

# FARM TO TABLING FREE SPEECH: THE FIRST AMENDMENT & AG-GAG LAW

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## I. INTRODUCTION – AN OVERVIEW

In November 2019, an employee at the Dick Van Dam factory farm in Southern California walked into work and began covertly recording a video.<sup>1</sup> The subsequent footage, shot over several months, exposed cows being struck in the face with canes and having their eyes prodded.<sup>2</sup> Hindquarters were beaten with metal pipes.<sup>3</sup> Dead newborn calves were shown decomposing in and under the elements.<sup>4</sup>

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1. See Sophie Kevany, *Alleged Animal Abuse in US Dairy Sector Under Investigation*, THE GUARDIAN (Oct. 15, 2020, 4:00 PM EDT), <https://www.theguardian.com/environment/2020/oct/15/alleged-animal-abuse-in-us-dairy-sector-under-investigation> [<https://perma.cc/F5QM-BNMT>].

2. *Id.*

3. *Id.*

4. *Id.*

The cows' underbellies were kicked and their teats so severely damaged from successive assault that the milk they produced was a blood-tinged pink.<sup>5</sup>

The employee, Erin Wing, had been working for the Dick Van Dam facility as part of a two-year career in agricultural operations, which spanned throughout several factory farms.<sup>6</sup> However, if asked today, she would say her real work during that period was with an animal rights organization called Animal Outlook.<sup>7</sup> After Ms. Wing filmed the abuse at the Dick Van Dam dairy farm, she ended her employment and revealed herself as an undercover investigator for the group.<sup>8</sup> Drawing from the visual evidence supplied by Ms. Wing's video footage, the Animal Legal Defense Fund (ALDF) drafted a lawsuit in 2020 accusing the California-based dairy farm of systemic animal abuse.<sup>9</sup>

Since the early 1990s, laws passed in a number of states have attempted to put protections in place that would make undercover investigations, like the one conducted by Ms. Wing, illegal.<sup>10</sup> So-called "ag-gag" laws have generally sought to "criminalize (1) recording video or taking pictures of agricultural facilities without consent . . . and/or (2) entering an agricultural facility under false pretenses or misrepresentation to gain employment."<sup>11</sup> A third type requires an individual to surrender video footage of animal abuse taken at agricultural facilities to a law enforcement agency within 24, 48, or 120 hours after capture.<sup>12</sup> These laws were enacted in two waves: a first in the early 1990s and a second beginning in 2011.<sup>13</sup> In 2018, the constitutionality of the laws in several states were called into question and have since been struck down as violations of the First Amendment of the United States Constitution.<sup>14</sup>

This Note will survey the history of ag-gag laws and the reasons behind large agricultural companies pushing to have such laws enacted in their respective states. It will examine recent litigation, focusing on trespass as a "legally cognizable

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5. *Id.*

6. *Undercover Investigator Goes Public to Reveal Animal Cruelty on California Dairy Farm*, ANIMAL OUTLOOK (Oct. 8, 2020), <https://animaloutlook.org/undercover-investigator-goes-public-to-reveal-animal-cruelty-on-california-dairy-farm/> [<https://perma.cc/T5F7-GJBZ>].

7. *Id.*

8. *See id.*

9. Kevany, *supra* note 1.

10. Meredith Kaufman, *The Clash of Agricultural Exceptionalism and the First Amendment: A Discussion of Kansas' Ag-Gag Law*, 15 J. OF FOOD & L. POL'Y 49, 53 (2019).

11. Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J. OF L. & SOC. PROBS. 337, 337 (2015).

12. *Id.*

13. Kaufman, *supra* note 10, at 49-50.

14. *Id.* at 51.

harm,” and the court holdings examining First Amendment considerations in the context of ag-gag legislation.

## II. THE AG EMPIRE STRIKES BACK: THE RISE OF AG-GAG

### *A. An Agrarian Reframing and the Investigatory Counter*

A handful of large corporations have emerged and systemically replaced the old agrarian way.<sup>15</sup> After a century-long transformation, family farms have been swallowed up and animals moved into “prison-style plants in the middle of rural nowhere, far from the gaze of nervous consumers.”<sup>16</sup> Unprecedented sales of cheap meat and the slaughtering and processing of billions of livestock herds each year have become the norm.<sup>17</sup> At each development, whistleblowers, undercover investigators, and animal protection groups supporting their covert investigations have looked to monitor and expose animal agriculture’s procedure and methodology.<sup>18</sup> Such investigations have sought to combat inhumane treatment, threats to food safety, and even market manipulation.

In May 2020, for instance, a rural factory farm in Grundy County, Iowa, owned by Iowa Select Farms—Iowa’s largest pork producer and the fourth largest producer in the country—commenced with a procedure known to industry insiders as ventilation shutdown (VSD).<sup>19</sup> Workers first cut the inflow of air to the ventilation system in the facility’s barn and began pumping steam through the airways.<sup>20</sup> The objective of VSD is rather straightforward: a rapid, total “depopulation” of a facility.<sup>21</sup> Depopulation is an industry term referring to a protocol to euthanize and dispose of a population of animals in response to urgent circumstances.<sup>22</sup>

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15. Paul Solotaroff, *In the Belly of the Beast*, ROLLING STONE (Dec. 10, 2013), <https://www.rollingstone.com/interactive/feature-belly-beast-meat-factory-farms-animal-activists/> [<https://perma.cc/F4J7-K8SJ>].

16. *Id.*

17. *See id.*

18. *See id.*

19. *See Homegrown Iowa*, IOWA SELECT FARMS 1 (Sept. 22, 2022, 1:43 PM), <https://www.iowaselect.com/webres/File/2020-a-commitment-to-iowa-.pdf> [<https://perma.cc/SG7D-RHTB>]; *see also* Glenn Greenwald, *Hidden Video and Whistleblower Reveal Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, INTERCEPT (May 29, 2020, 11:08 AM), <https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/> [<https://perma.cc/4N49-DR6J>].

20. Greenwald, *supra* note 19.

21. *Id.*

22. AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION 4 (2019), <https://www.avma.org/sites/default/files/resources/AVMA->

The coronavirus pandemic devastated supply chains and made the pigs at the Grundy County facility commercially worthless.<sup>23</sup> In other words, the pigs—in Iowa Select’s eyes—had to be destroyed in order to control prices and maintain costs.<sup>24</sup> Iowa Select had toyed with several VSD variables, including heat, oxygen deprivation, and time, beginning in April 2020.<sup>25</sup> After testing on smaller groups to perfect the procedure, they finally concluded that steam combined with the other elements was the most effective method.<sup>26</sup>

Most of the pigs, numbering in the hundreds, suffocated and roasted to death overnight.<sup>27</sup> The few that managed to survive fell victim to a bolt gun when armed employees entered the barn at dawn to survey the grounds for survivors.<sup>28</sup> Those not killed by the steam or the bolt gun were crushed under the bulldozers used to remove the rest of the dead.<sup>29</sup> The procedure was undoubtedly successful in scope and finality.

While Iowa Select experimented with the procedure, the animal rights group Direct Action Everywhere (DxE) received a telephone call from an employee of the Grundy County facility.<sup>30</sup> The employee, who elected to remain anonymous to the media—though was later tracked down by a private investigator hired by Iowa Select and asked by the Federal Bureau of Investigations (FBI) to be an informant against DxE<sup>31</sup>—told *The Intercept* of the company’s planned mass-extermination in mid-May.<sup>32</sup> He had already attempted to reach regulators of the state’s Department of Natural Resources (DNR), but his complaints fell on deaf ears, likely because Governor Reynolds’ appointed head of the DNR is a former “dairy industry official and agribusiness lobbyist.”<sup>33</sup> The Iowa Select employee turned undercover

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Guidelines-for-the-Depopulation-of-Animals.pdf [https://perma.cc/RD7M-C9PJ];

see also Jennifer Shike, *Depopulation: 4 Things Producers Need to Consider*, FARM J.’S PORK (Apr. 28, 2020), <https://www.porkbusiness.com/news/hog-production/depopulation-4-things-producers-need-consider> [https://perma.cc/V4FM-NDQ7].

23. Greenwald, *supra* note 19.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Lee Fang, *After Pork Giant Was Exposed for Cruel Killings, the FBI Pursued Its Critics*, INTERCEPT (Feb. 17, 2021, 5:30 AM), <https://theintercept.com/2021/02/17/fbi-iowa-select-pigs-whistleblower/> [https://perma.cc/VT94-FENF].

32. Greenwald, *supra* note 19; see also Fang, *supra* note 31 (discussing the FBI’s involvement with the whistleblower).

33. Fang, *supra* note 31.

reporter was no “coastal animal rights activist or vegan fanatic ideologically opposed to all animal agriculture” either.<sup>34</sup> In fact, he was a passionate supporter of former President Donald Trump and the National Rifle Association (NRA).<sup>35</sup> He was also fully experienced in the raising and slaughtering of animals.<sup>36</sup> However, he decided to come forward because healthy pigs were being killed without cause, and the inhumane treatment increasingly weighed on his conscience.<sup>37</sup> So, on the night of the planned May VSD, DxE investigators activated the video cameras and audio recorders they had planted throughout the barn.<sup>38</sup> The devices recorded throughout the night and well into the morning, catching all the resulting horrors of the extermination with visual and audible force.<sup>39</sup> The video and audio were later widely covered, gaining international attention and outrage.<sup>40</sup>

### *B. A Real Threat to Big Ag*

Undercover probes have been the primary avenue through which the American public has received information about animal agriculture operations.<sup>41</sup> A 2012 consumer survey conducted by Purdue University’s Department of Agricultural Economics and Department of Animal Sciences found that the public relied on animal protection groups and investigative journalists for animal welfare and food safety information more than industry groups and the government combined.<sup>42</sup> The result of the survey is surely rooted, in part at least, in the fact that these groups and individuals perform a vital service which the federal government has often failed to provide: adequate supervision of American meat production.<sup>43</sup>

Congress gave the United States Department of Agriculture (USDA) the power to oversee the animal agricultural industry in the United States.<sup>44</sup> However, staffing shortages and budget cuts within the agency limit inspectors’ investigatory scope to slaughterhouses and processing plants.<sup>45</sup> This leaves the agency able to

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34. Greenwald, *supra* note 19.

35. Fang, *supra* note 31.

36. Greenwald, *supra* note 19.

37. *Id.*

38. *Id.*

39. *Id.*

40. Fang, *supra* note 31.

41. *Ag-Gag Laws in the United States*, CTR. FOR FOOD SAFETY (Aug. 13, 2022, 2:18 PM), <https://www.centerforfoodsafety.org/issues/307/animal-%09%09%09factories/ag-gag-laws-in-the-us> [<https://perma.cc/3E2J-GPB2>].

42. *Id.*

43. Solotaroff, *supra* note 15.

44. *Id.*

45. *Id.*

accomplish only cursory examinations of small groups of livestock just hours before they are culled and made ready for market.<sup>46</sup> Moreover, many farms are exempted altogether from inspections.<sup>47</sup>

The lack of government oversight is no accident; the meat industry has worked diligently over the years to keep its walls opaque to the public.<sup>48</sup> No other country raises and slaughters food animals on as large of a scale as the United States.<sup>49</sup> Roughly 25 million animals are slaughtered for food every single day in America.<sup>50</sup> Given the scale of the business, there is a real incentive for the industry to hide common slaughtering practices. As the bestselling author Michael Pollan wrote for a 2002 opinion piece in the *New York Times*: “Were all the walls of our meat industry to become transparent, literally or even figuratively, we would not long continue to do it this way.”<sup>51</sup> Maintaining their opaque walls usually involves large agricultural operations currying favor with state and federal politicians. For example, Iowa Select Farms has donated nearly \$300,000 to Kim Reynolds’ Iowa gubernatorial campaigns.<sup>52</sup>

Undercover investigations present an unequivocal danger to the industry.<sup>53</sup> Video and audio recordings captured at slaughterhouses, processing plants, or farms depicting poor living conditions or explicit abuse can lead to temporary shut-downs, arrests, and/or company insolvency.<sup>54</sup> In 2008, the Humane Society of the United States (HSUS) released a video of workers at the Hallmark Meat Packing

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46. *Id.*; see also Eve Conant, *Food-Safety System Endangers Americans Due to Lack of Inspectors, Budget Cuts*, DAILY BEAST (July 13, 2017, 9:10 PM ET), <https://www.thedailybeast.com/food-safety-system-endangers-americans-due-to-lack-of-inspectors-budget-cuts> [https://perma.cc/TLQ3-5CTY].

47. Brandon Keim, *Ag-Gag Laws Could Make America Sick*, WIRED (May 2, 2013, 12:16 PM), <https://www.wired.com/2013/05/ag-gag-public-health/> [https://perma.cc/Q2X5-7FCB].

48. Chip Gibbons, *Ag-Gag Across America: Corporate- Backed Attacks on Activists and Whistleblowers*, CTR. FOR CONST. RIGHTS & DEFENDING RIGHTS & DISSENT 5 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> [https://perma.cc/6GLE-RN77].

49. Shea, *supra* note 11, at 339; Michael Pollan, *An Animal’s Place*, N.Y. TIMES SUNDAY-MAG. (Nov. 10, 2002), <http://www.nytimes.com/2002/11/10/magazine/an-animal-s-place.html> [https://perma.cc/76NM-3MEM].

50. *Everything You Need to Know About Animal Slaughter*, HUMANE LEAGUE (June 14, 2021), <https://thehumaneleague.org/article/animal-slaughter> [https://perma.cc/FW32-FKWR].

51. Shea, *supra* note 11, at 339; Pollan, *supra* note 49.

52. Fang, *supra* note 31.

53. See Solotaroff, *supra* note 15 (explaining how undercover investigations led to the shutdown of farms and processing plants, including termination of deals with corporate buyers).

54. *Id.*

Company in Chino, California.<sup>55</sup> The video depicted workers physically abusing sick cows and using forklifts to drive them to walk.<sup>56</sup> News broadcasts televised the footage nightly and millions more saw portions of the video on YouTube.<sup>57</sup> The video and its subsequent national circulation, resulted in the largest beef recall in United States history because the federal government had banned “downer cows”<sup>58</sup> to reduce the risk of mad cow disease.<sup>59</sup> Hallmark Meat was eventually driven to bankruptcy because of the publicity.<sup>60</sup>

Media attention and public debate triggered by animal protection organizations’ timely audiovisual releases can also force corporate buyers to drop an offending farm as a source of their meat.<sup>61</sup> For example, at a news conference in 2015, Mercy for Animals unveiled video footage showing workers stabbing, beating, and stomping on chickens at T&S Farms in Dukedom, Tennessee.<sup>62</sup> Tyson Foods, the largest meat and poultry processing company in the United States,<sup>63</sup> responded by terminating all business contracts it had with the chicken farm and, in a written statement to the press, echoed the company’s dogma that “[a]nimal well-being is a priority at [Tyson] and [they] will not tolerate the unacceptable animal treatment shown in [Mercy for Animal’s] video.”<sup>64</sup>

Whether the discontinuation of the contracts with the chicken farm was in truth public posturing or unaffected activism, the Mercy for Animal video had real effect on the meat industry and, if only narrowly, on agricultural animal abuse.<sup>65</sup>

### *C. Making the Laws: Ag-Gag from the 1980s to the Present*

In order to combat the pervasive threat of undercover investigators and the

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55. Shea, *supra* note 11, at 337.

56. *Id.*

57. *Id.* at 338.

58. Laurent Ménard & Alexander Thompson, *Milk Fever and Alert Downer Cows*, CAN. VET. J. 487, 488 (2007) (defining “downer cow” as an animal unable to rise to a standing position on their own volition).

59. Shea, *supra* note 11, at 338.

60. *Id.*

61. See Solotaroff, *supra* note 15.

62. *McDonald’s Drops Nuggets Supplier After Video Shows Animal Cruelty*, GUARDIAN (Aug. 27, 2015, 6:08 PM), <https://www.theguardian.com/us-news/2015/aug/27/mcdonalds-drops-chicken-nuggets-supplier-video> [<https://perma.cc/52KJ-55MV>].

63. M. Shahbandeh, *Leading Meat and Poultry Processing Companies in the United States in 2021, Based on Sales*, STATISTICA (Sept. 21, 2021), <https://www.statista.com/statistics/264898/major-us-meat-and-poultry-companies-based-on-sales/> [<https://perma.cc/LVZ9-JUED>].

64. *Id.*

65. *Id.*

damaging consequences caused by their work, the animal agricultural industry began lobbying state lawmakers in the 1980s.<sup>66</sup> They sought legislation that would make the methods of evidence collection that undercover investigators used illegal.<sup>67</sup> The industry also pushed lawmakers to prohibit the techniques investigators employed to gain access to animal-ag facilities.<sup>68</sup>

Kansas was the first to pass such a law in 1990.<sup>69</sup> The Farm Animal and Field Crop and Research Facilities Protection Act (the “Kansas Act”) prohibited “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means.”<sup>70</sup> In 1991, Montana and North Dakota followed Kansas, enacting their own legislation banning photographs, video, and audio recordings in animal facilities.<sup>71</sup> Kansas and Montana contained their own unique *mens rea* element—an *intent* to “damage the enterprise” in Kansas’s case, or “commit criminal defamation” in Montana’s—while North Dakota’s included no such requirement.<sup>72</sup>

The Kansas, Montana, and North Dakota Acts focused almost exclusively on evidence gathering and instituting the infrastructure necessary to criminalize clandestine activity *after* an investigator had already gained access to a facility.<sup>73</sup> A second wave of similar laws two decades later continued to champion for the illegality of filming and the recording of audio on a facility’s grounds, but also incorporated new and seemingly innocuous language and provisions making it illegal to give false statements to gain employment in animal production facilities and imposed mandatory reporting requirements.<sup>74</sup> Other states included conditional rhetoric that made access to a facility all but criminal for investigators and journalists from the onset.<sup>75</sup>

In 2012, Iowa passed the first statute in this new wave, a bill making it a crime to give:

[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

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66. Gibbons, *supra* note 48, at 7.

67. *Id.*

68. *Id.* at 6.

69. *Id.* at 10.

70. KAN. STAT. ANN. § 47-1827(C)(4) (West 2022).

71. Shea, *supra* note 11, at 338.

72. KAN. § 47-1827; MONT. CODE ANN. § 81-30-103 (West 2021); N.D. CENT. CODE ANN. § 12.1-21.1 (West 2021).

73. *See* KAN. § 47-1827; MONT. § 81-30-103; N.D. § 12.1-21.1.

74. Shea, *supra* note 11, at 337.

75. *See id.* at 358.

not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.<sup>76</sup>

The law was in direct response to a 2008 People for the Ethical Treatment of Animals (PETA) video shot at a MowMar Farms facility in Iowa by an undercover investigator.<sup>77</sup> The video documented workers striking pigs with metal and electric rods, kicking pregnant sows, and grabbing piglets by their hind legs and battering their heads into the floor until they were dead.<sup>78</sup> Under the law, an undercover investigator who willfully makes a false statement or representation in order to gain access to an agricultural production facility can face animal facilities fraud charges, which carries up to two years imprisonment and/or a fine of up to \$6,250.00 if found guilty.<sup>79</sup> In addition, a person who “conspires to commit agricultural production facility fraud . . . is subject to provisions of Iowa’s Conspiracy statute.”<sup>80</sup>

That same year, Utah criminalized recording in any form, establishing that a person is guilty of agricultural operation interference if they, “without consent from the owner of the agricultural operation . . . knowingly or intentionally record an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation.”<sup>81</sup> Prior to its ratification, the bill’s sponsor, Representative John Mathis, claimed the bill was designed to stop “animal rights terrorists.”<sup>82</sup> Mr. Mathis’ use of “terrorist” was not unusual in this context. Since at least the 1970s, *terrorist* or *terrorism* have been common modifiers thrown around by legislators and lobbyists in describing undercover investigators, animal rights groups, and their clandestine activities.<sup>83</sup>

Shortly after Utah’s law went into effect, Missouri introduced the first rapid reporting requirement.<sup>84</sup> On its face, the provision could be misunderstood to be protective of animals.<sup>85</sup> The law mandates that:

Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to

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76. IOWA CODE ANN. § 717A.3A(1)(b) (West 2012).

77. Gibbons, *supra* note 48, at 14.

78. *Id.* at 13.

79. *Id.*

80. IOWA CODE § 717A.3A(1)(b); *see also* IOWA CODE ANN. §§ 706.1–706.4 (West 2022).

81. UTAH CODE ANN. § 76-6-112 (West 2012).

82. Gibbons, *supra* note 48, at 15-16.

83. *See id.* at 7.

84. *Id.* at 15.

85. *Id.* at 8.

abuse or neglect . . . such farm animal professional shall . . . submit such [recording] to a law enforcement agency within twenty-four-hours of the recording.<sup>86</sup>

Duty-to-report laws have been enacted in some areas of American jurisprudence.<sup>87</sup> But these statutes are generally “reserved for serious felonies . . . [and do not require] a duty to report rapidly.”<sup>88</sup> In animal abuse investigatory operations, this duty prevents investigators from gathering documentation of patterned forms of abuse that are often uncovered by prolonged investigations.<sup>89</sup> In effect, mandatory reporting in the animal abuse context permits the industry to dismiss violations of animal cruelty, corroborated by audio and video evidence, as fringe cases perpetrated by bad apples.<sup>90</sup>

Idaho, Wyoming, North Carolina, and Arkansas have all added similar statutes to their lawbooks in the years since.<sup>91</sup> Ag-gag laws, a term coined in 2011 by *New York Times* columnist Mark Bittman, aimed to maintain the industry’s opaque walls through legislative measures and legal ramifications.<sup>92</sup> At risk, however, and as we will see, is continued animal suffering, environmental destruction, our health, and our constitutional rights.

### III. THREATS VEILED BEHIND THE OPAQUE WALLS

#### A. Animal Cruelty

On factory farms, it is not uncommon for egg-laying hens to be confined in cages so small the birds cannot spread their wings, calves to be held in crates just large enough for the animal to be able to move, or mother pigs to be locked in enclosures that prevent the sows from moving.<sup>93</sup> Factory farming, like most big business operations, is aimed “to produce large volumes of yield for the smallest possible price.”<sup>94</sup> Livestock production is an expensive endeavor because animals

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86. MO. ANN. STAT § 578.013(1) (West 2012).

87. See Shea, *supra* note 11, at 364.

88. *Id.*

89. *Id.*

90. Gibbons, *supra* note 48, at 6.

91. See IDAHO CODE ANN. § 18-7042(1)(a) (West 2014); N.C. GEN. STAT. ANN. § 99A-2 (West 2016); ARK. CODE ANN. § 16-118-113 (West 2017).

92. Gibbons, *supra* note 48, at 6.

93. *Improving the Lives of Farm Animals*, THE HUMANE SOC’Y OF THE U.S (Aug. 13, 2022, 2:34 PM), <https://www.humanesociety.org/all-our-fights/improving-lives-farm-animals> [<https://perma.cc/46L3-6GCU>].

94. *How Are Factory Farms Cruel to Animals?*, THE HUMANE LEAGUE (Jan. 4, 2021),

require “food, water, and shelter in order to grow large enough to be slaughtered, or to produce milk or eggs for human consumption,” so smaller cages and extreme confinement are often utilized as cost-saving measures.<sup>95</sup> Economizing animals in the same cost-benefit analysis as other products, however, neglects the fact that the physical, emotional, and social needs domesticated livestock have inherited from their wild ancestors are being ignored.<sup>96</sup>

### *B. Public Health*

As farm operations have grown and farming processes have become more industrialized, disease-spreading industry practices have become more prevalent.<sup>97</sup> Processing sick cattle and holding poultry in filthy conditions raise the risk of food contamination.<sup>98</sup> On some farms, identifying ear tags on non-organic cattle are replaced by new tags to indicate a cow is organic, which can triple or even quadruple the meat’s sale value.<sup>99</sup> Identification tags were designed to control disease transmission.<sup>100</sup> However, removing the tag breaks “the link with the animal’s health and veterinary history” and creates a supply chain with zero traceability.<sup>101</sup>

Moreover, selection for desirable gene traits, such as larger chicken breasts, has made farmed animals nearly genetically identical.<sup>102</sup> In addition, the stress, overcrowding, and unsanitary conditions often persistent within factory farms weaken animals’ immune systems.<sup>103</sup> This means a virus can spread more easily from animal to animal without encountering usual immune defense while becoming more virulent and antibiotic-resistant.<sup>104</sup> The World Health Organization

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<https://thehumaneleague.org/article/factory-farming-animal-cruelty> [<https://perma.cc/9BXQ-DU8V>].

95. *Id.*

96. Yuval Noah Harari, *Industrial Farming is one of the Worst Crimes in History*, THE GUARDIAN (Sept. 25, 2015, 2:59 PM EDT), <https://www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question> [<https://perma.cc/VW54-MMF6>].

97. *See* Keim, *supra* note 47.

98. *Id.*

99. Kevany, *supra* note 1.

100. *Id.*

101. *Id.*

102. Sigal Samuel, *The Meat We Eat is a Pandemic Risk, Too*, VOX (Aug. 20, 2020, 11:50 AM EDT), <https://www.vox.com/future-perfect/2020/4/22/21228158/coronavirus-pandemic-risk-factory-farming-meat> [<https://perma.cc/AW68-U26P>].

103. Monica Nickelsburg, *5 Modern Diseases Grown by Factory Farming*, THE WEEK (Jan. 8, 2015), <https://theweek.com/articles/457135/5-modern-diseases-grown-by-factory-farming> [<https://perma.cc/UL3A-V3RV>].

104. Samuel, *supra* note 102.

(WHO) and the Centers for Disease Control and Prevention (CDC) have long warned “that most emerging infectious diseases come from animals and that our industrialized farming practices are ratcheting up the risk.”<sup>105</sup> E. coli, methicillin-resistant staphylococcus aureus (MRSA), campylobacter, salmonella, bovine spongiform encephalopathy (Mad Cow Disease), influenzas, and coronaviruses, to name a few, are all zoonoses, and all carry the risk of a serious global health threat.<sup>106</sup>

### C. Climate Change, Water Waste and Pollution, & Deforestation

The Food and Agricultural Organization of the United Nations (FAO) has declared that livestock farming accounts for 14.5% of all greenhouse gas emissions, with 65% of the 14.5% being due to methane emissions from cows.<sup>107</sup> Methane is far more effective at trapping heat and is more than 80 times more potent than carbon dioxide in terms of warming the climate system.<sup>108</sup>

Methane is not the only big agricultural byproduct that has adverse environmental impacts. Water waste and water pollution are other areas of concern. Meat production is estimated to exhaust 1,800 gallons of water to produce a single pound of saleable meat.<sup>109</sup> In fact, research has concluded one quarter of all global fresh-water used worldwide relates to meat and dairy production.<sup>110</sup> Further, excess amounts of liquid manure produced by thousands of animals on factory farms run into nearby lakes and streams.<sup>111</sup> Factory farm waste runoff has been linked to fueling toxic algae blooms in local waterways, exposure to which can cause illness

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105. *Id.*

106. See Nickelsburg, *supra* note 103.

107. Emerson Slomka, *Factory Farming is Destroying the Environment*, THE N. IOWAN (Feb. 11, 2021), <https://www.northerniowan.com/14082/opinion/factory-farming-is-destroying-the-environment/> [<https://perma.cc/WPA3-5ZHL>].

108. Josie Garthwaite, *Methane and Climate Change*, STAN. EARTH MATTERS MAG. (Nov. 2, 2021), <https://earth.stanford.edu/news/methane-and-climate-change#gs.n99wyi> [<https://perma.cc/SVV7-7YUU>].

109. *34 Mind-Shattering Facts Linking Factory Farming to the Climate Crisis*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (Aug. 13, 2022, 2:45 PM), <https://www.peta.org/features/meat-climate-crisis/> [<https://perma.cc/76JW-XJTH>] [hereinafter *34 Mind-Shattering Facts*].

110. *Wasting Water*, COMPASSION IN WORLD FARMING (Aug. 13, 2022, 2:46 PM), <https://www.ciwf.org.uk/research/environment/wasting-water/> [<https://perma.cc/X2PY-ELYQ>].

111. Emma Schmit, *No Surprises Here: Iowa’s Factory Farms are Causing a Water Crisis*, BLEEDING HEARTLAND (Aug. 22, 2019), <https://www.bleedingheartland.com/2019/08/22/no-surprises-here-iowas-factory-farms-are-causing-a-water-crisis/> [<https://perma.cc/Z3HP-NNRC>].

and even death.<sup>112</sup> Algae blooms caused by livestock farming have also led to the “Dead Zone,” an area of the Gulf of Mexico depleted of oxygen that cannot sustain life as a result of the blooms.<sup>113</sup>

Deforestation and land destruction are also effects of factory farming.<sup>114</sup> Approximately 897 million acres of United States land is devoted to farming, with nearly 260 million acres dedicated to the clearing of forests in order to grow food for livestock.<sup>115</sup> Globally, every six seconds one acre of rain forest is cut down to facilitate cattle farming, which equates to 14,400 acres every day.<sup>116</sup>

Of course, investigations into deforestation and land destruction do not necessarily require undercover fact finders to reveal hidden truths. This is because both have profound and unconcealed underlying global implications with global results. Whether, however, investigations are of a covert or overt nature does not matter. Investigators’ ambitions remain the same in both types: raise awareness to a particular issue and push for change in that issue’s respective environment. In realizing these goals, both rely on one fundamental right: free speech.

#### IV. FIRST AMENDMENT CONSIDERATIONS: TRESPASS AND FALSE STATEMENTS

Only a few years after the second wave of ag-gag laws were enacted, federal courts across the country began striking down several Acts as unconstitutional.<sup>117</sup> Laws in Arkansas, North Carolina, Kansas, Utah, Idaho, and Iowa have either been struck down or are currently in litigation for being in violation of the Free Speech Clause of the First Amendment of the United States Constitution.<sup>118</sup>

The First Amendment prohibits laws abridging the freedom of speech.<sup>119</sup> The First Amendment attacks vulnerable ag-gag laws in several ways.<sup>120</sup> First, there is a presumption that laws targeting the content of speech violate constitutionally

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112. *Id.*

113. Slomka, *supra* note 107.

114. *Id.*

115. *Id.*

116. *34 Mind-Shattering Facts*, *supra* note 109.

117. Paul Brennan, *Free Speech v. Industrial Farms: Iowa’s Ag-Gag Laws Go to Federal Court*, LITTLE VILLAGE (Aug. 11, 2021), <https://littlevillagemag.com/free-speech-v-industrial-farms-iowas-ag-gag-laws-go-to-federal-court/> [<https://perma.cc/JAL8-DZH6>].

118. *See Ag-Gag Laws Face the First Amendment*, FIRST AMEND. WATCH (Aug. 13, 2022, 2:49 PM), <https://firstamendmentwatch.org/deep-dive/ag-gag-laws-face-the-first-amendment/> [<https://perma.cc/V8XF-A69A>].

119. *See* U.S. CONST. amend. I.

120. *See Ag-Gag Laws Face the First Amendment*, *supra* note 118.

protected free speech.<sup>121</sup> Second, such laws can act like a prior restraint on the publication of information.<sup>122</sup> Prior restraint is a legal term of art defined as a government action that prohibits speech and other expressions before the speech or expression happens, which occur, generally, in one of three ways: (1) by statute or regulation requiring a speaker acquire a permit or license before speaking; (2) by judicial injunction; or (3) the government prohibits a certain type of speech outright.<sup>123</sup> Finally, some ag-gag laws may ban speech or other expressions in overly broad ways.<sup>124</sup> That is, real world applications of certain laws could criminalize protected speech and activities.<sup>125</sup>

This section will examine the United States Supreme Court's determination on whether false statements are protected by the First Amendment in *United States v. Alvarez*, and two recent decisions in Utah and Iowa that held the States' ag-gag laws to be unconstitutional.<sup>126</sup>

*A. A "Legally Cognizable Harm:" U.S. v. Alvarez*

When Xavier Alvarez falsely claimed he was a recipient of the Congressional Medal of Honor, he unwittingly violated the Stolen Valor Act, which made it a federal crime to lie about having been awarded a military decoration or medal.<sup>127</sup> He ultimately pled guilty to the charge but reserved his right to appeal.<sup>128</sup> The case advanced through the appellate courts and eventually landed before the United States Supreme Court.<sup>129</sup>

In analyzing the issue, the plurality recognized that "defamation, fraud, or some other *legally cognizable harm* associated with a false statement" falls into a category of free speech that is not protected by the First Amendment.<sup>130</sup> This holding distinguished the limited instances of unprotected speech from falsity alone, which, the Court stated, "may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood."<sup>131</sup> Further,

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121. *Id.*

122. *Id.*

123. *Prior Restraint*, CORNELL L. SCH. LEGAL INFO. INST. (Aug. 13, 2022, 2:50 PM), [https://www.law.cornell.edu/wex/prior\\_restraint](https://www.law.cornell.edu/wex/prior_restraint) [<https://perma.cc/Y2QS-A49U>].

124. *Ag-Gag Laws Face the First Amendment*, *supra* note 118.

125. *Id.*

126. *See* *Animal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017); *see also* *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019).

127. *See* *United States v. Alvarez*, 567 U.S. 709, 714 (2012).

128. *See id.*

129. *See id.*

130. *Id.* at 719 (emphasis added).

131. *Id.*

the few recognizable restrictions on false statements have narrow scopes and/or underlying policy importance as “the criminal prohibition of a false statement made to Government officials in communications concerning official matters, 18 U.S.C. § 1001” and threatens the integrity of judgments.<sup>132</sup>

In the end, the plurality concluded that while some categories of speech have been historically unprotected, “[t]he government has not demonstrated that false statements generally should constitute a new category. . . .”<sup>133</sup> Moreover, the Act, the Court noted, sought “to control and suppress all false statements . . . in almost limitless times and settings without regard to whether the lie was made for the purpose of material gain.”<sup>134</sup> While applying strict scrutiny in assessing content-based restrictions on protected speech, the Court declared, “[t]he Act does not satisfy [that] scrutiny.”<sup>135</sup>

In the years after *Alvarez*, the Court’s decision in the case will begin to play an important role in determining the constitutionality of the access provisions in ag-gag laws. As will be seen *infra*, of particular consequence will be the ways in which lower courts resolve the ambiguity in the Court’s “legally cognizable harm” language when deciding which false statements warrant First Amendment protection.<sup>136</sup>

#### *B. ALDF vs. Herbert, 263 F. Supp.3d 1193*

On February 8, 2013, Amy Meyer became the first person to be charged under Utah Code § 76-6-112 (the “Utah Act”) for filming a bulldozer as it moved a sick cow at a slaughterhouse in Draper City, Utah.<sup>137</sup> The state would eventually dismiss the charges due to Ms. Meyer’s being on public and not, as the law required, private property.<sup>138</sup> Nonetheless, Ms. Meyer, the ALDF, and PETA filed a lawsuit against Utah’s then-Governor, Gary Herbert, and Utah’s then-Attorney General, Sean Reyes, challenging the Utah Act as an unconstitutional restriction on the First Amendment free speech doctrine.<sup>139</sup> In addition, the suit claimed the law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>140</sup>

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132. *Id.*

133. *Id.* at 722.

134. *Id.* at 722-23.

135. *Id.* at 724.

136. *See id.* at 719; *see also* Animal Legal Defense Fund v. Reynolds, 135 HARV. L. REV. 1166, 1166 (2022).

137. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1199 (D. Utah 2017).

138. *Id.*

139. *Id.*

140. *Id.*

In July 2017, the United States District Court for the Central Division of Utah heard the case with District Judge Robert Shelby writing the opinion.<sup>141</sup> Employing the *Alvarez* language, the threshold question before the Court was “whether all the lies prohibited by the Act cause[d] *legally cognizable harm*.”<sup>142</sup> The State contended the lies did, claiming the falsities resulted in two cognizable harms, “(1) Danger to animals and employees, and (2) trespass over property.”<sup>143</sup> Plaintiffs disagreed, arguing neither of the harms provided by the State occurred as a result of a person lying to gain access to an agricultural facility.<sup>144</sup>

Regarding the first alleged harm, Judge Shelby concurred with the Plaintiffs, writing there was “no evidence in the record that lying to gain access to an agricultural facility will necessarily harm animals or employees.”<sup>145</sup> Certain examples, he admitted, might arise where a lie could result in such harm, such as when an applicant lies about training on heavy equipment, but “plenty of lies that fall within the purview of the Act would cause no harm at all to animals or workers—[for example] the applicant who says he has always dreamed of working at a slaughterhouse, that he doesn’t mind commuting, that the hiring manager has a nice tie.”<sup>146</sup> Because *these* lies enjoy First Amendment protection, Judge Shelby held that the State’s rationale failed to “place the lying provision outside First Amendment scrutiny.”<sup>147</sup>

Turning to the trespass issue, Judge Shelby first explored whether “misrepresentation negates consent,” consent being a defense—the Plaintiffs contended—to trespassing.<sup>148</sup> Because neither the Utah appellate courts nor the Tenth Circuit had spoken on the issue, the Judge looked to the Fourth and Seventh Circuits for guidance, both having concluded: “[I]f the person causes harm of the type the tort of trespass seeks to protect—interference with ownership or possession of the land—then her consent to enter becomes invalid, and from that point on she is not merely a liar, but a trespasser as well.”<sup>149</sup> Merging this trespass conclusion “with *Alvarez*’s First Amendment conclusion (that a law criminalizing lies is immune from First Amendment scrutiny only if the lies cause legally cognizable harm),” Judge Shelby came to develop the following standard:

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141. *See id.* at 1193.

142. *Id.* at 1201-02 (emphasis added).

143. *Id.* at 1202.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1202-03.

[T]he Act here is immune from First Amendment scrutiny under the State’s trespass theory only if those who gain access to an agricultural operation under false pretenses subsequently cause trespass-type harm, meaning interference with ownership or possession of the property. In those instances, they have negated their consent to enter, they are trespassers (and have therefore caused legally cognizable harm), and their lies, under *Alvarez*, receive no First Amendment protection.<sup>150</sup>

Here, Judge Shelby was conscious it was certainly possible that a lie used to gain access may cause trespass-type harm, but given the Act’s broad language—“obtaining access to an agricultural operation under false pretenses”—the law “also sweeps in many more trivial, harmless lies that have no discernable effect on whether a person is granted access.”<sup>151</sup> Further, agreeing with both the Fourth and Seventh Circuits, Judge Shelby did not find it relevant that consent was given *because of* the misrepresentation.<sup>152</sup> In way of an example, Judge Shelby cited to a Fourth Circuit case in which undercover ABC news reporters falsified their resumes and obtained employment at a grocery store to record health violations.<sup>153</sup> Judge Shelby noted that the Fourth Circuit concluded the “resume fraud did not amount to trespass because it did not interfere with ‘the ownership and peaceable possession of land,’ regardless of the fact that the store owner would not have [otherwise] allowed the reporters on the property . . .”<sup>154</sup> Without more, Judge Shelby held that lying to gain entry does not render someone a trespasser.<sup>155</sup>

Under a broader constitutional light, Judge Shelby found both the lying and recording provisions in the Utah Act to be subject to First Amendment protections.<sup>156</sup> Moreover, Judge Shelby held Utah’s law targeted content because falsity of speech “cannot be determined without looking to the content of the message;” and “the use of ‘of’ rather than ‘at’ [in the Utah Act] means the Act does not bar all filming at an agricultural operation.”<sup>157</sup> In these ways, the Utah Act violated the First Amendment.<sup>158</sup>

In coming to his decision, Judge Shelby applied strict scrutiny.<sup>159</sup> Strict scrutiny is a form of judicial review requiring a party to prove the legislature must have

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150. *Id.* at 1203.

151. *Id.* at 1202-03.

152. *Id.* at 1204.

153. *Id.* at 1205.

154. *Id.*

155. *Id.*

156. *Id.* at 1210-11.

157. *Id.* at 1210.

158. *Id.* at 1213.

159. *Id.* at 1211.

passed a law to further a compelling governmental interest and has narrowly tailored the law to achieve that interest.<sup>160</sup> Strict scrutiny is the highest standard of review a court uses to determine the constitutionality of governmental discrimination.<sup>161</sup> As Judge Shelby wrote in his opinion:

This approach makes sense . . . Whether someone violates the Act depends on what they say. If, for example, enforcement authorities know only that an applicant represented to an agricultural facility that she attended a particular school, that alone is not sufficient to determine whether the Act was violated. Rather, the authorities must take the next step of examining the content of the message: what school did she say she attended, and is that the school she actually attended? The falsity of the speech cannot be determined without looking to the content of the message. This means the provision is content based, and subject to strict scrutiny.<sup>162</sup>

Next, Judge Shelby addressed the State's argument that the lying provision is content neutral because it prohibits *all* people from lying to gain access to agricultural operations.<sup>163</sup> In his opinion, he wrote: "The speech in question is the lie itself, and the only way to know whether a lie is a lie is to review what was said. This is perhaps the quintessential example of a content-based restriction."<sup>164</sup>

Judge Shelby concluded his opinion with the following: "Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them."<sup>165</sup>

As is the case in Judge Shelby's opinion, the recording provisions of many ag-gag laws fail to overcome First Amendment scrutiny. Yet, as the Eighth Circuit's holding shows, a well-tailored trespass-harm argument may be able to overcome free speech protection, enabling ag-gag laws to survive constitutional examination.<sup>166</sup> As Judge Shelby conceded: "There is ample room for disagreement . . . the Utah appellate courts or Tenth Circuit might well adopt a different analysis [on what constitutes legally cognizable harm]."<sup>167</sup>

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160. *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST. (Aug. 13, 2022, 2:51 PM), [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) [<https://perma.cc/6ZCR-FENP>].

161. *Id.*

162. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1210 (D. Utah 2017).

163. *Id.* (emphasis added).

164. *Id.*

165. *Id.* at 1213.

166. *Id.* at 1205.

167. *Id.*

*C. ALDF v. Reynolds, 353 F. Supp.3d 812*

In January 2019, Judge James Gritzner, writing for the United States District Court for the Southern District of Iowa, discussed the State’s 2012 Agricultural Production Facility Fraud Act (the “Iowa Act”).<sup>168</sup> The Iowa Act criminalized an investigator gaining access to agricultural production facilities under false pretenses with the intent to record video or photography without permission.<sup>169</sup> “The First Amendment requires heightened scrutiny,” Judge Gritzner declared, “whenever the state creates ‘a regulation of speech because of disagreement with the message it conveys.’”<sup>170</sup> The federal judge was writing the panel’s opinion in *Animal Legal Defense Fund v. Reynolds*.<sup>171</sup>

In *ALDF v. Reynolds*, as in *ALDF v. Herbert* above, the non-profit organization, ALDF, among other organizations, sued the State of Iowa arguing the Iowa Act “impermissibly restrict[ed] their free speech under the First Amendment,” and the law was “facially unconstitutional as a content-based, viewpoint-based, and overbroad regulation.”<sup>172</sup> ALDF filed their Complaint in federal court in October 2017, to which defendants, Iowa Governor Kim Reynolds, the Attorney General of Iowa, and the County Attorney for Montgomery County, Iowa, filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and (b)(6).<sup>173</sup> Defendants argued Plaintiffs lacked standing and, alternatively, they failed to state a claim under either the First or the Fourteenth Amendments.<sup>174</sup>

In the end, Judge Gritzner “sided with [the] opponents of the 2012 law . . . intended to stop organizations . . . from doing animal abuse investigations at farms and puppy mills.”<sup>175</sup> In his opinion, he wrote:

Not only is [the Iowa Act] unnecessary to protect the state’s interests, it is also an under-inclusive means by which to address them. ‘Where a regulation restricts a medium of speech in the name of a particular interest but leaves unfettered other modes of expression that implicate the same interest,

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168. See *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 822 (S.D. Iowa 2019).

169. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); see IOWA § 717A.3A(1)(b).

170. *Reynolds*, 353 F. Supp. 3d at 822.

171. See *id.*

172. *Id.* at 819.

173. *Id.*

174. *Id.*

175. David Pitt, *Federal Judge Strikes Down Iowa Law on Undercover Ag Workers*, ASSOCIATED PRESS (Jan. 9, 2019), <https://apnews.com/article/baf3b2fa1dae4f518e8e79df32a4bec5> [<https://perma.cc/5R27-SXCU>].

the regulations under inclusiveness may diminish the credibility of the government's rationale for restricting speech in the first place.<sup>176</sup>

Echoing strict scrutiny language, Judge Gritzner wrote: “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the [state] proves that they are narrowly tailored to serve compelling state interests.”<sup>177</sup> In this case, Judge Gritzner held the State failed to prove such an interest existed.<sup>178</sup>

However, this was not the end of *Reynolds*. The State appealed the District Court's decision and on August 10, 2021, the United States Court of Appeals for the Eighth Circuit decided the case.<sup>179</sup> A divided panel of judges partially affirmed the District Court's opinion and, alternatively, partially upheld Iowa's ag-gag law.<sup>180</sup> A majority affirmed the District Court's holding regarding the law's applications of employment and hiring, while they reversed the lower court's holding that the provision of § 717A.3A criminalizing obtaining access to agricultural facilities by false pretenses was unconstitutional.<sup>181</sup>

In its analysis, the Eighth Circuit, as Judge Shelby had in *Herbert*, looked to the *Alvarez* Court's “legally cognizable harm” language for guidance in considering the Iowa Act's Access Provision.<sup>182</sup> The State had raised—as the State had in *Herbert*—trespass to private property as the legally cognizable harm done by gaining access to an animal production facility by false pretenses.<sup>183</sup> The similarities with *Herbert*, however, end there.<sup>184</sup> Writing for the panel, the Honorable Circuit Judge Steven M. Colloton observed: “[T]his provision is consistent with the First Amendment because it prohibits exclusively lies associated with a legally cognizable harm—namely, trespass to private property.”<sup>185</sup> In his view, “trespass to private property is a comparable ‘legally cognizable harm’ [of those discussed in *Alvarez*], such that knowingly false speech designed to cause that harm” does not implicate the First Amendment.<sup>186</sup> Judge Colloton seems to conclude that, because the access

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176. *Reynolds*, 353 F. Supp. 3d at 826 (quoting *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013)).

177. *Id.* at 822 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

178. *Id.* at 826.

179. *See* *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 783 (8th Cir. 2021).

180. *Id.*

181. *See id.*

182. *See id.* at 792; *see also* *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1202 (D. Utah 2017).

183. *Reynolds*, 8 F.4th at 785-86; *see also* *Herbert*, 263 F. Supp. 3d at 1202-06.

184. *Compare* *Reynolds*, 8 F.4th 781 *with* *Herbert*, 263 F. Supp. 3d 1193.

185. *Reynolds*, 8 F.4th at 785-86.

186. *Id.* at 786.

provision only proscribes *material* misrepresentations that lead directly to a trespass without sweeping so broadly as to criminalize immaterial falsehoods, the provision is not subject to First Amendment scrutiny.<sup>187</sup>

Judge Colloton’s reasoning is itself logically sound. For example, if a person willfully misrepresents herself to gain access to an animal production facility, *and* misrepresentation is presumed to negate consent as the panel seems to imply, then intrinsically the misrepresentation must be material because *but for* the misrepresentation there is no trespass. However, as the next section will explore, Judge Colloton’s reasoning neglects a fundamental legal reality: the *Alvarez* Court envisioned legally cognizable harms as those that are caused by the speech itself.<sup>188</sup>

#### *D. Alvarez Revisited & Falsity Alone. . .*

As discussed above, the *Alvarez* plurality explained that the Court’s prior holdings on false statements concerned “cases discussing defamation, fraud, or some other *legally cognizable harm* associated with a false statement.”<sup>189</sup> It has been argued—as considered in *Herbert* and *Reynolds* *supra*—that trespass fits into the *Alvarez* “*other* legally cognizable harm” framework.<sup>190</sup> However, trespass is distinguishable from the paradigmatic legally cognizable harms discussed in *Alvarez*.<sup>191</sup>

In the cases of defamation and fraud, the harms produced are the direct result of the speech.<sup>192</sup> The harm caused by trespass, however, does not derive from the false speech itself. It can *only* occur if an actor takes further action to interfere with ownership and the peaceable possession of land. Even if a presumption is made that misrepresentation negates consent, no trespass exists if an actor takes no measures toward realizing the original intent that had motivated her first obtaining access to the production facility. For example, videotaping cruelty to animals does *no* damage to the enterprise. As the Tenth Circuit recently elaborated:

[Trespass] is not like defamation, where the false speech directly causes reputational harm; fraud, where the false speech causes someone to hand over a thing [of] value; or perjury, lies to the government, or impersonating a government official, where the speech itself harms our institutions. Rather, there

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187. *Id.* at 788; *see also* *Animal Legal Def. Fund v. Reynolds*, 135 HARV. L. REV. 1166, 1168 (2022).

188. *See* *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1234 (10th Cir. 2021).

189. *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (emphasis added).

190. *See id.* (emphasis added); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1202 (D. Utah 2017); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021).

191. *See* *Kelly*, 9 F.4th at 1234-35.

192. *Id.* at 1234.

are numerous further causal links between the false speech and the animal facility suffering damage.<sup>193</sup>

Consider a hypothetical that illustrates the point: an investigator obtains access to a facility by falsely denying she is a member of a certain animal rights group. Her sole intent in gaining access is to document and release to the public evidence of animal abuse but never does. Several months later, the production facility learns of her lie and her ties to the animal rights group. The owner seeks criminal charges; she did obtain access by false pretenses as a matter of fact. Yet can her actions be said to have produced a legally cognizable harm?

The answer is emphatically no. Nonetheless, she has, by the literal language of Iowa law, violated the statute and faces several years in prison.<sup>194</sup> Because her lie itself is sufficient in effectuating a formal charge, the law can be scrutinized as criminalizing the falsity of speech alone, a doctrine that has long been established “not [to] suffice . . . [in] bring[ing] speech outside the First Amendment.”<sup>195</sup>

#### *E. One More Note on Trespass*

One may argue access is a cognizable harm. As the Eighth Circuit reasoned in *Reynolds*, “[e]ven without physical damage to property arising from a trespass . . . “a property owner’s fundamental right to exclude is immediately violated upon access.”<sup>196</sup> However, this line of thought exaggerates the reality. A property owner’s right to exclude is not lost completely *just because* a person has made misrepresentations to obtain access to a facility. The property owner may choose to exclude for any number of factors independent the misrepresentations, including a lack of qualifying experience, a misplaced comma on a resumé, or a feeble handshake.

### V. THE FUTURE OF AG-GAG?

#### *A. Rapid Reporting*

As briefly mentioned in Section II above, Missouri enacted the State’s second ag-gag law in 2012.<sup>197</sup> Missouri Code § 578.013 reads, in part:

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193. *Id.*

194. IOWA § 717A.3A(1)(a) (“A person is guilty . . . if a person willfully . . . (a) Obtains access to agricultural production facility by false pretenses.”).

195. *Reynolds*, 8 F.4th at 786.

196. *Id.*

197. Maggie Strong, *The Show-Me State’s Hidden Cruelty: How Missouri’s Ag-Gag Laws Unconstitutionally Silence Animal-Welfare Whistleblowers*, 63 ST. LOUIS U. L.J. 611, 612 (2019).

1. Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.<sup>198</sup>

Read literally, the language could suggest the law was intended to protect animals.<sup>199</sup> After all, the law does mandate animal professionals come forward with videotaped or digitally recorded evidence of farm animal abuse.<sup>200</sup> However, such a conclusion occurs when taking the section at face value without digging down into the implied significance of the subordinate clause “within twenty-four hours of the recording.”<sup>201</sup> The assignment of a time limit to the duty-to-report all but eliminates “an undercover reporter’s ability to expose patterns of animal abuse.”<sup>202</sup> The key word here is “patterns.” Patterns reflect on the behavior of a system as a whole and cannot be easily dismissed as isolated or incidental. Rapid reporting mandates effectively create an affirmative defense against a charge of “systemic” abuse.<sup>203</sup> Such laws accomplish this by providing animal production facilities with a simple message: the video or digital evidence put forward was nothing more than the actions of a bad employee who can *and* will be fired.<sup>204</sup> The owners of the facilities, however, will not face the same economic consequences that they may have if the abuse was shown to be patterned.<sup>205</sup>

So, if—or more accurately, when—ALDF or another group look to challenge rapid reporting statutes on the grounds of constitutionality, can the laws survive the First Amendment? The answer, as of now, remains unclear. Some have argued that the Missouri statute is content-based like more traditional ag-gag legislation because “authorities must view a farm worker’s video to determine whether the worker has violated the statute.”<sup>206</sup> Further, because Missouri’s law “compels speech based on content . . . [it] is therefore ‘presumptively unconstitutional,’” and the law must be narrowly tailored to a compelling state interest to survive strict scrutiny.<sup>207</sup> Others have commented, however, that if more and more traditional

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198. MO. ANN. STAT. § 578.013(1) (West 2012).

199. *See id.*

200. *Id.*

201. *Id.*

202. Strong, *supra* note 197, at 612.

203. Shea, *supra* note 11, at 364.

204. *See id.*

205. *Id.*

206. Strong, *supra* note 197, at 634.

207. *Id.*

ag-gag laws fall to strict scrutiny “rapid reporting statutes might soon be considered the only constitutionally valid form of ag-gag” remaining.<sup>208</sup>

### B. A Petition for a Writ of Certiorari

Judge L. Steven Graszc wrote in his concurrence for the Eighth Circuit’s opinion in *Animal Legal Defense Fund v. Reynolds*: “Ultimately, the Supreme Court will have to determine whether such laws can be sustained, or whether they infringe on the ‘breathing room’ necessary to effectuate the promise of the First Amendment.”<sup>209</sup> The Judge’s intuition may soon become reality. A Petition for Writ of Certiorari has been filed in regard to a decision from the United States Court of Appeals for the Tenth Circuit in *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021). Although the Supreme Court has yet to issue Certiorari and the Petition only poses the question regarding Kansas Statute §47-1827(b), (c), and (d), which criminalizes trespass by deception at animal facilities with intent to damage the enterprise, a Supreme Court acceptance and decision on the matter of ag-gag may be determinative and the ultimate judgment on *these* laws as they stand before the Free Speech Clause of the First Amendment.<sup>210</sup>

## VI. CONCLUSION

Undercover investigations have a long and storied history in the United States.<sup>211</sup> For example, in the early 1900s, an undercover investigation of Chicago slaughterhouses and its subsequent publication as the plot in a novel, led to a major shift in both public and governmental thinking and policymaking regarding meat production in the United States.<sup>212</sup>

Over the years, the agricultural industry has invested massive amounts of capital and manpower to protect animal production operations against undercover investigations. Lobbyists and insiders have worked to villainize activists and investigatory journalists; advance public smear campaigns labelling investigators as terrorists; discredit the evidence collected during investigations as faked or else perpetrated by a handful of bad employees; and finally, urge lawmakers to criminalize undercover evidence collection in and on the grounds of animal production

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208. Shea, *supra* note 11, at 371.

209. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 788 (8th Cir. 2021).

210. *See generally* *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021).

211. *See generally* UPTON SINCLAIR, *THE JUNGLE* (1906); *see also* *Milestones in U.S. Food and Drug Law*, FOOD & DRUG ADMIN. (Jan. 31, 2018), <https://www.fda.gov/about-fda/fda-history/milestones-us-food-and-drug-law> [<https://perma.cc/K2FC-8HAF>].

212. *See generally* SINCLAIR, *supra* note 211; *see also* *Milestones in U.S. Food and Drug Law*, *supra* note 211.

facilities.<sup>213</sup> Ag-gag laws are the manifestation of this decades-old crusade by the industry as a whole.

These legal defensive measures are meant to control the messaging. Expressed differently, ag-gag laws have pitted an individual's right to freedom of speech, including false speech, against the industry's right to control speech. Recently, courts in several jurisdictions have recognized this legal friction and have sought to resolve the issue.<sup>214</sup>

At the heart of the matter is whether false statements deserve First Amendment protection. Courts have yet to reach a definitive answer on the matter. A District Court in Utah, for example, declared that false statements without more justify protection by the First Amendment.<sup>215</sup> The Eighth Circuit, however, held in part that falsehoods employed to gain access to a production facility are entitled to no First Amendment protection.<sup>216</sup>

It is this author's opinion that the Utah federal court's reasoning is more sound and should be adopted by courts moving forward.<sup>217</sup> Material lies which contribute to a person obtaining access to an animal production facility cannot be considered the type of false speech—namely, defamation, fraud, and some other legally cognizable harms—as examined by the *Alvarez* Court.<sup>218</sup> Although states have argued, and have won in one case, that trespass is a cognizable harm that occurs by false pretenses, trespass can be distinguished from defamation and fraud and should fall outside the *other* categorical harm because trespass does not derive from the false speech itself.<sup>219</sup> Trespass can only occur as a product of someone's acting to interfere with ownership and the peaceable possession of land.<sup>220</sup> Trespass as a cognizable harm allows the falsity of speech alone to push the speech outside the purview of the First Amendment, a proposition which has long been rejected by American law.

The United States Supreme Court may soon decide the fate of ag-gag statutes once and for all. Until then, animal welfare, public well-being, and environmental

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213. See Cheryl Leahy, *Why Undercover Investigations?*, ANIMAL OUTLOOK (Apr. 1, 2021), <https://animaloutlook.org/why-undercover-investigations-my-top-five-reasons/> [<https://perma.cc/H6RK-P6PA>].

214. See Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 787 (8th Cir. 2021).

215. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

216. Reynolds, 8 F.4th at 787.

217. See *id.*

218. United States. v. Alvarez, 567 U.S. 709, 719 (2012).

219. Herbert, 263 F. Supp. 3d at 1203.

220. *Id.* at 1205.

health continue to be threatened by undocumented abuses carried out by the agricultural industry. Ultimately, what may be at stake is not just existential risk, but also free speech itself—the foundational safeguard of a free market of ideas at large and the first element to any healthy democracy as a whole.