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## The Show-Me State's Hidden Cruelty: How Missouri's Ag-Gag Laws Unconstitutionally Silence Animal-Welfare Whistleblowers

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**THE SHOW-ME STATE’S HIDDEN CRUELTY: HOW MISSOURI’S  
AG-GAG LAWS UNCONSTITUTIONALLY SILENCE ANIMAL-  
WELFARE WHISTLEBLOWERS**

I. INTRODUCTION

The Founding Fathers recognized the importance of agriculture. George Washington and Thomas Jefferson were avid farmers who sought efficient farming techniques.<sup>1</sup> Washington told Jefferson that a modernized grain thresher would “be among the most valuable institutions in this Country.”<sup>2</sup> Throughout U.S. history, state and federal governments have favored the agricultural industry.<sup>3</sup> To this day, the federal government heavily subsidizes agriculture,<sup>4</sup> and every state has a right-to-farm statute.<sup>5</sup>

Recently, however, states have passed laws that protect agriculture at the expense of another foundation of American society—free speech. Known as “ag-gag” laws, these laws shield agricultural facilities from public scrutiny by criminalizing tactics undercover investigators use to expose animal abuse. Many ag-gag laws are unconstitutional because they criminalize protected First Amendment speech, such as the right to lie and the right to film.

Multiple states have ag-gag laws,<sup>6</sup> but this paper addresses the impact and constitutional implications of Missouri’s two ag-gag laws. Missouri has a

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1. Letter from George Washington to Thomas Jefferson, July 6, 1796, available at <https://www.loc.gov/resource/mgw2.019/?sp=199> [<https://perma.cc/5ABJ-PJWW>].

2. *Id.*

3. United States Farm Bills, National Agricultural Law Center, <http://nationalaglawcenter.org/farmbills/> [<https://perma.cc/H38X-RRDR>] (last visited Feb. 12, 2018).

4. H.R. 2642, AGRICULTURAL ACT OF 2014, available at <http://docs.house.gov/billsthisweek/20140127/CRPT-113hrpt-HR2642.pdf> [<https://perma.cc/9MB6-6CKM>].

5. See Kyle Weldon & Elizabeth Rumley, *States’ Right-To-Farm Statutes*, National Agricultural Law Center, <http://nationalaglawcenter.org/state-compilations/right-to-farm/> [<https://perma.cc/4S5N-GJQ7>] (last visited Feb. 18, 2018) (“All fifty states have enacted right-to-farm laws that seek to protect qualifying farmers and ranchers from nuisance lawsuits.”).

6. Rita-Marie Cain Reid & Amber L. Kingery, *Putting A Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL’Y 31, 35–36 (Spring 2015). Kansas was the first state to pass an ag-gag law in 1990. Jesse Hirsch, *Ag-Gag Laws: State of the States*, MODERN FARMER, Apr. 10, 2013, <https://modernfarmer.com/2013/04/ag-gag-laws-state-of-the-states/> [<https://perma.cc/QXC5-MA2W>] (last visited Apr. 8, 2019).

growing number of factory farms<sup>7</sup> and over 800 puppy mills.<sup>8</sup> Missouri puppy mill operators have been rated the most abusive in the nation for the past five years.<sup>9</sup> Ag-gag laws protect these animal abusers from public scrutiny.<sup>10</sup>

In Missouri, under § 578.405, a person who obtains access to an “animal facility by false pretenses for the purpose of performing acts not authorized by the facility” is subject to a class A misdemeanor.<sup>11</sup> Section 578.405 broadly defines “animal facility” to include any facility “involving the use of animals.”<sup>12</sup>

Missouri’s second ag-gag law, § 578.013, requires that farm employees who take an audio or video recording of perceived animal abuse must turn the recording over to law enforcement within twenty-four hours or face criminal liability.<sup>13</sup> The law reads like an animal-welfare statute, but its purpose is to frustrate an undercover reporter’s ability to expose patterns of animal abuse.

Part II sketches a brief history of food whistleblowing in the United States. Upton Sinclair’s undercover investigations in 1906 led to the first federal meat inspection law.<sup>14</sup> Since Sinclair’s time, investigative journalists have driven animal-welfare reform by exposing inhumane treatment of animals. Part II also explores the classic food-whistleblower case of *Food Lion, Inc. v. Capital Cities/ABC, Inc.*<sup>15</sup>

Part III examines the federal government’s regulation of agricultural and animal facilities through the United States Department of Agriculture (the “USDA”). The USDA does little to ensure the humane treatment of farm animals. Further, the USDA’s few regulations are poorly enforced. Due to such poor federal oversight, the public relies on undercover reporters to expose inhumane farming practices.

Part IV analyzes recent federal court rulings striking down ag-gag laws similar to Missouri’s laws. In *Animal Legal Defense Fund v. Wasden*,<sup>16</sup> the Ninth Circuit struck portions of Idaho’s ag-gag law for violating the First Amendment’s Free Speech Clause. In *Animal Legal Defense Fund v. Herbert*,<sup>17</sup> the District of Utah struck Utah’s ag-gag law for First Amendment and Equal

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7. Missouri Department of Natural Resources, *Concentrated Animal Feeding Operations*, <https://dnr.mo.gov/env/wpp/cafo/> [<https://perma.cc/GQT9-CN35>] (last visited Feb. 5, 2019).

8. Bailing Out Benji, *Puppy Mills by State*, <https://bailingoutbenji.com/puppy-mill-maps/#Missouri> [<https://perma.cc/53TP-EMKB>] (last visited Apr. 8, 2019).

9. Kelsey Ryan, *Missouri Tops Humane Society’s Horrible Hundred Puppy Mill List . . . Again*, KANSAS CITY STAR, May 16, 2017, <https://www.kansascity.com/news/politics-government/article150820432.html> [<https://perma.cc/55FY-4WTV>] (last visited Apr. 8, 2019).

10. See *infra* Part IV.

11. Mo. Rev. Stat. § 578.405.

12. *Id.*

13. Mo. Rev. Stat. § 578.013.

14. Upton Sinclair, *THE JUNGLE* (Dover Thrift eds., Dover Publications 2001) (1906).

15. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

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

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

Protection Clause violations. Both rulings relied on *U.S. v. Alvarez*, where the Supreme Court addressed the First Amendment right to lie.<sup>18</sup> This “right to lie” principle renders many ag-gag laws—including Missouri’s—unconstitutional.

Part V then examines Missouri’s ag-gag laws in light of *Alvarez*, *Wasden*, and *Herbert*. Missouri’s ag-gag laws, like Idaho’s and Utah’s, violate the First Amendment.

Finally, Part VI highlights Missouri’s protection of its agricultural industry. With a legislature resistant to animal-welfare reform, Missourians rely on their First Amendment right to investigate and speak publicly about abusive animal practices in Missouri.

## II. HISTORY OF AGRICULTURAL WHISTLEBLOWING

In 1906, Upton Sinclair published *The Jungle*, an account of Chicago’s meatpacking industry.<sup>19</sup> To document the industry’s abuses, Sinclair misrepresented his identity to become an employee at a meatpacking facility.<sup>20</sup> Sinclair’s book sold millions of copies and spurred public outrage over unsanitary and inhumane slaughterhouse practices.<sup>21</sup> In response to public outcry, President Theodore Roosevelt signed the first federal law regulating meat production—the Federal Meat Inspection Act.<sup>22</sup> In Missouri, Sinclair’s muckraking would subject him to criminal liability.<sup>23</sup>

Since 1998, undercover farm investigators have produced over 100 videos documenting animal abuse.<sup>24</sup> In 2007, farm employees at Westland/Hallmark Meat Company were filmed forcing sick cows into a “kill box” by shocking them with an electric prod, jabbing them in the eye, and spraying water up their noses.<sup>25</sup> A 2009 video showed hundreds of thousands of unwanted male chicks

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18. *United States v. Alvarez*, 567 U.S. 709 (2012).

19. Sinclair, *supra* note 14.

20. WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977).

21. Upton Sinclair, *Whose Muckraking Changed the Meat Industry*, N.Y. TIMES, June 30, 2016, <https://www.nytimes.com/interactive/projects/cp/obituaries/archives/upton-sinclair-meat-industry> [<https://perma.cc/6JCE-D9XX>] (last visited Apr. 8, 2019).

22. *Id.*; see also *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 455–56 (2012) (describing how the Act implemented an “elaborate system of inspect[ing] live animals and carcasses in order to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products”) (internal quotations removed).

23. See *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015).

24. Animal Visuals, *Investigations*, Jan. 30, 2019, available at <http://www.animalvisuals.org/projects/data/investigations#lawlist> [<https://perma.cc/BZS8-HTXB>] (last visited Apr. 8, 2019).

25. Matthew L. Wald, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. TIMES, Mar. 13, 2008, available at <http://www.nytimes.com/2008/03/13/business/13meat.html> [<https://perma.cc/7FCD-SDWT>] (last visited Apr. 8, 2019).

being macerated alive.<sup>26</sup> In 2011, a Texas farmer was filmed beating cows on the head with pickaxes and leaving them to die.<sup>27</sup>

Exposés have driven food-safety and animal-welfare reform. Videos have led states to ban certain farming practices, and one video triggered the largest meat recall in U.S. history.<sup>28</sup> Companies like McDonald's, Target, and Sam's Club have also cut ties with farms over animal-cruelty exposés.<sup>29</sup>

Prior to the emergence of ag-gag legislation, food producers challenged whistleblowers using common law theories. The food-whistleblower case of *Food Lion, Inc., v. Capital Cities/ABC, Inc.*<sup>30</sup> continues to inform courts' analyses of ag-gag laws.

#### A. *Food Lion, Inc. v. Capital Cities/ABC, Inc*

In *Food Lion*, supermarket chain Food Lion sued two ABC investigative journalists who misrepresented their identities to become Food Lion employees.<sup>31</sup> While employed, the journalists surreptitiously filmed Food Lion handlers repackaging expired meat with a new expiration date, mixing together expired and fresh beef, and masking the smell of expired chicken with barbeque sauce.<sup>32</sup> ABC subsequently broadcast the footage on *Prime Time Live*.<sup>33</sup> Food Lion sued ABC, two producers, and the undercover journalists under trespass, fraud, and breach of loyalty theories.<sup>34</sup>

At trial, Food Lion did not dispute the truth of ABC's broadcast, but nonetheless claimed damages of over five billion dollars for lost profits, lost sales, and a variety of damages collectively described as "publication damages."<sup>35</sup> The jury refused to impose punitive damages against the journalists, but held ABC and its producers liable for fraud.<sup>36</sup> The jury awarded Food Lion

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26. Associated Press, *Agriculture Industry Defends Itself Over Grisly Iowa Chick Video*, LA TIMES, Sept. 5, 2009, <http://latimesblogs.latimes.com/unleashed/2009/09/agriculture-industry-defends-itself-over-grisly-iowa-chick-video.html> [https://perma.cc/5LRR-2MAV] (last visited Apr. 8, 2019); Associated Press, *Chicks Being Ground Up Alive*, HUFFINGTON POST, Oct. 17, 2009, <http://www.youtube.com/watch?v=JJ—faib7to> [https://perma.cc/X6JR-4QMT] (last visited Apr. 8, 2019).

27. Kevin Lewis, *Charges Filed in E6 Cattle Case*, PLAINVIEW DAILY HERALD, May 26, 2011, <http://www.myplainview.com/news/article/Charges-filed-in-E6-Cattle-case-8414335.php> [https://perma.cc/PRQ3-WSLX] (last visited Apr. 8, 2019).

28. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1197 (D. Utah 2017).

29. *Id.*

30. *Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

31. *Id.* at 510.

32. *Id.* at 511.

33. *Id.* at 510.

34. *Id.* at 511. Food Lion also sued ABC for violation of the North Carolina Unfair and Deceptive Trade Practices Act. *Id.*

35. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 959, 965 (M.D.N.C. 1997).

36. *Id.* at 958.

over five million dollars in punitive damages.<sup>37</sup> The district court determined the punitive damages were excessive, and Food Lion accepted a remittitur of \$315,000.<sup>38</sup>

On appeal, the Fourth Circuit overturned the fraud verdict because Food Lion had failed to satisfy the requisite element of injury.<sup>39</sup> Specifically, Food Lion had not proven that it had been injured by reasonably relying on the investigators' job application misrepresentations.<sup>40</sup> Because the investigators were hired as "at will" employees, Food Lion's claim for lost administrative costs associated with the turnover of the two journalists failed.<sup>41</sup> The investigators' misrepresentations also did not amount to trespass because they did not cause Food Lion any trespass-type harm.

Although the investigators breached their duty of loyalty, Food Lion could not recover reputational damages.<sup>42</sup> Relying on the Supreme Court opinion *Hustler Magazine v. Falwell*,<sup>43</sup> the Fourth Circuit reasoned that reputational damages from ABC's publication could only be sought under a defamation claim, which required proof of actual malice.<sup>44</sup> Food Lion could not circumvent the heightened First Amendment scrutiny of defamation claims by seeking reputational damages through the torts of trespass and breach of loyalty.<sup>45</sup> Food Lion was ultimately awarded two dollars in damages.<sup>46</sup>

### III. POOR FEDERAL ENFORCEMENT IN THE AGE OF FACTORY FARMING

Independent whistleblowing is necessary due to inadequate federal oversight of animal facilities. The USDA's primary animal-welfare regime, the Animal Welfare Act (the "AWA"), does not apply to farm animals.<sup>47</sup> In fact, the USDA imposes no standards for the day-to-day treatment of farm animals. The Humane Methods of Slaughter Act (the "HMSA") regulates how farm animals may be slaughtered. However, the HMSA is poorly enforced and inspectors

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37. *Id.* at 965.

38. *Food Lion, Inc.*, 194 F.3d at 511.

39. *Id.* at 511-12.

40. *Id.* at 512, 514.

41. *Id.* at 513.

42. *Id.* at 518.

43. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

44. *Food Lion, Inc.*, 194 F.3d at 511.

45. *Id.* at 522-23.

46. *Id.* at 524.

47. The AWA does not apply to "farm animals used for food or fiber." United States Department of Agriculture, *Animal Welfare Act*, Sept. 29, 2017, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA\\_AWA](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA) [<https://perma.cc/5JWE-LZZZ>] (last visited Apr. 8, 2019). Additionally, the AWA does not cover amphibians, reptiles, or any rats, mice, and birds used in research. *Id.*

often do not suspend plant operations or take regulatory actions when they appear warranted.<sup>48</sup>

The USDA's 28-Hour Law regulates the humane transport of farm animals. The 28-Hour Law is also poorly enforced and contains many loopholes.<sup>49</sup> Moreover, neither the HMSA nor the 28-Hour Law applies to chickens, which account for ninety-five percent of U.S. farm animals.<sup>50</sup>

#### A. *USDA Information Blackout*

Despite the USDA's shortcomings, the USDA's public records of Animal Welfare Act violations have driven animal-welfare reform. In January 2017, however, the USDA pulled all AWA violation records from its website.<sup>51</sup> Amidst public criticism, the USDA stated that it would continue to process requests through the Freedom of Information Act (the "FOIA").<sup>52</sup> However, journalists' subsequent FOIA requests for AWA reports have been returned almost entirely redacted.<sup>53</sup>

This sudden lack of information has been a blow to the Humane Society's Stop the Puppy Mill campaign. Through this campaign, the Humane Society has partnered with seven states and several municipalities to require that pet stores purchase puppies only from breeding facilities with clean AWA inspection reports.<sup>54</sup> Without access to AWA records, it is difficult to identify and blacklist abusive dog breeders.<sup>55</sup>

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48. U.S. Government Accountability Office, *Humane Methods of Slaughter Act: Weaknesses in USDA Enforcement*, Mar. 4, 2010, <https://www.gao.gov/products/GAO-10-487T> [<https://perma.cc/STB3-QETV>] (last visited Apr. 8, 2019).

49. Kate Brindle, *Farmed Animals in Transport: an Analysis of the Twenty-Eight Hour Law and Recommendations for Greater Animal Welfare*, Digital Commons at Michigan State University College of Law (2016), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1253&context=king> [<https://perma.cc/H7HE-TBBV>] (last visited Apr. 8, 2019).

50. See U.S. Department of Agriculture Food Safety and Inspection Service, *Treatment of Live Poultry Before Slaughter; Notice*, Federal Register Vol. 70, No. 187, 56624-26, September 28, 2005, <https://www.federalregister.gov/documents/2005/09/28/05-19378/treatment-of-live-poultry-before-slaughter> [<https://perma.cc/2EB7-7XMA>] (last visited Apr. 25, 2019).

51. Karin Brulliard, *USDA abruptly purges animal welfare information from its website*, WASH. POST, Feb. 3, 2017, [https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm\\_term=.9ec5ab2918b3](https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm_term=.9ec5ab2918b3) [<https://perma.cc/9XLA-DL96>] (last visited Apr. 8, 2019).

52. United States Department of Agriculture, *AWA Inspection and Annual Reports*, Aug. 18, 2017, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/awa-inspection-and-annual-reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports) [<https://perma.cc/U53M-DJ6E>] (last visited Apr. 8, 2019).

53. Brulliard, *supra* note 51.

54. Natasha Daly and Rachael Bale, *We Asked the Government Why Animal Welfare Records Disappeared. They Sent 1,700 Blacked-Out Pages*, NAT'L GEO., May 1, 2017, <https://news.nationalgeographic.com/2017/05/usda-animal-welfare-records-foia-black-out-first-release/> [<https://perma.cc/Q4D9-LXQG>] (last visited Apr. 8, 2019).

55. *Id.*

As a result of poor federal oversight, some states have enacted their own farm-animal welfare statutes.<sup>56</sup> But in Missouri, like the majority of states, farm animals are excluded from state anti-cruelty laws. Farmers need only adhere to “normal or accepted practices of animal husbandry.”<sup>57</sup> This freedom to self-regulate has allowed for increasingly industrialized farming practices.

### B. *The Rise of Factory Farming*

Modern farming is a far cry from the days of Washington and Jefferson. Today, ninety-nine percent of U.S. farm animals live in factory farms.<sup>58</sup> In factory farms, animals live “indoors in conditions intended to maximize production at minimal cost.”<sup>59</sup> “Between 1997 and 2007, U.S. factory farms added 5,800 broiler chickens every hour.”<sup>60</sup> In that same period, factory farms added nearly 4,600 pigs and 650 cows daily.<sup>61</sup>

While farming practices have become less humane, the public’s desire for humane treatment of farm animals has increased.<sup>62</sup> Seventy-seven percent of consumers are concerned about farm-animal welfare, and seventy-eight percent of consumers think there should be an objective third party monitoring farm-animal welfare.<sup>63</sup> Because of the public’s interest in humane farming practices, factory farming is cloaked in secrecy.<sup>64</sup> Ag-gag laws assist animal facilities in this secrecy by imposing criminal liability on undercover reporters.<sup>65</sup>

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56. See *infra* Part VI.

57. See Mo. Rev. Stat. §§ 578.005–188.

58. ASPCA, *ASPCA Farm Surveys*, ASPCA, <https://www.aspc.org/shopwithyourheart/business-and-farmer-resources/aspc-farm-surveys> [https://perma.cc/5DRB-U9EZ] (last visited Jan. 25, 2019).

59. *Definition of Factory Farm*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/factory%20farm> [https://perma.cc/DZ9D-SHZM] (last visited Feb 11, 2018).

60. Kamelia Angelova, *13 Stunning Facts About The Rise Of Industrial Meat Farming In America*, BUS. INSIDER Jan. 27, 2011, <http://www.businessinsider.com/farm-factory-facts-2011-1#us-hog-factory-farms-added-4600-hogs-every-day-between-1997-and-2007> [https://perma.cc/SKK7-C9S7] (last visited Apr. 8, 2019).

61. *Id.*

62. Amelia Cornish et al., *What We Know about the Public’s Level of Concern for Farm Animal Welfare in Food Production in Developed Countries*, NAT’L INST. HEALTH, Nov. 16, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5126776/> [https://perma.cc/3TFE-7N2B] (last visited Apr. 8, 2019).

63. Bob Meadow & Joshua Ulibarri, *Results from a Recent Survey of American Consumers*, LAKE RES. PARTNERS, June 29, 2016, [https://www.aspc.org/sites/default/files/publicmemo\\_aspc\\_labeling\\_fi\\_rev1\\_0629716.pdf](https://www.aspc.org/sites/default/files/publicmemo_aspc_labeling_fi_rev1_0629716.pdf) [https://perma.cc/V7BZ-RE92] (last visited Apr. 8, 2019).

64. Nita Rao & Paul Solotaroff, *Animal Cruelty is the Price We Pay For Cheap Meat*, ROLLING STONE Dec. 10, 2013, <https://www.rollingstone.com/feature/belly-beast-meat-factory-farms-animal-activists> [https://perma.cc/YZ53-RCVJ] (last visited Apr. 8, 2019).

65. *Id.*

## IV. RECENT CONSTITUTIONAL CHALLENGES TO AG-GAG LAWS

Two recent federal rulings have stricken ag-gag laws as unconstitutional. In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit struck down two provisions in Idaho's ag-gag law for violating First Amendment free speech rights.<sup>66</sup> In *Animal Legal Defense Fund v. Herbert*, the District of Utah struck Utah's ag-gag law on First Amendment and Equal Protection grounds.<sup>67</sup> Both cases rely on the Supreme Court case of *U.S. v. Alvarez*.<sup>68</sup>

## A. U.S. v. Alvarez

In *Alvarez*, the Supreme Court invalidated the Stolen Valor Act for violating the First Amendment.<sup>69</sup> Congress passed the Act to criminalize lying about receiving the Congressional Medal of Honor.<sup>70</sup> However, the Act criminalized potentially harmless lies and thus exceeded Constitutional bounds.<sup>71</sup> The Court struck down the statute 6-3, and Justice Kennedy authored the plurality opinion.<sup>72</sup>

Justice Kennedy first observed that, absent historically-recognized examples,<sup>73</sup> falsity alone does not "bring the speech outside the First Amendment."<sup>74</sup> Laws against false speech have historically been linked to "defamation, fraud, or some other legally cognizable harm associated with" the false statement.<sup>75</sup> The Stolen Valor Act, by contrast, criminalized harmless lies.<sup>76</sup> The Act not only criminalized lying publicly about receiving the Congressional Medal of Honor, but also criminalized whispering the same lie in the privacy of one's own home.<sup>77</sup> This sweeping ban on speech included no requirement that the lie cause harm or generate any material gain.<sup>78</sup> Upholding

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66. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018).

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

68. *United States v. Alvarez*, 567 U.S. 709 (2012).

69. *Id.* at 730; 18 U.S.C. § 704(b) (2014).

70. *Alvarez*, 567 U.S. at 713.

71. *Id.* at 730.

72. *Id.* at 730. Chief Justice Roberts and Justices Ginsburg and Sotomayor joined Justice Kennedy's plurality opinion. *Id.*

73. False speech historically excluded from First Amendment protection includes: "[inciting] imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent." *Id.* at 717 (citations omitted). Three additional criminal prohibitions on false speech involve: (1) false statements made to a Government official, (2) perjury, and (3) impersonating a Government official. *Id.* at 720.

74. *Id.* at 719.

75. *Alvarez*, 567 U.S. at 719.

76. *Id.*

77. *Id.* at 723.

78. *Id.*

the Act would allow the government “to compile a list of subjects about which false statements are punishable.”<sup>79</sup>

The dissent also recognized that some lies warrant First Amendment protection.<sup>80</sup> The dissent would have upheld the Stolen Valor Act because it saw no “intrinsic value” in the lies criminalized by the Act.<sup>81</sup> In other cases, however, criminalizing lies could “chill other expression” falling within the First Amendment.<sup>82</sup> Accordingly, some lies warranted “strategic protection” in order to “ensure sufficient breathing space for protected speech.”<sup>83</sup> In his concurrence, Justice Breyer also recognized that, in “technical, philosophical, and scientific contexts,” false statements may assist the pursuit of truth.<sup>84</sup>

In an important remark, Justice Kennedy noted that governments may restrict lies told to secure valuable consideration, such as “offers of employment,” without violating the First Amendment.<sup>85</sup> This reasoning was central to the Ninth Circuit’s holding in *Wasden*.

#### B. Animal Legal Defense Fund v. Wasden

The Ninth Circuit recently struck two provisions in Idaho’s ag-gag law as unconstitutional.<sup>86</sup> Idaho’s ag-gag law criminalized (1) entering an agricultural facility by misrepresentation,<sup>87</sup> (2) obtaining records by misrepresentation with the intent to injure the facility, (3) obtaining employment at an agricultural facility by misrepresentation with the intent to injure the facility, and (4) entering an agricultural facility and recording the conduct of the facility.<sup>88</sup> A person convicted under the statute would face up to a year in prison, a \$5,000 fine, or both.<sup>89</sup>

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79. *Id.*

80. *Alvarez*, 567 U.S. at 750 (Alito, J., dissenting).

81. *Id.*

82. *Id.*

83. *Id.* at 750 (internal quotations omitted) (Alito, J., dissenting).

84. *Id.* at 733 (Breyer, J., concurring).

85. *Alvarez*, 567 U.S. at 723.

86. *Wasden*, 878 F.3d at 1205.

87. The full provision prohibited entry by force, threat, misrepresentation, or trespass, but ALDF challenged only the misrepresentation prong. *Id.* at 1193.

88. Idaho Code § 18-7042(1)(a)-(d). Idaho’s law also criminalized intentionally injuring an agricultural facility’s productions; however, the Ninth Circuit did not address this provision. Idaho Code § 18-7042(1)(a)-(e); *Wasden*, 878 F.3d at 1193.

89. *Wasden*, 878 F.3d at 1191; Idaho Code § 18-7042.

### 1. Background of Idaho's Ag-Gag Law

In 2012, Mercy For Animals<sup>90</sup> published footage of animal abuse at a Bettencourt Dairy farm in Idaho.<sup>91</sup> The video shows a dairy farmer attaching a chain around a sick cow's neck then dragging her with a tractor.<sup>92</sup> Workers are also seen repeatedly beating, kicking, shocking, and jumping on cows to force them to move.<sup>93</sup> In response to public outcry, Burger King cut ties with Bettencourt Dairies.<sup>94</sup> Wendy's and In-N-Out Burger also publicly dissociated from the dairy farm.<sup>95</sup> Bettencourt responded by firing the abusive employees, instituting safety protocols, and conducting an animal-welfare audit.<sup>96</sup>

The Idaho legislature and agricultural industry responded by passing ag-gag legislation. The Idaho Dairymen's Association drafted and sponsored Idaho Code § 18-7042.<sup>97</sup> During bill discussions, legislators likened Mercy for Animals and other animal activists to "terrorists," and "marauding invaders."<sup>98</sup> Legislators described animal-abuse videos as a "blackmail tool" used to unfairly prosecute farms in the press.<sup>99</sup> Legislators also accused activists of contriving issues "simply to bring in the donations."<sup>100</sup>

90. Mercy For Animals is an international non-profit organization "dedicated to preventing cruelty to farmed animals and promoting compassionate food choices and policies." *About Mercy For Animals*, MERCY FOR ANIMALS, <https://mercyforanimals.org/about> [https://perma.cc/6QNW-PVST] (last visited Feb. 1, 2019).

91. *Wasden*, 878 F.3d at 1189. Bettencourt Dairies operates multiple dairy farms in the state of Idaho. Mychel Matthews, *Bettencourt Sells Dairy that Was Site of Animal Cruelty Video*, MAGICVALLEY.COM, May 11, 2014, [https://magicvalley.com/business/agriculture/bettencourt-sells-dairy-that-was-site-of-animal-cruelty-video/article\\_9402143b-384f-53ad-a014-c93076bcd6d8.html](https://magicvalley.com/business/agriculture/bettencourt-sells-dairy-that-was-site-of-animal-cruelty-video/article_9402143b-384f-53ad-a014-c93076bcd6d8.html) [https://perma.cc/2CKQ-HD9K] (last visited Apr. 8, 2019).

92. Matt Pearce, *Idaho's ban on undercover animal abuse videos struck down by federal judge*, LA TIMES, Aug. 4, 2015, <http://www.latimes.com/nation/la-na-idaho-ag-gag-20150803-story.html> [https://perma.cc/8VA6-BMZJ] (last visited Apr. 8, 2019).

93. *Wasden*, 878 F.3d at 1189; see also Nathan Runkle, *Undercover videos critical to exposing abuse*, USA TODAY, Aug. 13, 2015, <https://www.usatoday.com/story/opinion/2015/08/13/undercover-videos-exposing-abuse-column/31208801/> [https://perma.cc/Q984-ULHW] (last visited Apr. 8, 2019) (describing the video's depiction of "[s]ick and injured cows bellow[ing] in agony as they are kicked, stomped on, dragged, beaten, and even sexually molested").

94. Ann Almendrala, *In-N-Out Responds To Animal Abuse Allegations Directed At Idaho Dairy Farm*, HUFFINGTON POST, Dec. 6, 2017, [https://www.huffingtonpost.com/2012/10/11/in-n-out-animal-abuse\\_n\\_1958505.html](https://www.huffingtonpost.com/2012/10/11/in-n-out-animal-abuse_n_1958505.html) [https://perma.cc/4C9H-Q2A4] (last visited Apr. 8, 2019).

95. Andrew Crisp, *Graphic Video Taken at Bettencourt Dairies Shows 'Culture of Cruelty,' Says Mercy for Animals*, BOISE WEEKLY, Oct. 10, 2012, <https://www.boiseweekly.com/CityDesk/archives/2012/10/10/graphic-video-taken-at-bettencourt-dairies-shows-culture-of-cruelty-says-mercy-for-animals> [https://perma.cc/LS55-XC72] (last visited Apr. 8, 2019).

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

97. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015).

98. *Id.* at 1200.

99. *Wasden*, 878 F.3d at 1192.

100. *Otter*, 118 F. Supp. 3d at 1200.

## 2. Constitutional Analysis of Idaho's Ag-Gag Law

In 2014, The Animal Legal Defense Fund (the "ALDF") challenged Idaho's ag-gag law on First Amendment and Equal Protection grounds.<sup>101</sup> The District of Idaho granted ALDF's motion for summary judgment on both grounds and struck Idaho's law in its entirety.<sup>102</sup> Idaho's criminalization of lying and filming were content-based restrictions on speech relating to matters of public concern.<sup>103</sup> Such speech is at the heart of the First Amendment's protections.<sup>104</sup>

The district court also held that Idaho's ag-gag law violated the Equal Protection Clause.<sup>105</sup> The law's purpose and effect was to discriminate against animal-welfare groups.<sup>106</sup> Idaho's bare desire to harm a politically unpopular group furthered no legitimate or rational purpose, thus, the law failed rational basis review.<sup>107</sup> On appeal, the Ninth Circuit affirmed and reversed in part.<sup>108</sup> The court's opinion was driven by *U.S. v. Alvarez*.<sup>109</sup>

### a. Idaho's General Lying Ban

The Ninth Circuit first examined Idaho's criminalization of lies told to gain entry to an agricultural facility.<sup>110</sup> Idaho's ban, like the Stolen Valor Act, criminalized false statements that might not lead to material gain or legal harm.<sup>111</sup> Idaho's argument, that entering property *is* a material gain, had no basis in law.<sup>112</sup> A liar might immediately be discovered and removed from a facility. The liar would have gained nothing yet would face criminal liability. Additionally, lying to gain entry did not automatically create a trespass. Lying by itself did not implicate interests that the tort of trespass seeks to protect—"the ownership and peaceable possession of land."<sup>113</sup> Because Idaho targeted false speech and nothing more, the regulation triggered "the most exacting scrutiny."<sup>114</sup>

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101. *Id.* at 1199–1200.

102. *Id.* at 1202.

103. *Id.* at 1209.

104. *Id.*

105. *Otter*, 118 F. Supp. 3d at 1209.

106. *Id.* at 1202.

107. *Id.* at 1211.

108. *Id.* at 1195.

109. *United States v. Alvarez*, 567 U.S. 709 (2012).

110. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1193–4 (9th Cir. 2018). Idaho Code § 18–7042(1)(a) prohibited entry by force, threat, misrepresentation or trespass, but ALDF challenged only the misrepresentation prong. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1196 (quoting *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999)).

114. *Id.*; see also *Alvarez*, 567 U.S. at 719 (regulations targeting falsity and nothing more are subject to the "most exacting scrutiny").

Under strict scrutiny analysis, Idaho had to demonstrate a compelling state interest. Additionally, the law had to be narrowly tailored, or “actually necessary,” toward achieving such interest. Idaho asserted interests in regulating property rights and protecting the farm industry.<sup>115</sup> These interests, however, were not compelling to the court because Idaho already has a criminal trespass statute that does not burden speech.<sup>116</sup> Further, Idaho’s legislative history indicated that Idaho’s interest likely was to target investigative journalists.<sup>117</sup>

Next, Idaho’s statute was not narrowly tailored. The ban applied to “almost limitless times and settings.”<sup>118</sup> The court was unsettled by Idaho’s broad definition of an “agricultural production facility.”<sup>119</sup> The law implicated lies told to gain access to publicly-accessible facilities like grocery stores, garden nurseries, and restaurants with an herb garden.<sup>120</sup> For example, a restaurant critic might conceal her identity to be sat at a table where she could easily view a restaurant’s operations. The critic’s lie would not cause fraud, gain, or a legally cognizable harm, yet the critic could face a year in prison or a \$5,000 fine. Accordingly, Idaho’s criminalization of lying to gain access to an agricultural facility failed strict scrutiny.<sup>121</sup>

The Ninth Circuit added that Idaho’s lying ban could be fixed with an intent requirement.<sup>122</sup> After *Alvarez*, Congress amended the Stolen Valor Act to criminalize only lies told with the intent “to obtain money, property, or other tangible benefit.”<sup>123</sup> Idaho likewise could comply with the First Amendment by proscribing only lies told with the intent to injure the agricultural facility.<sup>124</sup>

#### b. Idaho’s Ban on Lying to Obtain Records

Next, the Ninth Circuit disagreed with the lower court that Idaho’s ban on lying to obtain agricultural records violated the Equal Protection Clause.<sup>125</sup> The records provision was partly motivated by animus toward animal-welfare groups, but the legislative record also revealed legitimate interests.<sup>126</sup> Legislators had stated concerns over breeding papers and other agricultural documents.<sup>127</sup> Moreover, the ban was not a free speech violation because it

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115. *Wasden*, 878 F.3d at 1196.

116. Idaho Code § 18–7008(9).

117. *Wasden*, 878 F.3d at 1196.

118. *Id.* (quoting *Alvarez*, 567 U.S. at 722–23).

119. *Id.*

120. *Id.*

121. *Id.* at 1198.

122. *Wasden*, 878 F.3d at 1198.

123. *Id.*; 18 U.S.C. § 704(b) (2013).

124. *Wasden*, 878 F.3d at 1198.

125. *Id.* at 1200.

126. *Id.* at 1200–01.

127. *Id.* at 1200.

aimed at conduct—telling lies for “material gain.”<sup>128</sup> Thus, Idaho’s ban on lying to obtain agricultural records survived rational basis review.<sup>129</sup>

c. Idaho’s Ban on Lying to Gain Employment

The Ninth Circuit also reversed the district court’s ruling that Idaho could not ban lies told to gain employment.<sup>130</sup> Based on *Alvarez*, Idaho had the right to restrict false speech made to secure “offers of employment.”<sup>131</sup> The Ninth Circuit rejected the lower court’s argument that undercover investigators’ lies are not told for the material gain of employment but rather to expose threats to the public.<sup>132</sup> While this might be true, investigators still receive payment for their work.<sup>133</sup>

Idaho’s prohibition on lies to gain employment was further narrowed by an intent requirement.<sup>134</sup> The statute criminalized only lies told with intent to cause economic or other injury to the agricultural facility.<sup>135</sup> As the court observed, not every undercover investigator “hired under false pretenses intends to harm the employer.”<sup>136</sup> This intent element would require proof.<sup>137</sup>

Idaho’s ban on lies to gain employment also was not an Equal Protection Clause violation. Idaho had a legitimate interest in banning job-seeking lies.<sup>138</sup> Like the records provision, the ban addressed privacy concerns because employees have access to confidential materials and secured locations within facilities.<sup>139</sup>

Moreover, Idaho’s restitution clause did not unfairly target undercover journalists.<sup>140</sup> The clause requires that a defendant make restitution to a victim under the statute for twice the damages caused.<sup>141</sup> Because the restitution clause excludes “less tangible damage,” the court read the clause to exclude publication and reputational damages.<sup>142</sup> Accordingly, Idaho’s ban on lies made to secure employment had a rational purpose beyond harming journalists and was not an Equal Protection violation.<sup>143</sup>

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128. *Id.* (quoting *United States v. Alvarez*, 567 U.S. 709, 723 (2012)).

129. *Wasden*, 878 F.3d at 1201.

130. *Id.* at 1202.

131. *Id.* at 1201.

132. *Id.* at 1201—02.

133. *Id.* at 1202.

134. *Wasden*, 878 F.3d at 1201.

135. *Id.*

136. *Id.* at 1202.

137. *Id.*

138. *Id.* at 1196.

139. *Wasden*, 878 F.3d at 1199–1200, 1202.

140. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)).

141. Idaho Code § 18–7042(4).

142. *Wasden*, 878 F.3d at 1202 (citing *Falwell*, 485 U.S. at 52); Idaho Code § 18–7042(4).

143. *Wasden*, 878 F.3d at 1193, 1205.

d. Idaho's Recording Ban

Idaho's recording ban, however, was a content-based restriction of First Amendment speech.<sup>144</sup> First, the court recognized the "First Amendment right to film matters of public interest."<sup>145</sup> The First Amendment's protection of visual recordings would have little meaning if the act of making a recording were not also protected as expressive activity.<sup>146</sup>

Next, Idaho's recording ban was a content-based prohibition on speech because it regulated speech according to subject matter.<sup>147</sup> Criminality depended on whether a recording depicted "the conduct of an agricultural production facility's operations."<sup>148</sup> The ban's purpose and justifications were also content-based.<sup>149</sup> Idaho sought to eliminate all recordings of agricultural operations to prohibit public discussion on an entire topic.<sup>150</sup> Therefore, Idaho's recording ban was subject to strict scrutiny.<sup>151</sup>

As with the lying ban, the court doubted that Idaho enacted its recording ban to protect property rights.<sup>152</sup> Even accepting this interest, the recording ban was not narrowly tailored.<sup>153</sup> Idaho's ban on audio and video recordings was underinclusive because it ignored the danger of photographs.<sup>154</sup> It also made little sense why Idaho banned only videos *of* agricultural operations. Because the ban singled out one mode of speech, it strongly suggested the ban's purpose was "to keep controversy and suspect practices out of the public eye."<sup>155</sup>

Finally, the ban was overinclusive because plenty of remedies already exist to address Idaho's purported property and privacy concerns.<sup>156</sup> Idaho recognizes torts of trade-secret theft and invasion of privacy, and neither burdens protected speech.<sup>157</sup>

Accordingly, Idaho's Recordings Clause failed strict scrutiny.<sup>158</sup> Because the recording ban violated the First Amendment, the court did not reach ALDF's Equal Protection claim.<sup>159</sup>

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144. *Id.* at 1203.

145. *Id.* (quoting *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)).

146. *Id.* (citing *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)).

147. *Id.* at 1204 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

148. *Wasden*, 878 F.3d at 1204; Idaho Code § 18-7042(1)(d).

149. *Wasden*, 878 F.3d at 1204 (citing *Reed*, 135 S. Ct. at 2228).

150. *Id.* at 1204.

151. *Id.*

152. *Id.* at 1199.

153. *Id.* at 1205.

154. *Wasden*, 878 F.3d at 1204-05.

155. *Id.* at 1205.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Wasden*, 878 F.3d at 1204-05.

### C. Animal Legal Defense Fund v. Herbert

In *Herbert*, the District of Utah struck down Utah's ag-gag law as unconstitutional.<sup>160</sup> Utah's ag-gag law criminalized: (1) accessing an agricultural operation under false pretenses, (2) bugging an agricultural operation, (3) filming an agricultural operation after applying for a position with the intent to film, and (4) filming an agricultural operation while trespassing.<sup>161</sup>

#### 1. Background of Utah's Ag-Gag Law

Utah's legislature passed its ag-gag law in 2012 to address "propaganda groups" trying to "undo[] animal agriculture."<sup>162</sup> The bill's sponsor aimed to stop "vegetarian people" from "hiding cameras and trying to . . . modify the films."<sup>163</sup>

Shortly after the law's enactment, Utah became the first state to charge a person under an ag-gag law.<sup>164</sup> Amy Meyer was charged after she filmed a slaughterhouse worker pushing a sick cow with a bulldozer.<sup>165</sup> Although Meyer filmed on public property, Utah charged her with filming an agricultural operation while trespassing.<sup>166</sup> The state eventually dismissed the case without prejudice.<sup>167</sup>

Meyer then filed suit against Utah's governor and attorney general, challenging Utah's ag-gag law.<sup>168</sup> ALDF and People for the Ethical Treatment of Animals joined as plaintiffs.<sup>169</sup> The plaintiffs challenged Utah's law on First Amendment and Equal Protection grounds.<sup>170</sup>

#### 2. Constitutional Analysis of Utah's Ag-Gag Law

The court first addressed the plaintiffs' standing to sue.<sup>171</sup> The question was whether the plaintiffs' alleged injury—chilling effect on speech—was sufficiently concrete.<sup>172</sup> Under the Tenth Circuit's three-part test, the court asked whether (1) the plaintiffs had engaged in the speech implicated by the statute in the past, (2) the plaintiffs had a desire but no specific plans to engage in the speech, and (3) whether the plaintiffs presently had no intention of engaging in

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160. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1195–96, 1213 (D. Utah 2017).

161. Utah Code § 76-6-112 (2012).

162. *Herbert*, 263 F. Supp. 3d at 1198, 1212.

163. *Id.* at 1198.

164. *Id.* at 1199.

165. *Id.*

166. *Id.*

167. *Herbert*, 263 F. Supp. 3d at 1199.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Herbert*, 263 F. Supp. 3d at 1200.

the speech because of a credible threat the statute will be enforced.<sup>173</sup> Because the plaintiffs all had previously engaged in undercover investigations now prohibited by Utah's statute, and all wished to engage in more investigations but were refraining for fear of prosecution, the plaintiffs had standing to sue.<sup>174</sup>

a. Utah's Lying Ban

Next, the court considered whether Utah's criminalization of lying to gain entry implicated protected First Amendment speech.<sup>175</sup> As in *Wasden*, the court looked to *Alvarez* for the rule that governmental restrictions of harmless lies trigger First Amendment scrutiny.<sup>176</sup> Accordingly, the court asked whether lying to gain entry to a farm always causes harm.<sup>177</sup>

The court easily disposed of Utah's argument that lying to access a farm causes harm to farm animals and employees.<sup>178</sup> While this may sometimes be true, such lies do not always harm animals and employees.<sup>179</sup>

The court then considered Utah's alternative argument that lying to gain entry always causes the harm of trespass.<sup>180</sup> Utah's argument failed because a liar is not a trespasser "unless and until" the liar causes "trespass-type harm."<sup>181</sup> Even if consent is obtained by lying, the consent remains valid until the liar causes trespass-related harm.<sup>182</sup>

The court drew on the Seventh Circuit's reasoning in *Desnick v. American Broadcasting Cos.*<sup>183</sup> In *Desnick*, ABC investigators obtained consent to enter an ophthalmic clinic by posing as patients.<sup>184</sup> Once inside, the investigators secretly filmed their eye examinations.<sup>185</sup> ABC later released an exposé on the clinic's poor practices.<sup>186</sup> The Seventh Circuit rejected the clinic's trespass claims because the investigators committed no trespass-related harms, such as entering unauthorized areas, stealing trade secrets, or disrupting office activities.<sup>187</sup> It made no difference that the ophthalmic clinic would have denied the investigators entry had it known their true intentions.<sup>188</sup> The investigators'

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173. *Id.*

174. *Id.*

175. *See id.* at 1203–05.

176. *Id.* at 1201.

177. *Herbert*, 263 F. Supp. 3d at 1202.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1203.

182. *Herbert*, 263 F. Supp. 3d at 1203.

183. *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345 (7th Cir. 1995).

184. *Id.* at 1348.

185. *Id.*

186. *Id.* at 1347–48.

187. *Id.* at 1351–53.

188. *Desnick*, 44 F.3d at 1351.

entry had not infringed on the specific interests that the tort of trespass seeks to protect.<sup>189</sup>

The court also considered *Food Lion Inc. v. Capital Cities/ABC, Inc.*, where ABC reporters falsified their resumes in order to become supermarket employees.<sup>190</sup> Once employed, the reporters filmed various food-safety violations.<sup>191</sup> ABC again released the reporters' videos.<sup>192</sup> The Fourth Circuit held the reporters did not commit trespass-related harms either by lying on their job applications or covertly filming other employees.<sup>193</sup> The fact that the supermarket would have denied the reporters entry had it known their intentions did not, without more, render the reporters trespassers.<sup>194</sup>

Returning to Utah's lying provision, in *Herbert*, the District of Utah determined that not all lies told to gain access to an agricultural facility necessarily cause trespass-type harm.<sup>195</sup> A person might give false reasons for wanting a tour, or falsely claim interest in purchasing the facility to gain entry.<sup>196</sup> These lies, without additional trespass-related harm, would not create a trespass.<sup>197</sup> Therefore, like the Stolen Valor Act, Utah's law criminalized harmless lies.

Also like the Stolen Valor Act, Utah's lying ban was content-based. Authorities would only know if someone violated the lying provision by reviewing what was said and determining if it was a lie. This was the "quintessential example of a content-based restriction" that triggered strict scrutiny.<sup>198</sup>

#### b. Utah's Recording Provision

Utah's criminalization of recording an agricultural operation also implicated First Amendment speech.<sup>199</sup> As in *Wasden*, the court recognized the First Amendment right to film.<sup>200</sup> Otherwise, the government might circumvent a person's right to broadcast a film by banning the process of making it.<sup>201</sup>

Further, Utah's recording ban was a content-based restriction. For example, a person might trespass on a farm and film a flock of geese flying overhead. The

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189. *Id.* at 1353.

190. *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

191. *Id.* at 510–11.

192. *Id.* at 511.

193. *Id.* at 518.

194. *Id.*

195. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017).

196. *See id.*

197. *Id.*

198. *Id.* at 1210.

199. *Id.* at 1206–07.

200. *Herbert*, 263 F. Supp. 3d at 1206–07.

201. *Id.*

film would not be *of* an agricultural operation and would not violate Utah's law. Because authorities would have to view a recording to determine if its contents were criminal, the law was content-based.

c. Utah's Lying and Recording Provisions Fail Strict Scrutiny

Because Utah's lying and recording provisions were content-based restrictions of protected speech, the court applied strict scrutiny.<sup>202</sup> Under strict scrutiny, Utah first had to demonstrate a compelling interest.<sup>203</sup> Utah argued its law furthered four interests: (1) protecting animals from disease, (2) protecting animals from injury, (3) protecting workers from disease, and (4) protecting workers from injury by unqualified workers.<sup>204</sup> Considering the legislative history behind Utah's ag-gag law, the court doubted Utah's professed interests.<sup>205</sup> Also, Utah provided no evidence that undercover operatives had previously threatened these interests.<sup>206</sup> Accordingly, Utah's asserted harm was "entirely speculative."<sup>207</sup>

Even accepting Utah's proffered interests, Utah's lying and recording bans were not narrowly tailored. Many content-neutral laws would address Utah's interests. The law was also underinclusive by failing to address harms caused by those who are not undercover investigators.<sup>208</sup> Rather, the law was "perfectly tailored toward [] preventing undercover investigators from exposing abuses at agricultural facilities."<sup>209</sup> Accordingly, Utah's ag-gag law failed strict scrutiny.<sup>210</sup>

## V. CONSTITUTIONAL ANALYSIS OF MISSOURI'S AG-GAG LAWS

Missouri has two ag-gag laws. Section 578.405 criminalizes lies told to access an animal or agricultural facility.<sup>211</sup> Section 578.013 requires farm workers to turn over videos depicting animal abuse within twenty-four hours or face criminal liability.<sup>212</sup> Both laws restrict protected First Amendment Speech.

### A. Missouri's Lying Provision: § 578.405

Like Utah's and Idaho's laws, Missouri's law criminalizes lies told to gain entry to an animal facility. Missouri's lying provision is part of a larger law, §

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202. *Id.* at 1209.

203. *Id.* at 1211

204. *Id.*

205. *Herbert*, 263 F. Supp. 3d at 1212–13.

206. *Id.* at 1212.

207. *Id.*

208. *Id.* at 1212–13.

209. *Id.* at 1213.

210. *Herbert*, 263 F. Supp. 3d at 1213.

211. Mo. Rev. Stat. § 578.405 (2017).

212. Mo. Rev. Stat. § 578.013 (2017).

578.405, entitled “Prohibited acts against animal research and production facilities.” Section 578.405(3) is the ag-gag provision. It criminalizes lies told to gain access to an animal facility “for the purpose of performing acts not authorized by the facility.”<sup>213</sup> “Animal facility” is defined broadly to include “any facility involving the use of animals.”<sup>214</sup> With an intent clause, Missouri’s lying ban is narrower than Utah’s and Idaho’s general lying bans.<sup>215</sup> Those charged under the statute face a minimum class A misdemeanor punishable by up to one year in prison, a \$2,000 fine, or both.<sup>216</sup>

#### 1. Constitutional Analysis of § 578.405

Like Idaho’s and Utah’s general lying bans, Missouri’s lying ban criminalizes protected First Amendment speech.<sup>217</sup> Thus, § 578.405 should not survive strict scrutiny.

##### a. Missouri’s Lying Ban Criminalizes Protected Speech

Based on *Alvarez*, Missouri cannot criminalize lies that do not generate material gain or cause legally cognizable harm.<sup>218</sup> *Wasden* and *Herbert* struck down state laws banning lying to gain entry to an agricultural facility.<sup>219</sup> Those laws impermissibly criminalized lies that generated no gain or harm.<sup>220</sup> The question follows whether Missouri’s ban on lies told to gain entry to an animal facility “for the purpose of performing acts not authorized by the facility” is sufficiently narrow to comply with *Alvarez*.<sup>221</sup>

Despite its intent requirement, Missouri’s lying ban is unconstitutional. As *Wasden* and *Herbert* show, a dishonest entrant does not necessarily harm a facility’s animals or employees.<sup>222</sup> These cases also demonstrate that lying to gain entry does not automatically constitute a legal trespass.<sup>223</sup> Accordingly, Missouri criminalizes lies that do not necessarily harm animals, workers, or amount to trespass.

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213. Mo. Rev. Stat. § 578.405(3) (2017).

214. Mo. Rev. Stat. § 578.405(2) (2017).

215. See *infra* Part IV.

216. Mo. Rev. Stat. § 578.405(4) (2017); Mo. Rev. Stat. § 558.002(2) (2017); Mo. Rev. Stat. § 558.011(6) (2017).

217. Mo. Rev. Stat. § 578.405 (2017).

218. See *supra* Part IV.

219. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1203, 1205–06 (D. Utah 2017).

220. *Wasden*, 878 F.3d at 1198–99; *Herbert*, 263 F. Supp. 3d at 1202–06.

221. Mo. Rev. Stat. § 578.405(3) (2017).

222. See *supra* Part IV.

223. *Wasden*, 878 F.3d at 1196–97; *Herbert*, 263 F. Supp. 3d at 1203; see, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

In *Wasden*, the Ninth Circuit did observe that Idaho's lying ban might be valid if it contained an "intent to injure" requirement.<sup>224</sup> Yet, Missouri's requirement of an intent to perform *unauthorized acts* does not satisfy this "intent to injure" requirement. An animal facility may prohibit virtually any conduct, whether or not it causes legally cognizable harm.

Imagine a factory farm that prohibits yelling inside its barns. A mischievous teenager intending to yell at the farm animals might lie about her reasons for taking a farm tour. Although neither the teen's lie nor her conduct would generate material gain or cause legally cognizable harm, the teen could face criminal liability under § 578.405(3).<sup>225</sup>

Or consider an undercover reporter who lies to access a puppy mill where filming is prohibited. The reporter expresses interest in purchasing a litter of puppies when in fact he intends to surreptitiously film abused dogs. The only way that the reporter will be discovered is if the animal abuse exists. If no abuse exists, the reporter has told a lie but done nothing more. Under Missouri's ag-gag law, he would face criminal liability nonetheless.

By empowering animal facilities to decide what acts are unauthorized—and therefore criminal—Missouri has turned animal facilities into "state-backed censors."<sup>226</sup> Of course a facility may prohibit any list of activities and may eject anyone who violates its rules. However, following *Alvarez*, Missouri may *criminalize* only those lies told to secure material gain or cause legally cognizable harm.<sup>227</sup> Missouri cannot circumvent this constitutional requirement by allowing animal facilities to decide which lies trigger criminal liability.

Even the *Alvarez* dissenters recognized that certain lies deserve strategic protection so that protected speech may have breathing space.<sup>228</sup> Lies that undercover reporters must tell in order to access animal facilities should fall into this category. If reporters' lies are not given strategic protection, Missouri can effectively suppress speech on a matter of public concern—animal abuse inside Missouri's factory farms and puppy mills.<sup>229</sup>

Like Idaho's and Utah's lying laws, Missouri's lying law is a content-based restriction. Authorities would have to examine what was said to determine if a person lied.<sup>230</sup> Therefore, Missouri's lying ban triggers strict scrutiny.<sup>231</sup>

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224. *Wasden*, 878 F.3d at 1198.

225. Mo. Rev. Stat. § 578.405(3) (2017).

226. *Wasden*, 878 F.3d at 1205.

227. *United States v. Alvarez*, 567 U.S. 709, 723 (2011).

228. *Alvarez*, 567 U.S. at 750 (Alito, J., dissenting).

229. *See Reid & Kingery*, *supra* note 6, at 66–67.

230. *See supra* Part IV.

231. *See, e.g., Alvarez*, 567 U.S. at 715.

b. Missouri's Lying Ban Cannot Survive Strict Scrutiny

Under strict scrutiny, Missouri would have to demonstrate a compelling interest in criminalizing lies told to gain entry to an animal facility with the purpose to perform unauthorized acts. Missouri's likely purpose is to protect the agricultural industry from public scrutiny. *Wasden* and *Herbert* instruct that targeting undercover reporting to protect animal facilities from "the court of public opinion"<sup>232</sup> is not a valid state interest.<sup>233</sup> However, unlike with Idaho's and Utah's ag-gag laws, there is no legislative history available for Missouri's lying ban. Therefore, Missouri might plausibly assert an interest in privacy and property rights. Regardless of Missouri's purported state interest, Missouri's ban on protected speech is not narrowly tailored.

Specifically, Missouri's lying ban is not narrowly tailored to any privacy rights Missouri might assert. First, like *Alvarez*, *Wasden*, and *Herbert*, Missouri's statute is overinclusive because it sweeps up a multitude of harmless lies.<sup>234</sup> Second, Missouri already has laws that protect animal facilities without burdening speech.<sup>235</sup> Section 578.405 prohibits damaging, vandalizing, or stealing an animal facility's property.<sup>236</sup> Additionally, § 578.405 prohibits interfering with an animal facility with intent to destroy, alter, or duplicate records, and knowingly obtaining records through deception.<sup>237</sup> Section 578.405 further states that anyone who enters or remains on an animal facility with the intent to commit these acts is subject to prosecution.<sup>238</sup> With multiple provisions criminalizing damage and theft in animal facilities, Missouri's restriction on protected speech is not "actually necessary" to achieve property and privacy interests.<sup>239</sup> Accordingly, Missouri's lying ban is a content-based restriction that fails strict scrutiny.

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232. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1191–92, 1197 (9th Cir. 2018).

233. *Id.* at 1189, 1195; *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1212–13 (D. Utah 2017).

234. *See supra* Part IV.

235. *See, e.g., Alvarez*, 567 U.S. at 729 (noting that the government could compile a registry of Medal of Honor recipients to prevent fraudulent claims).

236. Mo. Rev. Stat. § 578.405(3) (2017).

237. Mo. Rev. Stat. § 578.405(4)–(5) (2017).

238. Mo. Rev. Stat. § 578.405(6) (2017).

239. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1196 (9th Cir. 2018) ("Even assuming Idaho has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not 'actually necessary' to protect those rights."); *see also Alvarez*, 567 U.S. at 725 ("[T]o recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest.").

### B. *Missouri's Mandatory-Reporting Statute: § 578.013*

Missouri's second ag-gag law restricts a farm worker's right to document animal abuse. Under § 578.013,<sup>240</sup> any farm worker who records what he or she believes is farm animal abuse must turn the video over to law-enforcement within twenty-four hours or face criminal liability. The recording may not be edited or spliced.<sup>241</sup> At first blush, Missouri's mandatory-reporting law could be an animal welfare statute. The law's legislative history reveals, however, that its purpose is to frustrate undercover farm investigations.

#### 1. Legislative History Behind Missouri's Mandatory Reporting Law: § 578.013

Missouri's mandatory-reporting statute is a watered-down version of an ag-gag bill first proposed by the Missouri House.<sup>242</sup> In 2012, the Missouri House passed HB 1860,<sup>243</sup> which would have criminalized filming or possessing an unauthorized audio or video recording of an agricultural facility.<sup>244</sup> The bill's sponsor, former Representative Casey Guernsey, explained that the bill targeted activists because "the problem is what they capture and how they use what they capture. It's all in propaganda."<sup>245</sup> Guernsey insisted that "[f]armers and ag businesses really don't have anything to hide."<sup>246</sup> House Committee notes also stated HB 1860's purpose of protecting farms from "anti-agriculture organizations and individuals."<sup>247</sup>

HB 1860's sweeping language met resistance in the Missouri Senate. Accordingly, HB 1860 was replaced by the twenty-four-hour provision now in effect. This provision was added to a larger agricultural bill—Senate Bill 631.<sup>248</sup> SB 631 contained several pro-agriculture measures but did not originally contain a provision criminalizing farm recordings.<sup>249</sup> The Missouri Senate amended SB 631 a few days before its passage to include the twenty-four-hour mandatory reporting statute.<sup>250</sup> The bill's sponsor, Representative Mike Parson (now

240. Mo. Rev. Stat. § 578.013.

241. Mo. Rev. Stat. § 578.013(2).

242. Dan Flynn, 'Show Me' State Compromises on Ag-Gag, FOOD SAFETY NEWS, May 18, 2012, <http://www.foodsafetynews.com/2012/05/show-me-state-compromises-on-ag-gag/#.Wn-0j5M-e8U> [<https://perma.cc/T2HH-5FUT>] (last visited Apr. 8, 2019).

243. H.R. 1860, 96th Gen. Assemb., 2d Sess. (Mo. 2012).

244. Matt Pearce, *Missouri Legislators Zero in on Guns, Gays and Gags in Another Year of Attempted Lawmaking*, THE PITCH, May 8, 2012, <https://www.pitch.com/news/article/20570525/missouri-legislators-zero-in-on-guns-gays-and-gags-in-another-year-of-attempted-lawmaking> [<https://perma.cc/UYE8-VTMR>] (last visited Apr. 8, 2019).

245. *Id.*

246. *Id.*

247. H.R. 1860, 96th Gen. Assemb., 2d Sess. (Mo. 2012).

248. S. 631, 96th Gen. Assemb. (Mo. 2012).

249. *Id.*

250. H. JOURNAL, 96th Gen. Assemb., 2d Sess. 1978 (Mo. 2012).

Governor), urged his colleagues to pass the twenty-four-hour reporting provision. Parson's remarks reflected the bill's purpose of limiting whistleblowing—not animal abuse. Parson explained that a farm worker in possession of a damaging recording now will have to “share it with law enforcement, and [they] are done.”<sup>251</sup> Another senator noted that the twenty-four-hour language “should satisfy those who’ve emailed lawmakers about the so-called ‘ag-gag’ law, House Bill 1860.”<sup>252</sup>

## 2. Constitutional Analysis of Missouri’s Mandatory Reporting Law: § 578.013

Missouri’s mandatory-reporting statute is a content-based restriction on speech that cannot withstand strict scrutiny.

### a. Missouri’s Mandatory Reporting Statute is Content-Based

As *Wasden* and *Herbert* demonstrate, the right to film is a protected First Amendment expression.<sup>253</sup> Under § 578.013, Missouri prohibits farm workers from filming patterns of animal abuse in Missouri animal facilities.<sup>254</sup>

Under the First Amendment, the government generally cannot restrict expression based on its “message, its ideas, its subject matter, or its content.”<sup>255</sup> A regulation is content-based if enforcement depends on the particular idea or message conveyed by the speech.<sup>256</sup> Content-based restrictions are dangerous because states can wield them for “invidious, thought-control purposes” and “to suppress disfavored speech.”<sup>257</sup>

In *United States v. Stevens*, the Supreme Court invalidated a federal statute that criminalized video depictions of animal cruelty.<sup>258</sup> Congress had impermissibly regulated expression based on its content.<sup>259</sup> The Court explained that only a few historically-recognized and narrowly-limited classes of speech

251. Dan Flynn, ‘*Show Me*’ State Compromises on Ag-Gag, FOOD SAFETY NEWS, May 18, 2012, <http://www.foodsafetynews.com/2012/05/show-me-state-compromises-on-ag-gag/#.Wn-Oj5M-e8U> [https://perma.cc/KLP9-P3ZJ] (last visited Apr. 8, 2019).

252. *Id.*

253. *See supra* Part IV.

254. Mo. Rev. Stat. § 578.013 (“Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect under sections 578.009 or 578.012, such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.”).

255. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010).

256. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

257. *Id.* at 2229.

258. *Stevens*, 559 U.S. at 464–65 (“Section 48 establishe[d] a criminal penalty of up to five years in prison for anyone who knowingly ‘creates, sells, or possesses a depiction of animal cruelty,’ if done ‘for commercial gain’ in interstate or foreign commerce.”).

259. *Id.* at 468.

may be subject to content-based restrictions.<sup>260</sup> The statute in *Stevens* did not meet this “well-defined” list of exceptions.<sup>261</sup>

The Supreme Court similarly struck a content-based regulation in *Riley v. National Federation of the Blind, Inc.*<sup>262</sup> North Carolina passed a law requiring charities to disclose to potential donors the percentage of charitable contributions collected that were actually used for charitable purposes.<sup>263</sup> By mandating speech that a speaker would not otherwise make, North Carolina was altering the content of speech.<sup>264</sup> The law burdened protected speech by compelling statements of fact or opinion.<sup>265</sup> Such a law could not withstand exacting scrutiny.<sup>266</sup>

Missouri’s mandatory reporting statute imposes criminal liability on any farm worker who films animal abuse and fails to submit the recording to law enforcement within twenty-four hours.<sup>267</sup> The video may not be spliced or edited prior to submission.<sup>268</sup> Like the statute in *Stevens*, Missouri’s law is content-based because authorities must view a farm worker’s video to determine whether the worker has violated the statute.<sup>269</sup> Further, Missouri’s law burdens an individual’s “right to refrain from speaking.”<sup>270</sup> This right is central to a person’s “freedom of mind.”<sup>271</sup> The law restricts a farm worker’s right to film more than one work shift of animal abuse before speaking out.<sup>272</sup>

Missouri’s mandatory-reporting statute compels speech based on content and is therefore “presumptively unconstitutional.”<sup>273</sup> To survive strict scrutiny, the law must be narrowly tailored to a compelling state interest.

#### b. Missouri’s Mandatory Reporting Statute Fails Strict Scrutiny

Missouri’s legislative history shows that § 578.013 is a watered-down version of a bill that aimed to criminalize the act of filming at an animal facility. Though Missouri’s mandatory-reporting law is less extreme than an outright ban on filming, the law’s purpose is the same: to block a farm worker’s ability to

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260. *Id.*

261. *Id.* at 468–69.

262. *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 795 (U.S. 1988).

263. *Id.*

264. *Id.*

265. *Id.* at 797–98.

266. *Id.* at 798.

267. Mo. Rev. Stat. § 578.013(1).

268. Mo. Rev. Stat. § 578.013(2).

269. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (describing Idaho’s prohibition of recording “the conduct of an agricultural production facility’s operations” as “an obvious example of a content-based regulation of speech”) (internal quotations omitted).

270. *Riley*, 487 U.S. at 797.

271. *Id.*

272. *See Reid and Kingery*, *supra* note 6, at 71.

273. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

2019] speak publicly about systemic animal abuse.<sup>274</sup> The law should fail strict scrutiny because the Missouri legislature's desire to "suppress disfavored speech," is not a compelling state interest.<sup>275</sup> Moreover, even if Missouri successfully asserted an interest in preventing animal abuse, the law would not be narrowly tailored.

If Missouri wanted to prevent animal abuse, the legislature could take the obvious step of enhancing Missouri's animal-welfare statutes. As Part VI shows, the Missouri legislature has resisted animal-welfare legislation. Additionally, Missouri's mandatory-reporting law is "suspiciously underinclusive" if its purpose is to prevent animal abuse.<sup>276</sup> The law does not require disclosure of photographs even though photographs also can depict animal abuse.<sup>277</sup>

Missouri's criminalization of failing to turn over videos of farm-animal abuse is also suspiciously more exacting than Missouri's other mandatory-disclosure laws. For example, in Missouri, certain individuals must "immediately" report suspected child abuse.<sup>278</sup> Yet, the state does not explicitly criminalize a failure to report child abuse within twenty-four hours.<sup>279</sup> Further, child-abuse whistleblowers are protected from retaliation, while farm workers are not.<sup>280</sup> Similarly, Missourians who are required to report elder abuse need not do so within a specified time frame.<sup>281</sup> The law simply criminalizes the "failure to report abuse or neglect."<sup>282</sup> It is also striking that Missouri farm workers who violate § 578.013 are subject to the same punishment as a person failing to report elder abuse.<sup>283</sup>

Based on the legislative record behind § 578.013, it is unsurprising that Missouri's mandatory-reporting law is "perfectly tailored toward [] preventing undercover investigators from exposing abuses at agricultural facilities."<sup>284</sup> Even if the law's actual purpose were to prevent farm animal abuse, the law would not be "actually necessary" because Missouri could enact alternative regulations that do not burden protected speech.<sup>285</sup> Missouri's ag-gag laws suppress protected First Amendment speech and therefore should be stricken as unconstitutional.

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274. See Reid and Kingery, *supra* note 6, at 69.

275. *Reed*, 135 S. Ct. at 2229.

276. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018).

277. *Id.* at 1204–05.

278. Mo. Rev. Stat. § 210.115 (2018).

279. *Id.*

280. Mo. Rev. Stat. § 210.115(3); see Mo. Rev. Stat. § 578.013.

281. Mo. Rev. Stat. § 565.188.

282. *Id.*

283. *Id.*; Mo. Rev. Stat. § 578.013.

284. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213.

285. *Id.* at 1212.

## VI. MISSOURI'S DEMONSTRATED HOSTILITY TOWARD ANIMAL-WELFARE REFORM

Missouri officials have repeatedly demonstrated their allegiance to the agricultural industry. In 2010, the legislature overrode a voter-approved measure for tougher puppy mill regulations.<sup>286</sup> In 2014, Missouri's Attorney General used taxpayer dollars to challenge California's progressive farm-animal-welfare statutes.<sup>287</sup> In 2016, the legislature attempted to create an "information blackout" which would have blocked Missourians' access to state inspection reports of animal-cruelty violations.<sup>288</sup> Such resistance to animal-welfare reform at the state level means that Missourians depend on their First Amendment right to speak out against animal abuse in order to spur animal-welfare reform.

### A. *Proposition B*

The USDA's Animal Welfare Act database has exposed pervasive dog abuse by Missouri puppy breeders. At one Missouri puppy mill in 2016, an AWA inspector observed "one puppy found motionless and one deceased."<sup>289</sup>

In 2010, Missouri voters approved Proposition B, the "Puppy Mill Cruelty Prevention Act," to require more humane conditions in Missouri's puppy mills.<sup>290</sup> Missourians for the Protection of Dogs and The Humane Society of Missouri promoted the bill by releasing a twenty-seven-page report detailing "Missouri's Dirty Dozen" puppy mills.<sup>291</sup> The report relied on AWA inspection records. As soon as Proposition B passed, however, Missouri lawmakers sought to dismantle it.<sup>292</sup>

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286. See, e.g., Virginia Young, *Compromise dog breeding measure is rushed into law*, ST. LOUIS POST-DISPATCH, Apr. 28, 2011, [https://www.stltoday.com/news/state-and-regional/missouri/compromise-dog-breeding-measure-is-rushed-into-law/article\\_200c6417-ffef-58fa-990e-1b110af3807.html](https://www.stltoday.com/news/state-and-regional/missouri/compromise-dog-breeding-measure-is-rushed-into-law/article_200c6417-ffef-58fa-990e-1b110af3807.html) [<https://perma.cc/RUM5-6QBJ>] (last visited Apr. 8, 2019).

287. See Katie Cox, *Twelve states want the Supreme Court to axe California's anti-confinement egg laws*, NEW FOOD ECON., Dec. 12, 2017, <https://newfoodeconomy.org/missouri-twelve-states-supreme-court-california-egg-laws/> [<https://perma.cc/7L6D-3R8R>] (last visited Apr. 8, 2019).

288. See H.R. 1414, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016); LCA, *The Current State of Ag Gag*, LCA, <http://endaggaglaws.com/> [<https://perma.cc/DXQ8-V664>] (last visited Apr. 8, 2019).

289. *The Horrible Hundred 2016: Puppy Mills Exposed*, HUMANE SOC'Y, May 2016, <https://www.humanesociety.org/sites/default/files/docs/2016-horrible-hundred.pdf> [<https://perma.cc/9H8L-YLBY>] (last visited Apr. 8, 2019); *Summary Report: Missouri's Dirty Dozen*, HUMANE SOC'Y, Oct. 2010, <https://www.humanesociety.org/sites/default/files/docs/summary-report-on-mos-dirty.pdf> [<https://perma.cc/UBC8-D6YZ>] (last visited Apr. 8, 2019).

290. *Smith v. Humane Soc'y of United States*, 519 S.W.3d 789, 792 (Mo. banc 2017), reh'g denied (June 27, 2017).

291. *Id.* at 791–92.

292. *Id.* at 794; Virginia Young, *Missouri Legislature passes measure to weaken Prop B*, ST. LOUIS POST-DISPATCH, Apr. 14, 2011, <http://www.stltoday.com/news/local/govt-and-politics/>

Among those legislators was Representative Jason Smith.<sup>293</sup> Smith had a personal stake in repealing the bill; his mother's puppy mill was featured in the "Dirty Dozen" report.<sup>294</sup> Smith also previously co-owned his mother's puppy mill.<sup>295</sup> The "Dirty Dozen" report described how dogs in Smith's mother's facility were "exposed to below-freezing temperatures without adequate shelter" and were not given "enough cage space to turn and move around freely."<sup>296</sup> Inspection reports also described "injured and bleeding dogs" and dogs with bloody stool who had not been treated by a vet.<sup>297</sup> The report also cited that Smith's mother's kennel remained licensed despite ongoing and repeat violations.<sup>298</sup>

The Missouri legislature succeeded in passing Senate Bill 113 which eliminated most of Proposition B's reforms.<sup>299</sup> Then-Senator Parson—the bill's sponsor—said that Proposition B's requirements "would put all 1,400 licensed commercial breeders in Missouri out of business and financially ruin people . . . ."<sup>300</sup> Parson also insisted that SB 113 was an "alternative that would do more than Proposition B would to weed out unlicensed breeders."<sup>301</sup>

Parson's replacement bill erased all of Proposition B's language which would have guaranteed that dogs have:

constant and unfettered access to an indoor enclosure that has a solid floor, is not stacked or otherwise placed on top of or below another animal's enclosure, is cleaned of waste at least once a day while the dog is outside the enclosure, and does not fall below forty-five degrees Fahrenheit, or rise above eighty-five degrees Fahrenheit.<sup>302</sup>

Senate Bill 113 replaced these explicit requirements with vague language mandating "the continuous provision of a sanitary facility, protection from the extremes of weather conditions, proper ventilation, and appropriate space

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missouri-legislature-passes-measure-to-weaken-prop-b/article\_19122622-322a-5216-8d0e-7f541f9d06d8.html [https://perma.cc/A2YE-34D7] (last visited Apr. 8, 2019).

293. *Smith*, 519 S.W.3d at 794.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Smith*, 519 S.W.3d at 794.

299. S. 113, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

300. Virginia Young, *Bill to limit Prop B advances in Mo. Senate*, ST. LOUIS POST-DISPATCH, Mar 9, 2011, [http://www.stltoday.com/news/local/govt-and-politics/bill-to-limit-prop-b-advances-in-mo-senate/article\\_c424620b-4208-5f34-81e5-4ed018ceca8e.html](http://www.stltoday.com/news/local/govt-and-politics/bill-to-limit-prop-b-advances-in-mo-senate/article_c424620b-4208-5f34-81e5-4ed018ceca8e.html) [https://perma.cc/G7XH-9G C4] (last visited Apr. 8, 2019)

301. *Id.*

302. S. 113, 96th Gen. Assemb., 1st Reg. Sess. (as introduced by Senators Parson and Engler, Jan. 13, 2011).

depending on the species of animal, as required by regulations of the Missouri Department of Agriculture.”<sup>303</sup>

Fortunately, later that year, Parson introduced and passed legislation that restored many of the reforms contained in Proposition B. This resulted in the closing of hundreds of puppy mills in the state.<sup>304</sup>

#### B. *Missouri Sues States Over Farm-Animal-Welfare Reform*

In 2014, Missouri Attorney General Chris Koster filed a federal lawsuit challenging a California farm-animal-welfare statute.<sup>305</sup> California’s voter-approved Proposition 2 requires that laying hens be allowed enough space to lie down, stand up, turn around, and fully extend their limbs.<sup>306</sup> The law also requires that all eggs sold in California adhere to these standards.<sup>307</sup> Missouri was the first state to initiate the lawsuit, which was joined by twelve other states.<sup>308</sup> Missouri argued that California’s law increased the cost of egg production and discriminated against out-of-state egg sellers.<sup>309</sup>

Missouri is also suing Massachusetts over a voter-approved bill that bans the sale of food products from farm animals confined in overly-restrictive cages.<sup>310</sup> Similar to California’s law, Massachusetts’s law bans cages that “prevent an egg-laying hen, breeding pig, or calf raised for veal from standing up, turning around or fully extending its limbs.”<sup>311</sup>

Both of these lawsuits expend vast resources to protect Missouri’s agricultural industry. These lawsuits also highlight Missouri’s hostility toward animal-welfare reform.

303. *Id.*

304. Email from Bob Baker, Executive Director of the Missouri Alliance for Animal Legislation, to author (Aug. 28, 2018) (on file with author).

305. Reid Wilson, *Missouri sues California over chicken regulations*, WASH. POST, Feb. 4, 2014, [https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/04/missouri-sues-california-over-chicken-regulations/?utm\\_term=.987ea0edd647](https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/04/missouri-sues-california-over-chicken-regulations/?utm_term=.987ea0edd647) [<https://perma.cc/C9FP-42DG>] (last visited Apr. 8, 2019).

306. Associated Press, *Block California’s egg law, 12 states ask the Supreme Court*, LA TIMES, Dec. 4, 2017, <http://www.latimes.com/business/la-fi-eggs-california-20171204-story.html> [<https://perma.cc/Y752-25U5>] (last visited Apr. 8, 2019).

307. *Id.*

308. Missouri ex rel. Koster v. Harris, 847 F.3d 646, 650 (9th Cir.), *cert. denied sub nom*; Missouri ex rel. Hawley v. Becerra, 137 S. Ct. 2188 (2017).

309. *Harris*, 847 F.3d at 652.

310. Associated Press, *Missouri and a dozen other states sue to stop cage-free eggs law in Massachusetts*, ST. LOUIS POST-DISPATCH, Dec. 18, 2017, [http://www.stltoday.com/business/local/missouri-and-a-dozen-other-states-sue-to-stop-cage/article\\_12bd6385-66e6-5e4c-b11f-2a00628bd4ab.html](http://www.stltoday.com/business/local/missouri-and-a-dozen-other-states-sue-to-stop-cage/article_12bd6385-66e6-5e4c-b11f-2a00628bd4ab.html) [<https://perma.cc/GH9U-XCMU>] (last visited Apr. 8, 2019).

311. Karin Brulliard, *Massachusetts voters say no to tight quarters for hens, pigs and calves*, WASH. POST, Nov. 9, 2016, [https://www.washingtonpost.com/news/animalia/wp/2016/11/09/massachusetts-voters-say-no-to-tight-quarters-for-hens-pigs-and-calves/?noredirect=on&utm\\_term=.eb837e40fb04](https://www.washingtonpost.com/news/animalia/wp/2016/11/09/massachusetts-voters-say-no-to-tight-quarters-for-hens-pigs-and-calves/?noredirect=on&utm_term=.eb837e40fb04) [<https://perma.cc/2K29-497P>] (last visited Apr. 8, 2019).

C. *House Bill 1414: Information Blackout*

In 2016, Missouri legislators passed House Bill 1414 which would have created an “information blackout” for factory farms and puppy mills.<sup>312</sup> The bill would have created an exception to the state’s Sunshine Law by prohibiting state agencies from releasing almost any public records regarding animals or the environment.<sup>313</sup> Due to public outrage, HB 1414 was amended on the Senate Floor to ensure that all state government-mandated information on agriculture and the environment would be available under the Missouri’s Sunshine Law.<sup>314</sup>

VII. CONCLUSION

Missouri has around 100,000 farms which occupy nearly two-thirds of the state’s land.<sup>315</sup> Over 400,000 Missourians are employed in the agricultural industry.<sup>316</sup> As Missouri’s leading industry, the agricultural industry deserves protection. No industry, however, is as valuable as this nation’s tradition of free speech. Those who fought for our independence believed public discussion to be “a fundamental principle of the American government.”<sup>317</sup> Missouri’s ag-gag laws unconstitutionally suppress the public’s right to speak and must be stricken.

MAGGIE STRONG\*

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312. H.R. 1414, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016).

313. *Id.*

314. Email from Bob Baker, Executive Director of the Missouri Alliance for Animal Legislation, to author (Aug. 28, 2018) (on file with author).

315. *Missouri Ag Highlights*, MO. DEPT. AGRIC., <http://agriculture.mo.gov/topcommodities.php> [<https://perma.cc/MWY5-TW5P>] (last visited Mar. 26, 2019).

316. *Id.*

317. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

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