges against Ms. Meyer were later dropped, the case is currently moving forward.

Most recently, on January 13, 2016, the ALDF filed a lawsuit challenging North Carolina's ag-gag law. The North Carolina lawsuit alleges violations under both the U.S. Constitution and North Carolina's Constitution.[19] With the recent decision in *ALDF v. Otter*, it's only a matter of time before other states with ag-gag laws are challenged in court.

Part II provides a brief glimpse into what has prompted this recent surge in the enactment of ag-gag laws, specifically in Iowa. In doing so, this part discusses several examples where undercover investigations have exposed the wrongdoings of agricultural operations in Iowa and ultimately damaged the industry. The ultimate goal of Part II is to present the driving force behind ag-gag legislation: money. Part III provides the legislative history behind the enactment of each state's ag-gag law, including the different approach each state has taken in drafting their state's law. The entirety of Part III is dedicated to the introduction of each state's law in order to provide a big picture understanding of how each law was drafted and how it could affect those who wish to engage in undercover investigations. Part IV focuses on the recent decision in *ALDF v. Otter* and how that decision may apply to Iowa's ag-gag law. While preemption claims were brought in *Otter* and may apply to Iowa's ag-gag law, this Note does not analyze those claims. Finally, Part V discusses the potential Equal Protection claim that could be brought under Iowa's State Constitution and how a state constitution claim could provide another outlet to challenge ag-gag laws.

15. *See generally* Civil Rights Complaint, Animal Legal Def. Fund v. Herbert, No 2:13-cv-00679-RJS (D. Utah 2013) [hereinafter Civil Rights Complaint, Utah].

16. *Id.* at 9-10.

17. *Id.*

18. *Id.*

19. *See generally* Complaint for Declaratory and Injunctive Relief Concerning the Constitutionality of a State Statute, People for the Ethical Treatment of Animals, Inc., v. Cooper, No. 16-CV-25 (D. N.C. 2016) [hereinafter Complaint for Declaratory and Injunctive Relief, N.C.].

II. UNDERCOVER INVESTIGATIONS IN IOWA RESULTING IN THE REVIVAL OF AG-GAG LEGISLATION

During the 1970s and 1980s, meat producers in the Midwest encountered high levels of regulation and unionization.[20] Since the Midwest was heavily regulated, big meat producers focused their farming operations on the unregulated South.[21] The industry in the South suffered a major blow in 1999, when a grand jury handed down the first animal cruelty indictments on farm workers in American history after a three-month PETA investigation at Belcross Farm, in North Carolina.[22] Three workers were convicted and sentenced after hours of video uncovered violent beatings of pregnant pigs with a wrench and an iron pole.[23] The backlash led big meat producers to reconsider the Midwest as a place they could build large facilities with little governmental oversight or public outcry.[24]

Many large meat producers, including Cargill, Smithfield, and Hormel, focused their attention for hog development on Iowa.[25] In 2006, Cargill, Smithfield, and Hormel challenged Iowa Code section 202B in the United States District Court for the Southern District of Iowa.[26] The purpose of Iowa Code section 202B is to "preserve free and private enterprise, prevent monopoly, and also to protect consumers by regulating the balance of competitive forces in beef and swine production . . . ."[27] Shortly thereafter, Cargill, Smithfield, and Hormel agreed to a consent decree with the State of Iowa that allowed them to buy farmland and build large hog confinement facilities in Iowa.[28]

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20. Desiree Evans, *The Hands Behind the Turkey*, INST. FOR SOUTHERN STUD. (Nov. 25, 2008, 12:20 PM), http://www.southernstudies.org/2008/11/the-hands-behind-the-turkey.html (stating big meat producers looked to the southern states for cheaper labor and states hostile to unions); *see also* Stephanie Ogburn, *Ranchers Struggle Against Giant Meatpackers and Economic Troubles*, GRIST (Apr. 15, 2011), http://grist.org/food/2011-04-14-ranchers-struggle-against-giant-meatpackers-economic-troubles/full/ (explaining the long battle against vertical integration in the meat industry, causing four giant companies—Tyson, Cargill, JBS, and National Beef—to control 80 percent of the United States beef market).

21. Ted Genoways, *Gagged by Big Ag: How Exposing Abuse Became a Crime*, EARTH FIRST! NEWSWIRE (June 17, 2013), http://earthfirstjournal.org/newswire/2013/06/17/gagged-by-big-ag-how-exposing-abuse-became-a-crime/.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. IOWA CODE § 202B.101 (2016); *see* Hormel Foods Corp. v. Miller, No. 4:06-CV-00161 (S.D. Iowa 2006).

27. IOWA CODE § 202B.101 (2016).

28. *State Reaches Hog Production Agreement with Texas Farm LLC,* IOWA ATT'Y GEN. (Apr. 19, 2013), https://www.iowaattorneygeneral.gov/newsroom/state-reaches-hog-production-agreement-with-texas-farm-llc/ [hereinafter *Hog Prod. Agreement*] ("By

With the increase in large hog confinement facilities, animal rights activists turned their cameras to animal agricultural operations in Iowa.[29] In 2009, People for the Ethical Treatment of Animals (PETA) released a video showing employees of MowMar Farms, a supplier of Hormel Foods, located in Greene County Iowa, repeatedly kicking, shocking, and cursing at an injured sow that was unable to stand.[30] Six Hormel Foods employees plead guilty to abusing factory-farmed pigs, received fines, and were then placed on probation.[31] After the release of the recording, Hormel "went on the offensive against PETA, criticizing its practice of methodically building cases over a period of months in order to demonstrate patterns of abuse."[32]

Hog confinement facilities were not the only animal food production facilities that were being exposed. In February and March of 2010, the Humane Society of the United States (HSUS) had one of its employees pose as a worker at Rose Acre Farm facilities in Winterset, Stuart, and Guthrie Center, Iowa.[33] In the

agreement with Hormel dated April 6, 2006, and with the approval of the United States District Court for the Southern District of Iowa, the Attorney General consented to an injunction prohibiting the enforcement of Iowa Code section 202B.201 against Hormel by the State of Iowa.").

29. *See* Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. 10,960, 10,962 (2012) (explaining the long history of undercover investigations conducted at agricultural operations).

30. The findings were not limited to animal abuse. "PETA also documented an apparent violation of the Federal Food, Drug, and Cosmetic Act. Animals who were to be killed for human consumption were sprayed with a substance that contains gentian violet (a chemical that is linked to certain cancers) thereby making their flesh 'adulterated' under federal law." *Mother Pigs and Piglets Abused by Hormel Supplier*, PETA, http://investigations.peta.org/mother-pigs-piglets-abused-hormel-supplier/ (last visited July 30, 2016) [hereinafter *Mother Pigs*]; *see also Excerpts From the Investigators' Log Notes*, *Iowa Sow Farm: Hormel Supplier Investigation, 2008*, http://www.mediapeta.com/peta/pdf/IowaSowFarmInvestigatorsLogNotes.pdf [hereinafter Log Notes]; Steve Karnowski, *PETA: Manager Still at Farm Where Pigs Were Abused*, STAR TRIBUNE (Oct. 21, 2008, 12:11 PM), http://www.startribune.com/31706519.html.

31. Shawna Flavell, *Four More Former Iowa Pig Factory Farm Workers Admit Guilt!*, PETA (June 24, 2009), http://www.peta.org/blog/four-former-iowa-pig-factory-farm-workers-admit-guilt/.

32. Genoways, *supra* note 21.

33. Tom Philpott, *Flies, Maggots, Rats, and Lots of Poop: What Big Ag Doesn't Want You to See*, MOTHER JONES (Mar. 20, 2013, 6:00 AM), http://www.motherjones.com/tom-philpott/2013/03/ag-ag-illegal-undercover-film-livestock; *see* HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: UNDERCOVER EXPOSES AT THE SECOND- AND THIRD- LARGEST U.S. EGG PRODUCERS HIGHLIGHT NEED FOR INDUSTRY WIDE REFORM 1 (2010), http://www.humanesociety.org/assets/pdfs/farm/report_2010_iowa_egg.pdf [hereinafter AN

fifteen days that the HSUS employee worked for Rose Acre Farms, the employee took video of chickens being abused.[34] "But the company said the video was misleading. It cut many hours of images into just a few minutes and cut back and forth between farms operated by two companies. Among hundreds of thousands of egg-laying hens, sick and dead birds are inevitable, they said."[35] The HSUS employee signed the company's "Animal Welfare" document, which requires employees to bring the recorded behavior to the attention of a supervisor, which the HSUS employee did not do.[36] The HSUS employee also "circled 'No' when asked if he was 'a member of, associated with, or connected in any way with any organization that could be considered an animal rights group.'"[37]

Shortly after the HSUS investigation into Rose Acre Farms, egg-producing factories in Iowa were forced to recall nearly half a billion eggs potentially containing salmonella after more than 1000 people became ill.[38] The outbreak of salmonella triggered the Food and Drug Administration to conduct an investigation

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HSUS REPORT].

34. Dave Russell, *Rose Acre Farms Begins Third Party Audit*, BROWNFIELD (Apr. 8, 2010), http://brownfieldagnews.com/2010/04/08/rose-acre-farms-begins-third-party-audit/; *see* AN HSUS REPORT, *supra* note 33, at 2 (stating "[t]he HSUS investigator working in the Winterset pullet shed pulled dead young hens, some of them mummified (meaning they'd been rotting in cages for weeks), from cages everyday . . . the manure pit under a pullet shed had not been cleaned in two years. The ammonia levels caused the investigator respiratory distress despite the painter's facemask he wore. Rose Acre workers claimed that some hens are blinded because of excessive ammonia levels.").

35. A.G. Sulzeberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. TIMES (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/us/14video.html?_r=0 ("T[he] video showed rows of crowded wire cages, some containing injured and disfigured hens, as well as rotting, dead birds. Employees were seen throwing the birds into bins and talking about how their wings or legs sometimes fell off in the process.")

36. Russel, *supra* note 34.

37. *See* Sulzeberger, *supra* note 35 (confirming Rose Acre Farms did not fire a single employee as a result of the video taken by the HSUS investigator. Instead, they instituted more extensive background checks on new workers.).

38. Determining how many people were sickened by the eggs coming from Jack DeCoster's egg producing farms is difficult, but the United States Centers for Disease Control and Prevention estimates 1,939 people became ill from May 1 to November 1, 2010, as a result of Jack DeCoster's farms. The two egg producing factories owned by Jack DeCoster where positive samples of salmonella were found were Wright County Egg and Hillandale Farms. *See Multistate Outbreak of Human Salmonella Enteritidis Infection Associated with Shell Eggs (Final Update)*, CDC (Dec. 2, 2010), http://www.cdc.gov/salmonella/2010/shell-eggs-12-2-10.html [hereinafter *Multistate Outbreak*]; Philpott, *supra* note 33; Ryan J. Foley, *Egg Recall: Salmonella Found In Feed At Two Iowa Farms; Feed Mill Under Review*, HUFFINGTON POST (Aug. 27, 2010, 11:19 AM), http://www.huffingtonpost.com/2010/08/27/egg-recall-salmonella-found-feed-iowa_n_696961.html.

into the conditions of the egg-producing facilities.[39] "The report portrays the facilities as a kind of fecal nightmare, with manure mounding up in eight-foot piles . . . ."[40]

Undercover investigations into animal food production facilities have also caused the industry to take several financial blows. In 2013, Mercy for Animals conducted an investigation at Sparboe Farms in Iowa, Minnesota, and Colorado.[41] People associated with Mercy for Animals were hired as workers at the farms after being equipped with hidden cameras.[42] After capturing footage of animal abuse, Mercy for Animals released the video to the public.[43] The videos revealed workers at Sparboe Farms throwing chickens by the neck into cages, burning the beaks off of chicks without painkillers, and leaving dead chickens to rot in cages, alongside live birds.[44] As a result, both McDonalds and Target dropped Sparboe farms as their egg supplier.[45]

In recent years, investigations into animal food production facilities have increased, especially in Iowa, which is the nation's largest producer of eggs and pork.[46] "The agricultural industry's response to this intractable public relations threat couldn't be more straightforward: make it illegal."[47] In 2003, to combat undercover investigations, the American Legislative Exchange Council began

39. Philpott, *supra* note 33; Dan Flynn, *DeCoster Sentencing in Sioux City Reveals Many Sides of the Story*, FOOD SAFETY NEWS (Apr. 14, 2015), http://www.foodsafetynews.com/2015/04/decoster-sentencing-in-sioux-city-reveals-many-sides-of-the-story/#.VgMpg7RYblI (United States District Judge Mark Bennett on April 13, 2015, sentenced Jack DeCoster and his son, Peter DeCoster, to serve three months each in prison and pay fines of $100,000 each for selling salmonella-contaminated eggs from their Iowa farms in 2010).

40. Philpott, *supra* note 33; *see also* Observations Made by the FDA at Quality Egg, LLC, (Aug. 12, 2010—Aug. 30, 2010), http://www.fda.gov/downloads/Safety/Recalls/MajorProductRecalls/UCM224392.pdf; Observations Made by the FDA at Hillandale Farms of Iowa, Inc., (Aug. 19, 2010—Aug. 26, 2010), http://www.fda.gov/downloads/Safety/Recalls/MajorProductRecalls/UCM224391.pdf.

41. Steve Karnowski, *McDonald's Drops Egg Supplier Over Cruelty Charges*, CNSNEWS.COM (Nov. 18, 2011, 1:15 PM), http://cnsnews.com/news/article/mcdonalds-drops-egg-supplier-over-cruelty-charges [hereinafter Karnowski, *McDonald's*].

42. *Id.*

43. *Id.*

44. Bollard, *supra* note 29.

45. Karnowski, *McDonald's*, *supra* note 41.

46. Sulzberger, *supra* note 35.

47. Leighton Akio Woodhouse, *Charged With the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), http://www.thenation.com/article/charged-crime-filming-slaughterhouse/.

drafting and distributing nationwide model legislation known as the Animal and Ecological Terrorism Act.[48] While Iowa refused to adopt the model legislation, they did become the first state to enact ag-gag legislation in over twenty years, setting off a chain reaction of ag-gag legislation that would spread to several states with large agricultural operations.[49]

III. HISTORY OF AG-GAG LEGISLATION

Ag-gag laws emerged in the early 1990s in response to a threat posed by underground activists with the Animal Liberation Front movement.[50] In states where agriculture is a dominant force, both economically and politically, ag-gag legislation is being considered and passed by state legislators.[51] However, not every state has taken the same approach. Some states "criminalize documenting abuses outright. Some make it a crime to lie about one's associations with animal advocacy groups on job applications for farm employment. Others require those who document abuses to turn any evidence over to law enforcement within 24-48 hours of recording it . . . ."[52]

The nation's first ag-gag statute was passed in Kansas in 1990, called the Farm Animal and Field Crop and Research Facilities Protection Act.[53] The statute criminalizes an employee or member of the public from entering an animal facility

48. The model legislation requires the Attorney General to maintain a registry of information for every person who is convicted or pleads guilty of the Act. Todd Roberson, '*Animal Ecological Terrorism Act' Seeks to Protect Agricultural Abusers*, DALL. MORNING NEWS (Apr. 10, 2013, 3:03 PM), http://dallasmorningviewsblog.dallasnews.com/2013/04/animal-ecological-terrorism-act-seeks-to-protect-agricultural-abuses.html/. "The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators . . . . Comprised of nearly one-quarter of the country's state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United Stated." *About Alec*, AM. LEGIS. EXCHANGE COUNCIL, http://www.alec.org/alec-about/ (last visited June 20, 2016); *The Animal and Ecological Terrorism Act (AETA)*, AM. LEGIS. EXCHANGE COUNCIL (last visited June 20, 2016), http://www.alec.org/model-legislation/the-animal-and-ecological-terrorism-act-aeta/.

49. *See* IOWA CODE § 717A.3A (2016).

50. The mission statement for the Animal Liberation front movement includes inflicting economic damage on those who profit from the misery and exploitation of animals and to liberate animals from places of abuse and place them in good homes where they can live out their natural lives, free from suffering. *Frequently Asked Questions About the North American Animal Liberation Press Office*, NORTH AM. ANIMAL LIBERATION PRESS OFF., https://animalliberationpressoffice.org/NAALPO/f-a-q-s/#5 (last visited July 30, 2016) [hereinafter *FAQ*].

51. Sulzeberger, *supra* note 35.

52. Woodhouse, *supra* note 47.

53. *See* KAN. STAT. ANN. § 47-1825 (2016).

without the consent of the owner to record animal production operations with the intent to damage the enterprise.[54] In 1991, Montana followed Kansas and passed a similar statute entitled the Farm Animal and Research Facilities Protection Act.[55] The statute bans recordings without effective consent of the owner for those who have the intent to commit criminal defamation with the intent to damage the enterprise.[56] Also in 1991, North Dakota passed the Animal Research Facility Damage Act.[57] The North Dakota statute goes further than the Kansas and Montana statutes by imposing liability for unauthorized use of recording at an animal research facility, regardless of intent.[58]

In more recent years, ag-gag legislation has begun gathering momentum and bills are appearing across the country.[59] In March 2011, the Iowa House approved House File 589, which establishes new civil and criminal penalties for various offenses on farms, including unauthorized video or audio recordings.[60] However, "[t]he Iowa Attorney General's office advised legislators that the ban on recording

54. The statute does not define the term "damage to the enterprise," however; one can presume that damage in this context refers to reputational or economic damage. Jessica Pitts, Note, *"Ag-Gag" Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information*, 40 AM. J. CRIM. L. 95, 97 (2012).

55. *See* MONT. CODE. ANN. § 81-30-103(2)(e) (2015).

56. Criminal defamation is defined as anything that exposes the person to disgrace, ridicule, degradation, or hatred in society. ALLISON BOGSTED & MATHEW SWINBURN, NETWORK FOR PUBLIC HEALTH LAW, AG-GAG REFLEX: FOOD SAFETY AND THE BAD TASTE OF ANIMAL FACILITY TAMPERING ACTS 1 (2013), https://www.networkforphl.org/_asset/hhdkth/Issue-Brief—-Ag-Gag-3.pdf; Jeff Zalesin, *An Overview of "Ag-Gag" Laws*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (2013), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2013/overview-ag-gag-laws.

57. N.D. CENT. CODE § 12.1-21.1-03 (2016).

58. Bollard, *supra* note 29.

59. *See* Zalesin, *supra* note 56.

60. House File 589 was written to have the same effect as the Kansas, North Dakota, and Montana statutes over a decade ago. H.F. 589, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). Nine House Democrats joined all of the Republicans present to pass the bill on a 66 to 27 vote. Most of the Democrats supporting the bill represented rural or small town areas. *See* Journal of the House, 716-17 (Mar. 17, 2011), https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/March%2017,%202011.pdf. Former Senator Tom Harkin responded to House File 589 by saying, "Thankfully, because of whistleblowers and others doing undercover work, we are finding out about a lot of the abuses that are taking place in animal agriculture - and some of those abuses have just been awful." *Iowa Ban on Secret Farm Recordings Could End Up in Court*, BLEEDING HEARTLAND (Mar. 18, 2011), http://www.bleedingheartland.com/tag/animal-cruelty/.

would make the law vulnerable to Constitutional challenges."[61] After all, in 2010, the United States Supreme Court ruled that a recording exposing animal cruelty represents the exercise of free speech.[62] In response, Iowa Senator Joe Seng worked on a provision that scrapped the House version in substitute for a provision that did not deal with recordings.[63] The Senate version doesn't address audio or video recording issues. Instead, it would create a new crime: agricultural production facility fraud.[64]

In February 2012, the Iowa Senate took up the proposed changes and passed the legislation with a 40-10 vote.[65] "The House then immediately took up the Senate changes and approved them without debate on a 69-28 vote."[66] While the Iowa bill has no official legislative history, the sponsor of Iowa's Senate bill, Senator Joe Seng "stated his intent was to stop 'subversive acts' that could 'bring down the industry,' especially when committed by 'extremist vegans.'"[67] On March 2, 2012, Governor Terry Branstad signed the bill into law and defended the bill in a March 5th press conference by saying, "[a]griculture is an important part of our economy and farmers should not be subjected to people doing illegal, inappropriate things and being involved in fraud and deception in order to try to disrupt agricultural operations."[68] State Representative Pat Murphy, who voted against the bill, stated, "I think the overwhelming majority of farmers and people who own breeding facilities in Iowa operate very reputable businesses and treat

61. Cindy Galli, *'Ag Gag' Bills Would Stop Undercover Animal Abuse Investigations*, ABC NEWS (Feb. 29, 2012), http://abcnews.go.com/Blotter/ag-gag-bills-stop-undercover-animal-abuse-investigations/story?id=15816805.

62. Jason Clayworth, *'Ag Gag' Bill Passes Legislature, Headed to Governor; Opponents Predict Dire Consequences*, DES MOINES REGISTER (Feb. 28, 2012, 1:32 PM), http://blogs.desmoinesregister.com/dmr/index.php/2012/02/28/iowa-senate-approves-ag-gag-bill-opponents-predict-dire-consequences. The federal law that was struck down by the United States Supreme Court was passed to try to stop interstate trafficking of so called "crush videos," showing the killing of cats, dogs, and other animals by stomping or other cruel methods. Lyle Denniston, *First Amendment Left Intact*, SCOTUS BLOG (Apr. 20, 2010, 10:11 AM), http://www.scotusblog.com/2010/04/first-amendment-left-intact/; *see* United States v. Stevens, 559 U.S. 460, 481 (2010) (holding the federal law regulates expression on the basis of its content, which makes the law invalid under the First Amendment).

63. Clayworth, *supra* note 62.

64. *Id.*

65. Dan Flynn, *Iowa Approves Nations First 'Ag-Gag' Law*, FOOD SAFETY NEWS (Mar. 1, 2012), http://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/#.VNbE9sa1F7m [hereinafter Flynn, *First*].

66. *Id.*

67. Bollard, *supra* note 29.

68. O. Kay Henderson, *Branstad Says "Ag Gag" Law Protects Iowa Farmers*, RADIO IOWA (Mar. 5, 2012), http://www.radioiowa.com/2012/03/05/branstad-says-ag-gag-law-protects-iowa-farmers-from/; *See* BOGSTED & SWINBURN, *supra* note 57, at 1.

their animals well, that's how they make their money . . . but for that small percentage that has a problem with it, you have to wonder what do they have to hide?"[69]

The Iowa law uses different language than the Kansas, Montana, and North Dakota laws in that it does not criminalize taking photographs or recordings.[70] Instead, the Iowa law is designed to prevent authorization onto agricultural facilities under false pretenses, including lying on a job application.[71] The Iowa law specifically prohibits:

> (a) Obtain[ing] access to an agricultural facility by false pretenses;[72]
>
> (b) Mak[ing] a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.[73]

The expansion of language used in the new Iowa law is significant, as it prevents "food safety advocates from securing employment at a facility, thereby gaining legal access to the property."[74] Furthermore, the Iowa statute imposes

69. Mike Wiser, *Iowa House OKs Bill Outlawing Secret Recording on Farms*, SIOUX CITY J. (Mar. 18, 2011), http://siouxcityjournal.com/news/state-and-regional/iowa/iowa-house-oks-bill-outlawing-secret-recording-on-farms/article_273e1fac-23ed-5312-9979-3c65aea45f40.html. Des Moines based advertising specialist Mike Libbie believes passing the bill was a big mistake, stating, "[a]t a time when agriculture needs more, not less, friends and at a time when so many people have horrible misconceptions about farming and nearly zero relationships with farmers and ranchers. . .this bill is ill advised. Bad idea for agriculture, bad idea for farmers and ranchersFalsethis will only fuel the fires of those who already think animal agriculture is evil. And for those who don't, they just might start wondering, '*So, what is going on they don't want me to know about?*'" Michael Libbie, *Iowa To Make History. . .Or a Mistake?*, INSIGHT ADVERT. (Mar. 30, 2011, 4:33 PM), http://insightadvertising.typepad.com/hwy_6_your_road_to_the_co/2011/03/iowa-to-make-historyor-mistake.html.

70. The main difference between the nation's first three ag-gag laws and Iowa's modern ag-gag law is the prohibition of just about any kind of damage to the animal facilities. The more modern Iowa law focuses on undercover investigations, while the older laws were also concerned about property damage and the liberation and theft of animals. Doris Lin, *First Ag-Gag Laws in United States are Over Twenty Years Old*, ABOUT NEWS, http://animalrights.about.com/od/animallaw/a/First-Ag-Gag-Laws-In-United-States-Are-Over-Twenty-Years-Old.htm (last updated Feb. 2, 2016); *see* IOWA CODE § 717A.3A (2016).

71. BOGSTED & SWINBURN, *supra* note 56, at 1.

72. IOWA CODE § 717A.3A(1)(a).

73. IOWA CODE § 717A.3A(1)(b); BOGSTED & SWINBURN, *supra* note 56, at 1.

74. BOGSTED & SWINBURN, *supra* note 56, at 1.

liability on a person or organization that aids or abets in the fraud, thus, criminalizing any food safety or animal rights organization from collaborating with an individual whistleblower.[75] Nonetheless, ag-gag legislation didn't stop in Iowa.

On March 20, 2012, Utah became the fifth state to pass ag-gag legislation when the Agricultural Operation Interference Act was signed into law.[76] Like the Kansas, Montana, and North Dakota laws, the Utah law prohibits recording an agricultural operation without the owner's consent.[77] On July 9, 2012, Missouri Governor Jay Nixon signed into law, Senate Bill 631 after the bill passed both chambers of the legislature by wide margins.[78] Missouri took a much different approach to its ag-gag law in an effort to keep Missouri's number one industry moving forward. The Missouri statute "requires any factory farm employee who makes a recording of what the employee suspects is animal abuse to submit the unedited recording to the police within twenty-four hours."[79] Critics of Missouri's ag-gag law believe the "provision will be used to suppress evidence of cruelty on farms rather than expose it."[80] "Perhaps dissatisfaction with the bill indicates a fear that law enforcement will not prosecute illegal acts, but will instead act as 'guardians' of depictions of cruelty so that animal activists and the public cannot have access to it."[81]

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75. "A person who conspires to commit agricultural production facility fraud under subsection 1, is subject to the provisions of chapter 706" (conspiracy provisions of the Iowa Code). "A person who aids and abets in the commission of agricultural production facility fraud under subsection 1, is subject to the provisions of chapter 703" (parties to a crime provisions of the Iowa Code). IOWA CODE § 717A.3A(3); *see also* IOWA CODE § 706 (2016); IOWA CODE § 703 (2016); BOGSTED & SWINBURN, *supra* note 56, at 1.

76. *See* UTAH CODE ANN. § 76-6-112 (LexisNexis 2016); BOGSTED & SWINBURN, *supra* note 56, at 1.

77. Utah's law also prohibits access to an agricultural operation under false pretenses. UTAH CODE ANN. § 76-6-112(1)-(2). Representative John Mathis, the sponsor of the House bill, "stated his intent was to stop 'national propaganda groups' from using farm footage to advance their political agendas."
Bollard, *supra* note 29, at 10,965.

78. Pitts, *supra* note 54, at 100; Press Release, Missouri Farmers Care, Missouri Farmers Care Applauds Governor Jay Nixon For Protecting Agriculture and Signing Senate Bill 631 (June 12, 2012), http://myemail.constantcontact.com/Press-Release—Missouri-Farmers-Care-applauds-Gov—Nixon-for-signing-SB 631.html?aid=pucRDaLc46k&soid=1105166336699 [hereinafter Missouri Farmers Care PR].

79. Pitts, *supra* note 54, at 99; Missouri Cattlemen's Association President Lonny Duckworth stated, "This is a commonsense law that is good for our animals and our farmers and ranchers. If abuse does in fact occur it needs to be dealt with immediately instead of being sensationalized months later as a fundraising tool for extremist animal rights groups like HSUS, PETA, and others." Missouri Farmers Care PR, *supra* note 79.

80. Pitts, *supra* note 54, at 99.

81. *Id.*

In 2014, Idaho Governor C.L. "Butch" Otter signed into law the Interference with Agricultural Production Act, which makes it illegal to take photos or videos at farms or slaughterhouses without the operator's permission.[82] The statute creates five agricultural production interferences that will be deemed criminal if the person knowingly:[83]

> (a) is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;[84]
>
> (b) obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;[85]
>
> (c) obtains employment with an agricultural production facility by force, threat, misrepresentation or trespass with the intent to cause economic or other injury to the facility's operations" or "business interests;[86]
>
> (d) enters an agricultural production facility that is not open to the public and, without the facility owner's express consent . . . makes audio or video recordings of the conduct of an agricultural production facility's operations;[87] or
>
> (e) intentionally causing physical damage or injury to the agricultural facility's operations.[88]

Opponents of the Idaho's "ag-gag law argues that the purpose of the statute is to prioritize and privilege speech that is favorable to the agricultural industry.[89] "Lawmakers who support the law say it is necessary to protect the agricultural industry, which adds billions of dollars to the Idaho economy, from unfair and biased investigations."[90] "State Senator Jim Patrick, the Twin Falls Republican who sponsored the legislation, has said [the law was] needed to prevent farmers from being 'set up' by activists."[91]

On May 29, 2015, North Carolina Governor Pat McCrory vetoed House Bill

82. IDAHO CODE ANN. § 18-7042 (2016).
83. *Id.*
84. *Id.* § 18-7042(1)(a).
85. *Id.* § 18-7042(1)(b).
86. *Id.* § 18-7042(1)(c).
87. *Id.* § 18-7042(1)(d).
88. *Id.* § 18-7042(1)(e).
89. Civil Rights Complaint, Idaho, *supra* note 14, at 28.
90. Laura Zuckerman, *ACLU Cites Free Speech in Suit against Idaho's 'Ag Gag' Law*, REUTERS (Mar. 17, 2014, 11:48 PM), http://www.reuters.com/article/2014/03/18/us-usa-idaho-livestock-idUSBREA2H05A20140318.
91. *Id.*

405, titled "Property Protection Act."[92] Nonetheless, on June 3, 2015, the North Carolina House and Senate overrode the Governor's veto and the law went into effect on January 1, 2016. North Carolina's statute is not specifically directed at the agricultural industry and more broadly prohibits any person from exceeding an owner or operator's authority over a nonpublic area.[93]

All eight states that have enacted ag-gag legislation have taken slightly different approaches to drafting the text of their state's statute. To date, only three states have seen their ag-gag laws challenged: Utah,[94] Idaho,[95] and North Carolina.[96]

IV. IDAHO LAWSUIT: ANIMAL LEGAL DEFENSE FUND V. OTTER

On March 17, 2014, ALDF filed a lawsuit against C.L. "Butch" Otter in his official capacity as Governor of Idaho and Lawrence Wasden in his official capacity as Attorney General of Idaho, in the United States District Court for the District of Idaho.[97] Unlike in Utah, Idaho never charged anyone with interference with agricultural productions. However, absent a prosecution under the Idaho ag-gag law, the ALDF argued they still had standing to bring the lawsuit forward. In a Memorandum Decision and Order, Judge B. Lynn Winmill held: "First Amendment cases 'present unique standing considerations.'"[98] "The Supreme

92. In expressing his reasoning for vetoing the bill, North Carolina Governor Pat McCrory stated, "I am concerned that subjecting these employees to potential civil penalties will create an environment that discourages them from reporting illegal activities." Mark Binker, *McCrory Vetoes 'Ag-Gag' Bill*, WRAL.COM (May 29, 2015), http://www.wral.com/mccrory-vetoes-ag-gag-bill/14677429/#GicwV4VRq32DlIiI.99.

93. House Bill 405 extends to all industries, including nursing homes, hospitals, group homes, medical practices, charter and private schools, day care centers and so forth. Binker, *supra* note 92.

94. On August 8, 2014, Judge Robert Shelby denied the Defendant's motion to dismiss the Plaintiff's claims for alleged equal protection and due process and the case remained in court. Order Grating in Part and Denying in Part Defendant's Motion to Dismiss, Animal Legal Def. Fund v. Herbert, No. 2:13-CV-00679-RJS (D. Utah Aug. 8, 2014).

95. *See generally* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).

96. On January 13, 2016, a number of whistleblower protection organizations filed a lawsuit challenging North Carolina's ag-gag law. Complaint for Declaratory and Injunctive Relief, N.C., *supra* note 19.

97. Otter, 118 F. Supp. 3d 1195; *See* Memorandum Decision and Order at 7-9, Animal Legal Def. Fund v. Otter (D. Idaho Sep. 4, 2014) [hereinafter Decision and Order, Idaho] (holding the *Ex Parte Young* exception does not apply to Governor Otter, and he must be dismissed as a defendant).

98. Decision and Order, Idaho, *supra* note 97, at 9; Libertarian Party of L.A. Cty. v. Bowen, 709 F.3d 867, 870 (9th Cir. 2013).

Court, to avoid the chilling effect of sweeping restrictions, has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences."[99] Therefore, ALDF only needed to show they engaged in a "course of conduct arguably affected with a constitutional interest and that there is a credible threat that the provision will be invoked against the plaintiff."[100] Judge Winmill allowed the case to move forward, finding ALDF sufficiently demonstrated they had intentionally to violated the statute.[101] Challenging the law as unconstitutional, ALDF alleged violations of the Free Speech Clause of the First Amendment, Equal Protection Clause of the Fourteenth Amendment, and preemption.[102]

A. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides, no "State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[103] Over time, the Supreme Court has developed a three-tiered approach of analysis under the Equal Protection Clause, and the level of scrutiny that is applied often determines the result of these cases.[104] Laws that create suspect classifications based on race, alienage, or national origin and those affecting fundamental rights are subject to strict scrutiny.[105] Under strict scrutiny, the classification will survive only if it is narrowly tailored to advance a compelling

99. Decision and Order, Idaho, *supra* note 97, at 9; Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003).

100. Decision and Order, Idaho, *supra* note 97, at 10; Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1015 (9th Cir. 2013).

101. "ALDF hopes that exposure of illegal or abusive behavior will result in boycotts, 'food safety recalls, citations for environmental and labor violations, evidence of health code violations, plant closures, criminal convictions, and civil litigation,' all of which could likely cause economic injury to an alleged violator's business. Because exposure of such conduct could hurt a facility's profits and reputation and economically injure the business, the Court believes that ALDF has alleged intent to violate subsection (c)." Decision and Order, Idaho, *supra* note 97, at 9.

102. The preemption claim was premised on the retaliation prohibition in the False Claims act, 31 U.S.C. § 3730(h), the employee protection provision of the Food Safety Modernization Act, 21 U.S.C. § 399d, and the employee protection provision of the Clean Water Act, 33 U.S.C. § 1367. *See* Civil Rights Complaint, Idaho, *supra* note 14, at 46-48.

103. U.S. CONST. Amend. XIV, § 1.

104. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L. J. 1013, 1022-23 (2003) (explaining the federal three tier federal model for judicial review); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) (stating plaintiffs generally win if the Court subjects a law to strict scrutiny; they generally lose if the Court applies rational basis review).

105. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432(1985).

government interest.[106] In other words, there is a presumption against the legislation that can only be overcome by showing an extremely strong justification.[107] Laws that create "quasi-suspect classifications," such as gender, receive intermediate scrutiny.[108] Under intermediate scrutiny, the legislation must serve important governmental objectives and must be substantially related to achievement of those objectives.[109] Lastly, legislation that creates an economic and social classification will receive rational basis review.[110] Under rational basis review, the plaintiff has the burden to prove the classification created in the legislation is not rationally related to a legitimate governmental interest.[111] Courts grant a high deference to lawmakers, and laws receiving rational basis review almost always survive.[112] Nonetheless, on a few rare occasions, the United States Supreme Court has struck down laws under rational basis review.[113]

In *United States v. Moreno*, Congress amended the Food Stamp Act of 1964 to exclude any household containing an individual who was unrelated to any other member of the household.[114] The purpose of the Food Stamp Act was to raise levels of nutrition among low-income households and to strengthen the market for agriculture.[115] The amendment created two classes of persons for food stamp purposes: those who live in a household with related members and those who live in a household with unrelated members.[116] The law did not involve a suspect class

106. *See id.*

107. *See* Craig v. Boren, 429 U.S. 190, 218 (1976); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

108. *See* Craig, 429 U.S. at 218; Hogan, 458 U.S. at 724.

109. *See* Craig, 429 U.S. at 218; Hogan, 458 U.S. at 724.

110. *See* City of Cleburne, 473 U.S. at 446.

111. *See id.*

112. *See* USDA v. Moreno, 413 U.S. 528, 534 (1973). "As traditionally understood, rational basis review has been devastating to equal protection plaintiffs because it is an extremely deferential standard that presumes the constitutionality of legislative enactments and places a heavy burden on the plaintiff to overcome that presumption. Not only is the government absolved of any responsibility to present legislative history or other genuine justifications for the law, but the Court is also free to speculate as to potential justifications and may find the law constitutional so long as the Court can summon through its collective imagination some conceivable legitimate state interest supporting the law." Susannah W. Pollvogt, *Article: Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 207 (2013) [hereinafter Pollvogt, *Article*].

113. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

114. Moreno, 413 U.S. at 534.

115. *Id.* at 533.

116. *Id.* at 534.

or quasi-suspect class, so the Court applied rational basis review - the law must serve some legitimate state interest, and the classification must be rationally related to that interest.[117] In determining the purpose of the amendment, the Court turned to the legislative history and determined the purpose was to prevent "hippies" from participating in the program.[118] The Court held the amendment (excluding households of unrelated people) did not constitute a legitimate governmental interest since doing so was unrelated to the purpose of the Food Stamp Act. The Court went on to state, "[t]he challenged classification clearly cannot be sustained by reference to this congressional purpose.[119] For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[120]

The court uncharacteristically struck down the law in *Moreno* using rational basis review, finding the classification did not rationally relate to a governmental interest. In analyzing this exception to rational basis review, constitutional scholars that have argued cases involving animus have applied a new level of scrutiny, rational basis review "with bite."[121] While the Court hasn't recognized this level of scrutiny, a handful of cases involving animus have failed under rational basis review. When animus exists, courts have seemed to increase the rigor in which they analyze the sufficiency of the government's interest for enacting the law.[122] "So while the Court has discerned the presence of

117. The government also argued the classification in the amendment prevented fraud, but the Court did not agree since there was no reason to think the classified group was more prone to commit fraud than any other. *Id.*

118. *Id.*

119. *Id.*; *see also* City of Cleburne, 473 U.S. 432, 473 (1985) (finding negative attitudes from community members towards those with cognitive disabilities recorded in the legislative history showed a bare desire to harm).

120. "If there is no articulable reason why a politically unpopular group is being selected for differential treatment, then the designation is arbitrary—the law creates a classification for the sake of a classification—and supports an inference that the law is actually primarily a vehicle to exclude a disfavored group rather than achieve a legitimate public purpose." Moreno, 413 U.S. at 534.

121. Pollvogt, *supra* note 104.

122. "Unconstitutional animus can essentially be understood as an expression of prejudice against a particular social group, but the concept is inherently enigmatic, as the Court itself has yet to present a unified theory of animus." Pollvogt, *Article*, *supra* note 112, at 207. "It's acceptable for a legislature to have animus towards someone because they commit murder or trespass, but it is unacceptable to have animus towards a group who might engage in conduct for a particular political reason." Justin Marceau, *Animus and Ag Gag Laws*, BALKINIZATION (October 6, 2014, 8:52 AM), http://balkin.blogspot.com/2014/10/animus-and-ag-gag-

unconstitutional animus on only a few occasions when animus is found, it functions as a doctrinal silver bullet."[123]

In *ALDF v. Otter*, the plaintiffs' attacked Idaho's ag-gag law on the same principle as *Moreno*: the statute created a classification against a politically unpopular group and was enacted based on animus towards that group. First, ALDF argued, which the Court agreed, Idaho's ag-gag statute created a classification between whistleblowers generally and whistleblowers in the agricultural industry.[124] Since the statute created a social classification, the Court applied rational basis review and analyzed whether the statute served some legitimate state interest and if the classification was rationally related to that interest. First, the State argued Idaho's ag-gag classification protected "private property of agricultural facility owners by guarding against such dangers as trespass, conversion, and fraud."[125] However, the Court found this argument unpersuasive, since laws preventing trespass, conversion, and fraud already exist in Idaho.[126] The State also argued agricultural facilities deserved more protection because agriculture plays such a vital role in Idaho's economy and culture.[127] Again, the Court failed to accept this as a legitimate government interest, concluding protecting a private interest of a powerful industry is not a legitimate government interest.[128] Instead of conceiving hypothetical justifications for the law, the Court turned to the legislative history to determine the legislator's actual purposes for the statute.[129] The legislative history revealed Idaho's ag-gag statute

laws.html; Pollvogt, *supra* note 105.

123. Pollvogt, *supra* note 104, at 889.

124. "A law may create a classification in one of three ways: by showing that the law discriminates on its face; by showing that the law is applied in a discriminatory fashion; or by showing that the law, although neutral on its face and applied in accordance with its terms, was enacted with a purpose of discriminating." Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1209 (D. Idaho 2015). *But see* Memorandum in Support of Motion to Dismiss at 3, Animal Legal Def. Fund v. Otter (D. Idaho Apr. 4, 2014) (arguing "[t]he law may interfere with ALDF's preferred business model, but, as a statute applicable to all individuals' and organizations' conduct, it violates neither the Free Speech nor the Equal Protection Clause.").

125. Otter, 118 F. Supp. 3d at 1208.

126. *Id.*

127. *Id.*

128. *Id.*

129. "[T]he inquiry into legislative motive—or more often, purpose—is not a subjective one. Determining whether animus materially influenced the government's act rests on a variety of considerations that are objective in the sense that they do not depend on discovering subjective legislative intent. These include, if applicable, considerations of statutory text, context, process, impact, and the persuasiveness of any non-animus-based justifications." Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 189-190 (2013).

was sparked by improper animus towards animal welfare groups.[130] The sponsor of the bill, Senator Jim Patrick, stated during a committee hearing, "This is how you combat your enemies," and compare animal activists to terrorists.[131] Since the State was unable to present the court with a legitimate or rational basis for the statute and the court determined the law was enacted with a discriminatory purpose, the court held Idaho's ag-gag statute violated the federal Equal Protection Clause.[132]

B. First Amendment Claim

The First Amendment prevents the government from restricting expression because of its message, idea, subject matter, or content.[133] However, over the years, case law has established exceptions to types of expressions the First Amendment restricts. For example, when a statute criminalizes advocacy intended and likely to incite imminent lawless action,[134] obscenity,[135] defamation, "fighting

130. Otter, 118 F. Supp. 3d at 1208.

131. Senator Jim Patrick, sponsor of the Senate bill, compared undercover investigators to "marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission." Senator Patrick, speaking of animal activists in a committee hearing, stated: "[T]errorism has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety. This is clear back in the 6th century B.C." John Miller, *Disputed 'Ag Gag Bill' Advances in Idaho Senate*, SALT LAKE TRIBUNE (Feb. 11, 2014, 12:49 PM), http://www.sltrib.com/sltrib/money/57530112-79/animal-idaho-bill-measure.html.csp. "The drafter of the legislation, Dan Steenson, likewise expressed a desire to shield Idaho dairymen and other farmers from undercover investigators and whistleblowers who expose the agricultural industry to 'the court of public opinion': 'The most extreme conduct that we see threatening Idaho dairymen and other farmers occurs under the cover of false identities and purposes, extremist groups implement vigilante tactics to deploy self-appointed so-called investigators who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse.'" Otter, 118 F. Supp. 3d at 1200.

132. Otter, 118 F. Supp. 3d at 1211-12.

133. United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012).

134. United States v. Alvarez, 132 S. Ct. at 2544 (2012); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

135. United States v. Alvarez, 132 S. Ct. at 2544 (2012); Miller v. California, 413 U.S. 15, 21 (1973).

words,"[136] child pornography,[137] fraud,[138] and threats,[139] the statute does not violate the First Amendment.

In *United States v. Alvarez*, the United States Supreme Court was confronted with deciding whether the Stolen Valor Act, which criminalized making false statements about receiving military medals of honor, violated the First Amendment.[140] The plurality acknowledged that while statutes criminalizing false claims to effectuate a fraud or secure valuable considerations are constitutionally permitted, the Court clarified that the government may only criminalize false statements that directly cause a legally cognizable harm.[141] In contrast, the Stolen Valor Act only penalized telling a lie, even if there was no harm involved.[142] Therefore, the court struck down the law, finding the First Amendment protected false statements made about receiving military medal of honors.

In *ALDF v. Otter*, the court had to first decide whether the activity prohibited by Idaho's ag-gag law constituted speech before determining if it violated the First Amendment. The State argued Idaho's ag-gag law targets whistleblowers conduct, such as trespass and conversion, not speech.[143] The court disagreed, and held: "Under no reading of the statute does a prohibition against telling lies become a prohibition of conduct. False speech is still speech—period."[144] The court pointed out that "just as 'the processes of writing down words on paper, painting a picture, and playing an instrument are purely expressive activities,' the act of audiovisual recording is a purely expressive activity."[145]

The court then analyzed whether the misrepresentation provisions were protected speech.[146] The State argued the statute—"with the intent to cause

136. United States v. Alvarez, 132 S. Ct. at 2544 (2012); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

137. United States v. Alvarez, 132 S. Ct. at 2544 (2012); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

138. United States v. Alvarez, 132 S. Ct. at 2544 (2012); New York v. Ferber, 458 U.S. 747 (1982).

139. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

140. Watts v. United States, 394 U.S. 705 (1969).

141. Alvarez, 132 S. Ct. at 2545 ("the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment.").

142. *Id.* at 2547 ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment.").

143. Decision and Order, Idaho, *supra* note 99, at 18.

144. *Id.* at 17-18 ("The State cannot deflect this exacting scrutiny by trying to re-characterize what is unequivocally speech—telling lies (or omitting truths)—as conduct.").

145. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1205 (D. Idaho 2015).

146. *Id.*

economic or other injury"—prevents First Amendment scrutiny since it prohibits material harm.[147] The court disagreed, and reasoned that the harm stemming from undercover investigations would arise from the publication of a story about the facility, not the lies used to gain access to the facility.[148] Thus, the proposed misrepresentations were not the type of material harm proscribed in *Alvarez* because the undercover reporters would not obtain any material advantage.[149]

The court further held the recording provision found in the statute discriminated not only on content but also on viewpoint.[150] The court determined the underlying purpose of the recording provision was to silence animal activists.[151] The court also stated "the recording provision facially discriminates based on content because it only targets speech concerning the 'conduct of an agricultural production facility's operations' while leaving unburdened other types of speech at agricultural production facilities."[152] The State argued the recording provisions were not content based because they did not regulate what was said, but where it was said.[153] The court rejected this argument, reasoning that a person could not violate the law simply by standing in an agricultural production facility.[154]

147. Decision and Order, Idaho, *supra* note 97, at 19.

148. Idaho's ag-gag law "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. . . '[T]he limited misrepresentations ALDF says it intends to make—affirmatively misrepresenting or omitting political or journalistic affiliations, or affirmatively misrepresenting or omitting certain educational backgrounds—will most likely not cause any material harm to the deceived party.'" Otter, 118 F. Supp. 3d at 1203-04.

149. Otter, 118 F. Supp. 3d at 1204 (stating, "the lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest.").

150. *See* IDAHO CODE ANN. § 18-7042(1)(d) (2016).

151. Otter, 118 F. Supp. 3d at 1205.

152. *Id.*

153. Laws may be content based in either of two ways: "if 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." *Id.*; Berger v. City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009); *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2524 (2014) (holding buffer zones outside abortion clinics are content neutral, not content based because the statute did not require law enforcement authorities to examine the content of the message it conveyed to determine whether a violation occurred). A content-based government speech restriction receives the most rigorous scrutiny, whereas a content neutral speech restriction receives much more lenient intermediate review.

154. Otter, 118 F. Supp. 3d at 1205.

Concluding Idaho's ag-gag statute was a content-based restriction on speech, the court applied strict scrutiny and rejected the State's argument that the law was narrowly tailored to advance a compelling state interest.[155] The court acknowledged "[t]he State's interest in protecting personal privacy and property rights is certainly an important interest," but the court did not find the State's interests to be the least restrictive means.[156] The court explained that laws against fraud and defamation already exist, which allow the State to achieve its stated interest while burdening little or no speech.[157] The court also noted the law was not "narrowly tailored to protect private property because it only seeks to limit the capture of audiovisual recordings in a private forum."[158] First, the court supported its assertion by stating food production and safety are not private matters, but instead "matters of utmost public concern."[159] Second, the court noted the law penalized lawful employees who seek to do the right thing by exposing animal abuse.[160]

V. *ALDF V. OTTER* APPLIED TO IOWA'S AG-GAG LAW

Although Iowa's ag-gag statute differs in some ways from Idaho's ag-gag statute, some of the rationale in the *Otter* decision would apply to Iowa's statute. Although Iowa's statute does not have an explicit recording ban like Idaho's statute, its ban on misrepresenting oneself to gain access could still be an unconstitutional content-based restriction on speech.[161] As *Otter* established, the recording provision gave agricultural owners veto power, allowing them to decide what can and cannot be recorded, allowing them to silence unfavorable speech.[162] The court in *Otter* went on to determine the misrepresentation provision did exactly the same thing: an employee who lies on a job application with the intent of praising agriculture goes unpunished, while an employee with the intent of

155. *Id.* (also stating, "This is an exacting test." Even if the goals of the law are "legitimate, or reasonable, or even praiseworthy," this is not enough. "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."); *see also* Turner Broadcasting Syst., Inc., v. F.C.C., 512 U.S. 622, 680 (1992).

156. Otter, 118 F. Supp. 3d at 1207 (also stating, "[g]iven the public's interest in the safety of the food supply, worker safety, and the humane treatment of animals, it would contravene strong First Amendment values to say the State has a compelling interest in affording these heavily regulated facilities extra protection from public scrutiny.").

157. *Id.*

158. *Id.* at 1208.

159. *Id.*

160. *Id.*

161. *See* IOWA CODE § 717A.3A(1)(a) (2016); *see also* IDAHO CODE ANN. § 18-7042(1)(a) (2016).

162. Otter, 118 F. Supp. 3d at 1207.

exposing abusing conditions is punished.[163] Using this rationale from *Otter*, a court could determine that the misrepresentation provision in Iowa's law is content- and viewpoint- based restrictions on speech, since Iowa's law criminalizes certain misrepresentations made to gain employment with the intent to commit an act not authorized by the owner of the agricultural production facility.[164]

Furthermore, Iowa's ag-gag statute has a very similar misrepresentation provision as Idaho's ag-gag statute.[165] Similarly to Idaho's statute, Iowa's statute also criminalizes false statements to gain employment or access at agricultural facilities. Using the same reasoning the court used in *Otter*, there is little doubt Iowa's misrepresentation provision would survive a constitutional challenge. As *Otter* stated, the misrepresentations Idaho's statute prohibited did not prevent any legally cognizable harm because whatever negative fallout an agricultural facility receives as a result of an undercover investigation is not the fault of the whistleblower but rather the agricultural facility itself. Thus, because Iowa's statue does not prohibit the type of harm proscribed in *Alvarez*, it is likely this same reasoning in *Otter* would apply to invalidate Iowa's misrepresentation provision under the First Amendment.

While the First Amendment claim may invalidate Iowa's statute by itself, it is likely to be accompanied by an Equal Protection claim as well. However, the *Otter* rationale does not appear to apply to Iowa's statute like the First Amendment claim rationale and analysis. Unlike Idaho, Iowa's statute is void of legislative history, and without showing the statute was motivated by animus towards a politically unpopular group, it will be difficult to overcome rational basis review. However, while most courts have always looked to the legislative history for improper motives of legislators', it is possible they could look to other objective indicators to determine the legislative motivations for the statute. If a court looked to the circumstances leading up to the enactment of Iowa's ag-gag statute, as discussed in Part II, in addition to the comments made publicly by state legislators, a court could determine improper motives for the enactment of Iowa's statute existed. After all, the sponsor of Iowa's Senate bill, Senator Joe Seng, "stated his intent was to stop 'subversive acts' that could 'bring down the industry,' especially when committed by 'extremist vegans.'"[166] Because the federal Equal Protection claim is not as clear as the claim made in Idaho, challengers of Iowa's ag-gag statute should make an Equal Protection claim under Iowa's Constitution.

163. *Id.*
164. *See* IOWA CODE § 717A.3A(1)(a) (2016).
165. *See Id.*; *See also* IDAHO CODE ANN. § 18-7042(1)(a) (2016).
166. Bollard, *supra* note 29, at 10965.

VI. CONSTITUTIONALITY OF IOWA'S AG-GAG LAW UNDER THE IOWA CONSTITUTION

While not every state constitution contains language expressly addressing equality, it is likely almost every state constitution contains language that could be interpreted to encompass a guarantee of equality. For many years, state courts looked to federal constitutional law as the model to follow when interpreting provisions in their state constitutions.[167] This model limited states from offering protection beyond what the federal constitutional law provided.[168] Over time, much of this changed in many states, including Iowa, and state supreme courts started interpreting state constitutions independent of federal constitutional interpretations.[169] "Some state supreme courts have recognized that it makes little sense to conform to the federal model of equality when state provisions differ significantly in language, purpose, and history from the federal Equal Protection Clause."[170]

Iowa's Equal Protection Clause states: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."[171] The purpose of Iowa's equal protection clause is to treat similarly situated people alike.[172] While the Iowa Supreme Court has deemed the United States and Iowa Equal Protection Clauses to be identical in scope, import, and purpose, the Iowa Supreme Court has reserved the right to determine the constitutionality of Iowa statutes challenged under the Iowa Constitution.[173] For many years, the Iowa Supreme Court refused to consider constitutional claims under the Iowa Constitution unless specifically raised by the parties. Recently, Iowa shifted away from this approach, interpreting the Iowa Constitution independent of the parties arguing for a separate interpretation between state and federal constitutions.[174]

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167. *See* Shaman, *supra* note 104, at 1020 (explaining how a generation of lawyers and judges were mesmerized by the Warren court's expansion of equality rights, and state courts obediently followed the federal framework for putting the Equal Protection Clause into effect).

168. *See id.*

169. *Id.* at 1050-1051.

170. *Id.* at 1030 (explaining the different approaches states have taken toward independence from the federal conception of equality).

171. IOWA CONST. art. I, § 6.

172. Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994).

173. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 4-5 (Iowa 2004).

174. "[W]hen there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, the appellate court regards both federal and state constitutional claims as preserved. Even in cases in which no

One of the first major cases in Iowa that established independent interpretations was *Racing Ass'n v. Fitzgerald.*[175] In *Fitzgerald*, an Iowa statute created a classification between racetracks and excursion boats, and it taxed excursion boats at a lower rate.[176] The Iowa Supreme Court applied rational basis review and struck down the differential tax rates under the federal Equal Protection Clause and Iowa Equal Protection Clause.[177] The United States Supreme Court later reversed the Iowa Supreme Court's decision to the extent it was decided under the federal Equal Protection claim.[178] The United States Supreme Court held the Iowa statute passed rational basis review because the state presented a rational reason for taxing the different gambling establishments at different rates.[179]

Following the United States Supreme Court opinion, the Iowa Supreme Court held for the second time that the differential tax rate failed to pass rational basis review under the Equal Protection Clause of the Iowa Constitution.[180] The Iowa Supreme Court did not implement its own test but instead, independently applied rational basis review.[181] The court held there was nothing to support the

substantive distinction had been made between state and federal constitutional provisions, the appellate court reserves the right to apply the principles differently under the state constitution compared to its federal counterpart. If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is incomplete or sparse, the issue has been preserved." State v. Gaskins, 866 N.W.2d 1, 29 (Iowa 2015); *see also* State v. Short, 851 N.W.2d 474 (Iowa 2014) (stating "'[W]e have consistently stated,' namely, that we 'jealously protect this court's authority to follow an independent approach' to claims made under the Iowa Constitution and that we reserve the right even in cases where parties do not advocate a different standard to apply the standard differently than federal precedents.").

175. Fitzgerald, 675 N.W.2d at 1.

176. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 556-57 (Iowa 2002).

177. *Id.*

178. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 110 (2003) (stating "a plausible policy reason for the classification, that the legislature rationally may have . . . considered . . . true the related justifying legislative facts, and that the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.").

179. *Id.* ("[T]he legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States.").

180. The Iowa Supreme Court announced two methods for analyzing state equal protection claims. First, the court could adhere to the federal framework but apply the structure independently. Second, the court could reject the federal constructs, and apply a new analytical structure if a claimant suggests a legal deficiency in the federal principles. Fitzgerald, 675 N.W.2d at 5-6; *see also* In re Det. of Garren, 620 N.W.2d 275, 280 (Iowa 2000).

181. Fitzgerald, 675 N.W.2d at 6.

legislature believed racetracks were more profitable than excursion boats; thus, no legitimate purpose existed to tax them different, other than an arbitrary decision to favor excursion boats. Therefore, similar to *Moreno* and *Cleburne*, the Iowa Supreme Court rejected several rational justifications to strike down the government's classification between racetracks and excursion boats.[182] Because the Iowa Supreme Court has interpreted state Equal Protection claims differently than its federal counterpart, and has suggested its willingness to use its own test, any challenge to Iowa's ag-gag law should include a challenge under Iowa's State Constitution.[183]

VII. CONCLUSION

A number of factors are at play in any challenge to an ag-gag law, but in Iowa, supporters and challengers, or potential challengers, should be aware of the constitutional arguments surrounding ag-gag laws in general. This Note aimed to do just that. If Iowa's ag-gag law remains intact, Iowa can expect a challenge that involves both a Free Speech component and an Equal Protection component. As discussed above, the Free Speech argument, analysis, and rationale will likely proceed along similar lines as that in *Otter* because of the similarities in the pertinent parts of Iowa's statute restricting speech. However, the Equal Protection challenge is not as "cut and dry." Defenders of the ag-gag law will, or should, point to the unclear legislative history—that is, the absence of sufficient evidence to show animus. Challengers, on the other hand, will surely use the public statements made by politicians at or around the time of its passing. Two important considerations should be understood by those on both sides of ag-gag laws: (1) Iowa lawmakers did a good job of carefully drafting and enacting the law to limit "animus" evidence, and (2) even though the animus may not be sufficient for an Equal Protection analysis consistent with federal constitutional law, the Iowa Supreme Court recently has independently interpreted the Equal Protection Clause in the Iowa Constitution, not relying on federal Equal Protection interpretations. One thing is for sure, as long as Iowa's ag-gag statute stays on the books, a constitutional challenge is inevitable.

182. *Id.*; USDA v. Moreno, 413 U.S. 528, 534 (1973); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

183. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1413 (1999) (explaining how federal courts handle state constitutional claims).