

THE MOVE FROM AG-GAG LAWS TO FARM PROTECTION STATUTES

Macy G.H. Perry[†]

“Farmers and ranchers lead the way in animal care, so it’s important we stand shoulder to shoulder with our fellow producers to protect the critical agriculture industry.” – Rodd Moesel, Oklahoma Farm Bureau President¹

Abstract	28
I. Introduction	28
II. Animal welfare v. Animal rights	30
III. Background of Ag-Gag Laws	34
A. Common Elements of Ag-Gag Laws	36
1. Prohibition on Filming and/or Distribution of Agricultural Activities	36
2. Using False Information to Gain Employment	38
3. Rapid Reporting Requirement	38
4. Trespassing onto Agricultural Facilities	39
B. Common Challenges to Ag-Gag laws	39
1. Violation of Free Speech Under the First Amendment	39
2. Violation of Animal Rights Groups’ Equal Protection	40
3. Overbreadth	41
IV. Recent Circuit Split	41
A. The Tenth Circuit	42
B. The Eighth Circuit	44
C. The Ninth Circuit	45
V. What Would Oklahoma’s Ag-Gag Statute Look Like?	46
A. Should Oklahoma Even Attempt to Pass an Ag-Gag Law?	46
B. Kelly’s Effect on Oklahoma	49
VI. Conclusion	50

[†] Macy G.H. Perry is a 2023 J.D. Candidate at the University of Oklahoma College of Law. She received her B.S. in Animal Science with a minor in Agricultural Economics and Agribusiness from Oklahoma State University in 2018. In 2020, she received her M.S. in Animal Science with an emphasis in Meat Science also from OSU. Macy would like to thank Emeritus Professor Drew Kershen for his guidance and feedback in reviewing drafts of this Note.

1. *OKFB Legal Foundation Supports Campaign Against Colorado Initiative 16*, OKLA. FARM REP. (June 15, 2021, 10:45 AM), http://www.oklahomafarmreport.com/wire/news/2021/06/02995_OKFBagainstColorado06142021_104537.php#.YYL-Mgi1h1mA [<https://perma.cc/MF7L-5UYN>].

ABSTRACT

There is currently a dispute in this country between animal rights activists and agriculturists concerning state-enacted legislation, commonly called an “ag-gag law,” which holds individuals either criminally or civilly liable for conducting undercover investigations at agricultural operations in order to expose animal abuse. While these ag-gag laws in many ways help protect animal welfare, they have continuously struggled to maintain their constitutionality under First Amendment legal challenges. Therefore, this Note argues that the better route to protect animal welfare and promote transparency in agriculture would be to enact farm protections statutes.

I. INTRODUCTION

The American food supply is one of most “abundant, affordable[,] and . . . safest” in the world² due to the technological advancements the agriculture industry has made in the United States.³ This expansion has resulted in the transition away from small family farms to what many dub “factory farms” and concentrated animal feeding operations (CAFOs) for the majority of our food production.⁴ However, 98% of these larger farming operations are still family owned.⁵ A growing population needs more food, so it is only natural that those producing that food would increase in scale to become more efficient. The abundance we have in our grocery stores would not be available if American agriculture was not at the scale that it is today.⁶

The focus of this Article is state-enacted legislation, commonly called “ag-gag laws,” that hold individuals either criminally or civilly liable for conducting undercover investigations at agricultural operations in order to expose animal abuse.⁷ Ag-gag laws have received their fair share of criticism since their inception

2. *Fast Facts About Agriculture & Food*, AM. FARM BUREAU FED’N (Feb. 2, 2023, 12:31 PM), <https://www.fb.org/newsroom/fast-facts> [<https://perma.cc/9RM3-4MKK>].

3. See generally Jeff Simmons, *Making Safe, Affordable and Abundant Food a Global Reality*, RANGE BEEF COW SYMP. (2011).

4. *U.S. Food System Factsheet*, UNIV. OF MICH. CTR. FOR SUSTAINABLE SYS. (Feb. 2, 2023, 12:33 PM), <https://css.umich.edu/factsheets/us-food-system-factsheet> [<https://perma.cc/9J8S-RSQF>]; Christine Whitt, *A Look at America’s Family Farms*, USDA (July 29, 2021), <https://www.usda.gov/media/blog/2020/01/23/look-americas-family-farms> [<https://perma.cc/4J85-DWHG>].

5. *Fast Facts About Agriculture & Food*, *supra* note 2.

6. *Id.*

7. Fern L. Kletter, Annotation, *Criminalization of Undercover Investigation of Agricultural Operations (“Ag-Gag” Statutes)*, 40 A.L.R.7th Art. 8 § 2 (2019).

in 1990.⁸ The first versions of these state statutes were in response to terroristic acts, while later versions responded to the release of videos exposing animal cruelty captured by animal rights groups undercover at animal facilities.⁹ The agriculture industry reacted defensively¹⁰ when a few bad apples gave the industry a reputation not necessarily applicable to the entirety. But has this reaction caused a detrimental effect that was not originally intended? When completing an online search of “ag-gag laws,” on the first page, almost every source retrieved will likely be an animal rights group slamming ag-gag statutes.¹¹ In today’s media culture, where digging for the truth online is rare since not many tread past the first page of a Google search,¹² where does the average American receive an agriculturist’s view of ag-gag legislation? When Americans are an average of three generations removed from the family farm,¹³ where can they receive information about the industry that provides the food they purchase at their grocery store?¹⁴ The need for

8. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE U. L. REV. 311, 318–19 (2014); Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 200, 203 (2017).

9. Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, MICH. STATE UNIV. ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> [<https://perma.cc/4MU6-NHNL>].

10. *Id.*

11. *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND (Feb. 2, 2023, 12:28 PM), <https://aldf.org/issue/ag-gag/> [<https://perma.cc/8LVN-W7S2>]; *What is Ag-Gag Legislation?*, ASPCA (Feb. 2, 2023, 12:40 PM), <https://www.aspc.org/improving-laws-animals/public-policy/what-ag-gag-legislation> [<https://perma.cc/U3GY-7H6T>]; Kelsey Piper, “Ag-Gag Laws” *Hide the Cruelty of Factory Farms From the Public. Courts Are Striking Them Down*, VOX (Jan. 11, 2019, 2:48 PM), <https://www.vox.com/future-perfect/2019/1/11/18176551/ag-gag-laws-factory-farms-explained> [<https://perma.cc/RN8C-FF6T>]; *Anti-Whistleblower (“Ag-Gag”) Legislation*, ANIMAL WELFARE INST. (Feb. 2, 2023, 1:11 PM), <https://awionline.org/content/anti-whistleblower-legislation> [<https://perma.cc/RL35-6RTF>]; *Anti-Whistleblower Ag-Gag Bills Hide Factory Farming Abuses From the Public*, HUMANE SOC’Y U.S. (Feb. 2, 2023, 1:12 PM), <https://www.humanesociety.org/resources/anti-whistleblower-ag-gag-bills-hide-factory-farming-abuses-public> [<https://perma.cc/5P4S-8K7L>].

12. Kelly Shelton, *The Value of Search Results Rankings*, FORBES (Oct. 30, 2017, 8:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/10/30/the-value-of-search-results-rankings/?sh=74b302d244d3> [<https://perma.cc/7VKU-FWPG>].

13. *The American Family Farm*, NEB. FARM BUREAU (Dec. 11, 2019), <https://www.nefb.org/12/11/2019/the-american-family-farm-2/#:~:text=The%20average%20American%20is%20three%20generations%20removed%20from,and%20that%20number%20is%20plunging%20by%20the%20decade> [<https://perma.cc/H2JP-Z2YB>].

14. See Angus TV, *RAISING THE STEAKS (2017) – Food Production Documentary*, YOUTUBE (Dec. 22, 2017),

the public to be provided with a basic agricultural education is strong, but sadly lacking, unless an individual was raised in the industry or takes a Future Farmers of America (FFA) class during high school. Fortunately, most in the agriculture industry are very willing to share their personal knowledge to help teach the public where that rib-eye steak or gallon of milk actually came from. This Article is an evaluation of ag-gag laws with an agriculturist's background that is neither quick to condemn the statutes nor swift to support them. Both sides of the argument must be fairly evaluated from a realist perspective, keeping in mind the important role that United States agriculture has in helping feed the world.

This Article considers what an ag-gag bill would have to look like to be passed in Oklahoma. Part II examines the difference between animal welfare and animal rights, with the ultimate goal of promoting animal welfare. Part III provides a brief background of ag-gag laws, including the common elements of and challenges brought against the statutes. Part IV looks at the three main circuit rulings concerning ag-gag laws and how the recent decision from the Tenth Circuit in *Animal Legal Defense Fund v. Kelly* has created a circuit split. Part V applies the Tenth Circuit case, *Kelly*, to Oklahoma and evaluates whether the state should enact an ag-gag law and what it would have to look like to remain constitutional.

II. ANIMAL WELFARE V. ANIMAL RIGHTS

Prior to addressing the legality of ag-gag laws, it is important to review the background of animal welfare since a majority of lawsuits challenging ag-gag laws are brought by animal rights groups.¹⁵ There is a stark difference between animal rights and animal welfare. Those that support animal rights believe that animals should not be subject to human use, and are against animals being used for food, clothing, medical research, entertainment, or even as pets.¹⁶ Animal rights

<https://www.youtube.com/watch?v=zERxUjOImQs&list=PLX2qbJUDUuTYJ-9u21XqUyrAyiengNboh&index=21> [<https://perma.cc/4QNP-CQN5>] (documenting the entire beef production lifecycle starting at the cow-calf level and ending with the consumption of a steak through the eyes of two consumers).

15. *Ag-Gag Timeline*, ANIMAL LEGAL DEF. FUND (Feb. 2, 2023, 1:18 PM), <https://aldf.org/article/ag-gag-timeline/> [<https://perma.cc/5HY8-3VWK>].

16. *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL (Feb. 2, 2023, 1:24 PM), https://www.animalwelfarecouncil.org/?page_id=16 [<https://perma.cc/XA6J-57U6>]; see also *Animal Welfare vs. Animal Rights*, N. AM. MEAT INST. (Feb. 2, 2023, 1:20 PM), http://animal-handling.org/consumers/animal_welfare_animal_rights [<https://perma.cc/45UU-VE7Y>] (“Animal rights adherents believe that animals should not be used for food, clothing, entertainment, or experimentation.”); see generally Karin Brulliard & Scott Clement, *How Many Americans have Pets? An Investigation of Fuzzy Statistics.*, THE WASH. POST (Jan. 31, 2019 1:54 PM), <https://www.washingtonpost.com/science/2019/01/31/how-many-americans-have-pets-an->

supporters view any kind of animal ownership as a form of slavery, and consider the consumption of meat, fish, or dairy to be murder.¹⁷ On the other hand, animal welfarists believe in the humane treatment of animals.¹⁸ Those supporting animal welfare are not on the other side of the spectrum from animal rights supporters; that would mean they support animal abuse. Instead, animal welfarists respect animals' lives and treat animals with dignity while still recognizing that only humans have rights.¹⁹ Animal welfare promotes a sustainable and dutiful stewardship of the gift of animals. Animal rights advocates, on the other hand, promote an avenue which is not economical. Veganism cannot feed the world. The fact is that there would be no sustainable way to feed a world that already has a hunger crisis without animal agriculture.²⁰

Animal rights groups may also be referred to as animal extremists in the agriculture industry due to their support for animal liberation.²¹ The most common challenger to ag-gag laws is the Animal Legal Defense Fund (ALDF), listed as an "animal extremist" by Protect the Harvest.²² Joining ALDF with the title of animal

investigation-into-fuzzy-statistics/ [https://perma.cc/VP3E-8TT6] (explaining that somewhere between 57 to 68 percent of households owned pets in 2016).

17. See *Animal Welfare vs Animal Rights: An Important Distinction*, TRUTH ABOUT FUR (Apr. 13, 2017), <https://blog.truthaboutfur.com/animal-welfare-animal-rights-distinction/> [https://perma.cc/SB3N-VUS7].

18. *Welfare vs. Rights*, *supra* note 16.

19. John Hart, *Animals Don't Have Rights, but Humans Do Have Duties*, TRI-STATE LIVESTOCK NEWS (Sept. 2, 2010), <https://www.tsln.com/news/animals-dont-have-rights-but-humans-do-have-duties/> [https://perma.cc/336B-KZ43].

20. Lawrence P. Reynolds et. al., *Importance of Animals in Agricultural Sustainability and Food Security*, 145 J. NUTRITION 1377, 1377–78 (2015); see generally *Animal Production*, U.S. DEP'T OF AGRIC. NAT'L INST. OF FOOD & AGRIC. (Feb. 9, 2023, 11:30 AM), <https://www.nifa.usda.gov/topics/animals> [https://perma.cc/4FVM-5SAP] ("Raising livestock and producing animal products is a multi-billion-dollar-per-year industry and a significant segment of U.S. agriculture.").

21. See generally *Animal Legal Def. Fund*, INFLUENCE WATCH (Feb. 2, 2023, 1:27 PM), <https://www.influencewatch.org/non-profit/animal-legal-defense-fund/> [https://perma.cc/D494-RTWS]; *Humane Society of the United States (HSUS)*, INFLUENCE WATCH (Feb. 2, 2023, 1:27 PM), <https://www.influencewatch.org/non-profit/humane-society-of-the-united-states/> [https://perma.cc/G2Y4-Y9SB]; *People for the Ethical Treatment of Animals (PETA)*, INFLUENCE WATCH (Feb. 2, 2023, 1:28 PM), <https://www.influencewatch.org/non-profit/people-for-the-ethical-treatment-of-animals-peta/> [https://perma.cc/8UZJ-8T52]; *Mercy for Animals*, INFLUENCE WATCH (Feb. 2, 2023, 1:29 PM), <https://www.influencewatch.org/non-profit/mercy-for-animals/> [https://perma.cc/M7MM-BZRJ]; *Animal Liberation Front (ALF)*, INFLUENCE WATCH (Feb. 2, 2023, 1:30 PM), <https://www.influencewatch.org/organization/animal-liberation-front-alf/> [https://perma.cc/V86T-SS5D].

22. *Animal Legal Defense Fund*, PROTECT THE HARVEST (Feb. 2, 2023, 1:31 PM),

extremist are well-known animal rights groups like The Humane Society of the United States (HSUS), People for the Ethical Treatment of Animals (PETA), Direct Action Everywhere (DxE), Farm Animal Rights Movement (FARM), Compassion Over Killing, and Mercy For Animals.²³ Why have these groups been named not only animal rights groups, but also animal extremists? Maybe quotes like these from the 2021 Farmed Animal Conference E-Summit will provide some context:

‘We must challenge the ridiculous notion of human supremacy. All we are is different, and the differences never, ever justify the prejudice.’

....

‘We are opposed to any exploitation of animals. Not just bigger cages, no cages. Not just less domination but no dominating. Not just making sure they are anesthetized before being killed for a shoe or a steak but not being killed for either.’

....

‘There’s simply no such thing as humane meat, dairy and egg production. Don’t be misled by quaint farm names and claims.’

....

‘When you buy from animal agriculture, you’re supporting environmental racism.’

....

‘Push the envelope wherever we are to confront what is destroying our planet.’

....

‘The only humane choice is vegan.’²⁴

Animal rights groups are so resolutely against ag-gag laws because their whistleblowers have been “gagged” from videotaping practices at farms and

<https://protecttheharvest.com/what-you-need-to-know/overview-of-animal-rights-organizations/animal-legal-defense-fund/> [https://perma.cc/3MN7-YXLE].

23. *Animal Extremist Groups – Who They Really Are*, PROTECT THE HARVEST (Feb. 2, 2023, 1:31 PM), <https://protecttheharvest.com/news/animal-rights-groups-who-they-really-are/> [https://perma.cc/G73W-72H9]. (PETA has engaged in funding terroristic acts and misleading the public in ad campaigns using false images.); Mihai Andrei, *The Dark Side of PETA – Serial “Mercy” Killings, Misleading Campaigns, and Pseudoscience*, ZME SCIENCE (Mar. 28, 2019), <https://www.zmescience.com/science/peta-killing-campaign-28032019/> [https://perma.cc/X2TM-DV6U].

24. Hannah Thompson-Weeman, *Virtual Animal Rights Conferences Continue to Center on Animal Ag*, MEETINGPLACE (Aug. 24, 2021), <https://www.meetingplace.com/Industry/Blogs/Details/100936> [https://perma.cc/8V6G-JAP2].

processing facilities.²⁵ The issue is that in the agriculture industry, there are many practices and occurrences that may not *look* humane but actually are. These practices include the processing of piglets at a young age,²⁶ use of sow gestation crates,²⁷ and cattle's reaction after being stunned.²⁸ Without background knowledge of these practices, an average American watching a video released from PETA may come away thinking that the animals are not being humanely treated.

A 2013 law journal article claimed that the United States agriculture industry focuses more on passing ag-gag legislation than actually promoting animal welfare and agricultural education.²⁹ Additionally, animal rights advocates truly believe that agriculturists promote animal cruelty and that “the horrors of our food system couldn't stand up to the light of day.”³⁰ On the contrary, the American animal agriculture industry is extremely committed to following established and certified standards to ensure proper animal welfare.³¹ In fact, “[t]he U.S. meat industry is one of the most heavily regulated industries in the nation.”³² The meat industry is governed by the Humane Slaughter Act of 1978 which regulates animal handling

25. *Ag-Gag Laws*, *supra* note 11.

26. *How To Process Piglets*, PORK INFO. GATEWAY (Feb. 8, 2023, 5:15 PM), <https://porkgateway.org/resource/how-to-process-piglets/> [<https://perma.cc/PYK8-6WHK>] (Processing piglets includes clipping needle teeth (prevents damage to sow's underline during nursing), docking tails (helps avoid tail biting which results in infection), giving medication (needed because sow's milk is deficient in iron), identification measures like ear notching (important for management), and/or castration (avoids boar taint which negative impacts meat quality)).

27. *Veterinarian Statement on Sow Housing*, MATERNITY PENS 1 (Feb. 8, 2023, 5:31 PM), <http://maternitypens.com/vet-statement.pdf> [<https://perma.cc/5DRZ-BQQS>] (comparing individual gestation stalls and group-housing systems, specifically stating that “individual pens protect sows from more aggressive animals and reduce competition for food.”).

28. Temple Grandin, *Humane Stunning of Cattle and Pigs*, DR. TEMPLE GRANDIN'S WEBSITE (Nov. 2015), <http://www.grandin.com/inc/humane.slaughter.html> [<https://perma.cc/BP28-CFWD>] (explaining that leg movements after proper stunning is only a reflex for the bovine, not a sign of consciousness).

29. Sarah Rouse, *Improving Farm Animal Welfare and Promoting Education: Combating the Introduced Ag-Gag Law in Pennsylvania*, 2 MID-ATL. J. ON L. & PUB. POL'Y 185, 186 (2013).

30. Piper, *supra* note 11.

31. *Animal Welfare*, ANIMAL AGRIC. ALL. (Feb. 8, 2023, 4:44 PM), <https://animalagalliance.org/issues/animal-welfare/> [<https://perma.cc/CE54-UYVH>].

32. Kurt Vogel & Temple Grandin, *Animal Welfare in Packing Plants: An Overview*, N. AM. MEAT INST. 1 (Feb. 8, 2023, 4:52 PM), <http://animalhandling.org/sites/default/files/documents/Animal%20Welfare%20in%20Packing%20Plants-%20An%20Overview.pdf> [<https://perma.cc/ZJ3L-RVC2>].

and slaughtering practices.³³ Additionally, every processing plant has Food Safety and Inspection Service inspectors present during all operational hours.³⁴ While general care standards for farm animal agriculture production are not regulated, every industry has adopted quality assurance certification programs or welfare guidelines to educate producers on best practices in promoting animal welfare.³⁵ These programs, which have been implemented in all species of animals raised for food production, are illustrative of how the agriculture industry is making strides to prevent any further animal abuse.³⁶ The industry does not deny that cruelty has happened, but it does not support it.³⁷ Instead, it is committed to promoting animal welfare.

III. BACKGROUND OF AG-GAG LAWS

Many animal rights groups assert that ag-gag laws are passed solely to prevent the disclosure of animal cruelty.³⁸ However, what animal rights groups fail to

33. *Id.* (The Act requires a stress-free environment for livestock when being handled and moved and before livestock are slaughtered, they must be fully unconscious.)

34. *Id.*

35. See *What is BQA?*, BEEF QUALITY ASSURANCE (Feb. 15, 2023, 5:00 PM), <https://www.bqa.org/about-us/bqa-and-the-cattle-industry#:~:text=Beef%20Quality%20Assurance%20is%20a, optimum%20management%20and%20environmental%20conditions> [https://perma.cc/2DPW-TH6K]; see also *PQA Plus Certification*, PORK CHECKOFF (Feb. 8, 2023, 5:14 PM), <https://porkcheckoff.org/certification-tools/training-certification/pqa-plus/> [https://perma.cc/8ZQK-2LQP]; *What is the National Dairy FARM Program?*, FARMERS ASSURING RESPONSIBLE MGMT. (Feb. 8, 2023, 3:28 PM), <https://nationaldairyfarm.com/what-is-farm/> [https://perma.cc/96NT-J3BC]; *Animal Care & Welfare*, AM. SHEEP INDUS. ASS'N (Feb. 8, 2023, 4:24 PM), <https://www.sheepusa.org/researcheducation-animalcarewelfare> [https://perma.cc/JN5U-2LHL]; *Animal Welfare for Broiler Chickens*, NAT'L CHICKEN COUNCIL (Feb. 8, 2023, 4:59 PM), <https://www.nationalchickencouncil.org/policy/animal-welfare/> [https://perma.cc/3CMG-6CQR]; *United Egg Producers Certified Animal Welfare Program*, UNITED EGG PRODUCERS (Feb. 8 2023, 5:25 PM), <https://uepcertified.com> [https://perma.cc/M669-LLJY]; *NTF Standards of Conduct*, NAT'L TURKEY FED'N (Feb. 8, 2023, 5:07 PM), <https://www.eatturkey.org/animal-welfare/standards/> [https://perma.cc/2AVZ-AC6B] (discussing each industry's respective quality assurance programs and welfare guidelines).

36. See generally TEMPLE GRANDIN, AVOID BEING ABSTRACT WHEN MAKING POLICIES ON THE WELFARE OF ANIMALS, *in* SPECIES MATTERS: HUMANE ADVOCACY AND CULTURAL THEORY 195 (Marianne DeKoven & Michael Lundblad eds., 2010), <http://www.grandin.com/welfare/avoid.abstract.making.policy.animal.welfare.pdf> [https://perma.cc/P2D3-3Y5L] (describing how the animal agriculture industry has made significant reforms since the late 1990s that are largely ignored by animal rights activists).

37. See generally Temple Grandin, *Animal Welfare and Society Concerns Finding the Missing Link*, 98 MEAT SCI. 461, 464 (2014).

38. See e.g., *Ag-Gag Laws*, *supra* note 11; *Anti-whistleblower ("Ag-Gag") Legislation*,

understand is that if an animal is being abused, that causes that animal to become stressed.³⁹ When an animal is stressed, it will release epinephrine which negatively affects meat quality.⁴⁰ Low meat quality results in a lower product value, causing the processing plant or producer to lose money.⁴¹ A low-stress environment is vital in processing plants where livestock are being harvested because it results in less bruising and much higher meat quality.⁴² Animal abuse is neither low-stress nor economically efficient. Since “[p]roper handling of meat animals can improve productivity, quality and profitability,” livestock producers have all the incentive to promote animal welfare.⁴³ Some would even say “it’s just good business to do it right.”⁴⁴

Preventing the disclosure of animal cruelty was not the original intention of the states that first introduced ag-gag statutes.⁴⁵ The laws were initially introduced to combat a significant amount of terroristic acts mainly perpetrated by Animal Liberation Front and Earth Liberation Front.⁴⁶ Kansas, Montana, and North Dakota passed some of the first ag-gag statutes in the early 1990s.⁴⁷ However, these first statutes were mainly considered agroterrorism laws.⁴⁸ The laws focused on preventing public access to livestock operations without the owner’s consent in order to limit future instances of trespassing leading to property damage.⁴⁹ These three states also included language in their statutes that prohibited individuals from taking pictures or recordings on animal facilities, a common element in the more

supra note 11; *What is Ag-Gag Legislation?*, *supra* note 11; *What are “Ag-Gag” Bills?*, PETA (Feb. 8, 2023, 5:14 PM), <https://www.peta.org/action/action-alerts/ag-gag-bills/> [<https://perma.cc/U7ZU-Z9BF>].

39. See generally Keith E. Belk et al., *The Relationship Between Good Handling/Stunning and Meat Quality in Beef, Pork, and Lamb*, COLO. STATE UNIV. (Feb. 21, 2002), <http://www.grandin.com/meat/hand.stun.relate.quality.html> [<https://perma.cc/AFR4-RG9K>].

40. Temple Grandin, *The Effect of Stress on Livestock and Meat Quality Prior to and During Slaughter*, 1 INT’L J. STUDY ANIMAL PROBS. 313, 317 (1980).

41. Keith E. Belk et al., *supra* note 39.

42. *Id.*

43. *Id.*

44. *Id.*

45. ELIZABETH RUMLEY, THE NAT’L AGRIC. L. CTR., AN OVERVIEW OF “AG-GAG” LAWS: ARKANSAS AND BEYOND 6 (Feb. 8, 2023, 5:34 PM), <https://nationalaglawcenter.org/wp-content/uploads/2019/11/webinar.pdf> [<https://perma.cc/2P4L-P25S>].

46. *Id.* at 6–7.

47. *An Overview of “Ag-Gag” Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS (Feb. 8, 2023, 5:16 PM), <https://www.rcfp.org/journals/overview-ag-gag-laws/> [<https://perma.cc/HX4L-K5HL>].

48. Prygoski, *supra* note 9.

49. *Id.*

recent ag-gag legislation.⁵⁰

In 1992, Congress passed the Animal Enterprise Protection Act (AEPA) in the hopes of protecting “animal enterprises” from “physical disruptions.”⁵¹ Congress amended the AEPA in 2006 with the enactment of the Animal Enterprise Terrorism Act (AETA).⁵² The AETA removed the physical disruption language of the AEPA and replaced it with, “damaging or interfering with the operation of an animal enterprise.”⁵³ The AETA criminalizes animal rights extremists who commit terroristic acts while at the same time protecting the “First Amendment rights of animal rights activists to peacefully protest and boycott lawfully”⁵⁴ under the Rules of Construction section.⁵⁵ The AETA has been challenged by animal rights activists; however, the First Circuit affirmed the district court’s dismissal for lack of standing.⁵⁶

In the early 2010s, a new wave of ag-gag bills were introduced in multiple states;⁵⁷ however, most of the legislation failed to become law.⁵⁸ A few states were successful in enacting the legislation, but many of these have since faced legal challenges, even being ruled unconstitutional.⁵⁹

A. Common Elements of Ag-Gag Laws

1. Prohibition on Filming and/or Distribution of Agricultural Activities

This feature of the laws is one of the main sections challenged by animal rights groups due to its restriction on the groups’ ability to operate undercover

50. *Id.*

51. Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43(a) (1992) (amended 2006).

52. Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RESV. L. REV. 651, 654 (2010).

53. 18 U.S.C. § 43(a)(1).

54. Press Release, Dianne Feinstein, U.S. Sen. for California, House Unanimously Passes Animal Enterprise Terrorism Act (Nov. 13, 2006), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=7929e3ca-7e9c-9af9-78e6-8049c2e67205> [<https://perma.cc/3JBP-RVXC>].

55. 18 U.S.C. § 43(e).

56. *Blum v. Holder*, 744 F.3d 790, 803 (1st Cir. 2014).

57. *An Overview of “Ag-Gag” Laws*, *supra* note 47.

58. *What is Ag-Gag Legislation?*, *supra* note 11 (Ag-gag bills have failed in Arizona, California, Colorado, Florida, Illinois, Indiana, Kentucky, Minnesota, Nebraska, New Hampshire, New Mexico, New York, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, and Washington).

59. *Anti-Whistleblower (“Ag-Gag”) Legislation*, *supra* note 11 (Idaho’s, part of Iowa’s, Kansas’s, North Carolina’s, Utah’s, and Wyoming’s were ruled unconstitutional. Alabama’s, part of Iowa’s, Missouri’s, Montana’s, and North Dakota’s are all active).

investigations.⁶⁰ This element prohibits individuals from entering a private animal production facility to either take pictures or record audio or video footage without the owner's consent.⁶¹

There is no denying that undercover operations by animal rights groups have exposed unacceptable animal abuse.⁶² No industry is perfect—just think about the stories you read about in your professional responsibility class in law school. However, the videos ultimately show the view of agriculture the editor wants to expose by manipulating the editing process.⁶³ Additionally, the speakers at the Animal Rights National Conference have promoted the use of undercover video footage to help end animal agriculture.⁶⁴ This element favors the right of private property owners over the right of those in a journalistic role.⁶⁵

60. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1206 (D. Utah 2017); *see also* *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 985 (D. Kan. 2020) *aff'd*, 9 F.4th 1219 (10th Cir. 2021); *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1016 (D. Idaho 2014).

61. *Farm Protection Legislation*, ANIMAL AGRIC. ALL. 1 (June 2020), <https://animalagalliance.org/wp-content/uploads/2020/06/Farm-Protection-Overview.pdf> [<https://perma.cc/V6S3-4DLU>]; *Anti-Whistleblower (“Ag-Gag”) Legislation*, *supra* note 11 (States with an ag-gag law still in effect with this element include Arkansas and Montana. In Idaho, Iowa, Kansas, North Carolina, Utah, and Wyoming, the ag-gag law was ruled unconstitutional.).

62. *See generally Accomplishments*, ANIMAL RECOVERY MISSIONS (Feb. 8, 2023, 4:48 PM), <https://animalrecoverymission.org/accomplishments/> [<https://perma.cc/4QUZ-68A2>]; *see also* Kitty Block, *Investigations*, THE HUMANE SOCIETY OF THE U.S. (Feb. 8, 2023, 4:51 PM), https://blog.humanesociety.org/category/investigations?credit=blog_post_062717_id9085 [<https://perma.cc/4FRN-ASZM>]; *Undercover Investigations*, MERCY FOR ANIMALS (Feb. 8, 2023, 4:58 PM), <https://mercyforanimals.org/investigations/> [<https://perma.cc/B8W7-FB2Q>]; *Exposés and Undercover Investigations*, PETA (Feb. 8, 2023, 5:13 PM), <https://www.peta.org/investigations/> [<https://perma.cc/7ZNB-STCS>]; *Investigations*, ANIMAL OUTLOOK (Feb. 8, 2023, 4:46 PM), <https://animaloutlook.org/investigations/> [<https://perma.cc/C8EF-ZU3H>].

63. Janet Riley, *Now You See It...Or Did You? Why a Critical Eye is Needed for Edited, Undercover Videos*, N. AM. MEAT INST. (Feb. 22, 2016), <http://blog.meatinstitute.org/2016/02/now-you-see-it-or-did-you-why-a-critical-eye-is-needed-for-edited-undercover-videos/> [<https://perma.cc/QZ33-3ZSL>].

64. *Insights Gained From An Animal Rights Conference*, ANIMAL AGRIC. ALL. (Feb. 8, 2023, 4:34 PM), <https://animalagalliance.org/resource/insights-gained-from-an-animal-rights-conference/> [<https://perma.cc/5ETQ-3B8N>].

65. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018) (stating that “the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability.”).

2. Using False Information to Gain Employment

This element prevents animal rights activists from gaining employment through lying or misrepresentation.⁶⁶ Animal rights activists will often apply for jobs at animal enterprises in the hopes of being exposed to abusive animal practices.⁶⁷ However, this element has been subjected to extensive First Amendment scrutiny due to its attempt to moderate speech.⁶⁸

3. Rapid Reporting Requirement

This section of ag-gag laws requires the undercover investigator to report the animal abuse to a law enforcement agency within a reasonable amount of time by providing the authorities with the digital recording.⁶⁹ A prompt reporting requirement is a relatively new and rare feature of ag-gag statutes.⁷⁰ Those opposed to ag-gag laws claim that the mandatory reporting requirement results in a hindrance on undercover investigators' goals because they have to "out themselves, rendering them unable to document larger patterns of violence."⁷¹ This, they claim, results in animal agriculture's "industry spokespeople" having the opportunity to simply "dismiss individual violations as aberrations."⁷²

On the contrary, incorporating this element would help guarantee that those who abuse animals are prosecuted.⁷³ Additionally, rapid reporting is beneficial to the animals suffering from abuse because it encourages the abuse to be reported quickly and then efficiently dealt with.⁷⁴ A 2015 law review article recommends that each animal agriculture operation should have a "contact person" who employees would report to when they witness animal abuse, and that contact person

66. This element for Idaho is still active. *See id.* However, the element has been ruled unconstitutional in Iowa. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 784 (8th Cir. 2021).

67. *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 984-85 (D. Kan. 2020) *aff'd*, 9 F.4th 1219 (10th Cir. 2021).

68. *Wasden*, 878 F.3d at 1190, (However, some courts have upheld this element due to an individual's motivation to harm the owner).

69. CHIP GIBBONS, CTR. FOR CONST. RTS. AND DEFENDING RTS. & DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 15, 23-24 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> [<https://perma.cc/FRA2-GATQ>] (Missouri's ag-gag law requires reporting within 24 hours, Tennessee's proposed but defeated ag-gag law included a 48-hour reporting requirement.).

70. Missouri's ag-gag bill includes a rapid recording element. Prygoski, *supra* note 9.

71. GIBBONS, *supra* note 69, at 6.

72. *Id.*

73. Stephen R. Layne, *Ag-Gag: The Need for Compromise in the Food Industry*, 4 BRIT. J. AM. LEGAL STUD. 473, 495 (2015).

74. *Id.*

would then be legally required to report the violation to law enforcement.⁷⁵

4. Trespassing onto Agricultural Facilities

The trespass element is commonly criticized due to laws already being in force across the nation that provide remedies for those who have had their property trespassed upon.⁷⁶ However, the trespass language is usually used as a precursor before a prohibition on recording.⁷⁷ This element commonly includes language that criminalizes those who “[e]nter[] an agricultural production facility that is not open to the public . . . without the facility owner’s express consent.”⁷⁸

B. Common Challenges to Ag-Gag laws

1. Violation of Free Speech Under the First Amendment

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”⁷⁹ As previously mentioned, the main challenge to ag-gag laws is to the statutory element that limits recording or photographing animal abuse on private property.⁸⁰ Animal rights groups argue these ag-gag laws violate the First Amendment since they specifically target and restrict speech critical of animal agriculture.⁸¹ The government usually argues that the recording of videos is conduct not subject to the First Amendment.⁸²

Under the First Amendment, there is no absolute protection of all speech;

75. *Id.*

76. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE UNIV. L. REV. 1317, 1335 (2015).

77. IDAHO CODE § 18-7042(1)(d) (2022).

78. *Id.* The states with a trespass element still in effect are as follows: Alabama (ALA. CODE § 13A-11-150 (2022)), Iowa (IOWA CODE § 716.7A (2022)), Montana (MONT. CODE ANN. § 81-30-103 (2022)), and North Dakota (N.D. CENT. CODE § 12.1-21.1-03 (2022)). Kansas’s was held unconstitutional. *Farm Protection Legislation*, *supra* note 61.

79. U.S. CONST. amend. I.

80. *See* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1206 (D. Utah 2017); *see also* Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974, 985 (D. Kan. 2020) *aff’d*, 9 F.4th 1219 (10th Cir. 2021); Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1016 (D. Idaho 2014).

81. *Kelly*, 434 F. Supp. 3d at 986; *Wasden*, 878 F.3d at 1192; Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 818–19 (S.D. Iowa 2019), *aff’d in part, rev’d in part*, 8 F.4th 781 (8th Cir. 2021).

82. *Reynolds*, 353 F. Supp. 3d at 819.

some regulation is allowed.⁸³ In determining the constitutionality of laws under the First Amendment, courts look at the distinction between content-based and content-neutral regulations, a test established by the Supreme Court.⁸⁴ A law is content-neutral if it is “both viewpoint neutral and subject matter neutral” in its control on speech.⁸⁵ If the government’s restriction on speech is not “based on the ideology of the message,” then the restriction is viewpoint neutral.⁸⁶ If the government’s constraint on speech is not “based on the topic of the speech,” then the constraint is subject matter neutral.⁸⁷

The Supreme Court has ruled that strict scrutiny applies to laws that apply content-based restrictions, whereas content-neutral restrictions on speech are subject to intermediate scrutiny.⁸⁸ In order for a law to survive strict scrutiny, it must be “necessary to achieve a compelling government purpose.”⁸⁹ Intermediate scrutiny requires the law to be “substantially related to an important government purpose.”⁹⁰

2. Violation of Animal Rights Groups’ Equal Protection

The Fourteenth Amendment provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁹¹ This challenge is less popular than the First Amendment claim; however, animal rights groups may still bring the cause of action to argue that the laws were enacted by an “improper animus” towards them.⁹² States will combat this argument by stating that the statute was motivated by a need “to protect private property and the privacy of agricultural facility owners.”⁹³ When a state law is challenged on an equal protection claim, the

83. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1005 (Rachel E. Barkow et al. eds., 6th ed. 2019).

84. *Id.* at 1013.

85. *Id.* at 1014 (citing *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

86. *Id.* at 1014 (citing Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993)).

87. *Id.* at 1015 (citing Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1217 (1993)).

88. *Id.* at 1013 (citing *Turner Broad. Sys. v. Fed. Commc’ns Comm’n*, 512 U.S. 622 (1994)).

89. *Id.* at 588 (citations omitted).

90. *Id.* at 587 (citations omitted).

91. U.S. CONST. amend. XIV.

92. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1211 (D. Idaho 2015), *aff’d in part, rev’d in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

93. *Id.* at 1202.

court must look to whether “the government can identify a sufficiently important objective for its discrimination.”⁹⁴

3. Overbreadth

Some states decided not to focus solely on criminalizing those attacking the agriculture industry.⁹⁵ Instead, states like North Carolina broadened the laws to protect all employers who have employees that capture pictures or video on private property without their permission, “effectively drop[ping] the ‘ag’ from ‘ag-gag,’ resulting in a sweeping ‘gag’ law.”⁹⁶ North Carolina’s statute was ruled unconstitutional by the lower court but, at the time of writing, was before the Fourth Circuit.⁹⁷

IV. RECENT CIRCUIT SPLIT

Due to an ag-gag statute’s focus on criminalizing false speech, the circuit courts have turned to the Supreme Court’s ruling in *United States v. Alvarez* for guidance in determining the constitutionality of the laws.⁹⁸ However, the circuit courts have differed in *Alvarez*’s application due to the non-existence of a majority opinion.⁹⁹ The plurality in *Alvarez* held that “false speech may be criminalized if made ‘for the purpose of material gain’ or ‘material advantage,’ or if such speech inflicts a ‘legally cognizable harm.’”¹⁰⁰ Justice Breyer’s concurrence affirmed the prohibition of false speech that causes a legally cognizable harm.¹⁰¹ The Supreme Court has defined a “legally cognizable harm” as “an injury that supports standing to pursue a cause of action.”¹⁰² This kind of harm must be “imminently caused by the speech.”¹⁰³ The circuit courts have come to different conclusions on similar provisions of ag-gag laws using *Alvarez* for support; thus, creating the circuit split

94. CHEMERINSKY, *supra* note 83, at 725 (citations omitted).

95. GIBBONS, *supra* note 69, at 19.

96. *Id.*

97. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 586 (M.D.N.C. 2020), *appeal docketed*, No. 20-1807 (4th Cir. 2020).

98. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 784-85 (8th Cir. 2021); *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1232 (10th Cir. 2021).

99. *Kelly*, 9 F.4th at 1231.

100. *Wasden*, 878 F.3d at 1194 (citation omitted).

101. *Kelly*, 9 F.4th at 1231 (citation omitted).

102. *Reynolds*, 8 F.4th at 792 (Gruender, J., concurring in part and dissenting in part).

103. *Kelly*, 9 F.4th at 1234 (citation omitted).

we see today.¹⁰⁴

A. The Tenth Circuit

Kansas's Farm Animal and Field Crop and Research Facilities Protection Act initiated the "first wave" of ag-gag laws passed in the United States in the early 1990s.¹⁰⁵ In 2018, ALDF challenged the constitutionality of Kansas's ag-gag law.¹⁰⁶ ALDF is a non-profit animal rights group that performs undercover investigations at animal agriculture facilities.¹⁰⁷ In order to conduct these undercover investigations, ALDF's investigators "lie about their association with ALDF" in order to gain employment at animal production facilities.¹⁰⁸

Plaintiffs' complaint challenged Kansas's ag-gag law under the free speech clause of the First Amendment by alleging the law to be both viewpoint-based and content-based in its regulation of speech.¹⁰⁹ In *Animal Legal Defense Fund v. Kelly*, the Tenth Circuit affirmed the lower court's decision in ruling unconstitutional three subsections of Kansas's ag-gag statute because they criminalized protected speech, a violation of the First Amendment.¹¹⁰

The three subsections that the Tenth Circuit struck down after applying strict scrutiny were §§ 47-1827(b), (c), and (d).¹¹¹ Subsection (b) criminalizes an individual who, "without the effective consent of the owner," gains control of an animal facility, animal, or piece of property of said facility with either the intent to deprive the owner of such items or to damage the owner's operation.¹¹² Subsection (c) bans an individual from entering an animal facility to record video or take photographs "without the effective consent of the owner" and with the motive to harm the enterprise.¹¹³ Subsection (d) prohibits entry onto an animal facility "without the effective consent of the owner" and with the intent to cause damage to the owner's enterprise.¹¹⁴

104. Elizabeth Rumley, "Ag-gag" Laws: An Update of Recent Legal Developments, THE NAT'L AGRIC. L. CTR. (Aug. 26, 2021), <https://nationalaglawcenter.org/ag-gag-laws-an-update-of-recent-legal-developments/> [https://perma.cc/4HFG-V8XU].

105. GIBBONS, *supra* note 69, at 10.

106. *Kelly*, 434 F. Supp. 3d at 984, 986.

107. *Id.* at 984.

108. *Kelly*, 9 F.4th at 1223.

109. *Kelly*, 434 F. Supp. 3d at 986.

110. *Kelly*, 9 F.4th at 1224.

111. *Id.* at 1235–37.

112. KAN. STAT. ANN. § 47-1827(b) (2021).

113. *Id.* § 47-1827(c).

114. *Id.* § 47-1827(d).

The court found §§ 47-1827(b)–(d) to be regulating not just conduct, but speech since the statutory language controlled “what may be permissibly said to gain access to or control over an animal facility.”¹¹⁵ The statute implicates speech by silently including deception with the language “effective consent.”¹¹⁶ Additionally, relying on its former ruling in *Western Watersheds Project v. Michael*, the Tenth Circuit found that the “recording of animals or the conditions in which they live [] is speech-creation” in regard to subsection (c).¹¹⁷

The Tenth Circuit found all three subsections to be viewpoint discriminatory since an individual breaks the law *only if* their lies to acquire or exercise control over, record or photograph, or enter into the facility, are intended to damage the enterprise.¹¹⁸ The court highlighted that the “Act places pro-animal facility viewpoints above anti-animal facility viewpoints” since the “text of the law alone” promotes “protect[ing] animal facilities.”¹¹⁹ Therefore, the court noted that “even unprotected speech may not ‘be made the vehicle [] for content discrimination unrelated to [its] distinctively proscribable content.’”¹²⁰

Since the Tenth Circuit determined §§ 47-1827(b)–(d) to be viewpoint discriminatory,¹²¹ the court then needed to decide whether the regulated speech is unprotected “because it is false speech made with [the] intent to damage the enterprise of an animal facility.”¹²² This question brought *Alvarez* into the equation.¹²³ *Alvarez* does not extend First Amendment protection to false speech if that speech results in harm.¹²⁴ The Tenth Circuit found that “not all intents to damage the enterprise of an animal facility are [legally] cognizable harms under *Alvarez*.”¹²⁵

The court stated that the harm prohibited by Kansas’s ag-gag law is distinguishable from trespass harm since it criminalizes those who intend to damage the facility once present “on the property.”¹²⁶ Addressing whether that harm is legally cognizable, the Tenth Circuit concluded that the only harm an animal enterprise may incur would result from ALDF’s investigators exposing and sharing proof of

115. *Kelly*, 9 F.4th at 1232.

116. *Id.* at 1237.

117. *Id.* at 1228 (citation omitted).

118. *Id.* at 1233, 1236–37.

119. *Id.* at 1233.

120. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992)).

121. *Id.* at 1233, 1236–37.

122. *Id.* at 1234.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1233–34.

the enterprise's wronging.¹²⁷ This kind of harm is not legally cognizable because it resulted from speech that is protected and true.¹²⁸ The court reasoned that even though "the information from which the harm flows would not be obtainable without the false statement used to gain entry to the facility, the false statement does not directly cause the harm."¹²⁹

B. The Eighth Circuit

In *Animal Legal Defense Fund v. Reynolds*, the Eight Circuit reversed the district court's ruling that Iowa Code § 717A.3A(1)(a), the "Access Provision," was unconstitutional since the law criminalized false speech used in order to trespass.¹³⁰ However, the Eighth Circuit affirmed the lower court's decision in finding § 717A.3A(1)(b), the "Employment Provision," to be a violation of the free speech clause of the First Amendment.¹³¹ The version of Iowa's ag-gag law before the Eight Circuit focused on criminalizing individuals who lie to gain access onto a production facility (the Access Provision) and lie to gain employment at such facility with the intent to commit an unauthorized action established by the owner of the facility (the Employment Provision).¹³²

The Eighth Circuit distinguished itself from the Ninth Circuit by upholding Iowa's Access Provision.¹³³ The court agreed with the dissent in *Wasden*, finding the "harm flowing from trespass [to be] legally cognizable."¹³⁴ The lower court in *Reynolds* argued that since trespass only offers property owners nominal damages as a remedy, this type of harm was not legally cognizable.¹³⁵ However, the Eighth Circuit disagreed, noting that "nominal damages are 'awarded *when a legal injury is suffered* but there is no substantial loss or injury to be compensated.'"¹³⁶ The court stated that a clearer rule in interpreting whether laws criminalizing false speech violate the First Amendment would be to look for false speech *made intentionally* to achieve a legally cognizable harm.¹³⁷

127. *Id.* at 1234.

128. *Id.* at 1235.

129. *Id.*

130. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 785–86 (8th Cir. 2021).

131. *Id.* at 787.

132. *Id.* at 783–84. Common unauthorized actions established by an owner of an agriculture production facility would be prohibiting the use of phones and cameras through posted notices and well-known employee directives. *Kelly*, 9 F.4th at 1225.

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

134. *Id.*

135. *Id.*

136. *Id.* (emphasis added) (citation omitted).

137. *Id.*

In striking down the Employment Provision, the court distinguished *Alvarez*'s plurality support for First Amendment restrictions of false speech used to gain an offer of employment.¹³⁸ The Eighth Circuit found the provision too broad in its application since it criminalizes individuals “who make false statements that are not capable of influencing an offer of employment.”¹³⁹ The court determined that the Employment Provision could be remedied by the Iowa legislature through a less restrictive means of prohibiting “only false statements that are material to a hiring decision.”¹⁴⁰

Since the district court's ruling in 2019,¹⁴¹ the Iowa legislature has enacted Iowa Code § 717A.3B (forbidding accessing an agriculture production facility by deception with the intent to cause harm),¹⁴² § 716.7A (prohibiting food operation trespass),¹⁴³ and § 727.8A (criminalizing leaving “a camera or electronic surveillance device” while trespassing).¹⁴⁴ Challenges to both § 717A.3B and § 727.8A have already been brought in court, and they have both been struck down as unconstitutional.¹⁴⁵

C. The Ninth Circuit

In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit ruled that Idaho Code § 18–7042(1)(a), “criminaliz[ing] entry into an agricultural facility ‘by . . . misrepresentation,’” and § 18–7042(1)(d), criminalizing “audio and video recordings of a production facility's operations,” violate the First Amendment.¹⁴⁶ However, the court upheld §§ 18–7042(1)(b)–(c) because both subsections served a legitimate government interest in protecting privacy and property rights.¹⁴⁷

Relying on *Alvarez*, the court found § 18–7042(1)(a)'s use of “misrepresentation” unconstitutional.¹⁴⁸ The Ninth Circuit ruled that using false speech to gain entry onto an agriculture production facility does not result in a specific harm because this kind of entry “does not infringe upon the specific interests trespass seeks

138. *Id.* at 787.

139. *Id.*

140. *Id.* (citation omitted).

141. Rumley, *supra* note 104.

142. IOWA CODE § 717A.3B (2023).

143. IOWA CODE § 716.7A (2022).

144. IOWA CODE § 727.8A (2021).

145. Rumley, *supra* note 104; *Anti-Whistleblower (“Ag-Gag”) Legislation*, *supra* note 11.

146. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018).

147. *Id.* at 1199–1203 (subsection (b) prohibits using misrepresentation to obtain an agricultural production facility's records. Subsection (c) criminalizes those who obtain employment through misrepresentation with the intent to harm the facility).

148. *Id.* at 1194.

to protect.”¹⁴⁹ However, the dissent strongly disagreed, recognizing the majority’s ruling to be contradictory to “the ‘universally held’ principle that the ‘right to exclude’ is ‘a fundamental element of the property right’”¹⁵⁰ and that Idaho has acknowledged a violation of that right as a legally cognizable harm.¹⁵¹ Since § 18–7042(1)(a) criminalized entry “by force, threat, misrepresentation or trespass,”¹⁵² the majority severed “misrepresentation” from the subsection to remedy the First Amendment violation.¹⁵³

In its analysis of § 18–7042(1)(d), the court found the Recordings Clause to be “a classic example of a content-based restriction that cannot survive strict scrutiny.”¹⁵⁴ The Ninth Circuit determined that the prohibition on making audio or video recordings was both under-inclusive and over-inclusive.¹⁵⁵ Under-inclusive because the subsection did not mention photographs, and over-inclusive since it “suppress[ed] more speech than necessary to further Idaho’s stated goals of protecting property and privacy.”¹⁵⁶

V. WHAT WOULD OKLAHOMA’S AG-GAG STATUTE LOOK LIKE?

A. *Should Oklahoma Even Attempt to Pass an Ag-Gag Law?*

Animal rights advocates assert that “[t]he fact that the industry is going to such great lengths to prevent people from seeing what happens on farms and at slaughterhouses [. . .] proves that they have something to hide.”¹⁵⁷ Even Paul McCartney claimed “[i]f slaughterhouses had glass walls, everyone would be vegetarian.”¹⁵⁸ However, Dr. Temple Grandin argues otherwise. Dr. Grandin is a renowned animal scientist in the field of animal behavior, and she has been a lifetime advocate for the humane treatment of livestock, especially in slaughterhouses (or

149. *Id.* at 1195–96.

150. *Id.* at 1206 (Bea, J., dissenting in part and concurring in part) (citation omitted) (internal quotations omitted).

151. *Id.* at 1208 (Bea, J., dissenting in part and concurring in part) (citation omitted).

152. IDAHO CODE § 18–7042(1)(a) (2021).

153. *Wasden*, 878 F.3d at 1198–99.

154. *Id.* at 1203.

155. *Id.* at 1204.

156. *Id.* at 1204–05.

157. *Two Views on Ag-Gags: The Investigator and The Farm Advocate*, GRIST (Apr. 25, 2013), <https://grist.org/food/two-views-on-ag-gags/> [<https://perma.cc/88PW-ATY2>].

158. Jennie Richards, *Sir Paul McCartney, If Slaughterhouses had Glass Walls, Everyone Would be Vegetarian*, HUMANE DECISIONS (Oct. 12, 2020), <http://www.humaneconnections.com/sir-paul-mccartney-if-slaughterhouses-had-glass-walls-everyone-would-be-vegetarian/> [<https://perma.cc/2LKJ-U4WM>].

processing plants, as they are commonly referred to today).¹⁵⁹ Dr. Grandin mentions that a live video feed would not be beneficial to the public because they would not understand the slaughter process without some form of narration.¹⁶⁰

The agriculture industry receives negative media attention due to ag-gag laws because of the perception it gives the public that the industry is trying to hide something.¹⁶¹ This is a valid argument since many of the more recent versions of these laws were initially passed due to videos surfacing from animal rights groups showing animal cruelty.¹⁶² The state legislatures attempted to protect the industry with ag-gag statutes, but the laws have “sen[t] the wrong message to today’s consumer.”¹⁶³ Beef Magazine conducted a poll in 2012 titled, “Are ag gag laws a good idea for the livestock industry to pursue?”¹⁶⁴ Out of 300 voters, 63% did not support

159. *Biography: Temple Grandin, Ph.D.*, DR. TEMPLE GRANDIN’S WEBSITE (Feb. 8, 2023, 3:26 PM), <http://www.grandin.com/temple.html> [<https://perma.cc/N7BD-9UDE>]; Tony Phifer, *Temple Grandin: CSU’s One-Of-A-Kind Mind*, COLO. STATE UNIV. (Feb. 8, 2023, 5:24 PM), <https://source.colostate.edu/temple-grandin/> [<https://perma.cc/4QLH-DS9S>].

160. N. AM. MEAT INST., *IF MEAT PLANTS HAD GLASS WALLS. . .*, at 10 (Feb. 8, 2023, 5:33 PM), <http://animalhandling.org/sites/default/files/documents/Meat%20Plants%20Glass%20Walls%20Brochure.pdf> [<https://perma.cc/AHC4-G96V>]; see also Meatnewsnetwork, *Video Tour of Beef Plant Featuring Temple Grandin*, YOUTUBE (Aug. 23, 2012),

<https://www.youtube.com/watch?v=VMqYYXswono&list=PLX2qbJUDUuTYJ-9u21XqUyrAyiengNboh&index=1&t=484s> [<https://perma.cc/T8YH-C8U8>] (for a look at a narration by Dr. Temple Grandin of a beef plant); Meatnewsnetwork, *Video Tour of a Pork Plant Featuring Temple Grandin*, YOUTUBE (May 7, 2013),

<https://www.youtube.com/watch?v=LsEbvMipJI&list=PLX2qbJUDUuTYJ-9u21XqUyrAyiengNboh&index=2> [<https://perma.cc/7PA2-EPC4>] (provides video footage of a pork processing plant with narration by Dr. Temple Grandin); Meatnewsnetwork, *Video Tour of a Lamb Plant Featuring Temple Grandin*, YOUTUBE (Apr. 26, 2016),

<https://www.youtube.com/watch?v=BoB3tf9Q2AA&list=PLX2qbJUDUuTYJ-9u21XqUyrAyiengNboh&index=4> [<https://perma.cc/DNV6-WCBG>] (provides video footage of a lamb processing plant with narration by Dr. Temple Grandin); Meatnewsnetwork, *Video Tour of a Turkey Farm and Processing Plant Featuring Temple Grandin*, YOUTUBE (Oct. 8, 2013), <https://www.youtube.com/watch?v=VQ2fDX76Mmc&list=PLX2qbJUDUuTYJ-9u21XqUyrAyiengNboh&index=3> [<https://perma.cc/F3KU-66F5>] (provides video footage of a turkey processing plant with narration by Dr. Temple Grandin).

161. Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny*, THE ATLANTIC (Mar. 20, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/> [<https://perma.cc/4XJJ-H9AL>].

162. Rumley, *supra* note 104.

163. Grandin, *supra* note 37, at 467.

164. Amanda Radke, *Do You Support Ag Gag Laws?*, BEEF (Mar. 14, 2012), <https://www.beefmagazine.com/blog/do-you-support-ag-gag-laws> [<https://perma.cc/5BFW-NC9K>].

the legislation because they believed the agriculture industry does not have anything to hide from the public; and only 35% supported the statutes.¹⁶⁵ Therefore, it is evident that there is support within the agriculture industry that ag-gag laws are not the answer. However, there is still an argument for enacting some of the elements of an ag-gag law that do not necessarily provoke a constitutional challenge as strongly as a recordings clause.

Over the last decade, the agriculture industry has advocated for more transparency with consumers so the average American can learn where their food comes from.¹⁶⁶ But the answer is not to simply open the doors wide open to the public and welcome everyone onto farms, ranches, and processing facilities. Unauthorized access onto animal agriculture facilities is not a viable solution due to producers' concern for biosecurity and animal welfare.¹⁶⁷

Biosecurity is the main reason why the public cannot enter animal agriculture facilities whenever it desires because the spread of disease can be detrimental to animals and result in the producer losing their livelihood.¹⁶⁸ Animal agriculturists engage in biosecurity measures at their respective farms, ranches, and processing plants to ensure the minimization of infection and to promote animal welfare.¹⁶⁹ Preventing the spread of disease is also extremely critical in guaranteeing food safety and public health.¹⁷⁰

Unauthorized entry could not only negatively impact animal welfare due to the spread of disease, but it can also increase animal stress.¹⁷¹ Livestock are easily startled on farms and in processing plants by any kind of visual distraction, whether that be a visitor, "a coat on a rail, a shadow on a wall[,] or a hose on the ground."¹⁷² If any person could enter an animal agriculture operation, this could easily cause an increase of stress for the animals due to the higher likelihood of spooking.¹⁷³

The courts have rightly recognized that ag-gag laws showcase a tension in

165. *Id.* (the target audience of Beef Magazine are beef producers so the voters are most likely involved in the agriculture industry).

166. Grandin, *supra* note 37, at 467; Joy N. Rumble & Tracy Irani, *Opening the Doors to Agriculture: The Effect of Transparent Communication on Attitude*, 100 J. APPLIED COMM'NS. 57, 57–58 (2016).

167. IF MEAT PLANTS HAD GLASS WALLS. . . , *supra* note 160, at 9.

168. *See generally* Laura V. Alarcón, Alberto Allepuz & Enric Mateu, *Biosecurity in Pig Farms: A Review*, PORCINE HEALTH MGMT. (Jan. 2021).

169. *See generally id.*

170. *Id.* at 1.

171. IF MEAT PLANTS HAD GLASS WALLS. . . , *supra* note 160, at 2.

172. *Id.* at 1.

173. *Id.*

the law,¹⁷⁴ with both sides of the issue finding themselves in the legal version of a tug-of-war. Animal rights groups are fighting for the laws to be stricken in order to protect undercover journalists' right to freedom of speech under the First Amendment.¹⁷⁵ The State is also fighting for the laws to be upheld in order to protect agriculturists' property and privacy rights.¹⁷⁶ Instead of one side pulling all of the rope over the middle to victory, courts like the Eighth and Ninth Circuits have found that the tension causes the rope to snap instead, finding only parts of the challenged statutes unconstitutional.¹⁷⁷ This results in animal agriculturists still being able to maintain some property and privacy protections.¹⁷⁸ However, the Tenth Circuit has differentiated itself from the Eighth and Ninth.¹⁷⁹

B. Kelly's Effect on Oklahoma

In Oklahoma, a statute like the Kansas law, §§ 47-1827(b)—(d)—recently ruled unconstitutional by the Tenth Circuit—would not survive¹⁸⁰ since Oklahoma is also part of the Tenth Circuit. Since the prohibition on recording video and taking photographs was struck down in both *Kelly* and *Wasden*, Oklahoma would need to avoid including this element into its statute.¹⁸¹

With respect to unauthorized entry, *Kelly* distinguished its ruling from the majority in *Reynolds*¹⁸² and the dissent in *Wasden*.¹⁸³ The Tenth Circuit noted that Kansas focused on a certain viewpoint (intent to damage the enterprise) when criminalizing entry onto an agriculture enterprise.¹⁸⁴ Since the Kansas statute was viewpoint discriminatory, this automatically subjected the statute to strict scrutiny.¹⁸⁵ Additionally, the court “read *Alvarez* not to suggest that falsity plus harm makes a statement not speech for First Amendment purposes; rather . . . that falsity plus harm[s] makes the statement not *protected* speech.”¹⁸⁶

174. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 788 (8th Cir. 2021).

175. *Wasden*, 878 F.3d at 1190.

176. *Id.*

177. *Reynolds*, 8 F.4th at 788 (finding only the Employment Provision unconstitutional); *Wasden*, 878 F.3d at 1190 (holding §§ 18-7042(1)(a) and 18-7042(1)(d) unconstitutional).

178. *Reynolds*, 8 F.4th at 786 (upholding the Access Provision); *Wasden*, 878 F.3d at 1190 (upholding §§ 18-7042(1)(b)–(c)).

179. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1246 (10th Cir. 2021).

180. *Id.* at 1232.

181. *Kelly*, 9 F.4th at 1232; *Wasden*, 878 F.3d at 1192.

182. *Kelly*, 9 F.4th at 1239.

183. *Id.* at 1238–39.

184. *Id.* at 1235.

185. *Id.* at 1239–40.

186. *Id.* at 1238.

In light of *Kelly's* ruling, Oklahoma could still prohibit unauthorized access to animal production facilities through two ways.¹⁸⁷ The first is to avoid implicating deceptive speech since this will subject the statute to the First Amendment. However, if the legislature is intent on including “without effective consent,” the solution would be to not include the intent to harm element since this is what the *Kelly* court found to be viewpoint discriminatory.¹⁸⁸

Two other elements Oklahoma could incorporate are a ban on using deceptive speech to gain employment and a 72-hour prompt reporting element. Since the Kansas law did not include statutory law prohibiting individuals from lying for employment purposes, *Kelly* did not consider whether the statutory language was constitutional.¹⁸⁹ Additionally, there are differing circuit opinions on this element, with the Eighth Circuit finding it to be unconstitutional but the Ninth upholding it.¹⁹⁰ Oklahoma could also feature the newest element requiring rapid reporting. This element could help ensure animal abuse is reported and the abusers are prosecuted quickly and efficiently while also preventing the deceptive editing process some animal rights groups engage in for publicity purposes.¹⁹¹

VI. CONCLUSION

Several states have introduced ag-gag laws but have seen the bills fail to pass and actually become law.¹⁹² Today, only six states still have an ag-gag law in effect.¹⁹³ Even though the desire to protect the agriculture industry may be rooted in protecting the country's food system, the criticism of ag-gag laws shows that the laws may not be accomplishing the goals the animal agriculture industry originally hoped they would. In fact, many law review articles on this topic are strongly critical of the laws. There are two sides to the story. On one side is the animal rights activist who fights for the prevention of animal abuse but whose motives can also be fairly questioned based on past crimes and the questionable goal of completely destroying animal agriculture. On the other side is the animal agriculturist who

187. *See generally id.*

188. *See generally id.*

189. *See generally id.*

190. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 788 (8th Cir. 2021) (finding only the Employment Provision unconstitutional); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018) (upholding §§ 18–7042(1)(b)–(c)).

191. *See generally Riley*, *supra* note 63.

192. *See Farm Protection Legislation*, *supra* note 61; *What is Ag-Gag Legislation?*, *supra* note 11 (Those states include: Arizona, California, Colorado, Florida, Illinois, Indiana, Kentucky, Minnesota, Nebraska, New Hampshire, New Mexico, New York, Pennsylvania, Tennessee, Vermont, and Washington).

193. *Farm Protection Legislation*, *supra* note 61; *What is Ag-Gag Legislation?*, *supra* note 11.

2023]

Ag-Gag Laws to Farm Protection Statutes

51

remains firm in their practice of animal welfare while dealing with the few bad actors in the industry who give agriculture a negative reputation. Animal agriculture is a needed industry in order to feed a growing population; the world simply cannot survive without it. However, ag-gag laws are not the correct path to guarantee the future of the animal agriculture industry as they stand now due to the continued constitutional challenges and the criticism on transparency. The element of ag-gag laws that most notably “gag” animal rights groups is the prohibition on recording. Therefore, the animal agriculture industry should instead focus on promoting farm protection statutes that prohibit unauthorized entry in order to prevent the spread of disease and safeguard animals.