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Sinclair's Nightmare: SLAPP-ing Down Ag-Gag Legislation as Content-based Restrictions Chilling Protected Free Speech

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INTRODUCTION

Over a century after its publication, Upton Sinclair's 1906 novel, *The Jungle*, remains one of the most impactful pieces of investigative literature ever published. [1] During 1904, in an effort to expose the heinous working conditions of Chicago's meat packing industry, Sinclair went under disguise as a factory worker for seven weeks.[2] While Sinclair's purpose for *The Jungle* was to propel federal reform against inhumane work conditions, it was the first-hand depiction of the callous slaughtering and unsanitary processing of meat products which led to national uproar.[3] Gaining the attention of national political leaders, including President Theodore Roosevelt, *The Jungle* influenced Congress to pass The Meat Inspection Act of 1906.[4]

Sinclair's "guerilla" journalism method has influenced generations of social activists and more animal protection groups are turning to undercover video investigations to expose criminal and inhumane practices on factory farms that would otherwise go unnoticed by the public.[5] With the help of modern technological advances in recording devices, undercover investigations of animal facilities play a crucial role in building evidence necessary to assist law enforcement in criminally prosecuting the illegal handling of animals and animal products and issuing food recalls that potentially save millions from illnesses.[6]

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[1] Robert W. Cherry, *The Jungle and the Progressive Era*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, http://www.gilderlehrman.org/history-by-era/politics-reform/essays/jungle-and-progressive-era (last visited Sept. 1, 2015) ("The jungle produced an immediate and powerful effect on Americans and on federal policy").

[2] Chris Bachelder, *The Jungle at 100*, MOTHER JONES (Jan./Feb. 2006), http://www.motherjones.com/media/2006/01/jungle-100.

[3] *Upton Sinclair's The Jungle SchoolTube* (published Sept. 18, 2013), https://www.youtube.com/watch?v=Xxe9nosWawM.

[4] *Biography of Upton Sinclair*, GRADE SAVER, http://www.gradesaver.com/author/upton-sinclair (last visited Aug. 30, 2015). *See also Upton Sinclair's The Jungle SchoolTube, supra* note 3 at 4:28 ("Americans were outraged and they urged the United States Congress to pass the Meat Inspection Act of 1906. More federal laws followed that prevented packers from adding fillers and impurities to meat and the United States Department of Agriculture inspectors were put in every meat plant in the country.")

[5] Nathan Runkle, *Undercover Videos Critical to Exposing Abuse: Column,* USA TODAY (Aug. 13, 2015), http://www.usatoday.com/story/opinion/2015/08/13/undercover-videos-exposing-abuse-column/31208801/ ("Without undercover investigations, sadistic and often criminal acts of animal cruelty on factory farms would go undetected, unaddressed, and unpunished as would major threats to public health and the environment.")

[6] Jennifer Molido*, Undercover Investigations Help Protect Farmed Animals*, ANIMAL LEGAL DEFENSE FUND (Mar. 31, 2015), http://aldf.org/blog/undercover-investigations-help-protect-farmed-animals/.

With nothing more than a pen and pad, Sinclair was able to drive federal reform in meat production that benefited human health and welfare.[7] Sadly, however, this type of activism is now being criminalized throughout the United States.[8] "Ag-Gag" laws, a term first coined by New York Times food journalist Mark Bittman in 2011,[9] are laws currently valid in six states[10] which criminalize acts related to undercover investigations of daily agricultural activities.[11] Ag-Gag laws are far reaching, criminalizing not only the entrance of animal facilities for the purpose of obtaining evidence of animal cruelty, but even the mere possession and distribution of unauthorized media recorded on animal facilities.[12]

While the United States Constitution bars federal and state laws which abridge the freedom of speech,[13] Ag-Gag laws not only have the purpose and effect of chilling free speech, but they also impede the public enlightenment of critical social issues including animal welfare, food safety, workers' rights, and environmental safety.[14] The purpose of this article is to investigate and analyze various legal frameworks to attack Ag-Gag laws on multiple fronts. Part I provides a history and overview of Ag-Gag legislation and its implementation. Part II evaluates Ag-Gag laws in the context of First Amendment freedom of speech jurisprudence and addresses why these content-based restrictions on protected free speech must be deemed unconstitutional. Part III explores the potential application of anti-SLAPP laws to deter lawsuits brought under civil-liability provisions of Ag-Gag laws through early dismissal and recovery of litigation fees.

[7] Cherry, *supra* note 1.
[8] *Ag-Gag Whistleblower Suppression Legislation*, ASPCA, https://www.aspca.org/fight-cruelty/advocacy-center/Ag-Gag-whistleblower-suppression-legislation (last visited Sept. 1. 2015).
[9] Mark Bittman, *Who Protects the Animals?* (Apr. 26, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=1.
[10] *Ag-Gag Bills at the State Level*, ASPCA, https://www.aspca.org/animal-protection/public-policy/ag-gag-legislation-state (last visited Nov. 19, 2015).
[11] *Ag-Gag Whistleblower Suppression Legislation*, *supra* note 8 (while there are currently seven states with active Ag-Gag statutes, the U.S. District Court in Idaho recently ruled the Idaho law unconstitutional. *See* Animal Legal Defense Fund v. Otter, 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015)).
[12] *Why Ag-Gag Laws are Dangerous*, ASPCA, https://www.aspca.org/fight-cruelty/advocacy-center/Ag-Gag-whistleblower-suppression-legislation/why-Ag-Gag-laws-are (last visited Sept. 1, 2015).
[13] U.S. CONST. amends. I and XIV.
[14] *Why Ag-Gag Laws are Dangerous*, *supra* note 12.

I. HISTORY OF AG-GAG LEGISLATION IN THE UNITED STATES

A. HISTORY OF AG-GAG LAWS

In the late 1980's, direct action campaigns—often endorsing such extreme measures as animal liberation—championed a new, more directly-active animal rights movement to the mass public.[15] Not unlike acts committed during the American Civil Rights era of the 1960's,[16] animal activist groups propelled cases of animal abuse to the national spotlight through social protest and a "Rambo-raid" style animal liberation.[17] Through this heightened activism, animal activist groups discovered shocking revelations regarding the animal production industry.[18]

The agricultural industry has been referred to as the "backbone of our economy"[19] with the beef and poultry industry generating $119 billion annually within the United States.[20] Consequently, animal activists pose one of the largest threats to that industry.[21] In an attempt to regulate this perceived nuisance, in the early 1990's, Kansas, Montana, and North Dakota were the first states to enact statutes providing increased protections to the agricultural and livestock industry, creating advance criminal trespass penalties against those who enter facilities for the purpose of exposing inhumanities.[22]

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[15] Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1319 (2015).
[16] Clayborne Carson & David Malcom Carson*, Black Panther Party*, STANFORD UNIV., http://web.stanford.edu/~ccarson/articles/am_left.htm (last visited Sep. 20, 2015) (describing criminal activities the Black Panthers social group committed for the purpose of advancing the civil rights movement).
[17] Marceau, *supra* note 15, at 1320.
[18] Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 766-73 (1995) ("Every year, humans kill billions of animals for food, clothing, entertainment, and research. More than four billion cows, steer, sheep, lambs, pigs, chickens and turkeys are raised and slaughtered annually to satisfy Americans' appetite for meat, dairy, and eggs. Between ten and one hundred million animals are killed yearly in United States laboratories.").
[19] Brian Pivik, *Agriculture – the Backbone of the US Economy*, PETERSONS, (June 17, 2015), https://www.petersons.com/online-schools/agriculture-degree-online.aspx.
[20] Stephanie Armour, *'Industrial Terrorism' of Undercover Livestock Videos Targeted*, BLOOMBERG BUSINESSWEEK, (Feb. 21, 2012), http://www.ellinghuysen.com/news/articles/129669.shtml.
[21] Susie Cagle, *Two Views on Ag-Gag: The Investigator and the Farm Advocate*, GRIST, (Apr. 25, 2013), http://grist.org/food/two-views-on-Ag-Gags/ ("A 2010 Kansas State University study found that, '[a]s a whole, media attention to animal welfare has significant, negative effects on U.S. meat demand'").
[22] Daniel L. Sternberg, *Why Can't I Know How the Sausage Is Made?: How Ag-Gag Statutes Threaten Animal Welfare Groups and the First Amendment*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 625, 628 (2015).

Between 1991 and 2011, no new Ag-Gag legislation was passed.[23] However, since 2012, a new wave of Ag-Gag legislation, even more restrictive than its predecessors, emerged on the house floor in more than half of the states in the country.[24] Missouri, Idaho, Utah, and Iowa have implemented their own versions of these laws that, while marginally different, all have the same effect of criminalizing the process of gathering undercover information and reporting of animal industries.[25] Additionally, more states are following suit with an Ag-Gag law taking effect in North Carolina in 2016.[26]

B. TYPES OF AG-GAG LAWS AND THEIR IMPLEMENTATION

Boiled down, Ag-Gag laws are penalties imposed on investigators who go undercover in animal facilities for the purpose of exposing animal abuse.[27] There are two different types of Ag-Gag laws: restrictions on the act of recordings animal facilities and restrictions on the collection of animal abuse videos.[28] The first type of Ag-Gag laws, which were implemented in Kansas, Montana, Utah, Idaho, Iowa, and North Dakota, criminalize the unauthorized entry of an agricultural or animal facility with the intent to damage the enterprise.[29] Some Ag-Gag laws also criminalize the act of providing false information on employment applications for the purpose of gaining entry into agricultural facilities.[30] Those who violate these laws may face up to one year in jail,[31] $5000 in fines,[32] and even civil liability for three times the actual and consequential damages caused to the facility by the recording.[33]

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[23] *Ag-Gag Bills at the State Level, supra* note 10.
[24] *Id.* (since 2012, Ag-Gag laws were introduced, and have failed in, nineteen different states, including Florida).
[25] *Id.*
[26] Dan Flynn, *North Carolina's Civil 'Ag-Gag' Law Getting National Attention*, FOOD SAFETY NEWS, (June 9, 2015), http://www.foodsafetynews.com/2015/06/north-carolinas-civil-Ag-Gag-law-getting-national-attention/#.VkvGMHarS02.
[27] Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J. L. & SOC. PROBS. 337, 338 (2015).
[28] *Ag-Gag Bills at the State Level*, *supra* note 10.
[29] *Id.*
[30] *See* UTAH CODE ANN. § 76-6-112(2)(b)-(c) (West 2015); *See also* IDAHO CODE ANN. § 18-7042(1)(c) (West 2015).
[31] *See* KAN. STAT. ANN. § 47-1827 (West 2015); *See also* UTAH CODE ANN. § 76-6-112(3) (West 2015); IDAHO CODE ANN. § 18-7042(3) (West 2015).
[32] *See* IDAHO CODE ANN. § 18-7042(3) (West 2015).
[33] *See* KAN. STAT. ANN. § 47-1828 (West 2015). *See also* MONT. CODE ANN. § 81-30-104 (West 2015); N.D. CENT. CODE ANN. § 12.1-21.1-05 (West 2015).

The second type of Ag-Gag law, Missouri Statute 578.013.1, in what appears to be an attempt to make Ag-Gag laws more palatable, requires all recordings believed to depict animal abuse or neglect, including recordings made of factory farms, to be turned over to law enforcement within twenty-four hours of the recording.[34] Violation of these so-called "quick reporting" statutes is punishable by up to one year in jail and a fine of up to $5000.[35] While advocates of this law hold that it promotes animal welfare, its intent and effect is to prohibit individuals from gathering evidence of patterns of abuse, which is often necessary for states to prosecute under animal cruelty statutes.[36]

Unfortunately, Ag-Gag laws are a problem that continues to grow at both a domestic and international level.[37] North Carolina's new Property Protection Act,[38] which was passed over Governor Pat McCrory's veto, imposes steep civil penalties for "interference with property," which is defined vaguely.[39] Animal activists are worried that this law, although not a traditional Ag-Gag law in the sense that it does not impose criminal penalties, will have the effect of chilling speech and deterring employees or investigators from recording and reporting animal abuse.[40] Similarly, in Australia, a new amendment to Australia's criminal code was introduced by Western Australian Liberal Senator, Chris Back, creating a hybrid between the two types of Ag-Gag laws in that it criminalizes the act of purposely interfering with an animal enterprise—which includes undercover recordings—while also requiring recordings of animal abuse to be turned over to the proper authorities within five business days.[41]

Aside from being an unconstitutional restriction on free speech (which will be discussed further *infra*), Ag-Gag laws restrict the flow of critical information addressing agricultural activates that can affect public health, labor, and animal abuse concerns.[42] Modern Ag-Gag laws are modeled after the Animal

[34] MO. ANN. STAT. § 578.013(1) (West 2015).
[35] MO. ANN. STAT. § 578.013(3).
[36] Marceau, *supra* note 15, at 1341.
[37] *See* Flynn, *supra* note 26; *5 Reasons to Fear Ag-Gag*, VOICELESS: THE ANIMAL PROTECTION INSTITUTE, (Feb. 13, 2015), https://www.voiceless.org.au/content/5-reasons-fear-Ag-Gag.
[38] 2015 N.C. Sess. Laws 2015-50.
[39] *Flynn*, *supra* note 26.
[40] *Id.*
[41] *5 Reasons to Fear Ag-Gag*, *supra* note 37.
[42] Dayton Martindale, *Ag-Gag Laws: The Less You Know The Better*, IN THESE TIMES, (June 19, 2015), http://inthesetimes.com/rural-america/entry/18071/Ag-Gag-laws-what-you-dont-know-might-hurt-you.

Enterprise Terrorism Act (AETA),[43] a federal law designed to protect animal enterprises from interference by activists.[44] However, even though both AETA and Ag-Gag laws are severely overbroad, what differentiates AETA from current Ag-Gag legislation is a "savings clause" which recognizes that the law should not apply toward "activities protected by free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed."[45] Ag-Gag laws not only fail to include a similar savings clause, but expressly prohibit recordings made for the purpose of harming the reputation of the animal facility.[46]

While supporters of Ag-Gag laws deemed them necessary to protect agricultural facilities from so-called "animal terrorists,"[47] prosecution of these laws has been rare, with only two reported incidents of enforcement of an Ag-Gag law nationally.[48] Additionally, the State Attorney dropped both charges.[49]

II. AG-GAG LAWS UNCONSTITUTIONALLY RESTRICT FREE SPEECH

Under the United States Constitution, Americans are to be free from laws that abridge the freedom of speech.[50] Laws that are designed for the purpose of restricting expression contradict basic principles of

[43] 18 U.S.C. § 43 (West 2015).
[44] *Animal Enterprise Terrorism Act (AETA)*, CIVIL LIBERTIES DEFENSE CENTER, http://cldc.org/organizing-resources/animal-enterprise-terrorism-act-aeta/ (last visited Oct. 28, 2015).
[45] 18 U.S.C. § 43(e)(2) (2006).
[46] KAN. STAT. ANN. § 47-1827(c)(4) (West 2008) ("No person shall, without the effective consent of the owner and *with the intent to damage the enterprise conducted at the animal facility*: enter an animal facility to take pictures by photograph, video camera or by any other means." (emphasis added)).
[47] Armour, *supra* note 20 (explaining that the author of Iowa's Ag-Gag law refers to undercover investigative activities as "industrial terrorism."); *See also* Alexi Howk, *What It's Like To Be Detained And Prosecuted Under Ag-Gag Law*, THE DODO (Oct. 22, 2014), https://www.thedodo.com/what-its-like-to-be-detained-a-776800493.html ("Sen. David Hinkins, R-Orangeville . . . referred to 'vegetarian groups' who 'are trying to kill the animal industry' as 'terrorists,' according to court documents").
[48] Will Potter, *BREAKING: 4 People Prosecuted Under #AgGag Law for Photographing Factory Farm From the Road*, GREEN IS THE NEW RED (Sept. 27, 2014), http://www.greenisthenewred.com/blog/Ag-Gag-case-utah-circle-four-farms/8073/.
[49] Dan Flynn, *Utah Prosecutor Drops 'Ag-Gag' Charges Against Vegan Activists*, FOOD SAFETY NEWS (Jan. 13, 2015), http://www.foodsafetynews.com/2015/01/charges-against-four-vegan-activists-under-utah-Ag-Gag-dropped/#.VkvCK3arS01 (ironically, in the second instance, even though the charges under Utah's Ag-Gag law were dropped against the defendants, the state proceeded with criminal trespass charges, which is a less restrictive means than Ag-Gag laws when it comes to abridging free speech).
[50] U.S. CONST. amend. I.

the First Amendment.[51] The purpose of the First Amendment is to promote necessary values, including the advancement of knowledge, individual self-realization, the discovery of truth, and public participation from *all* members of society.[52] Accordingly, the "marketplace of ideas" theory cannot be realized with unscrutinized governmental censorship of individual perspective.[53]

With restrictions on the gathering of evidence of animal abuse or impractical deadlines to submit such evidence to proper authorities, Ag-Gag laws discriminate against an individual's constitutional right to investigate and uncover animal cruelty. Ag-Gag laws vary, but all have either the purpose or effect of chilling one specific type of speech: speech detrimental to the agricultural industry. Laws like Iowa's Ag-Gag law have the purpose of chilling free speech as it criminalizes the entry of animal facilities with the intention to record abuse and disrupt the facility's practices.[54] Similarly, laws like Missouri's Ag-Gag law have the effect of chilling speech by placing an impractical twenty-four hour deadline to turn in videotapes believed to depict animal abuse.[55]

This section will first analyze how Ag-Gag laws restrict forms of protected speech. After reviewing content-based jurisprudence and making a determination Ag-Gag laws are content-based, it will then analyze why these laws cannot survive strict scrutiny. Finally, a second facial challenge to these laws will be addressed to demonstrate why they are unconstitutionally overbroad.

A. FREE SPEECH ANALYSIS FRAMEWORK

1. Protected Speech

[51] U.S. v. Playboy Ent. Group, Inc., 529 U.S. 803, 812 (2000).
[52] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982).
[53] *Id*.
[54] IOWA CODE ANN. § 717A.2 (West 2013 & Supp. 2015).
[55] MO. ANN. STAT. § 578.013(1) (West Supp. 2016); *See also* Marceau, *supra* note 15, at 1340-41 (explaining how quick-reporting statutes have the effect of impeding journalistic and undercover investigation of animal facilities as (1) there is no evidence that these laws confer a concrete benefit to animals; and (2) the law makes it impossible to show patterns of systematic abuse).

The first threshold inquiry that must be made when analyzing whether a law violates the First Amendment right to free speech is determining whether the restricted speech or conduct is protected.[56] In order for Ag-Gag laws to violate free speech, the act of providing false information on employment applications and gathering information by recording on agricultural facilities must be a form of protected speech.

While forms of unprotected speech do exist, the Supreme Court has applied a very liberal view on what constitutes protected speech.[57] Even material that "many adults themselves would find . . . highly offensive" warrant First Amendment protection.[58] Categories of unprotected speech include obscenity, defamation, or speech having the ability to incite imminent lawless action, but have been held to be "well-defined and narrowly limited classes of speech."[59] Hence, the general rule that must be followed is that the First Amendment protects against governmental restrictions on expression based on "its message, its ideas, its subject matter, or its content."[60]

Under current Ag-Gag legislation, there are generally two forms of protected speech being abridged: the false statements made by the investigator that are necessary to gain entry into animal facilities and the actual recording within the facility.[61] Both forms of speech have been determined by the Supreme Court to constitute protected speech.[62]

In *United States v. Alvarez*,[63] the defendant, a habitual liar, was indicted under the Stolen Valor Act of 2005 for fabricating a story about earning a Congressional Medal of Honor.[64] After the defendant challenged the act for unconstitutionally abridging his First Amendment right to freedom of expression, the

[56] Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 892 (1991).
[57] *Id.* at 893-94.
[58] Playboy Ent. Group, Inc., 529 U.S. at 811.
[59] U.S. v. Stevens, 559 U.S. 460, 468-69 (2010).
[60] *Id.* at 468.
[61] *See* UTAH CODE ANN. § 76-6-112 (West 2015) (criminalizing submission of false information on employment applications with the intent to enter agricultural facilities to record); N.D. CENT. CODE ANN. § 12.1-21.1-02(6) (West 2015) (criminalizing the use or video records in an animal facility without the consent of the owner).
[62] *See* U.S. v. Alvarez, 132 S. Ct. 2537 (2012) (holding false statements may be protected under the First Amendment); Texas v. Johnson, 491 U.S. 397, 404 (1989) (holding non-verbal expression is protected speech under the First Amendment).
[63] Alvarez, 132 S. Ct. at 2542.
[64] *Id*.

plaintiff argued that false statements warrant no First Amendment protections.[65] The Supreme Court held while there are limitations as to liability in tort actions for false statements (i.e. in defamation and fraud civil actions), this general rule does not exist.[66] There is no "broad[] proposition that false statements are unprotected when made to any person, at any time, in any context" and, generally, false representations are only unprotected when it infringes on the integrity of governmental processes.[67]

The *Alvarez* Court reasoned "false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[68] Similarly, applying this reasoning to Ag-Gag laws, fabricated information submitted on employment applications by investigators may be necessary and inevitable in the fight against animal cruelty. Indeed, undercover investigations are one of the more effective methods of uncovering animal cruelty, and without gaining physical entrance to animal facilities, the information able to be gathered is severely limited.[69]

This is not to say that all false statements are protected speech under the First Amendment. The Supreme Court has concluded that certain false statements do not enjoy constitutional protection.[70] While the State in *Alvarez* argued the subject law's purpose was to regulate fraudulent speech, which reduces the level of scrutiny under which the law is reviewed, Justices Breyer and Kagan's concurrence rejects this assertion, reasoning that proof of specific harm was required for a statute that criminalizes false statements.[71] Failing to prove the required causal link between the speech being abridged and the specific harm resulting from such speech, the Stolen Valor Act could not be considered a fraud statute.[72] Therefore,

[65] *Id.*
[66] *Id.* at 2545-46.
[67] *Id*. at 2546.
[68] *Id.* at 2544 (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quotation omitted)).
[69] Runkle, *supra* note 5.
[70] Herbert v. Lando, 441 U.S. 153, 171-73 (1979) (holding defamatory statements made with actual malice are not protected under the First Amendment); *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (holding untruthful commercial speech is not protected under the First Amendment for its own sake); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (holding intentional or reckless false statements made about a public official do not enjoy constitutional protection).
[71] Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 575-76, 78 (2014).
[72] *Id.* at 578.

as *Alvarez* illustrates, there is no hard-and-fast rule that *all* false statements are unprotected.[73] Accordingly, false statements should be presumed protected speech unless falling within the scope of a tort action where the false statement is the relevant issue and causes a legally cognitive harm. Investigators making false statements to employers to gain entry into their facilities would not fall within this scope.[74] Moreover, Ag-Gag laws cannot reasonably be defined as a fraud statute as the statutes fail to express a specific harm caused by, or a causal link between, an investigator's false statements to a factory owner to gain entry onto the land and a subsequent harm to the business.

The second form of speech being infringed by Ag-Gag laws—the act of recording—has been consistently determined to be a form of expression that is protected under the First Amendment.[75] Therefore, the more compelling argument proponents of Ag-Gag statutes may have is that the act of recording loses its First Amendment protections when done on private property without consent of the owner. While that proposition is generally found to be true, Ag-Gag laws are so overbroad that even recording animal facilities on public property may be considered a violation.[76] Moreover, a state is forbidden to enact a content-based restrictions on speech regardless of whether that category of speech being restricted has been historically categorized as unprotected.[77]

[73] Alvarez, 132 S. Ct. at 2546.
[74] For example, in a successful defamation claim, the first element a plaintiff must prove is that a false and defamatory statement was made about the plaintiff by the defendant. New York Times Co., 376 U.S. at 258-59. Here, an investigator makes a false statement about *himself* in order to gain entry into the facility, thereby failing the first element of defamation.
[75] *See* Johnson, 491 U.S. at 404 ("we have long recognized that its protection does not end at the spoken or written word. . .[and] have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" (citation omitted)); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information . . . and specifically, a right to record matters of public interest."); *Cf., e.g.,* Gericke v. Begin, 753 F.3d 1, 8-9 (1st Cir. 2014) (holding defendant had the right to film police during a traffic stop).
[76] Potter, *supra* note 48 (In 2013, Amy Meyer was charged with violating Utah's Ag-Gag law for filming a sick cow being pushed by a bulldozer while on a public road).
[77] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 384-85 (1992) (holding an ordinance meant to restrict "fighting words,"—which is a category of unprotected speech—to be unconstitutional as a State may not impose restrictions on speech, whether protected or unprotected, when the regulation is based on hostility or favoritism towards the non-proscribed message they contain.).

Finally, public policy further strengthens the proposition that the recording of animal abuse is a form of protected free speech as the laws of America have prohibited animal cruelty since the 1600's.[78] Accordingly, the forms of speech being restricted by Ag-Gag laws are protected under First Amendment jurisprudence. The next step is to determine the types of restrictions at issue in these laws in order to apply the proper level of scrutiny.

2. Content-Based Restrictions and Strict Scrutiny Analysis

After determining that the conduct being suppressed by Ag-Gag laws constitutes forms of protected speech, the next inquiry is whether Ag-Gag laws are content-based.[79] If so, the law must pass the strict scrutiny test: demonstrating the law is narrowly tailored to further a compelling state interest.[80] The alternative would be to conclude the laws are content-neutral, in which case a state may apply reasonable time, place, and manner restrictions on protected speech so long as the law is narrowly tailored to serve a substantial governmental interest.[81] However, as discussed *infra*, Ag-Gag laws are clearly content-based and, therefore, a content-neutral analysis will not be necessary.

Laws are considered content-based restrictions on speech when they "prohibit the public discussion of an entire topic."[82] In *United States v. Playboy Entertainment Group, Inc.*,[83] the Supreme Court tackled the constitutionality of a law requiring cable providers to alter their television feed of sexually explicit material.[84] Section 505 of the Telecommunications Act of 1996 required cable providers to limit the

[78] Stevens, 559 U.S. at 469 (citing The Body of Liberties § 92 (Mass. Bay Colony 1641), reprinted in American Historical Documents 1000–1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) ("No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use.")).
[79] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed (citations omitted)).
[80] *Id.* at 2226 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *See also* Alvarez, 132 S. Ct. at 2544 ("the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.'" (quoting Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 660 (2004)).
[81] Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989).
[82] Boos v. Berry, 485 U.S. 312, 319, 321 (1988) (citation omitted) (holding a law is content-based when the law can be justified only by reference to the content of the speech being restricted).
[83] Playboy Ent. Group, Inc., 529 U.S. at 803.
[84] *Id.* at 806.

transmission of channels "primarily dedicated to sexually-oriented programming" between 10 p.m. and 6 a.m., when children are likely not watching.[85] At all other times the channel transmission was to be fully scrambled or blocked.[86] As one of the world's most prominent adult entertainment providers, Playboy challenged § 505 stating the law was a content-based restriction on free speech and therefore violated the First Amendment.[87]

Section 505 was created to address a "signal bleed" trend in contemporary television censorship, where channel scrambling technology already in place would emit discernible pictures or clear audio portions on scrambled screens from time to time.[88] With an economical advantage to simply block adult content between the waking hours of children rather than purchasing technologically advanced signal scramblers, a majority of cable providers choose the former to comply with the new law.[89]

The Supreme Court determined that § 505 was indeed a content-based restriction on speech as the statute applied only to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent" while leaving signal bleed on all other channels unaddressed.[90] Section 505 "focuses only on the content of the speech and the direct impact that speech has on its listeners."[91] Similarly, Ag-Gag laws are content-based restrictions because of the implementation of a scienter to the act of recording. While a statute forbidding recording on private property alone may be deemed content-neutral because it would affect all recordings, Ag-Gag laws focus on recordings that "damage the enterprise conducted at the animal facility."[92] Like § 505 in *Playboy* was found to be content-based because a restriction was placed on adult content only, Ag-Gag laws are content-based because they apply to recordings dedicated to hurt the business of animal facility only. Ag-Gag laws are unconcerned with

[85] *Id*.
[86] *Id.*
[87] *Id.* at 807.
[88] *Id.*
[89] *Id.* at 808.
[90] Playboy Ent. Group, Inc., 529 U.S at 811.
[91] *Id*. (quoting Boos, 485 U.S. at 321).
[92] MONT. CODE ANN. § 81-30-103(1) (West 2015).

recordings that may help the facility and only focus on recordings that will bring negative publicity, making the law content-based.

In *Playboy,* once it was determined that § 505 was a content-based law, the Court analyzed whether the law was narrowly tailored to promote a compelling governmental interest, which the Court answered in the negative.[93] If a less restrictive alternative would serve the government's purpose, that alternative must be used.[94] While protecting families from unwanted adult content bleeding through cable signals is a compelling governmental interest, the means taken to promote that goal—blocking all adult content between "waking hours"—was not narrowly tailored as less restrictive methods to achieve the goal were available.[95] That method was § 504 of the same law, which allowed subscribers, upon request, to block the adult channels in their household altogether.[96]

Similarly, Ag-Gag laws would fail to survive strict scrutiny as the laws are not narrowly tailored to promote a compelling governmental interest. Proponents of the law may argue that protecting the profitability of agricultural industry, one of the largest industries in the country, is a compelling interest. However, Ag-Gag laws are not narrowly tailored as protections against trespassers already exist in codified, trespass laws.[97] Just like *Playboy*, where a less restrictive alternative to § 505 was found in another law addressing the subject conduct, trespass and defamation statutes are a less restrictive alternative to Ag-Gag laws as they protect against the conduct targeted by these laws.[98] Furthermore, courts have held the privacy interest of animal facilities, in itself, was only an important interest, not rising to the level of compelling.[99]

[93] Playboy Ent. Group, Inc., 529 U.S. at 813.
[94] *Id.*
[95] *Id.* at 815.
[96] *Id.*
[97] *Ag-Gag Bills at the State Level, supra* note 10 (each State listed with current Ag-Gag laws have criminal trespass laws codified).
[98] *See also, e.g.,* Brown v. Ent. Merchants Ass'n, 131 S. Ct. 2729, 2739-40 (2011) (holding a content-based California law placing restrictions on the sale of violent video games to minors fails strict scrutiny because the law was underinclusive and the video-game industry already had in place a rating system informing buyers of the content of the games, accomplishing the purpose of the law to a large extent); 44 Liquormart Inc. v. R.I., 517 U.S. 484, 506-08 (1996) (holding a content-based Rhode Island law prohibiting the advertisement of liquor prices for the purpose of maintain higher prices to deter alcohol consumption fails strict scrutiny because less restrictive means are available without abridging speech, including direct regulations on alcohol sales or increased taxation).
[99] Animal Legal Defense Fund v. Otter, 1:14-cv-00104-BLW, 2015 WL 4623943 at 10 (D. Idaho Aug. 3, 2015).

Therefore, not only do Ag-Gag laws not serve a compelling governmental interest, but they are not narrowly tailored.

When a law, on its face, draws a distinction as to what type of message is being regulated, the law is content-based.[100] However, even if a law is considered facially content-neutral, it will be considered content-based if its purpose cannot be "'justified without reference to the content of the regulated speech,'" or that it was adopted by the government "because of disagreement with the message [the speech] conveys."[101] In *Reed v. Town of Gilbert*, the Supreme Court held a local sign code was facially content-based as it subjected ideological, political, and directional signs to specific size, duration, and location restrictions.[102] The Court was not persuaded by the State's argument that its intent, as shown through the legislative history, was not to regulate specific speech but all signs in general. [103]

While Ag-Gag laws are facially content-based, some proponents of these laws have asserted that the laws are content neutral and therefore should be subject to lesser scrutiny.[104] If faced with this argument, a court should look to the ruling in *Reed* and determine that the law should be considered content-based. Ag-Gag laws cannot be evaluated without reference to the animal abuse videos created by investigators. The purpose of the law is to regulate the amount of videos created due to the detrimental impact the videos may have on the industry. While the legislative intent of some Ag-Gag laws may show a content-neutral purpose of the law,[105] a court should not be swayed by the intent and focus on the actual content-based language of the law, regardless of its intent.

[100] Reed, 135 S. Ct. at 2227.
[101] *Id.* (quoting *Ward*, 491 U.S. at 791).
[102] *Id.* at 2227-28.
[103] *Id.* at 2228 ("an innocuous justification cannot transform a facially content-based law into one that is content neutral").
[104] Otter, 2015 WL 4623943 at 7 (in a challenge to Idaho's Ag-Gag law, the state argued the law was content-neutral because it does not regulate speech based on its content but rather based on the location at which the speech was communicated).
[105] Lewis Bollard, *The Terrible Price of Ag-Gag Laws*, N. Y. DAILY NEWS (May 17, 2013), http://www.nydailynews.com/opinion/terrible-price-ag-gag-laws-article-1.1346292 (for every one supporter claiming a content-neutral purpose for the law, there are dozens like Senator David Hinkins, who sponsored Utah's Ag-Gag law, claiming the law was aimed at the "vegetarian people who are trying to kill the animal industry.").

3. Overbreadth

An alternative facial challenge may be used to invalidate Ag-Gag laws.[106] Under the First Amendment, a law may be deemed unconstitutionally overbroad if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[107] "A statute may appear to do more good than harm in its total impact and nonetheless reach privileged conduct," and therefore will be invalidated.[108] Courts have routinely focused on the need for laws to be narrowly tailored to avoid infringing on protected speech.[109]

In *United States v. Stevens*,[110] the defendant challenged a law criminalizing the creation, sale, or possession of media depicting animal cruelty.[111] The primary focus of the legislature in enacting the law was to stop "crush videos," which feature the torturing and killing of animals for sexual gratification.[112] After refusing to extend a class of unprotected speech to animal cruelty videos, the Supreme Court focused its analysis on whether the law was unconstitutionally overbroad.[113] The Court held the law created sweeping prohibitions on not just crush videos, but all killing of animals.[114] "Those seeking to comply with the law thus face a bewildering maze of regulations. . ." as even a recording of a professional butcher within his line of service could violate the law.[115] Moreover, the "exception clause" carving out "religious, political, scientific, educational, journalistic, historical, or artistic" exceptions to the law would not narrow the scope of the statutory ban as the exceptions required an unrealistically broad reading of the statute in order to determine which actions fell within the exceptions.[116]

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[106] *United States* v. *Stevens*, 559 U.S. at 473 (applying the alternative facial challenge of overbreadth to a law restricting protected free speech).
[107] Wash. State. Grange v. Wash. State. Republican Party, 552 U.S. 442, 449 (2008).
[108] Lewis Sargentich, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970).
[109] *Id.*
[110] *Stevens*, 559 U.S. at 460 (2010).
[111] *Id.* at 464.
[112] *Id.* at 465 - 66.
[113] *Id.* at 474.
[114] *Id.* at 475 ("The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow").
[115] *Id.* at 477 (expounding on the inconsistencies between jurisdictions with regarding to legal animal killings).
[116] *Id.* at 477-78.

Ag-Gag laws are severely overbroad as they affect both protected and unprotected speech. As drafted, Ag-Gag laws restrict individuals from making recordings within animal facilities.[117] In North Dakota, no person, without consent, may enter an animal facility and "use or attempt to use a camera, video recorder, or any other video or audio recording equipment."[118] Accordingly, it is a violation of this law for any individual or employee to take a photo of themselves or use a smart phone to call a relative if the phone has a camera. Taking a photo of oneself and talking on the phone are forms of protected speech; therefore, this law places in the same class individuals who break and enter into an animal facility and steals equipment with those who simply facetime a friend with their iPhone 6.

Examples of the laws' overbreadth do not only exist in hyperbole, either. Amy Meyer's 2013 arrest in Utah for photographing animal abuse from a public easement exemplifies how Ag-Gag laws can restrict both protected speech and unprotected speech.[119] While Utah's Ag-Gag law is not as liberal as North Dakota's in that it applies only to trespassers recording with the intent to harm the animal facility, an officer was still so confused as to its application that it arrested Ms. Meyer for exercising speech that was not included within the letter of the law.

B. VICTORIES AGAINST AG-GAG LAWS AT THE STATE LEVEL

Even with the litany of defects explained above, Ag-Gag laws have faced little resistance in the way of legal challenges.[120] This is likely because the laws are so rarely enforced by the enacting States.[121]

[117] N.D. CENT. CODE ANN. § 12.1-21.1-02(6) (West 2015).
[118] *Id.*
[119] Potter, *supra* note 48.
[120] Andrew Amelinckx, *Unwinding The Overturn Of Idaho's "Ag-Gag" Law*, MODERN FARMER, (Aug. 5, 2015), http://modernfarmer.com/2015/08/idaho-ag-gag-law-overturned/.
[121] Flynn, *Utah Prosecutor Drops 'Ag-Gag' Charges Against Vegan Activists, supra* note 49 (there have been only two arrests in the United States for violating an Ag-Gag law).

However, as of this writing, three federal challenges have been filed in Utah,[122] Wyoming,[123] and Idaho,[124] with all three cases yielding successful outcomes.[125]

On July 22, 2013, in response to the Amy Meyer arrest, the Animal Legal Defense Fund (ALDF) filed the nation's first civil rights challenge against an Ag-Gag law in the United States District Court for the District of Utah.[126] The complaint challenged Utah's Ag-Gag law under four causes of action: First Amendment overbreadth; First Amendment content-based restrictions; preemption; and Fourteenth Amendment equal protection and due process.[127] ALDF argued, in part, that the law chilled Ms. Meyer's lawful free speech as she was already arrested for violating Utah's law while recording on a public easement.[128] After the State moved to dismiss the complaint arguing the lawsuit was filed "for the sole purpose of challenging the statute," and not for chilling Ms. Meyer's speech, Judge Robert Shelby denied plaintiff's motion, finding the law indeed underscored a reasonable fear of prosecution, thereby potentially chilling lawful free speech.[129] While this case is still ongoing,[130] Judge Shelby's ruling was a monumental step toward challenging Ag-Gag laws as it demonstrated an investigator's standing to bring suit. A trial will likely occur at the end of 2016.[131]

On September 29, 2015, a group of environmental and animal activist organizations filed a federal action challenging the constitutionality of two Wyoming statutes (one criminal and one civil) related to

[122] Animal Legal Defense Fund v. Herbert, 2:13-cv-00679-RJS, 2013 WL 4017889 (D. Utah July 22, 2013).
[123] Western Watersheds Project v. Michael, 2:15-cv-00169-SWS (D. Wyo. Sep. 29, 2015).
[124] Animal Legal Defense Fund v. Otter, 1:14-cv-00104-BLW, 2014 WL 101745 (D. Idaho. Mar. 17, 2014).
[125] *See* Lindsay Whitehurst, *Judge Refuses To Throw Out Challenge To Utah's 'Ag-Gag' Law*, HUFFINGTON POST, (Aug. 7, 2015), http://www.huffingtonpost.com/2014/08/08/utah-ag-gag_n_5660481.html (the Utah lawsuit survived a motion to dismiss); *and* Otter, 2014 WL 101745 (the Idaho court granted summary judgment for the plaintiffs).
[126] Samantha Morgan, *Ag-Gag Challenged: The Likelihood of Success of Animal Legal Defense Fund v. Herbert's First Amendment Claims*, 39 VT. L. REV. 241, 242 (2014).
[127] Herbert, *supra,* 2013 WL 4017889.
[128] *Id.*
[129] Whitehurst, *supra* note 125.
[130] *Animal Legal Defense Fund v. Herbert Docket,* PLAINSITE, http://www.plainsite.org/dockets/tzuyltkn/utah-district-court/animal-legal-defense-fund-et-al-v-herbert-et-al/ (last visited Nov. 4, 2015) (a review of the docket shows the case is still in the discovery phase of litigation).
[131] Ben Winslow, *Utah's 'Ag-Gag' Law Likely Going To Trial*, FOX 13 SALT LAKE CITY, (Oct. 18, 2015), http://fox13now.com/2015/10/18/utahs-ag-gag-law-likely-going-to-trial/.

preventing the collection and submission of data regarding land and land use of governmental agencies.[132] While these Wyoming statutes lack the traditional language found in Ag-Gag laws in a stated purpose to protect agricultural or animal facilities, the laws nevertheless have the same effect of criminalizing an investigator's right to protected free speech in recording animal abuse.[133] After the State moved to dismiss plaintiffs' claims for lack of standing, improper defendants, and failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court denied the motion.[134] Regarding plaintiff's freedom of speech, freedom to petition under the First Amendment, and equal protection violation arguments raised, the court had "serious concerns and questions as to the constitutionality of various provisions of these trespass statutes."[135] While this case is pending, Judge Scott W. Skavdahl expressed concerns of the Wyoming statute failing to survive even intermediate scrutiny, likely foreshadowing a later decision on the merits of the case.[136]

The third action, which ALDF filed on March 17, 2014 against Idaho Governor, C.L. "Butch" Otter and Idaho Attorney General, Lawrence Wasden in the United States District Court for the District of Idaho, has yielded the most successful outcome to date.[137] The lawsuit challenged Idaho's Ag-Gag law under the same causes of action used in its Utah complaint, even borrowing much of the same arguments.[138]

On August 3, 2015, an order was entered granting ALDF's motion for summary judgment, thereby invalidating Idaho's Ag-Gag law.[139] The District Court's Chief Judge B. Lynn Winmill, entered a thorough order, invalidating the statute as unconstitutionally impeding protected speech through content-based audiovisual provisions.[140]

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[132] Western Watersheds Project v. Michael, 2:15-cv-00169-SWS at 2 (D. Wyo. Dec. 28, 2015).
[133] WYO. STAT. ANN. § 6-3-414(a) (West 2015) ("A person is guilty of trespassing to unlawfully collect resource data if he [e]nters onto open land for the purpose of collecting resource data []and [d]oes not have . . . permission of the owner.")
[134] Western Watersheds Project, 2:15-cv-00169-SWS (D. Wyo. Dec. 28, 2015).
[135] Western Watersheds Project, 2:15-cv-00169-SWS at 40 (D. Wyo. Dec. 28, 2015).
[136] *Id.* at 30. (finding, when analyzing the statute under intermediate scrutiny, that "[d]efendants have provided no explanation as to how prohibiting data collection upon, or access to, public open lands prevents illegal trespass.")
[137] Animal Legal Defense Fund v. Otter, 1:14-cv-00104-BLW, 2014 WL 101745 (D. Idaho Mar. 17, 2014).
[138] *Id.*
[139] Animal Legal Defense Fund v. Otter, 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015).
[140] *Id.*

In relevant part, Idaho's Ag-Gag law provides:

> A person commits the crime of interference with agricultural production if the person knowingly:
> (a) Is not employed by an agricultural production facility and enters [the] facility by force, threat, misrepresentation or trespass;
> (b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;
> (c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations . . . [or] business interests . . . ;
> (d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or
> (e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.[141]

Judge Winmill reasoned that the law was a content-based restriction as it "targets undercover investigators who intend to publish videos they make through the press and seeks to suppress speech critical of animal agricultural practices."[142] Attempting to distinguish sections (a)-(c) of their law from *Alvarez,*[143] the State argued the law targets more than just false statement by criminalizing the statement only when accompanied by the act of recording.[144] However, the court noted that *Alvarez* stands for the proposition that "the government may criminalize false statements only when those statements, themselves, cause a 'legally cognizable harm.'" Idaho has failed to establish the false statements made by undercover investigators, by themselves, cause any legally cognizable harm.[145]

Idaho further argued that the law was content-neutral, rather than content-based, because the law did not regulate speech based on what was said (the message conveyed), but instead where it was said (within an agricultural facility).[146] However, "an employee[] would not violate [this law] if he or she stood in a[] . . . facility and surreptitiously filmed the . . . owner having a private conversation with his spouse.

[141] IDAHO CODE ANN. § 18-7042(1)(a)-(e) (West 2015).
[142] Otter, 2015 WL 4623943 at *4.
[143] Alvarez*,* 132 S. Ct. 2537.
[144] Otter, 2015 WL 4623943 at *5.
[145] *Id.* (citation omitted).
[146] *Id.* at *7.

This same employee, however, could be prosecuted under [this law] . . . if the employee, without the owner's consent, filmed his fellow workers repeatedly beating, kicking, and jumping on cows, or using a moving tractor to drag a cow on the floor by a chain attached to her neck."[147]

Analyzing the law under the strict scrutiny standard, Judge Winmill held the state's interest in protecting the personal privacy and private property of the agricultural facility was an important interest, but not compelling, as food production facilities are within one of the most heavily regulated industries in our nation and are regularly subjected to state and federal intrusions for the sake of inspection.[148] However, even if the state's interest is compelling, Idaho's Ag-Gag law is not narrowly tailored to achieve that interest as less restrictive means are available.[149] "Criminal and civil laws already exist that adequately protect those interests without impinging on free-speech rights. It is already illegal to steal documents or to trespass on private property. In addition, laws against fraud and defamation already exist to protect against false statements made to injure or malign an agricultural production facility."[150] Accordingly, the Idaho law fails strict scrutiny.[151]

States confronted with an Ag-Gag law should look toward Judge Winmill's order as a guide in analyzing the constitutionality of Ag-Gag laws. The order illustrates how Ag-Gag laws infringe protected free speech as the laws, implemented primarily by government officials with ties to the agricultural industry, place a restriction on messages critical of the industry. Further, there is no compelling state interest in providing increased privacy and property rights to agricultural production facilities. Even if there were, the laws are not narrowly tailored to achieve that goal as common law protections exist that do not impede protected speech.

[147] *Id.* at 8.
[148] Otter, 2015 WL 4623943 at 10.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 11.

III. APPLYING ANTI-SLAPP LEGISLATION AND PRINCIPLES TO DETER AG-GAG CIVIL ACTIONS

Aside from being unconstitutional for abridging free speech, there may be other legal mechanisms available on the legislative horizon to protect lawful protestors against Ag-Gag laws. With most Ag-Gag laws including provisions allowing increased civil liability if convicted under the law,[152] it is possible that a federal anti-SLAPP law can be used to not only dismiss the facility's claim, but deter the claims outright by granting a successful defendant recovery of its litigation costs. This section will discuss the history and purpose of anti-SLAPP legislation and its applicability to civil actions brought pursuant to Ag-Gag laws.

A. PURPOSE OF ANTI-SLAPP LAWS

The right to petition the government to resolve grievances is a founding principle of the American democratic system.[153] Incorporated into the language of the First Amendment, the framers recognized the need for the establishment of a fundamental right for citizens to petition the government.[154] Laws passed with the intent to discourage public participation are nothing new and courts are constantly tasked with determining whether a law unconstitutionally abridges protected fundamental rights.[155] Not to be outdone, industries have sought to achieve the same purpose of those laws being challenged by looking toward the court system as an alternative to the legislature.[156] The acronym "SLAPP" stands for "strategic lawsuits

[152] *See* KAN. STAT. ANN. § 47-1828(a) (West 2015) ("Any person who is damaged by reason of a violation of [this law] may bring an action in the district court against the person causing the damage to recover an amount equal to three times all actual and consequential damages").
[153] *A Brief History of SLAPP Suits*, ACLU, http://www.acluohio.org/slapped/brief-history-of-slapp (last visited Nov. 3, 2015) ("Some commentators believe the origins of the right to petition the government to resolve grievances goes back as far as the 10th century. There is a clear nexus between our First Amendment's right to petition clause, and the Bill of Rights previously exacted by William and Mary in the 17th century. Years later, the Declaration of Rights and Grievances emerged as an outgrowth of the Stamp Act in 1765, and included the right to petition the King and Parliament.").
[154] U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the government for a redress of grievances.").
[155] *See, e.g.,* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (invalidating the Oregon Criminal Syndicalism Law as unconstitutional for criminalize the peaceful assembly of various political parties, including Communists).
[156] *What Is a SLAPP Suit*, ACLU, http://www.acluohio.org/slapped/what-is-a-slapp-suit (last visited Sept. 11, 2015).

against public participation."[157] A SLAPP plaintiff, who generally have far more resources to expend in litigation than their counterparts, use tort law to punish activists from publicly speaking out against the plaintiff's activities to prevent severe economic loss.[158] Often brought by businesses, governmental agencies, and public officials, SLAPP suits are filed for the primary purpose of chilling public participation that would have a negative effect on the economic interests of the plaintiff.[159] SLAPP plaintiffs generally bring actions for defamation, conspiracy, malicious prosecution, nuisance, and/or tortious interference with business relationships as a means to turn public participation into an actionable offense.[160] Within such suits, a plaintiff may seek an exorbitant sum in damages, usually well outside the means of the defendant, and injunctive relief against the petitioning defendant to enjoin continued protest.[161]

The most disturbing aspect of SLAPP suits is even if the plaintiff is unsuccessful as decided in court, the plaintiff remains a winner. SLAPP suits are filed not necessarily to be adjudicated on their merits, but to drain defendants economically and emotionally.[162] Because the general rule in civil litigation is - barring any contractual or statutory provision - that each party bears its own legal fees,[163] insolvent protesters are at an extreme disadvantage as the corporation would rather spend thousands of dollars in attorney's fees to keep the protester busy with litigation than potentially lose millions due to negative publicity and criticism. Thus, a defendant in a SLAPP action with little resources may cease its otherwise legal protest against the plaintiff.[164] The effectiveness of SLAPP actions lies in the fact that so long as the

[157] Canan & Pring, *Strategic Lawsuits Against Political Participation*, 35 SOC. PROBS. 506, 506 (1988).
[158] Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 981-82 (1992).
[159] *What Is A SLAPP Suit*, *supra* note 156.
[160] *What Are SLAPPs?*, FIRST AMENDMENT PROJECT, http://thefirstamendment.org/slapp.html#1 (last visited Oct. 14, 2015).
[161] Waldman, *supra* note 158, at 984.
[162] *Id.*; *See generally* George (Rock) Pring & Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* 53 (The Access Initiative 2009), http://www.eufje.org/images/DocDivers/Rapport%20Pring.pdf (discussing that while the "typically multimiliion-dollar SLAPPs are overwhelmingly unsuccessful in court," they are "enormously successful in the real world in 'chilling' public interest advocacy.").
[163] Bernard J. Farber, *Attorney's Fees in Federal Civil Rights Lawsuits Part One*, 4 AELE Monthly L. J. 101, 101 (2011).
[164] Waldman, *supra* note 158, at 989.

action states a claim of relief that is "plausible on its face," it should survive a motion to dismiss.[165] Regardless of whether a defendant has factual defenses to plaintiff's claims, a complaint pled with sufficient particularity will generally allow a plaintiff to proceed with propounding discovery onto a defendant.[166] SLAPP actions are internationally employed, prevalent in courts within United States, Canada, Britain, Australia, New Zealand, and the Philippines.[167]

Recognizing the need to even the playing field, California was the first state in the U.S. to enact an anti-SLAPP law in 1993.[168] Taking a strong stance against SLAPP suits, the California legislature found "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . [and] declare[d] that it is in the public interest to encourage continued participation in matters of public significance."[169] After 1993, the majority of the country followed with thirty-two states and territories (Washington, D.C. and Guam) now providing some sort of anti-SLAPP protection through statutes and common law.[170]

Anti-SLAPP laws are creatures of the Noerr-Pennington doctrine, which follows the principle that every United States citizen has the right to participate in the governmental process and should not be punished for exercising that right.[171] These statutes generally provide defendants with a special motion to strike or motion to dismiss that can rapidly end litigation.[172] For example, in California, their anti-SLAPP statute grants a judge authority to, at the outset of a suit, determine whether the lawsuit has the "probability"

[165] Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007) (requiring a complaint to contain "enough facts to state a claim to relief that is plausible on its face" in order to survive a motion to dismiss for failure to state a claim).
[166] *Id.*
[167] Pring & Pring, *supra* note 162.
[168] CAL. CIV. PRO. § 425.16 (West 2015).
[169] § 425.16(a).
[170] *Responding to Strategic Lawsuits against Public Participation (SLAPPs)*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps (last updated Feb. 4, 2013).
[171] Sheri Coover, *Pennsylvania Anti-SLAPP Legislation*, 12 PENN. ST. ENVTL. L. REV. 263, 267 (2004) ("The Noerr-Pennington doctrine is based on two Supreme Court cases . . . Although both of these cases dealt with anti-trust litigation, the Noerr-Pennington doctrine has been extended to protect other action in which a citizen or organization petitions the government.").
[172] Robert D. Links, *California Civil Practice Civil Rights Litigation Chapter 14. Strategic Lawsuits Against Public Policy (SLAPPs)*, Cal. Civ. Prac. Civil Rights Litigation § 14:1 (Updated Oct. 2015) ("California's [anti-SLAPP] statute permits courts at an early stage to dismiss meritless defamation cases aimed at chilling expression through costly, time-consuming litigation; the hallmark of a SLAPP suit"

of winning.[173] If the judge finds it does not, the lawsuit must be dismissed and the defendant is entitled to recovery of its attorney fees.[174] Similar to whistleblower statutes that protect citizens from liability and encourage them to report violations of the law,[175] anti-SLAPP motions protect citizens from being dragged through frivolous litigation and encourage them to continue to participate in public discussion over illegal or inhumane practices by industries.

Generally, a defendant may file an anti-SLAPP motion if the cause of action pled against them arises from the defendant's public participation in connection with a public issue.[176] However, some states limit the applicability of anti-SLAPP motions through restrictions on the method in which the speech occurred or the topic the speech it aimed to criticize.[177]

B. APPLYING ANTI-SLAPP LAWS AND PRINCIPLES TO DETER AND DISPOSE OF LAWSUITS BROUGHT UNDER AG-GAG CIVIL LIABILITY PROVISIONS

Ideally, anti-SLAPP laws would expand to cover the dismissal of criminal actions brought against individuals exercising their constitutional right to free speech and petition their government; however, current legislation only applied to civil actions. Consequently, an anti-SLAPP motion to dismiss would, at best, protect an undercover animal investigator against the increased civil penalties included in Ag-Gag laws, but not against potential jail time or fines. Ag-Gag laws are inconsistent with the Noerr-Pennington doctrine, as these laws are in place for the express purpose of stopping undercover investigators from publicizing inhumanities, which does not allow an individual to thoroughly participate in the petitioning of government for change. Accordingly, in order to protect a citizen's constitutional right to petition, the same

[173] *What Are SLAPP's? supra* note 159.
[174] *Id.*
[175] Whistleblower Protection Act of 1989, Pub. L. No. 101-12 (1989).
[176] *See* CAL. CIV. PROC. § 425.16(b)(1) (West 2015); FLA. STAT. § 768.295 (West 2015); WASH. REV. CODE § 4.24.500 (2015); VT. STAT. ANN. TIT. 12, § 1041 (West 2015).
[177] DEL. CODE ANN. TIT. 10 §§ 8136-8137 (West 2015) (providing individuals an anti-SLAPP motion if the speech is related toward a public applicant or permittee); 27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2015) (providing individuals an anti-SLAPP motion if the speech is made in connection with the implementation and enforcement of environmental laws and regulations).

principles behind state anti-SLAPP laws should be applied across the judicial spectrum in both criminal and civil instances.

Currently, in order to apply an anti-SLAPP law to an Ag-Gag law, the latter must contain a provision that holds a violator civilly liable for damages.[178] Not surprising, of the seven states with codified Ag-Gag statutes, only two, Utah and Missouri, have anti-SLAPP statutes in place.[179] Moreover, Utah and Missouri's Ag-Gag laws do not include a civil liability provision,[180] thereby making its anti-SLAPP law inapplicable. With the remaining five states, each of which includes a civil penalty provision in their Ag-Gag laws, an anti-SLAPP law would be effective in limiting an agricultural facility's ability to silence an undercover investigator.

This is where the SPEAK FREE Act of 2015 can help.[181] A new bipartisan house bill introduced on May 13, 2015, the "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts" ("SPEAK FREE") Act is a federal anti-SLAPP law that creates a special motion to dismiss SLAPP suits.[182] In filing the motion, a defendant must make a "prima facie showing that the claim at issue arises from an oral or written statement or other expression by the defendant that was made in connection with an official proceeding or about a matter of public concern."[183] Matters of public concern under the proposed legislation is defined expansively to include: (1) health or safety; (2) environmental, economic, or community well-being; (3) the government; (4) a public official or public figure; or (5) a good, product, or service in the marketplace.[184] The law allows a judge to consider the merits of pleadings at an early stage, similar to a motion for summary judgment.[185] If a defendant successfully establishes the above-mentioned prima facie showing and the plaintiff cannot demonstrate that their claim is likely to

[178] *See* KAN. STAT. ANN. § 47-1828 (West 2015) (proving an individual damaged by a violator of the law may bring suit to recover three times all actual and consequential damages).
[179] UTAH CODE ANN. § 78B-6-1401 - 78B-6-1405 (West 2015); MO. ANN. STAT. § 537.528 (West 2015).
[180] UTAH CODE ANN. § 76-6-112(3)-(4) (West 2015) (stating violation of the law is either a Class A or B misdemeanor); MO. ANN. STAT. § 578.013(3) (West 2015) (stating a violation of the law is a Class A misdemeanor).
[181] SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015).
[182] *Id.* at § 4202(a).
[183] *Id.*
[184] *Id.* at § 4208(1).
[185] Sophia Cope, *Federal Anti-SLAPP Bill Introduced in The House*, ELECTRONIC FRONTIER FOUNDATION, (May 21, 2015), https://www.eff.org/deeplinks/2015/05/federal-anti-slapp-bill-introduced-house).

succeed on its merits, the complaint will be dismissed with prejudice and the court may require plaintiff to pay defendant's litigation fees.[186]

Applying the SPEAK FREE Act to civil actions brought by Ag-Gag violations, a defendant would be able to apply the proposed federal legislation not only to dismiss a plaintiff's claim at an early stage of litigation, but require the plaintiff to pay all of defendant's litigation costs. Without this act, current defendants of Ag-Gag lawsuits, assuming the complaint was pled with sufficient particularity, would be forced to incur thousands of dollars in litigation cost to adjudicate these claims. Moreover, even if they are successful, the defendant is likely not entitled to recover fees.

With "matters of public concern" being broadly defined within the SPEAK FREE Act, it will protect undercover investigators who film inhumanities within an animal facility for the purpose of publication as the recordings should be considered a matter of health, safety, environmental harm, and/or an issue related with a good or product in the marketplace. While this is an imperfect solution to Ag-Gag laws as the proposed legislation does not cover criminal actions, it at least would provide protection from a portion of those laws. Furthermore, because this is a federal law, these protections will be in place for citizens of every state if any future Ag-Gag laws were to be enacted. As of this writing, the SPEAK FREE Act has been referred to two subcommittees and awaits committee vote.[187] There is optimism that this act will pass as it is the first of its kind to be introduced with bi-partisan co-sponsors.[188]

Alternatively, defendants in a state without an anti-SLAPP statute who are faced with a civil action brought under Ag-Gag may turn to common law to create a pseudo anti-SLAPP statute. In *Protect Our Mountain Environment, Inc. v. District Court In and For Jefferson County*,[189] Protect Our Mountain Environment, Inc. (POME) brought a thirteen-count civil action against Gayno, Inc. in Colorado[190]

[186] H.R. 2304 §§ 4202 (a) and 4207(a).

[187] *H.R. 2304 – SPEAK FREE Act of 2015*, UNITED STATES CONGRESS, https://www.congress.gov/bill/114th-congress/house-bill/2304/all-actions (last visited Nov. 20, 2015).
[188] *SPEAK FREE Act of 2015*, PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org/speakfreeact/ (last visited Nov. 15, 2015).
[189] Protect Our Mountain Env't, Inc. v. Dist. Ct. In and For Jefferson Cnty., 677 P.2d 1361 (Colo. 1984).
[190] Colorado currently does not have an anti-SLAPP law enacted.

challenging the approval of its residential construction application.[191] After the district court ruled against POME (and the appellate court affirmed the ruling), Gayno filed an action against POME alleging that POME, "knowing its claims were without legal justification, had abused the legal process and caused Gayno economic harm . . . by unreasonably delaying the filing of the administrative record."[192] In response to POME's argument that its original complaint was a lawful exercise of its First Amendment right to petition the government for redress of grievances, the district court ruled in favor of Gayno, holding that POME's complaint was a "sham" pleading.[193]

The Supreme Court of Colorado used this issue to create a process similar to anti-SLAPP statutes when balancing an individual's First Amendment right to petition the court for grievances and a party's right to be free from baseless litigation.[194] The court held its new "standard will safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation and, at the same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights."[195] Similar principles were followed in West Virginia with its highest court applying an actual malice requirement to parties seeking redress from citizens exercising their fundamental right to petition the government.[196]

Citizens faced with a civil lawsuit brought under an Ag-Gag law can argue the application of the two cases cited above as support for why a court should dismiss a retaliatory action to the exercise of a First

[191] Protect Our Mountain Env't, Inc., 677 P.2d at 1363.
[192] *Id.* at 1364.
[193] *Id.*
[194] *Id.* at 1368-69 ("It cannot be denied that suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances. *See* Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106, 110–11 (1975). Damage to other persons and society, however, can also result from baseless litigation instigated under the pretext of legitimate petitioning activity. *See* ROBERT C. ELLICKSON & DAN A. TARLOCK, LAND USE CONTROLS 333–59 (1981). Accommodation of these competing concerns can best be achieved by requiring the suing party, when confronted with a motion to dismiss predicated on the First Amendment right to petition the government for redress of grievances, to demonstrate the constitutional viability of his claim.").
[195] *Id.* at 1369.
[196] Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993) (holding a party exercising its First Amendment right to petition the government for redress may not be actionable absent a showing of actual malice as set forth in *New York Times Co. v. Sullivan*).

Amendment right. Although both cases deal with the fundamental right to petition the government for redress, the fundamental right of free speech falls within the same constitutional amendment and follows similar purposes and principles.[197] The highest courts of Colorado and West Virginia have recognized the need to protect their citizens' exercise of a fundamental right from a lawsuit intended to chill that exercise. By requiring the plaintiff, upon a motion to dismiss, to "make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment," the fundamental right to petition the government is protected.[198] That same logic should be applied to Ag-Gag laws where a citizen is facing a civil action resulting from his or her exercise of their fundamental right of free speech. Requiring a plaintiff to show that the defendant's exercise of speech was not immunized from liability under the First Amendment will have the same effect as an anti-SLAPP law as it will allow the court to adjudicate the lawsuit on its merits at an early stage, potentially saving a defendant thousands in litigation costs.

CONCLUSION

Over a century after Upton Sinclair's undercover investigative expedition sparked federal reform of the meat packing industry, laws today have somehow devolved into protections against the very acts that exposed the public to potential health and animal welfare concerns. Agricultural industry "gag orders" have been codified in seven (soon to be eight) states for the primary purpose of impeding an undercover investigator's ability to gain entry into an animal facility and document evidence of the abusive, inhumane,

[197] *Compare* Protect Our Mountain Env't, Inc, 677 P.2d at 1364 (discussing the First Amendment right to petition the government as a necessary tool within a democratic government as one of the most effective tools to make the citizens' will known to government officials), *with* Boos, 485 U.S. at 318 ("[The Supreme Court] has recognized that the First Amendment [freedom of speech clause] reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide open' . . ., and having consistently commented on the central importance of protecting speech on public issues." (citation omitted)).
[198] Protect Our Mountain Env't, Inc., 677 P.2d at 1369.

and/or unsanitary treatment of animals. These laws go against the very foundation of the First Amendment of the United States Constitution as they impede a specific type of speech: that detrimental to the agricultural industry.

As content-based restrictions on protected free speech, Ag-Gag laws nationwide should be found to be unconstitutional as they do not further a compelling governmental interest using the least restrictive means possible. Tort law is readily available to animal facilities who believe they have a valid claim against an undercover investigator and, therefore, an Ag-Gag law should not be in place where it provides those same protections while simultaneously abridging a protected class of speech. Furthermore, Ag-Gag laws are unconstitutionally overbroad as they may be applicable to multiple forms of protected speech, even ones that the drafters of the laws did not intend to impede.

Looking to the environmental law context may help combat Ag-Gag laws by applying anti-SLAPP legislation and jurisprudence to the civil liability provisions with Ag-Gag laws. Applying an anti-SLAPP statute or its principles to an Ag-Gag law should allow an animal investigator to quickly resolve a frivolous lawsuit meant to chill their participation in criticizing an animal facility. This is, however, an imperfect solution as it will only address the civil side of Ag-Gag laws and not the more prominent criminal side. Overall, the purpose of this article is not to advocate that animal facilities should not enjoy personal and private property rights against those seeking to violate such rights, but rather as a reminder that laws providing additional legal protections akin to protections already in place are unconstitutional when they abridge a protected form of free speech.