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Taking Down the Eighth Circuit Monolith: Big-Ag & Ag-Gag

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Comment*

Taking Down the Eighth Circuit Monolith: Big-Ag & Ag-Gag

TABLE OF CONTENTS

I. Introduction	318
II. Historical Background	321
A. Aims of Ag-Gag Statutes	321
B. Challenges to Ag-Gag Laws in the Courts Historically	322
C. Circuit Split Summary	323
III. Analysis of Eighth Circuit Ag-Gag Laws	325
A. Ag-Gag is Dangerous to the Agricultural Industry and the First Amendment	325
B. Constitutionality of the Ag-Gag Statutes within the Eighth Circuit.....	326
1. Iowa Ag-Gag Laws.....	326
a. Litigation Regarding the Constitutionality of Iowa Code § 717A.3A	327
b. Litigation Regarding the Constitutionality of Iowa Code § 717A.3B	330
c. Iowa Code § 716.7A is Likely Constitutional	333
d. Litigation History Regarding the Constitutionality of Iowa Code § 727.8A.....	334
2. The Arkansas Ag-Gag Law	337

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* Kelly Shanahan, J.D. Candidate, University of Nebraska College of Law, 2023, B.A., 2020, University of Minnesota. This Comment is dedicated in memory of Betsy McDonald, a beloved friend who unequivocally supported my dreams. An additional thank you to all of my friends and family who have encouraged me on my journey. Lastly, a thank you to the *Nebraska Law Review* members, especially my mentor Chelsey Borchardt for your unending support and reassurance.

Disclaimer: All of the research for this Comment is accurate as of March 28, 2022, given the publication process and the fact that this is a rapidly unfolding area of law with many active lawsuits, by the date of publication some information contained herein may be outdated. Updates regarding various appeals and petitions were made in June, 2022.

a.	The Information Gathering and Recording Prohibitions Violate the First Amendment ..	338
b.	Joint Liability for Coconspirators Violates the First Amendment	340
3.	The North Dakota Ag-Gag Law	341
a.	There are First Amendment Grounds to Find the Audio-Video Recording Provision Unconstitutional	341
b.	Analysis on the Provision Prohibiting Acquiring or Exercising Control Over an Animal Facility	344
4.	Missouri Ag-Gag Laws	346
a.	Given Recent Court Developments, the False Pretenses Provision is Likely Constitutional	348
b.	Rapid Reporting for Filming Provision is Unconstitutional	351
IV.	Conclusion	354

I. INTRODUCTION

The term “Ag-Gag” refers to a collection of laws passed by various state legislatures to protect farm animal operations from undercover investigations and whistleblowers that document animal cruelty.¹ These laws are also often referred to as farm security laws or anti-whistleblower legislation.² There have been two phases of these laws within the United States.³ First, in the 1990s, Kansas, Montana, and North Dakota legislators passed laws in response to an uptick in terroristic bombings and arsons occurring primarily at non-farm facilities like research laboratories.⁴ State legislatures passed the second

1. See, e.g., Elizabeth Rumley, *Webinar: An Overview of “Ag-Gag” Laws: In Arkansas and Beyond*, THE NAT’L AGRIC. L. CTR. (Nov. 13, 2019), <https://nationalaglawcenter.org/webinars/aggagoverview> [<https://perma.cc/M5MB-QEJK>]; *Anti-whistleblower Ag-gag Bills Hide Factory Farming Abuses From the Public*, THE HUMANE SOC’Y OF THE U.S., <https://www.humanesociety.org/resources/anti-whistleblower-ag-gag-bills-hide-factory-farming-abuses-public> [<https://perma.cc/XN68-GTKE>]. The term “Ag-Gag” was first coined by *New York Times* opinion writer Mark Bittman in 2011, but the term has been long-used by animal rights activists. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES: THE OP. PAGES (Apr. 16, 2011, 9:29 PM), <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals> [<https://perma.cc/KX3L-KCBV>].

2. Rumley, *supra* note 1; see also *Anti-whistleblower (“Ag-Gag”) Legislation*, ANIMAL WELFARE INST., <https://awionline.org/content/anti-whistleblower-legislation> [<https://perma.cc/T7Y4-BEHW>] (last visited Aug. 13, 2021) (referring to these statutes as either anti-whistleblower legislation or ag-gag laws).

3. Rumley, *supra* note 1.

4. *Id.*

phase of Ag-Gag laws in the 2010s largely in response to a rise in undercover investigations by animal rights organizations.⁵

Generally speaking, there are five common core components to Ag-Gag laws.⁶ While not every law has each component, many of the laws touch on more than one of the following elements: (1) trespass in agricultural facilities, (2) prohibition on filming or distribution of agricultural activities, (3) employment fraud dealing with false information or intentions, (4) delayed reporting of animal abuse, and (5) liability for coconspirators.⁷

Ag-Gag laws are rarely exercised through prosecution,⁸ however, many of the laws have been challenged in court by coalitions of animal rights organizations.⁹ These challenges are primarily brought under the First Amendment.¹⁰ Secondly, these groups also raise challenges based on the laws being overly broad, constituting a content-based or viewpoint discrimination, and for violating animal rights groups' equal protection and due process rights.¹¹

It is no secret that the Eighth Circuit is a region of the United States dominated by big agriculture.¹² In 2021, Nebraska, Missouri, South Dakota, and North Dakota were among the top ten cattle producing states.¹³ For pig producers, the top ten states include Iowa, Minnesota, Missouri, and Nebraska.¹⁴ Additionally, in 2019, the top ten turkey producing states included Minnesota, Arkansas, Missouri,

5. *Id.*; Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws#id-5> [<https://perma.cc/RB7B-YMAM>]; CTR. FOR CONST. RTS. AND DEFENDING RTS. & DISSENT, *AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS* 18 (2017).

6. Rumley, *supra* note 1.

7. *Id.*

8. As of 2015, only two sets of prosecutions had occurred under these statutes. *See, e.g.*, Prygoski, *supra* note 5. One prosecution was brought in 2013 against a single animal rescue worker, Amy Meyer, and another set of prosecutions were brought in 2014 against four activists for violating the same law in Utah. *Id.* However, in both instances, the charges were dropped against the parties. *Id.*

9. Rumley, *supra* note 1.

10. *Id.*

11. *Id.*

12. The Eighth Circuit is composed of seven states: Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Missouri, and Arkansas. *Eighth Circuit*, U.S. CT. OF APPEALS, <https://www.ca8.uscourts.gov> [<https://perma.cc/7KUM-N2DE>] (last visited Oct. 3, 2021).

13. *Beef Production by State 2021*, WORLD POPULATION REV. (Jan. 2021), <https://worldpopulationreview.com/state-rankings/beef-production-by-state> [<https://perma.cc/6VE4-QUH9>].

14. *Top 10 U.S. States by Inventory of Hogs and Pigs as of March 2021*, STATISTA (Apr. 20, 2021), <https://www.statista.com/statistics/194371/top-10-us-states-by-number-of-hogs-and-pigs> [<https://perma.cc/CFM3-SYSE>].

and Iowa.¹⁵ And the connections do not end with livestock production. The Midwest, in which the Eighth Circuit lies, is also home to many of the United States' largest meat and poultry producers, including Cargill, Tyson Foods, Land O'Lakes, and Hormel.¹⁶ And not the least bit shocking, in the year 2020 over \$140 million was spent on lobbying for the agribusiness sector.¹⁷ Because of agricultural dominance in the region, Ag-Gag laws are particularly important in the Eighth Circuit.

Of the seven states that compose the Eighth Circuit, four currently have some form of an Ag-Gag law¹⁸: Missouri, North Dakota, Iowa, and Arkansas.¹⁹ These states constitute four out of the six states in the U.S. with active enforceable Ag-Gag laws.²⁰ Additionally, of the three remaining states in the circuit, Minnesota and Nebraska state legislatures introduced Ag-Gag bills between 2011 and 2013, but these attempts failed to pass.²¹

This Comment argues that most of the Ag-Gag laws in place in Iowa, Arkansas, North Dakota, and Missouri are unconstitutional under the First Amendment. In Part II, this Comment explores the background of Ag-Gag laws and provides an overview of court challenges to statutes from other circuit courts of appeal. In Part III, this Comment provides commentary on the importance of investigative journalism and analyzes the constitutionality of the Ag-Gag laws in the Eighth Circuit.

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15. *Turkey Sector: Background and Statistics*, U.S.D.A. ERS, <https://www.ers.usda.gov/newsroom/trending-topics/turkey-sector-background-statistics> [<https://perma.cc/XX8T-S6J8>] (last updated Jan. 12, 2022).
 16. Cargill is incorporated in Minnesota, Tyson Foods is incorporated in Arkansas, Land O'Lakes is incorporated in Minnesota, and Hormel is incorporated in Minnesota. See *Cargill Headquarters Information*, CARGILL, <https://www.headquartersinfo.com/cargill-headquarters-information> [<https://perma.cc/7ANC-8U2T>] (last visited Oct. 3, 2021); *Tyson Foods, Inc.*, SPRINGDALE CHAMBER OF COM., <https://web.springdale.com/Manufacturing-Processing/Tyson-Foods,-Inc-307> [<https://perma.cc/5N22-YKU9>] (last visited Oct. 3, 2021); *What We Do*, LAND O'LAKES, INC., <https://www.landolakesinc.com/What-We-Do> [<https://perma.cc/3VA4-M2BB>] (last visited Oct. 3, 2021); *Media Resources*, HORMEL FOODS, <https://www.hormelfoods.com/newsroom/media-resources> [<https://perma.cc/GE9E-GGNB>] (last visited Oct 3, 2021).
 17. *Sector Profile: Agribusiness*, OPEN SECRETS, <https://www.opensecrets.org/federal-lobbying/sectors/summary?cycle=2020&id=A> [<https://perma.cc/7WFU-H23E>].
 18. MO. REV. STAT. § 578.013 (2012); MO. REV. STAT. § 578.405 (2017); N.D. CENT. CODE § 12.1-21.1 (1991); IOWA CODE § 717.3A (2012), IOWA CODE § 717.3B (2019), IOWA CODE § 716.7A, (2011) IOWA CODE § 727.8A (2017); ARK. CODE ANN. § 16-118-113 (West 2017).
 19. *Id.*
 20. The other two states with current Ag-Gag laws include Montana and Alabama. See ALA. CODE §§ 13A-11-150 to -158 (2002); MONT. CODE ANN. §§ 81-30-101 to -105 (1991).
 21. *What Is Ag-Gag Legislation?*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/improving-laws-animals/public-policy/what-ag-gag-legislation> [<https://perma.cc/44NR-JEFH>] (last visited Oct. 3, 2021).

II. HISTORICAL BACKGROUND

A. Aims of Ag-Gag Statutes

There are five common core elements to Ag-Gag statutes.²² Overall, the laws tend to contain the following components: (1) trespass in agricultural facilities, (2) prohibition on filming/distribution of agricultural activities, (3) employment fraud or false pretenses, (4) delayed reporting of animal abuse, and (5) liability for coconspirators.²³

Many of the statutes contain provisions on trespass specifically geared toward preventing persons from entering an agricultural facility without consent of the owner.²⁴ These trespass provisions differ from ordinary trespass statutes given that instead of prohibiting unauthorized entry onto all private property, the laws specifically limit trespass onto agricultural facilities like slaughterhouses, farms, feeding operations, and the like. The statutes with filming prohibitions prevent filming, photographing, data collection, or distribution thereof.²⁵ Generally, employment fraud has two subtypes: (a) applying for a job using false information or (b) applying for a job using false pretenses.²⁶ Oftentimes the employment fraud provisions are accompanied with an additional intent to commit another prohibited act provision.²⁷ Delayed reporting is the newest and least popular Ag-Gag component.²⁸ Delayed reporting prohibits individuals from holding on to recordings of animal abuse; the provision is generally justified as providing law enforcement with the opportunity to conduct timely investigations.²⁹ Lastly, the coconspirator provisions extend punishment to other actors besides the person who took the prohibited action.³⁰

While three Ag-Gag laws originated in the 1990s, many statutes across the nation were written and passed during the 2010s.³¹ It is highly likely that some of these laws were motivated in part by the 2004 model law the Animal and Ecological Terrorism Act (AETA), written by the organization the American Legal Exchange Council.³²

22. Rumley, *supra* note 1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Matthew Shea, Note, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J.L. & SOC. PROBS. 337, 338–39 (2015).

29. Rumley, *supra* note 1.

30. *Id.*

31. Prygoski, *supra* note 5.

32. *The Animal and Ecological Terrorism Act (AETA)*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/model-policy/the-animal-and-ecological-terrorism-act-aeta>

The AETA contained provisions on trespass and the prohibition of filming.³³ The language and format of the AETA model statute very closely resembles the North Dakota statute passed in 1991.³⁴

B. Challenges to Ag-Gag Laws in the Courts Historically

Thus far there have been six major successful challenges to Ag-Gag laws. In March of 2022, the District Court for the Southern District of Iowa issued a permanent injunction against title 16, section 717A.3B of the Iowa Code after finding in a summary judgment ruling that the law violates the First Amendment.³⁵ In August of 2021, the Tenth Circuit Court of Appeals affirmed the U.S. District Court of Kansas's ruling that the state's Ag-Gag law violated the First Amendment and is thus unconstitutional.³⁶ In June 2020, the U.S. District Court for the Middle District of North Carolina ruled that the North Carolina Ag-Gag statute was unconstitutional and violated First Amendment rights.³⁷ In October of 2018, the United States District Court for District of Wyoming found a law that prevented entering "open land for the purpose of collecting resource data" violated the First Amendment right to free speech.³⁸ In January of 2018, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court for the District of Idaho's 2015 ruling that portions of the Idaho Ag-Gag law violated the First Amendment.³⁹ And in July of 2017, the U.S. District Court of Utah declared the state's Ag-Gag statute unconstitutional.⁴⁰

A seventh Ag-Gag law challenge was partially successful. In August 2021, the Eighth Circuit Court of Appeals reviewed the Southern District of Iowa's ruling on the 2012 Iowa Ag-Gag law.⁴¹ The lower court had declared the law unconstitutional and provided an injunc-

[<https://perma.cc/RZ9S-4867>] (last visited Oct. 3, 2021); Lewis Bollard, Article, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENV'T. L. REP. NEWS & ANALYSIS 10960, 10964 (2012) (highlighting that bills proposed in New York, Minnesota, Iowa, Illinois, Indiana, Nebraska, and Utah closely resembled the AETA).

33. AM. LEGIS. EXCH. COUNCIL, *supra* note 32.

34. *Id.*; N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (1991).

35. *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124, at 14 (S.D. Iowa Mar. 28, 2022) (order granting permanent injunction); *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124, at 3-4 (S.D. Iowa Mar. 14, 2022) (order granting plaintiffs' motion and denying defendants' motion for summary judgment).

36. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021). The law at issue in this case was the oldest Ag-Gag law on the books and dates back to 1990. *See ANIMAL WELFARE INST.*, *supra* note 2.

37. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547 (M.D.N.C. 2020).

38. *Western Watersheds Project v. Michael*, 353 F. Supp. 3d 1176 (D. Wyo. 2018).

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

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

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

tion against its enforcement.⁴² The Eighth Circuit's ruling affirmed the lower court's finding that the employment provision, title 16, section 717A.3A(1)(b) of the Iowa code, was unconstitutional, but vacated the lower court's injunction on the access provision of the statute.⁴³

Additionally, there are several current Ag-Gag law disputes awaiting resolution. Most recently, in April 2022, an appeal was filed in Iowa after a district court granted a permanent injunction against the Iowa Code § 717A.3B.⁴⁴ On August 9, 2021, the Eighth Circuit Court of Appeals reversed the Eastern District of Arkansas dismissal of a complaint by the Animal Legal Defense Fund and their partners seeking to prevent the company Peco Foods from bringing a civil suit under the Arkansas Ag-Gag law.⁴⁵ Though the lower court dismissed the case for failure to establish Article III standing, the Eighth Circuit found that the organizations had sufficient standing on account of the coalition's plans to operate undercover investigations of the Peco Foods slaughterhouse.⁴⁶ The case now awaits further proceedings to evaluate the constitutionality of the Arkansas law.⁴⁷ Additionally, a coalition of animal nonprofits, including the Animal Legal Defense Fund, filed a constitutional challenge to Iowa Code § 727.8A in August 2021.⁴⁸ And lastly, there is a pending decision with the Fourth Circuit Court of Appeals regarding the appeal of the 2020 North Carolina Ag-Gag lawsuit.⁴⁹

C. Circuit Split Summary

A circuit split arose out of the aforementioned cases: the Eighth, Tenth, and Ninth Circuit Courts of Appeals do not agree on the constitutionality of Ag-Gag laws.⁵⁰ When evaluating the validity of Ag-Gag statutes from Kansas, Iowa, and Idaho, the circuit courts took differ-

42. Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362, 2019 WL 1493717 (S.D. Iowa 2019).

43. *Reynolds*, 8 F.4th at 783–88.

44. Notice of Appeal, Animal Legal Def. Fund v. Reynolds (S.D. Iowa Apr. 20, 2022) (No. 4:19-cv-00124).

45. Animal Legal Defense Fund v. Vaught, 8 F.4th 714 (8th Cir. 2021).

46. *Id.* at 718.

47. Elizabeth Rumley, "Ag-Gag" Laws: An Update of Recent Legal Developments, THE NAT'L AGRIC. L. CTR. (Aug. 26, 2021), <https://nationalaglawcenter.org/ag-gag-laws-an-update-of-recent-legal-developments> [<https://perma.cc/8Y54-TU78>].

48. Civil Rights Complaint for Declaratory and Injunctive Relief, Animal Legal Def. Fund v. Reynolds (S.D. Iowa Aug. 10, 2021) (No. 4:17-cv-00231), 2021 WL 3522352.

49. The appeal was filed July 15, 2020. Docketing Notice, People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547 (M.D.N.C. 2020) (No. 20-01777).

50. Animal Legal Defense Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021); *Reynolds*, 8 F.4th 781; Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

ent approaches to interpreting the Supreme Court case *United States v. Alvarez*.⁵¹

In *Alvarez*, the Supreme Court analyzed the validity of the Stolen Valor Act of 2005, which in essence, prohibited lying about receiving military honors.⁵² *Alvarez* is an important case to the First Amendment because it reemphasized that falsity of a statement does not sufficiently bring the speech outside of constitutional protection.⁵³ Defamation, fraud, and other legally cognizable harms that are derivative of false statements, however, remain unprotected.⁵⁴

The three circuit courts differ on two matters.⁵⁵ First, whether an intent to harm element within a statute renders a provision unconstitutional under viewpoint discrimination.⁵⁶ Second, whether trespass is a legally cognizable harm that renders speech unprotected under the *Alvarez* plurality opinions.⁵⁷ The Eighth Circuit Court of Appeals differentiates itself because it determined that trespass is a legally cognizable harm under *Alvarez*, and therefore may be regulated.⁵⁸

The circuit split will however remain in place for the foreseeable future. On November 17, 2021, Laura Kelly, Governor of Kansas, alongside Derek Schmidt, Attorney General of Kansas, submitted a petition for writ of certiorari to the Supreme Court of the United States as related to the Tenth Circuit's opinion in *ALDF v. Kelly* and the interpretation of the *United States v. Alvarez* case precedence.⁵⁹ However, on April 25, 2022 the Supreme Court denied the petition.⁶⁰

The denial of the petition is being hailed as a victory by participants in the original lawsuit given that without review from the Supreme Court of the United States, the Kansas Ag-Gag law has been

51. 567 U.S. 709 (2012); *Kelly*, 9 F.4th 1219 (evaluating the Kansas statute); *Reynolds*, 8 F.4th 781 (evaluating the Iowa statute); *Wasden*, 878 F.3d 1184 (evaluating the Idaho statute).

52. Stolen Valor Act of 2005, Pub. L. 109-437, 120 Stat. 3266 & 3267, *invalidated by United States v. Alvarez*, 567 U.S. 709 (2012).

53. *Alvarez*, 567 U.S. at 719 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

54. *Id.*

55. It is worth noting there is a dispute as to whether the differences between the three circuit courts actually amount to a circuit split. *See* Brief in Opposition, *Animal Legal Defense Fund v. Kelly* (St. C. filed Mar. 14, 2022) (No. 21-760); *contra* Reply Brief of Petitioners, *Animal Legal Defense Fund v. Kelly* (S. Ct. filed Mar. 28, 2022) (No. 21-760).

56. Reply Brief of Petitioners, *supra* note 55 at 2–4.

57. *Id.* at 5.

58. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021).

59. *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), *petition for cert. filed* (U.S. Nov. 17, 2021) (No. 21-760).

60. *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 212 L. Ed. 2d 605 (2022).

successfully struck down.⁶¹ And while the Supreme Court's denial is certainly a victory for animals and animal advocates alike, the denial leaves first amendment jurisprudence a bit muddled.

III. ANALYSIS OF EIGHTH CIRCUIT AG-GAG LAWS

Just as many other circuit courts of appeals declared Ag-Gag statutes unconstitutional, there are convincing arguments to find the Ag-Gag laws within the Eighth Circuit unlawful; this Comment will analyze the validity of these statutes. First, Part III, Section A describes the importance of investigative journalism and the threat that Ag-Gag statutes pose. Second, Part III, Section B analyzes arguments over the constitutionality of the Ag-Gag statutes in Iowa, Arkansas, North Dakota, and Missouri.

A. Ag-Gag is Dangerous to the Agricultural Industry and the First Amendment

While the United States public is generally concerned with the wellbeing of animals, the United States legal system seldom protects farmed animals. For example, the Animal Welfare Act, the largest federal animal cruelty and neglect prevention measure in the United States, specifically exempts livestock and poultry.⁶² Because very few federal and state cruelty laws apply to farmed animals, undercover investigations by animal rights organizations and law enforcement officers are often the only way to achieve prosecution of animal cruelty crimes.⁶³ Undercover investigations accomplish two feats. First, they can reach local prosecutors and provide the necessary evidence to prosecute animal abuse or neglect in states where the animal cruelty laws extend to farmed animals. Alternatively, undercover investigative reports can reach the court of public opinion and ensure that consumers are aware of the treatment of farmed animals from certain facilities.

The Ag-Gag statutes have many effects, including preventing employees or investigators from blowing the whistle on agricultural producers abusing animals and extending consequences to public safety, agricultural worker safety, and even environmental conditions.⁶⁴ In

61. *Victory for Animals and Free Speech as U.S. Supreme Court Declines to Review Kansas Ag-Gag Law*, ANIMAL LEGAL DEF. FUND (Apr. 26, 2022), <https://aldf.org/article/victory-for-animals-and-free-speech-as-u-s-supreme-court-declines-to-review-kansas-ag-gag-law/> [https://perma.cc/9KGG6-Z9G7].

62. 7 U.S.C. § 2132(g).

63. Maggie Strong, Comment, *The Show-Me State's Hidden Cruelty: How Missouri's Ag-Gag Laws Unconstitutionally Silence Animal-Welfare Whistleblowers*, 63 ST. LOUIS UNIV. L.J. 611, 616–17 (2019).

64. Jacquelyn M. Lyons, Comment, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 917 (2016).

the past, undercover investigation of agricultural facilities have led to the passage of statutes like the Pure Food and Drug Act in 1906, which had positive implications for animal product consumers; however, under the current statutes within the Eighth Circuit, similar investigations would likely be criminalized.⁶⁵

If the courts allow Ag-Gag laws to stand where there exists compelling arguments of unconstitutionality, there are serious implications for other statutes that violate the First Amendment. To reject the unconstitutionality of Ag-Gag law weakens First Amendment jurisprudence and has the potential to influence the creation of more exemptions to First Amendment protections.⁶⁶ Ag-Gag statutes that focus on video recordings, if allowed to stand as constitutional, could have serious implications on other First Amendment situations involving videotaping such as filming encounters with the police.⁶⁷

Ag-Gag laws have been touted as protecting farmers, but rarely have that effect. Many farmers support the statutes for reasons including biosecurity and preventing negative public perceptions of the agriculture industry.⁶⁸ However, this support often gives the appearance that producers are using Ag-Gag laws to hide or ignore animal abuse.⁶⁹ In modern times where transparency—especially around food—is valued, these statutes can do more harm than good to the agricultural industry.⁷⁰

B. Constitutionality of the Ag-Gag Statutes within the Eighth Circuit

1. Iowa Ag-Gag Laws

Of all the states in the U.S. to pass Ag-Gag laws, Iowa has the most complex history. Since 2012, the Iowa legislature passed four Ag-Gag laws. Title 16, section 717A.3A of the Iowa Code was passed in 2012

65. *Id.* at 919–20.

66. Some currently recognized exemptions to First Amendment protections include: (1) obscene speech, (2) incitement, (3) fighting words, and (4) child pornography. *Miller v. California*, 413 U.S. 15, 23 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *New York v. Ferber*, 458 U.S. 747, 763 (1982); see KATHLEEN ANN RUANE, CONG. RSCH. SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2021).

67. See Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167, 184 (2017).

68. Jennifer Satterfield, Comment, *Striking a Balance: Rapid Reporting Laws Combined with Farmed Animal Welfare Laws as an Alternative to Ag-Gag Statutes*, 22 MINN. J.L. SCI. & TECH. 43, 57 (2021).

69. Charlie Arnot, *Ag-Gag Challenged: Opening Barn Doors Best Approach to Building Trust*, THE CTR. FOR FOOD INTEGRITY (Aug. 10, 2015), <https://foodintegrity.org/blog/2015/08/10/ag-gag-challenged-opening-barn-doors-best-approach-to-building-trust> [https://perma.cc/LPA3-V829].

70. *Id.*

and forbade obtaining access to an agricultural production facility by false pretenses. In 2019, Iowa passed § 717A.3B, an agricultural production facility trespass statute. In 2020, Iowa passed § 716.7A, a food operation trespass statute. And most recently, in 2021, the Iowa legislature passed § 727.8A, a law prohibiting filming within agricultural facilities.

In August 2021, the Eighth Circuit Court of Appeals found that § 717A.3A was partially unconstitutional.⁷¹ As it stands today, § 717A.3A(1)(b) is enforceable in Iowa, but § 717A.3A(1)(a) is unenforceable and was invalidated by the court.⁷² In March 2022, the District Court for the Southern District of Iowa ruled that § 717A.3B violates the First Amendment and issued a permanent injunction against the law's enforcement.⁷³ As of March 22, 2022, § 716.7A has not been challenged in court and is likely the only constitutional Ag-Gag statute passed by the Iowa Legislature. A coalition of animal nonprofits filed an ongoing constitutional challenge to § 727.8A in August 2021.⁷⁴ As of March 2022, § 717A.3A(1)(b), § 716.7A, and § 727.8A are enforceable within the state of Iowa.

a. Litigation Regarding the Constitutionality of Iowa Code § 717A.3A

In 2012, Iowa passed its first Ag-Gag law and has since passed three other statutes that fall under the Ag-Gag umbrella.⁷⁵ Recently, the Eighth Circuit Court of Appeals heard the dispute over the oldest of the four laws, § 717A.3A.

The 2012 law is titled Agricultural Production Facility Fraud⁷⁶ and involves both employment fraud and liability for coconspirators.⁷⁷ The statute reads:

1. A person is guilty of agricultural production facility fraud if the person willfully does any of the following:

71. Animal Legal Def. Fund v. Reynolds, 8 F.4th 781 (2017).

72. *Id.* at 785–86.

73. Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Mar. 14, 2022) (order granting plaintiffs' motion and denying defendants' motion for summary judgment); Animal Legal Def. Fund v. Reynolds, No. 4:19 cv 00124, at 14 (S.D. Iowa Mar. 28, 2022) (order granting permanent injunction). Note however, that this ruling has been appealed. Notice of Appeal, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Apr. 20, 2022).

74. See Civil Rights Complaint, *supra* note 48.

75. IOWA CODE § 717.3A (passed in 2012); IOWA CODE § 717.3B (passed in 2019); IOWA CODE § 716.7A (passed in 2020); IOWA CODE § 727.8A (passed in 2021).

76. IOWA CODE § 717.3A (2012).

77. However, the Eighth Circuit Court of Appeals did not address the coconspirator liability clause in IOWA CODE § 717.3A(3)(a). The issue was not raised in the original complaint filed in 2017. See Civil Rights Complaint, *supra* note 48.

- a. Obtains access to an agricultural production facility by false pretenses.⁷⁸
- b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.⁷⁹

When this statute was passed in 2012, Iowa was the largest pork producing state and raised over 45 million egg-laying hens in that year alone.⁸⁰ Before its passage, there were at least ten undercover investigations of confined animal feeding operations in the state; in the five years following the law's passage, there were none.⁸¹

In 2017, plaintiffs filed the original complaint challenging the constitutionality of § 717A.3A.⁸² Therein, the plaintiffs outlined the political context to the passage of the statute.⁸³ According to the Iowa legislature records of debate, the complaint found the “central objective of the law [was] to prevent whistleblowers from collecting information about animal agriculture and distributing it to the public.”⁸⁴ During floor debate, one of the senators discussing the bill said, “[w]hat we’re aiming at is stopping these [animal rights] groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name.”⁸⁵ The complaint also relayed messages of fervent support for the bill from lobbyists and representatives of Iowa Pork Producers Association, the Iowa Cattlemen’s Association, and the National Pork Producers Council.⁸⁶

The Southern District of Iowa examined the constitutionality of the “access provision”⁸⁷ and the “employment provision”⁸⁸ of § 717A.3A. It found that the access provision constituted a constitutional restraint,

78. IOWA CODE § 717.3A. In referring to this portion of the law, the Eighth Circuit Court of Appeals dubbed this provision the “access provision.” *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 783 (8th Cir. 2021).

79. IOWA CODE § 717.3A. In referring to this portion of the law, the Eighth Circuit Court of Appeals dubbed this provision the “employment provision.” *Reynolds*, 8 F.4th at 783.

80. *Public Interest Coalition Challenges Constitutionality of Iowa’s Ag-Gag Law*, ANIMAL LEGAL DEF. FUND (Oct. 10, 2017), <https://aldf.org/article/public-interest-coalition-challenges-constitutionality-iowas-ag-gag-law> [https://perma.cc/EFE4-Y2S8].

81. *Id.*

82. *See* Civil Rights Complaint, *supra* note 48, at 1.

83. *Id.* at 18–20.

84. *Id.* at 18.

85. *Id.*

86. *Id.*

87. *Id.*; IOWA CODE § 717.3A(1)(a) (2012).

88. *Reynolds*, 8 F.4th at 783; IOWA CODE § 717.3A(1)(b) (2012).

but the employment provision was an unconstitutional violation of the First Amendment.⁸⁹

The Eighth Circuit Court of Appeals released its opinion on August 10, 2021.⁹⁰ Contrary to the district court's opinion, the Eighth Circuit held that the access provision was constitutional.⁹¹ The court determined that the provision was consistent with the First Amendment because it "prohibits exclusively lies associated with a legally cognizable harm—namely trespass to private property."⁹² Despite other circuit court decisions finding the opposite, the Eighth Circuit determined that the lower court's reliance on the Supreme Court case *United States v. Alvarez* was misplaced because the case was decided by plurality and the reasoning relied on a portion written without majority support.⁹³ The court concluded that in light of *Alvarez*, "intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment."⁹⁴

With regards to the employment provision, the court found the statute violated the First Amendment.⁹⁵ The court determined the provision was unconstitutional because it restricted protected speech and could not overcome either strict or intermediate scrutiny.⁹⁶ The court ruled that the law was overly broad because it covered more than a purpose of "preventing false claims to secure offers of employment."⁹⁷ The statute is not narrowly tailored because it also criminalizes false statements made that are not material to employment decisions.⁹⁸ Ultimately the court reasoned that "[i]nsofar as the State has a compelling interest in preventing false statements made to secure offers of employment, a prohibition on immaterial falsehoods is not actually necessary to achieve the interest. There is a less restrictive means available: proscribe only false statements that are material to a hiring decision."⁹⁹

89. *Reynolds*, 8 F.4th at 785–88.

90. *Id.* at 781.

91. *Id.* at 786.

92. *Id.* at 785–86.

93. *Id.* at 786 (discussing *United States v. Alvarez*, 567 U.S. 709 (2012)).

94. *Id.*

95. *Id.* at 787.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

b. *Litigation Regarding the Constitutionality of Iowa Code § 717A.3B*

In 2019, the District Court for the Southern District of Iowa resolved the dispute over § 717A.3A, the 2012 Iowa Ag-Gag law.¹⁰⁰ Between two opinions released in January and February 2019, the district court found that § 717A.3A was unconstitutional and permanently enjoined the State from enforcing the code as it was drafted.¹⁰¹ In response to these court decisions, while the case awaited appeal with the Eighth Circuit, the Iowa State legislators introduced and passed Iowa Code § 717A.3B, a similar Ag-Gag law but with changes designed to withstand judicial scrutiny.¹⁰²

Just as with § 717A.3A, § 717A.3B also contains elements of employment fraud, agricultural production facility trespass, and liability for conspirators; the major difference in the statutes is that § 717A.3B includes an intent requirement.¹⁰³ The statute reads:

1. A person commits agricultural production facility trespass if the person does any of the following:
 - a. Uses deception . . . on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to the agricultural production facility, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.
 - b. Uses deception . . . on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.¹⁰⁴

State lawmakers defended the statute by claiming they were protecting farmers from being “disparaged” and stated the statute’s purpose is to protect agricultural producers from “those who would intentionally use deceptive practices to distort public perception of best prac-

100. The first district court opinion was filed on January 9, 2019. *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019). A follow-up opinion was filed on February 14, 2019. *Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362 (S.D. Iowa Feb. 14, 2019) (order granting permanent injunction and entry of judgment).

101. *Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362 (S.D. Iowa Feb. 14, 2019) (order granting permanent injunction and entry of judgment).

102. *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124, 2019 WL 8301668, *1, *2 (S.D. Iowa Dec. 2, 2019) (order granting partial motion to dismiss).

103. Just as in the case over the 2012 provision, the coalition that filed the court case over the 2019 statute decided to not challenge the conspirator liability provision despite other courts finding these provisions to be unconstitutional. *Reynolds*, 353 F. Supp. 3d 812.

104. IOWA CODE § 717A.3B.

tices to safely and responsibly produce food.”¹⁰⁵ The senators also stated concerns for protecting farmers from those who lie to get a job with the intent to cause harm in addition to biosecurity considerations.¹⁰⁶

In December of 2019, the Southern District Court of Iowa granted a preliminary injunction against the enforcement of § 717A.3B.¹⁰⁷ Following the preliminary injunction, the plaintiffs and defendants both filed for summary judgment of the case in March and April 2020, and the court continued the case until after the Eighth Circuit decided the appeal of § 717A.3A.¹⁰⁸

On March 14, 2022, the United States District Court for the Southern District of Iowa released an order on cross-motions for summary judgment with regards to § 717A.3B.¹⁰⁹ Chief Judge Stephanie M. Rose granted the Animal Legal Defense Fund, and its co-plaintiff, summary judgment, finding that the statute “violates the First Amendment . . . because it discriminates based on content and viewpoint and cannot survive strict scrutiny.”¹¹⁰ Given this finding, on March 28, 2022, Judge Rose issued a permanent injunction against the enforcement of § 717A.3B.¹¹¹

Judge Rose held that § 717A.3B was a speech regulation because the term “deception” requires “an expression of information in which the contents of the communication, whether verbal or nonverbal, must be examined to determine whether it was in fact deceptive.”¹¹² The Judge went on to affirm that, in light of the Eighth Circuit ruling on § 717A.3A, because the statute regulates falsehoods, it regulates unprotected speech.¹¹³ Nevertheless, Judge Rose highlighted, “[s]imply because speech is unprotected does not grant a free license for the government to regulate that speech based on viewpoint.”¹¹⁴

105. Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124, 2019 WL 8301668, *1, *2 (S.D. Iowa Dec. 2, 2019) (order granting partial motion to dismiss).

106. *Id.*

107. *Id.* at *20.

108. Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Mar. 14, 2022) (order granting plaintiffs’ motion and denying defendants’ motion for summary judgment). It is worth noting that this permanent injunction has been appealed by Kimberly Reynolds, Governor of Iowa. Notice of Appeal, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Apr. 20, 2022).

109. *Id.*

110. *Id.* at 2.

111. Order on Cross-Motions for Summary Judgment, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124, 3–4 (S.D. Iowa Mar. 13, 2022).

112. Permanent Injunction, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124, 14 (S.D. Iowa Mar. 28, 2022).

113. Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Mar. 14, 2022) (order granting plaintiffs’ motion and denying defendants’ motion for summary judgment).

114. *Id.* at 15 (citation omitted).

Applying the ruling of the Eighth Circuit regarding § 717A.3A, Judge Rose found that § 717A.3B constituted a content discrimination because the content of the speech at issue needs to be examined to determine if a trespasser gained access or employment based on deception.¹¹⁵

Judge Rose additionally found § 717A.3B to have viewpoint discrimination.¹¹⁶ Viewpoint discrimination arises when a law targets not the subject matter but rather the particular views taken by speakers on a subject.¹¹⁷ Section 717A.3B only punishes deceptive trespasses with the intent to physically or economically harm, it does not prohibit all deceptive trespasses such as those with no intent to harm or laud a facility.¹¹⁸ Therefore, the statute considers the viewpoint of the trespasser in delineating if the conduct is criminalized and prohibited by the Supreme Court jurisprudence from *Alvarez*.¹¹⁹

Given that § 717A.3B discriminates on viewpoint, according to precedent, the statute is only valid if it survives strict scrutiny analysis.¹²⁰ Strict scrutiny requires the law to be narrowly tailored to accomplish a compelling governmental interest, meaning the law must be the least restrictive means of achieving the identified interest.¹²¹ Iowa claims that § 717A.3B advances the governmental interests of protecting private property, proprietary information, and biosecurity from those who seek to harm agricultural facilities.¹²² Judge Rose, assuming these interests to be compelling despite arguments to the contrary, found the tailoring of § 717A.3B to be insufficient to pass strict scrutiny.¹²³ Overall, undercover investigations at agriculture facilities may violate other Iowa statutes, but this summary judgment ruling reiterated “the State of Iowa may not single out individuals for special punishment based on their critical viewpoint of agricultural practices, which they have sought to do with

115. *Id.*

116. *Id.* at 21. Judge Rose relied on the *R.A.V. v. City of St. Paul* Supreme Court Decision, and the Tenth Circuit Court of Appeals Decision in *ALDF v. Kelly* to find that § 717A.3B is plagued by viewpoint discrimination. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021).

117. *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124 (S.D. Iowa Mar. 14, 2022) (order granting plaintiffs’ motion and denying defendants’ motion for summary judgment).

118. *Id.* at 21.

119. *Id.*

120. *Id.* at 25.

121. *Id.*

122. *Id.*

123. *Id.* at 26.

§ 717A.3B.”¹²⁴ Hopefully on appeal, this favorable ruling will stand.¹²⁵

c. Iowa Code § 716.7A is Likely Constitutional

Following the January and February 2019 opinions which found § 717A.3A to be unconstitutional, and the December 2019 opinion that found § 717A.3B likely unconstitutional, in June 2020, the Iowa State Legislature passed a third Ag-Gag Statute, now codified as § 716.7A.¹²⁶ The law is formatted to more closely resemble the Iowa general trespass laws than the Ag-Gag laws, likely an attempt by the legislature to avoid judicial scrutiny.¹²⁷

The timing of this statute has an interesting backstory. In addition to responding to the litigation over the state’s other Ag-Gag statutes, the speed at which Iowa passed the statute correlates with allegations against state senator Ken Rozenboom. Senator Rozenboom, who sponsored both the 2019 and the 2020 Ag-Gag statutes, is himself a factory farm owner.¹²⁸ In January 2020, the senator’s farm was targeted by activists with the group Direct Action Everywhere when they released disturbing videos detailing animal abuse and neglect at his facility.¹²⁹ Shortly after the incident the senator introduced § 716.7A to the Iowa legislature.¹³⁰

This Iowa Code has not yet been challenged directly in the courts.¹³¹ Section 716.7A is referred to as the “food operation trespass” statute and makes it illegal to enter and remain on the property of a food operation without consent.¹³² The text of the law reads, “[a] person commits food operation trespass by entering or remaining on the property of a food operation without the consent of a person who

124. *Id.* at 27 (it is worth noting this summary judgment ruling relied heavily on the reasoning contained in *ALDF v. Kelly*. Animal Legal Defense Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021)).

125. Notice of Appeal, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Apr. 20, 2022).

126. Rumley, *supra* note .

127. Kitt Tovar, *Iowa Has a New Food Operation Trespass Law*, IOWA ST. UNIV. CTR. FOR AGRIC. L. & TAX’N (June 22, 2020), <https://www.calt.iastate.edu/article/iowa-has-new-food-operation-trespass-law> [<https://perma.cc/2QL4-AQ6E>].

128. Alleen Brown, *Iowa Quietly Passes Its Third Ag-Gag Bill After Constitutional Challenges*, THE INTERCEPT (June 10, 2020), <https://theintercept.com/2020/06/10/iowa-animal-rights-crime-ag-gag-law> [<https://perma.cc/8UVQ-TMGB>].

129. *Id.*

130. *Id.*

131. Although in the challenge to the IOWA CODE § 727.8A, IOWA CODE § 716.7 is “cross-referenced as the first element of the new crime challenge here.” See Civil Rights Complaint, *supra* note 48, at 19 ¶86.

132. IOWA CODE § 716.7A(2) (2020).

has real or apparent authority to allow the person to enter or remain on the property.”¹³³

Additionally, the § 716.8 outlines the penalty for violating the food operation trespass statute:

8. a. For a first offense, a person who commits food operation trespass as provided in section 716.7A is guilty of an aggravated misdemeanor.
- b. For a second or subsequent offense, a person who commits food operation trespass as provided in section 716.7A is guilty of a class “D” felony.¹³⁴

This statute significantly increases the penalty for trespass at a food operation as opposed to the standard trespass penalty statute under Iowa law.¹³⁵ Under the standard trespass statute, § 716.7, the penalty for all but one specific provision is a serious misdemeanor.¹³⁶ Only one individual has been charged under the food operation trespass statute thus far; in March 2021, after a surveillance video was passed to the Wright County Sheriff’s Department, Matthew Johnson, an animal rights activist with Direct Action Everywhere, was charged with food operation trespass for trying to enter the property of Iowa Select Farms, one of the biggest pork producers in the country.¹³⁷

This provision is likely a constitutional exercise of Iowa’s authority. On its face, this statute does not involve speech protected under the First Amendment, unlike the other statutes addressed in this Comment.¹³⁸

d. Litigation History Regarding the Constitutionality of Iowa Code § 727.8A

The fourth law in Iowa that falls under the umbrella of Ag-Gag was passed in 2021.¹³⁹ This statute, § 727.8A, is a filming prohibition Ag-Gag law. The statute reads:

133. *Id.*

134. IOWA CODE § 716.8 (2020).

135. IOWA CODE § 716.7 (2020).

136. *Id.*

137. Ryan J. Foley, *Industry Foe Charged Under Iowa’s New Food Trespassing Law*, ASSOCIATED PRESS (Apr. 8, 2021), <https://apnews.com/article/iowa-iowa-city-animal-rights-kim-reynolds-coronavirus-pandemic-ebad19753079efa4bbb28e0983737f7f> [<https://perma.cc/N5H8-D4SY>].

138. There may be an argument to be made that this statute has a chilling effect on First Amendment protected speech—namely that the law discourages undercover investigative speech like recording animal cruelty without regulating the activity directly. The chilling effect doctrine is most developed with regards to First Amendment protected speech; however, this doctrine is complicated and a group considering a challenge using this legal concept should conduct significant research on its history. *See Note, The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969). The chilling effect doctrine has even been used to protect the right of interstate travel against residency requirements for welfare benefits and therefore has many potential applications. *Id.* at 833–34.

139. IOWA CODE § 727.8A (2021).

A person committing a trespass as defined in section 716.7 who knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property commits an aggravated misdemeanor for a first offense and a class “D” felony for a second subsequent offense.¹⁴⁰

This statute is just the latest of four attempts by the Iowa State legislature to protect big agriculture through the suppression of free speech.¹⁴¹ In August 2021, the Animal Legal Defense Fund, an animal law nonprofit, along with People for the Ethical Treatment of Animals, Inc., Bailing out Benji, Food & Water Watch, and the Iowa Citizens for Community Improvement, filed a court case challenging the constitutionality of § 727.8A.¹⁴²

In challenging the statute, the coalition of nonprofits brought forth two causes of action.¹⁴³ The first cause of action deals with the First Amendment.¹⁴⁴ Plaintiffs first address the provision of the statute that criminalizes recordings. They argue that a recording is protected speech under the First Amendment.¹⁴⁵ The plaintiffs highlight that, just as other legislatures tried in the past, the code is written to “create [a] gloss of legitimacy by applying to industries beyond agriculture, so that the State can claim its aim is not just to prevent pro-animal speech.”¹⁴⁶ However, numerous courts reject such pretext and find the underlying statutes are unconstitutional despite such attempts at cover-ups.¹⁴⁷ Thus, the plaintiffs allege in their complaint that § 727.8A is not only constitutionally suspect but obviously unconstitutional, given that the State offered no justification for restricting speech.¹⁴⁸

Plaintiffs argue the legislative history of the bill makes it clear that the purpose of this statute is to prevent undercover investiga-

140. *Id.*

141. *See* Civil Rights Complaint, *supra* note 48, at 1.

142. *See* Civil Rights Complaint, *supra* note 48.

143. *Id.* at 7.

144. *Id.*

145. *Id.* at 4 (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04 (9th Cir. 2018); *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 561–62 (6th Cir. 2007); *Animal Legal Def. Fund v. Kelly*, 434 F.3d 974, 999 (D. Kan. 2020); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 566–67 (M.D.N.C. 2020), *appeal filed*, No. 20-1777 (4th Cir. July 10, 2020); *Animal Legal Def. Fund v. Herbert*, 263 F.3d 1193, 1206–09 (D. Utah 2017)).

146. *Id.*

147. *Id.* (citing *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017); *Stein*, 466 F. Supp. 3d 547; *Western Watersheds Project v. Michael*, 353 F. Supp. 3d 1176 (D. Wyo. 2018)).

148. *Id.* Additionally, the provision is wholly unnecessary given the protections by other Iowa statutes that (a) punish recording a person in compromising circumstances, and (b) a statute that makes it a misdemeanor to photograph or film a person through a window of their home without consent. *Id.* at 5 (citing IOWA CODE §§ 709.21, 716.7(2)(a)(7), 716.8(7)).

tions by animal interest groups and to protect agricultural producers.¹⁴⁹ The nonprofit coalition argues that the First Amendment “protects against the State’s unjustified attempts to suppress speech.”¹⁵⁰ In the case of this statute, it creates a new crime for engaging in speech “without the slightest justification, and where the law’s history suggests its only purpose is to continue Iowa’s unlawful campaign to prevent the public from learning the truth about what occurs at animal facilities.”¹⁵¹ Ultimately, the plaintiffs argue it follows that the statute fails First Amendment scrutiny.¹⁵² Plaintiffs assert that, given the statute does not justify the restriction on speech, § 727.8A is facially invalid and unconstitutional.¹⁵³

In the alternative, if the court were to find that the statute survives a facial challenge, the plaintiffs argue the law is still unconstitutional for having a chilling effect on the plaintiffs First Amendment protected speech, namely adding a barrier to their video recording and subsequent political advocacy.¹⁵⁴

The second cause of action deals with the overbreadth doctrine. The plaintiffs argue that the law violates the First Amendment for being overly broad because it “suppresses a substantial amount of protected speech.”¹⁵⁵ Additionally, it is unconstitutional because Iowa failed to justify the restriction on speech.¹⁵⁶ The plaintiffs advocate for the court to strike down the provision as unconstitutional and ask for an injunction against its enforcement to cure the chilling effect on the speech of non-profit groups suffering from the denial of access to information.¹⁵⁷ After an exchange of motions pertaining to this case, on January 17, 2022, the plaintiffs filed a reply in support of their motion for summary judgment, or in the alternative, a preliminary injunction against the statute.¹⁵⁸ The motion for summary judgment was the last substantive action in this case, and the case has yet to be resolved as of March 28, 2022.¹⁵⁹

149. *Id.* at 6.

150. *Id.* at 7.

151. *Id.*

152. *Id.*

153. *Id.* at 23.

154. *Id.*

155. *Id.* at 23–24.

156. *Id.* at 7, 24.

157. *Id.* at 24.

158. Plaintiffs’ Reply in Support of Their Motion for Summary Judgment, or in the Alternative, a Preliminary Injunction at 2, Animal Legal Def. Fund v. Reynolds, (S.D. Iowa Jan. 17, 2022) (No. 4:21-cv-00231).

159. *Id.*

2. *The Arkansas Ag-Gag Law*

Arkansas, another member of the Eighth Circuit, has its own Ag-Gag law. Title 16, section 16-118-13 of the Arkansas Code was enacted in 2017.¹⁶⁰ The “Arkansas Ag-Gag Law” encompasses two of the elements present in many Ag-Gag laws: (1) a prohibition of information gathering through filming and (2) liability for coconspirators. The text of the statute reads as follows:

- (c) An act that exceeds a person’s authority to enter a nonpublic area of commercial property includes an employee who knowingly enters a nonpublic area of commercial property for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and without authorization subsequently;
 - (1) Captures or removes the employer’s data, paper, records, or any other documents and uses the information contained on or in the employer’s data, paper, records, or any other documents in a manner that damages the employer;
 - (2) Records images or sound occurring within an employer’s commercial property and uses the recording in a manner that damages the employer;
 - (3) Places on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;
 -
- (d) A person who knowingly directs or assists another person to violate this section is jointly liable.¹⁶¹

The lead sponsor of the bill was Arkansas House Representative DeAnn Vaught.¹⁶² Vaught who is also a pork producer,¹⁶³ was initially one of the named defendants in the lawsuit detailed below, seeking to prevent enforcement of the statute.¹⁶⁴ Other sponsors of the bill included members of the Farm Bureau, including the former president of a local chapter, and the Arkansas Cattlemen’s Association.¹⁶⁵

160. *Id.*

161. ARK. CODE ANN. § 16-118-113 (West 2017).

162. H.B. 1665, 91st Leg., Reg. Sess. (Ark. 2017).

163. *DeAnn Vaught*, STATE OF ARKANSAS HOUSE OF REPRESENTATIVES, <https://www.arkansashouse.org/district/4> [<https://perma.cc/8LHB-MXTH>] (last visited Feb. 20, 2022) (noting Vaught’s occupation as a farmer and her membership status in the Farm Bureau and Pork Producers organization).

164. On December 3, 2021, DeAnn Vaught and her husband Jonathan were dismissed as defendants in the case. *Agreed Order of Dismissal of Vaught Defendants*, Animal Legal Def. Fund v. Vaught, 8 F.4th 714 (2020). The case name remained the same. *Id.*

165. Representative Jon Eubanks is a farmer and former president of the local Farm Bureau. *Jon S. Eubanks*, STATE OF ARK. HOUSE OF REPRESENTATIVES, <https://www.arkansashouse.org/district/74> [<https://perma.cc/DYP3-PFZF>] (last visited Sept. 15, 2021). Representative Jack Fortner is a cattleman and member of the Arkansas Cattlemen’s Association. *Jack Fortner*, STATE OF ARK. HOUSE OF REPRESENTATIVES, <https://www.arkansashouse.org/district/99> [<https://perma.cc/AH9V-F6RU>] (last visited Sept. 15, 2021).

In 2019 a group of nonprofits, the Animal Legal Defense Fund, Animal Equality, Center for Biological Diversity, and the Food Chain Workers Alliance filed a lawsuit in the Eastern District of Arkansas against Prayer Creek Farm and Peco Foods, Inc. This lawsuit seeks to stop enforcement of the Arkansas Ag-Gag Law against potential future undercover investigations. Plaintiff brought this suit on the grounds that enforcement would violate the First Amendment and Equal Protection Clause of the Constitution.¹⁶⁶ In February 2020, Judge James Moody Jr. granted the motions to dismiss the case, and the nonprofits appealed this decision soon thereafter.¹⁶⁷ In August 2021, after hearing the dispute, the Eighth Circuit Court of Appeals reversed the dismissal of the case and remanded it to the lower courts for proceedings.¹⁶⁸

At no point has an injunction against the enforcement of the law been awarded while the litigation is pending. As such, the Arkansas law is currently enforceable within the state.

As of March 22, 2022, the court has not set a date for the rehearing of the dispute. However, the arguments for the unconstitutionality of the case can be summarized as follows based on the opening briefs filed in 2020 and the original complaint from 2019.¹⁶⁹ In these documents, plaintiffs cited numerous First Amendments disputes settled by the United States Supreme Court, as well as the other Ag-Gag challenges appearing in this Comment.¹⁷⁰

a. The Information Gathering and Recording Prohibitions Violate the First Amendment

The information gathering and recording prohibitions, contained within § 16-118-113(c)(1)–(3) of the Arkansas Ag-Gag Law, target pro-

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166. Complaint for Declaratory and Injunctive Relief, *Animal Legal Def. Fund v. Vaught*, No. 4:19-CV-00442, 2020 WL 10319760 (E.D. Ark. June 25, 2019) [hereinafter *Vaught Complaint*]; *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 717 (8th Cir. 2021).
167. On March 12, 2020, the nonprofits filed a notice of appeal as to the judgment. Notice of Appeal at 1, *Animal Legal Def. Fund v. Vaught*, No. 4:19-CV-00442, 2020 WL 10319760 (E.D. Ark. Mar. 12, 2020).
168. *Vaught*, 8 F.4th at 717.
169. Opening Brief of Appellants, *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714 (8th Cir. May 27, 2020) (No. 20-1538) [hereinafter *Opening Brief of Appellants*]; see *Vaught Complaint*, *supra* note 166.
170. See *Opening Brief of Appellants*, *supra* note 169, at *6, *19, *35–37, *41 n.7 (citing to *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017)); *Animal Legal Def. Fund v. Kelly*, 434 F.3d 974 (D. Kan. 2020); *Animal Legal Def. Fund v. Reynolds*, 297 F.3d 901 (S.D. Iowa 2018); *Animal Legal Def. Fund v. Wasden*, 878 F. Supp. 3d 1184 (9th Cir. 2018), *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F.App'x 122 (4th Cir. 2018); *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017)).

tected speech.¹⁷¹ The provisions prohibit (1) gathering information if it is used and is subsequently communicated, and (2) using an unattended camera or electronic surveillance device to record images or data, or making audio or audiovisual recordings.¹⁷² Both of these provisions reference protected speech in the form of communication.¹⁷³ However, even if the court were to find these are not protected speech in terms of communication, the text still implicates the First Amendment because it involves the creation of speech.¹⁷⁴

Plaintiffs allege that because § 16-118-113(c)(1)–(3) defines unauthorized “acts” to include communications, an individual’s right to speak is subjected to a restraint on the way in “which the information might be used or disseminated.”¹⁷⁵ Additionally, the plaintiffs highlight that subsection (c)(2)–(3) prohibit recordings, an inherently expressive activity.¹⁷⁶ The plaintiffs emphasize that subsection (c)(1) prohibits information gathering to inform speech, which is yet again protected by the First Amendment.¹⁷⁷ Subsequently, the statute restricts the gathering of information and therefore prevents the information from being used in videos for public consumption.¹⁷⁸ Therefore, plaintiffs believe the law interferes with the creation of speech and infringes on the First Amendment rights of the members of the nonprofit coalition.¹⁷⁹

One of the First Amendment’s purposes is to protect persons against laws that target speech based on ideas, subject matter, or content.¹⁸⁰ Accordingly, the courts apply a strict scrutiny standard when reviewing the laws that restrict speech based on the content or viewpoint of the speech.¹⁸¹ In order for a law to stand the test of strict scrutiny, the government must show the law has a compelling govern-

171. ARK. CODE ANN. § 16-118-113(c)(1)–(3) (West 2017).

172. *Id.*

173. *See* Vaught Complaint, *supra* note 166, at 30 (finding that “[t]he ‘making [of] an audio or audiovisual recording’ is the equivalent of First Amendment-protected speech.” (citing *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012))).

174. *Id.* (referencing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 n.1 (2011)).

175. *Id.* at *6, *19, *35–37, *41 n.7 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011)).

176. *Id.* at *6 (citing *Animal Legal Def. Fund v. Wasden*, 878 F. Supp. 3d 1184, 1203 (9th Cir. 2018)).

177. *Id.* at *7 (finding laws that “control or suppress speech [through] operat[ing] at different points in the speech process” abridge freedom of speech (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 n.1 (2011))).

178. *Id.* at *7.

179. *Id.*

180. *See* Vaught Complaint, *supra* note 166, at 31 (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972)).

181. *Id.* (referencing *Reed v. Town of Gilbert*, 567 U.S. 155 (2015)).

mental interest and that the regulation is narrowly tailored to meet those needs.¹⁸²

The plaintiffs, in their original complaint, argue that the Ag-Gag law violates the First Amendment in two ways, (1) it is overly broad, and (2) many of the provisions directly regulate speech and cannot withstand strict scrutiny.¹⁸³

First, the statute is overbroad. Under the overbreadth doctrine, the Eighth Circuit Court of Appeals has previously found that “if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep,” then “[t]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment Rights.”¹⁸⁴

Second, the statute regulates speech in such a way that is not narrowly tailored to meet governmental interests. There is nothing in the legislative record that establishes a need for the Arkansas Ag-Gag Law.¹⁸⁵ The purpose of the statute is to “discourage and limit the public disclosure of and discourse about truthful information gathered through undercover investigations.”¹⁸⁶ The only other rationale that the legislative history reveals is an effort to stop corporate espionage; however, this concern is already addressed under other Arkansas law, thereby making the statute not narrowly tailored to fit the purpose.¹⁸⁷

b. Joint Liability for Coconspirators Violates the First Amendment

The plaintiffs also argue that the Arkansas Ag-Gag Law’s joint liability provision is unconstitutional.¹⁸⁸ This provision penalizes communications that are integral in facilitating the First Amendment protected activities like information gathering and speech creation through recording.¹⁸⁹ The same strict scrutiny analysis from the above section applies, thus the provision is also argued to be unconstitutional.¹⁹⁰

182. *Reed*, 576 U.S. at 155–56 (finding that “[b]ecause content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

183. *See* Vaught Complaint, *supra* note 166, at 35.

184. *Id.* (quoting *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1157 (8th Cir. 2014)).

185. *Id.* at 36.

186. *Id.*

187. *Id.*; ARK. CODE ANN. § 4-75-601 (West 2021).

188. *See* Opening Brief of Appellants, *supra* note 169, at *7.

189. *Id.*

190. *See* discussion *supra* subsection III.B.2.a.

3. *The North Dakota Ag-Gag Law*

North Dakota's Ag-Gag law is found in the criminal code and is titled the Animal Research Facility Damage Act.¹⁹¹ This statute contains provisions that prohibit filming and trespass, similar to the elements of other Ag-Gag laws. This law was passed during the first wave of Ag-Gag laws in 1991, shortly after the first Ag-Gag law went into effect in Kansas. North Dakota's Ag-Gag law reads:

No person without the effective consent of the owner may:

1. Intentionally damage or destroy an animal facility, an animal or property in or on the animal facility, or any enterprise conducted at the animal facility.
2. Acquire or otherwise exercise control over an animal facility or an animal or other property from an animal facility with the intent to deprive the owner and to damage the enterprise conducted at the facility.
3. Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section.
4. Enter an animal facility and remain concealed with intent to commit an act prohibited by this section.
5. Enter an animal facility and commit or attempt to commit an act prohibited by this section.
6. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.
7. Intentionally turn out or release any animal in or on an animal facility.¹⁹²

While little information about the authors of this legislation is available, at least one of the sponsors of the bill was a farmer and another sponsor received donations from the agricultural powerhouse Monsanto during later election periods.¹⁹³

a. There are First Amendment Grounds to Find the Audio-Video Recording Provision Unconstitutional

The text of the North Dakota law that specifically targets audio and video recordings reads, "No person without the effective consent of the owner may . . . [e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment."¹⁹⁴ The law defines effective consent to

[I]nclude[] consent by a person legally authorized to act for the owner. Consent is not effective if: (a) Induced by force or threat, (b) Given by a person the offender knows is not legally authorized to act for the owner; or (c) Given by a

191. N.D. CENT. CODE § 12.1-21.1 (2021).

192. N.D. CENT. CODE § 12.1-21.1-02 (2021).

193. Representative Alice Olson was a farmer. *Alice A. Olson*, N.D. LEGISLATIVE BRANCH, <https://www.legis.nd.gov/biography/alice-a-olson> [https://perma.cc/58KS-JCTT] (last visited Sept. 15, 2021). Senator Dave Nething received his largest donation in 2008 from the agricultural powerhouse Monsanto. *Dave Nething*, BALLOTPEdia.ORG, https://ballotpedia.org/Dave_Nething [https://perma.cc/M5S7-6GW9] (last visited Sept. 15, 2021).

194. N.D. CENT. CODE § 12.1-21.1-02 (2021).

person who by reason of age, mental disease or defect, or influence of drugs or alcohol is known by the offender to be unable to make a reasonable decision.¹⁹⁵

Additionally, the statute defines owner as “a person who has title to the property, possession of the property, or a greater right to possession of the property than the actor.”¹⁹⁶

The First Amendment provides grounds for a challenge against the constitutionality of North Dakota’s recording provision. Many First Amendment challenges and corresponding defenses have been examined during litigation in other states and circuits.

In *Animal Legal Defense Fund v. Herbert*, the District Court for the District of Utah determined that recordings are speech, and as such, would be treated just as restrictions of speech itself and evaluated under the First Amendment protections.¹⁹⁷ As recording is a protected activity under the First Amendment, so is making the recordings.¹⁹⁸ While states have the capability to regulate the act of recordings, just as they do speech generally, a state must justify such a provision and the provision must be narrowly tailored to survive the strict scrutiny standard of First Amendment constraints on protected speech.¹⁹⁹

In order to survive strict scrutiny analysis under the First Amendment, a law must be “‘actually necessary’ to achieve the State’s interests, and may not be over or underinclusive.”²⁰⁰ In *Herbert*, the Utah court determined first, that the State did not demonstrate a compelling interest, and second, that the Act was not actually necessary because the law’s overbreadth captured more behaviors than needed to effectuate the State’s stated purposes.²⁰¹

While rulings from a district court in Utah do not bind North Dakota, four other district and circuit courts have applied the same framework to a recording provision of an Ag-Gag law after determining that video recordings are speech.²⁰² A future challenger for the

195. N.D. CENT. CODE § 12.1-21.1-01 (2021).

196. *Id.*

197. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1207–08 (D. Utah 2017).

198. *Id.*

199. *Id.* at 1208.

200. *Id.* at 1212. (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–804 (2011)).

201. *Id.* at 1212–13.

202. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021); *Animal Legal Def. Fund v. Wasden*, 878 F. Supp. 3d 1184, 1193 (9th Cir. 2018); *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F.3d 547, 577 (M.D.N.C. 2020). While the question of video recording and photographs as speech protected under the First Amendment has not been analyzed in the Eighth Circuit yet, it will likely soon because the Eighth Circuit Court of Appeals recently remanded the case *Ness v. City of Bloomington* and the case *Animal Legal Defense Fund v. Vaught*, both of which involve a question on videos as speech. *Ness v. City of Bloomington*, No.

North Dakota provision should argue that (1) recordings are speech, (2) the making of recordings are protected by the First Amendment, (3) any restriction on such speech must survive strict scrutiny challenge, (4) any stated purposes claimed by the state of North Dakota are not compelling interests, and (5) even if the state provides a compelling interest, the restriction is not narrowly tailored because it is either over or underinclusive.

Given that a state's claimed compelling interest of an older statute, such as this, is not easily predictable ahead of the completion of a detailed legislative history, or before a legal challenge is brought, this Comment will only evaluate the narrow tailoring of the statute to the purposes for which similar statutes have been justified.²⁰³

In another lawsuit over a similar Idaho law, the state argued the act was needed to protect privacy and trade secrets.²⁰⁴ However, the Ninth Circuit Court of Appeals determined the provision was not constitutionally valid because it was not narrowly tailored; the circuit court found that there were "various other laws at [Idaho's] disposal that would allow it to achieve its stated interests while burdening little or no speech."²⁰⁵ The State's stated purpose for the statute was to protect privacy and property, and the court determined the State's tort laws against theft of trade secrets and invasion of privacy were sufficient to vindicate those rights.²⁰⁶ For those reasons, the Ninth Circuit determined the recordings provision could not survive First Amendment strict scrutiny, and it was struck down as unconstitutional.²⁰⁷ Similarly, North Dakota has adopted the North Dakota Trade Secrets Act, which addresses privacy and trade secret theft concerns.²⁰⁸ If North Dakota were to claim its Ag-Gag law was needed to protect privacy and trade secrets, it would likely fall victim to the same reasoning as Idaho. Having another statute that addresses the concerns of trade secrets and privacy implies that the Ag-Gag law is not narrowly tailored to accomplish these goals.

Utah claimed the purpose of their similar law was to protect the health and safety of animals and employees.²⁰⁹ The district court in

20-2571, 2021 WL 3918886 (8th Cir. Sept. 2, 2021); *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714 (8th Cir. 2021).

203. A state's claimed interests can sometimes be gleaned from the legislative history of a law passed. However, given that the North Dakota statute discussed in this Comment was passed in 1991, access to documents and floor debates that illuminate these kinds of information are limited. N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2021).

204. *Wasden*, 878 F. Supp. 3d at 1204–05 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc)).

205. *Id.*

206. *Id.* at 1204–05.

207. *Id.* at 1205.

208. N.D. CENT. CODE §§ 47-25.1-01 to -08 (2021).

209. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1212 (D. Utah 2017).

the *Herbert* found that the State provided no evidence that banning recordings was actually necessary to address perceived threats to animals and employees from individuals recording the operations.²¹⁰ The court said the act was also underinclusive because, while it punished undercover investigators, it did not punish others for the same harmful conduct.²¹¹ Along the same vein, North Dakota's Ag-Gag law seems unnecessary to protect animals and employees from harm, especially given how overly broad the statute is in application; if read literally, the North Dakota statute appears to imply that simply recording coworkers singing happy birthday would also be forbidden under the law.

b. *Analysis on the Provision Prohibiting Acquiring or Exercising Control Over an Animal Facility*

The provision of the North Dakota law that prohibits acquiring or exercising control over the animal facility falls under the category of Ag-Gag trespass laws. The statute reads, “[n]o person without the effective consent of the owner may . . . [a]cquire or otherwise exercise control over an animal facility or an animal or other property from an animal facility with the intent to deprive the owner and to damage the enterprise conducted at the facility.”²¹²

In a case regarding a similar provision, *Animal Legal Defense Fund v. Kelly*, the Tenth Circuit Court of Appeals determined that the control provision of the Kansas statute, the oldest Ag-Gag law in the nation,²¹³ was unconstitutional under the First Amendment.²¹⁴ The language of the statute, which is nearly identical to the North Dakota law, reads,

(b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.²¹⁵

While Kansas is not in the same circuit as North Dakota, it would behoove any challenger of the North Dakota statute to make the same arguments against unconstitutionality over the control provision of the law. A challenger may first argue, as they did in *Kelly*, that by using the term effective consent, the statute forbids categories of conduct based on what a person says to obtain consent.²¹⁶ In the case of

210. *Id.*

211. *Id.*

212. N.D. CENT. CODE § 12.1-21.1-03 (2021).

213. Rumley, *supra* note 1 (highlighting that the Kansas statute is the first Ag-Gag law to pass in the United States).

214. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1224 (10th Cir. 2021).

215. KAN. STAT. ANN. § 47-1827(a) (1990).

216. *Kelly*, 9 F.4th at 1233.

North Dakota, effective consent forbids conduct when consent was obtained by force or threat, the consenter did not have authority to act for the owner, or the consenter was legally unable to make a reasonable decision due to defect, age, or substance influence.²¹⁷ A second categorical limit on conduct is that it only applies when the action is taken with the intent to damage the enterprise conducted at the animal facility.

Effectively, the North Dakota Ag-Gag law operates only when an individual accesses a facility without obtaining proper consent and gains control of the property with the intent to deprive the owner and to damage the enterprise conducted at the facility. Both the Ninth and Tenth Circuit Courts have found that such language and limitations cannot “be characterized as simply proscribing conduct.”²¹⁸ Thus, courts have found similar statutes regulate not only the actions a potential undercover investigator can and cannot do, but also regulate what they can and cannot say.²¹⁹

The North Dakota Ag-Gag provision is likely a viewpoint discrimination. The text of the statute is meant to protect animal facilities, which it defines as “any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale.”²²⁰ Because the language of this provision includes an intent to deprive the owner and to damage the enterprise, it necessarily follows that someone who seeks to exercise control for other reasons, like an intent to praise the facility for their treatment of animals, will not be covered by the statute.²²¹

217. N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2021).

218. *Kelly*, 9 F.4th at 1233 (quoting *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018)).

219. *Id.* (citing *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006)).

220. N.D. CENT. CODE § 12.1-21.1-01(2) (2021).

221. It is worth noting however, that the portion of the *Kelly* opinion that is comparable to the North Dakota statute relied on a reading of the Supreme Court case *United States v. Alvarez* that runs contrary to the opinion of the Eighth Circuit Court of Appeals decision in *Animal Legal Def. Fund v. Reynolds*. *Kelly*, 9 F.4th at 1234 (emphasizing that while *Alvarez* finds that false speech is not entitled to full First Amendment protection, the intent to damage requirement does not leave the speech unprotected “because not all intents to damage the enterprise of an animal facility are cognizable harms under *Alvarez*.”); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021) (finding that trespass is “an ancient cause of action that is long recognized in this country,” and that under *Alvarez*, “intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment.”). Nevertheless, it is worth it for any challenger of the North Dakota law to present the arguments made in *Kelly*, given that the language of the Kansas statute more closely resembles the North Dakota statute than the Iowa statute at issue in *Reynolds*. While the district courts within the Eighth Circuit Court of Appeals are obligated to follow other precedents within the circuit, there are compelling arguments for adopting the analysis of the Tenth Circuit Court of Appeals from the decision in

But as in the recording provision, even unprotected speech may not be a vehicle for content-based discrimination so long as its unrelated to distinctive proscribable content.²²² While it is permissible to punish all entry to property without effective consent of an owner, this statute only prohibits entry onto the property without consent when there is an intent to damage the facility, which is an impermissible viewpoint discrimination. Under similar circumstances, the Tenth Circuit Court of Appeals concluded that the intent element does not remove the statute from analysis under a strict scrutiny standard.²²³ Under that standard a government must demonstrate that a challenged regulation “furthers a compelling governmental interest and is narrowly tailored to that end.”²²⁴ It is likely that any governmental interest presented by the state of North Dakota, if this provision were challenged, would not survive strict scrutiny as the statute is overly broad.

Given that the control provision of North Dakota’s Ag-Gag law is overly broad, it follows from the far-reaching definition of animal facility, the law could apply to a grocery store where fish are sold or a supply store that occasionally sells chickens.²²⁵ But as the provision only requires the actor to exercise control with intent to deprive the owner and damage the enterprise, this law could feasibly punish even a shoplifter.

4. *Missouri Ag-Gag Laws*

There are two active laws in the state of Missouri that fall under the category of Ag-Gag statutes.²²⁶ First, title 38, section 578.013 of

Kelly with regards to statutes like the N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2021).

222. *Kelly*, 9 F.4th at 1233.

223. *Id.* at 1235.

224. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015)).

225. See *Strong*, *supra* note 63, at 622 (highlighting that a similarly worded Idaho statute was so broad as to implicate “lies told to gain access to publicly-accessible facilities like grocery stores, garden nurseries, and restaurants with an herb garden.”).

226. There is a third Missouri statute that is sometimes referred to as an Ag-Gag statute that this Comment will not evaluate. Missouri Revised Statute § 261.099 makes it illegal for parties, other than certain federal and local bodies like the United States Department of Agriculture and the county sheriffs, to “inspect” an animal facility. MO. REV. STAT. § 261.099 (2021). The implication of such a provision is that it prohibits other parties from providing testimony, during criminal prosecutions, on the conditions or events that may take place during an “inspection.” Some groups, like the Animal Welfare Institute, classify this statute of Ag-Gag laws. See ANIMAL WELFARE INSTITUTE, *supra* note 2. Nevertheless, this statute is outside the scope of this Comment given that it does not clearly fall within one of the five common categories identified for evaluation: (1) trespass, (2) prohibitions on filming, (3) employment fraud or false pretenses, (4) delayed reporting, or (5) coconspirator liability.

the Missouri Revised Statutes is a delayed reporting Ag-Gag law. Second, § 578.405 is a false pretenses, or lying prohibition, Ag-Gag law.

The delayed reporting of filmed abuse or neglect provision, § 578.013, reads:

1. Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect 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.
2. No videotape or digital recording submitted under subsection 1 of this section shall be spliced, edited, or manipulated in any way prior to its submission.
3. An intentional violation of any provision of this section is a class A misdemeanor.²²⁷

The false pretenses Ag-Gag statute, § 578.405, is titled the Animal Research and Production Facilities Protection Act. It states:

3. A person commits the offense of prohibited acts against animal research and production facilities if he or she:
 -
 - (3) Obtains access to an animal facility by false pretenses for the purpose of performing acts not authorized by the facility;
 -
 - (5) Knowingly obtains, by theft or deception, control over records, data, material, equipment, or animals of any animal facility for the purpose of depriving the rightful owner or animal facility of the records, material, data, equipment, or animals, or for the purpose of concealing, abandoning, or destroying such records, material, data, equipment, or animals[.]²²⁸

The false pretenses statute contains relatively common language seen in various Ag-Gag statutes. Nonprofits have filed cases over these provisions for violating the “right to lie” principle. For example, both the Ninth Circuit in *Animal Legal Defense Fund v. Wasden* and the District of Utah in *Herbert* found that general provisions of this nature were unconstitutional for violating the right to lie principle established by the U.S. Supreme Court in *Alvarez*.²²⁹

As for the statute dealing with delayed reporting and recordings, it is not the typical language seen in prohibitions on filming, it instead is a rapid reporting provision. This type of law represents the newest attempt of Ag-Gag laws coming into fruition.²³⁰ The format of the law was written in response to the courts’ decisions in cases similar to *Wasden*, which found complete bans on video and audio recordings to

227. MO. REV. STAT. § 578.013 (2012).

228. *Id.* § 578.405 (2017).

229. *Animal Legal Def. Fund v. Wasden*, 878 F. Supp. 3d 1184, 1199 (9th Cir. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

230. *See* Shea, *supra* note 28 at 339.

violate the First Amendment.²³¹ By instead regulating the amount of time a person has to turn over a video, the legislators hope to avoid the same potential conflict that has invalidated other statutes under the First Amendment.²³²

This format inhibits long-term, systemic investigations.²³³ The statute makes it so that an employee cannot sit on a video of animal abuse until they record multiple incidents before bringing it to the attention of animal rights organizations or law enforcement; instead, an employee who records animal abuse must turn the evidence over to law enforcement within twenty-four hours, meaning that there is no time for a long-term, undercover investigation or confirmation. Rapid reporting requirements benefits the agricultural business sector in the court of public opinion; one-off videos of animal abuse are easier to sell as an bad-egg employee, rather than a systematic practice.²³⁴

a. Given Recent Court Developments, the False Pretenses Provision is Likely Constitutional

In analyzing similar disputes over provisions relating to falsehoods and lying, both the Ninth Circuit Court of Appeals and the District Court of Utah analyzed statutes using the Supreme Court ruling in *Alvarez*.²³⁵ In *Alvarez*, the court evaluated the Stolen Valor Act of 2005 (“Stolen Valor Act”) for violations of the First Amendment.²³⁶ The Stolen Valor Act criminalized lying about receiving a Congressional Medal of Honor and other military awards.²³⁷ The Supreme Court said the Stolen Valor Act violated the First Amendment because the Court had “never endorsed the categorical rule . . . that false statements receive no First Amendment protection.”²³⁸ Falsity of a statement alone is insufficient to bring speech outside the protections of the

231. *Wasden*, 878 F.3d at 1203.

232. *See* Shea, *supra* note 28, at 346–51, 369 (implying that after a few wins in the courts by animal coalition groups, big agriculture responded by advocating for rapid reporting laws instead of the classic Ag-Gag statutes as they might be able to better withstand legal challenges).

233. For instance, in 2008 the Humane Society of the United States investigated Westland/Hallmark Meat Company and gathered six weeks of evidence detailing animal abuse at their meat packing facility in California, this investigation led to a recall of 143 million pounds of beef—but in states like Missouri where there are rapid reporting laws, such an investigation would be impossible and widespread media attention to documented abuse would have been an unlikely result. Shea, *supra* note 28, at 337–38.

234. *Id.* at 338–39.

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

236. *Id.* at 715; Stolen Valor Act of 2005, Pub. L. 109-437, 120 Stat. 3266 & 3267, *invalidated by* *United States v. Alvarez*, 567 U.S. 709 (2012).

237. Stolen Valor Act of 2005, Pub. L. 109-437, 120 Stat. 3266 & 3267, *invalidated by* *United States v. Alvarez*, 567 U.S. 709 (2012).

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

First Amendment; for lies to be outside the bounds of protection it “must be a knowing or reckless falsehood.”²³⁹ Since the Stolen Valor Act, in contrast to defamation, fraud, and other legally cognizable harms deriving from false statements, criminalizes pure falsity and nothing more, the Court held it unconstitutional.²⁴⁰

In *Wasden*, the court evaluated the Idaho statute that contained three provisions prohibiting lying in different contexts.²⁴¹ The law prohibited (1) lying to gain entry to an agricultural facility, (2) lying to obtain records with intent to injure the facility, and (3) lying to obtain employment with intent to injure the facility.²⁴² Referencing *Alvarez*, the court concluded that the general provision that prohibits lying to gain entry to the agricultural facility was unconstitutional.²⁴³ Like the Stolen Valor Act from *Alvarez*, the statute that forbade lying to gain entry solely criminalizes making false statements without regard to legal harm or material gain.²⁴⁴ Because the provision targets generally false speech without specificity, it was not narrowly tailored enough to pass strict scrutiny analysis mandated by the First Amendment.²⁴⁵ The Ninth Circuit said the other two provisions were constitutional.²⁴⁶ For the records provision, the restriction was aimed at conduct—telling a lie for material gain, thus surviving rational basis review.²⁴⁷ The lying for employment provision was constitutional given that the drafters included an intent requirement that narrowed the applicability of the prohibition.²⁴⁸

In *Herbert*, the District of Utah struck down an Ag-Gag statute containing a provision that criminalized accessing an agricultural facility using false pretenses.²⁴⁹ The court cited *Alvarez* and accordingly applied a strict scrutiny standard to evaluate the restriction on lying.²⁵⁰ The court held while it is possible that a person lying to access an agricultural facility may harm animals and employees, there is no guarantee that such harm will happen.²⁵¹ While the State argued in response that lying causes the harm of trespass, the court held that liars who obtain access are not trespassers until a trespass-type harm

239. *Id.* at 719 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

240. *Id.* at 719.

241. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1193 (9th Cir. 2018).

242. *Id.*

243. *Id.* at 1190.

244. *Id.* at 1195–96.

245. *Id.* at 1196.

246. *Id.* at 1199–1202.

247. *Id.* at 1199–1201.

248. *Id.* at 1201–02 (the intent requirement meant that only those who intend to cause economic or other injuries to the facilities would be punished for lying to obtain employment).

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

250. *Id.* at 1209–11 (evaluating *United States v. Alvarez*, 567 U.S. 709 (2012)).

251. *Id.* at 1202.

occurs—consent based on a lie is still effective consent until harm occurs.²⁵² Additionally, not all lies that can be told to obtain access to a facility will cause a trespass-type harm, for instance the court said a person can provide false reasons for wanting a tour of a facility;²⁵³ and because this kind of entry does not alone create a trespass harm, just as in *Alvarez*, the law criminalizes lying.²⁵⁴

The *Herbert* court also determined that the false pretenses provision is a content-based restriction.²⁵⁵ An authority can only know if the law is violated by reviewing words said and determining if a lie was used in gaining entry, meaning the law considers content and is therefore subject to strict scrutiny.²⁵⁶ Under a strict scrutiny standard, the court found that the state provided no compelling interests and the harms that the state wished to protect against were “entirely speculative.”²⁵⁷ Even if the interests were valid, the court found the restriction was not narrowly tailored to the stated purposes.²⁵⁸ Other content-neutral laws easily could have addressed the concerns Utah cited.²⁵⁹ Instead, the law restricted protected speech and “prevent[ed] undercover investigators from exposing abuses at agricultural facilities.”²⁶⁰

Contrary to these prior non-binding precedents within other Circuit Courts of Appeal, the Eighth Circuit found a similar provision of an Ag-Gag statute in Iowa was constitutional and did not violate the First Amendment.²⁶¹ The majority cited the provision of the *Alvarez* plurality decision that determined false speech is not protected in cases of “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the cost of vexatious litigation.”²⁶² The court held that the legally cognizable harm of trespass was the intended target of the “access provision” of the Iowa statute which read, “[a] person is guilty of agricultural production facility fraud if the person willfully . . . [o]btains access to an agricultural production facility by false pretenses.”²⁶³

The Eighth Circuit pointed to a concurrence from the *Alvarez* opinion as one justification for its finding. *Alvarez* was not decided by a

252. *Id.* at 1203.

253. *Id.*

254. *Id.* at 1204 (analogizing to *Alvarez*, 567 U.S. 709).

255. *Id.* at 1211.

256. *Id.*

257. *Id.* at 1212.

258. *Id.*

259. *Id.* at 1213.

260. *Id.*

261. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021). See discussion *supra* subsection III.B.4.a.

262. *Reynolds*, 8 F.4th at 785 (quoting *United States v. Alvarez*, 567 U.S. 709 (2012)).

263. *Id.* at 783, 786.

majority of the Supreme Court, but rather through a plurality opinion. The Eighth Circuit held when such is the case, it is the court's job to attempt to identify the rule, but "where a concurring opinion is not a logical subset of the plurality's rationale, or vice-versa, it is not possible to discern a holding in the case."²⁶⁴ The concurrence in *Alvarez* contained a more narrow holding because, as opposed to the plurality opinion, it applied intermediate scrutiny rather than exacting or strict scrutiny.²⁶⁵ From this the Eighth Circuit concluded there is no single rationale, and therefore the only binding piece of the case was the specific result.²⁶⁶

The Eighth Circuit then went on to find the access provision valid under the constitution because the lie was associated with the legally cognizable harm of trespass.²⁶⁷ The opinion stated that trespass is an ancient cause of action long recognized in the U.S., and that the act produces a legally recognized harm that is repaid through the award of nominal damages.²⁶⁸ Ultimately, the Eighth Circuit concluded "the Access Provision's prohibition on assuming false pretenses to obtain access to an agricultural production facility is consistent with the First Amendment."²⁶⁹ Until the Supreme Court provides clarification, as it stands, the Eighth Circuit opinion in *Reynolds* would be binding on any challenge to the Missouri statute, given that Missouri is located within the Eighth Circuit and the challenge brought would be a constitutional question for a court to decide.

Due to similarities in the text evaluated from the Iowa statute reviewed by the Eighth Circuit, and the Missouri statute in question, the court would likely find that the provision was motivated by trespass and, as such, addresses a legally cognizable harm. With such a purpose, the statute would likely be constitutional.

b. Rapid Reporting for Filming Provision is Unconstitutional

The second Ag-Gag statute in Missouri indirectly restricts the right to record the occurrence of animal abuse.²⁷⁰ The law requires farm animal professionals in possession of digital recordings that depict farm animals being abused or neglected to turn those videos over to law enforcement within twenty-four hours of recording.²⁷¹ According to the big agriculture narrative, this type of restriction on animal abuse investigation should be touted as a win for animal rights and

264. *Id.* at 785 (citing *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009)).

265. *Id.* at 785.

266. *Id.*

267. *Id.* at 786.

268. *Id.*

269. *Id.*

270. MO. REV. STAT. § 578.405 (2017).

271. *Id.*

welfare advocates, but in reality it forces undercover investigations of on-going and systemic animal abuse to be cut short.²⁷² When an undercover investigator working as an employee is subjected to a rapid reporting statute they are faced with the choice of either reporting an incident immediately and blowing their cover after a single occurrence of abuse, which in turn provides facility owners with the excuse that it was a “one time occurrence,” or facing criminal penalties under the law.²⁷³ The Missouri law was sponsored by then-state representative and current governor, Mike Parson.²⁷⁴ Parson urged the senate to pass the twenty-four hour reporting provision in an effort to limit whistleblowing while also satisfying constituents who were emailing lawmakers with concerns of an earlier version of the bill that threatened to ban recording animal abuse altogether.²⁷⁵

As of February 2022, no case produced within the Eighth Circuit has settled the dispute over the constitutionality of restricting video recordings dealing with animal abuse and undercover investigations.²⁷⁶ Without a binding authority on the matter, the court is relegated to persuasive authorities including *Wasden*, *Herbert*, and *People for the Ethical Treatment of Animals v. Stein*, which all provide valuable insights as to how to evaluate such statutory provisions.²⁷⁷

272. Shea, *supra* note 28, at 337, 340.

273. *Id.* at 365.

274. Strong, *supra* note 63, at 632–33.

275. *Id.*

276. Note, however, some Supreme Court opinions may provide critical background to an evaluation of videos as speech. In 2010, the Supreme Court struck down a federal law banning the creation, sale, and possession of videos containing depictions of animal cruelty. The Court said that the videos were protected by the First Amendment given that the contents were not that typically unprotected by the constitution (like obscenity, child pornography, etc.). *United States v. Stevens*, 559 U.S. 460, 469–73 (2010). Additionally, there are two court cases that any group considering challenging this law should be mindful of as they make their way through the courts. First, the Eighth Circuit Court of Appeals remanded the case *Ness v. City of Bloomington*. *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021). The court remanded to the lower courts to decide if an ordinance forbidding photography and video recordings in public parks is unconstitutional under the First Amendment. *Id.* Similarly, the Eighth Circuit also remanded the case *Animal Legal Def. Fund v. Vaught*, analyzed earlier in this Comment, that is about an Ag-Gag law containing a provision prohibiting recordings that damage an employer. See discussion *supra* subsection III.B.2; *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714 (8th Cir. 2021). If either dispute makes it back up to the Eighth Circuit Court of Appeals, a decision could create binding authority for a dispute over the Missouri statute in the future.

277. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017)); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 566–67 (M.D.N.C. 2020).

In the *Wasden*, *Herbert*, and *Stein* opinions, the courts protected the recording of videos under the First Amendment.²⁷⁸ The Missouri statute is, in effect, a prohibition on filming patterns of animal abuse and neglect.²⁷⁹ Under the First Amendment, the government is prohibited from passing laws that restrict speech based on content or ideas.²⁸⁰ Content-based restrictions are subject to strict scrutiny given the dangerous implications of restricting “disfavored speech.”²⁸¹ The Supreme Court has even invalidated federal statutes that constituted content-based restrictions on First Amendment grounds when the statute did not fall into one of a few historically limited classes subjected to such restrictions.²⁸²

The Missouri mandate on reporting within twenty-four hours of recording animal abuse or neglect is a content-based restriction. It is content-based because law enforcement will have to view the recording to determine if the statute has been violated.²⁸³ Supreme Court jurisprudence shows that, “[c]ontent-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.”²⁸⁴

The Missouri statute is not narrowly tailored to serve a compelling state interest. The legislative history of the statute shows that the twenty-four-hour provision was rushed and a last minute inclusion after the Missouri Senate made it clear they would not pass a full-stop ban on recording within agricultural facilities.²⁸⁵ However, this analysis cannot be fully accurate without a complete investigation into the purpose for passing such a law which would involve completing an in-depth review of the legislative history. Nevertheless, it is likely that, considering the known legislative history, the state’s reason for the rapid reporting provision is to limit long-term undercover investigations at agricultural facilities.²⁸⁶ Given the outcome of similar governmental justifications on like provisions limiting video recordings of

278. Strong, *supra* note 63, at 624 (highlighting that the right to film is present in both *Wasden* and *Herbert*. *Wasden*, 878 F.3d 1184; *Herbert*, 263 F. Supp. 3d 1193); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 566–67 (M.D.N.C. 2020) (finding that while free speech does not justify violating the law, it does not necessarily follow that there is no protection of speech following a violation of law).

279. Strong, *supra* note 63, at 633.

280. *Id.*

281. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015)).

282. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). This case is cited by *Wasden*, *Herbert*, and *Stein*. *Wasden*, 878 F.3d at 1193, 1204; *Herbert*, 263 F. Supp. 3d at 1201 nn.47–48, 1207 n.71, 1213 n.105; *Stein*, 466 F. Supp. 3d at 566.

283. Strong, *supra* note 63, at 630.

284. *Reed*, 576 U.S. at 163.

285. Strong, *supra* note 63, at 634–35.

286. *Id.*

undercover investigations, a court could reasonably find the governmental interests not compelling, and the statute not narrowly tailored to the purpose.²⁸⁷

As for novel arguments against a rapid reporting provision, one law review comment suggested that a challenger of the Missouri provision could highlight that the law effectively removes the farm workers “right to refrain from speaking.”²⁸⁸ The right to refrain from speech is central to the freedom of mind.²⁸⁹ In a Supreme Court case cited by the author of the article, the Court concluded that a person cannot be compelled to speak because “[t]he right to speak and the right to refrain from speaking are complementary components.”²⁹⁰ A challenger could argue that by providing a criminal penalty for failing to hand over a video within twenty-four hours, the state of Missouri is engaging in compelling speech that is subject to First Amendment strict scrutiny; in which case, the same evaluation as above would be required by the court.²⁹¹ Meaning, in all likelihood, under this theory as well, the provision is unconstitutional.

IV. CONCLUSION

Decisions by the Eighth, Ninth, and Tenth Circuit Courts of Appeals leave the world of Ag-Gag law jurisprudence at a proverbial fork in the road. With the circuit court split, the existing Ag-Gag laws within the Eighth Circuit have an uncertain future. While most provisions of the Ag-Gag laws are likely unconstitutional, those statutes within the circuit containing provisions about lying, such as statutes with employment fraud provisions, have an uncertain fate, given that court analysis will turn on interpreting the Supreme Court decision in *Alvarez*.²⁹² This means coalitions of animal law groups considering challenging statutes in Iowa, North Dakota, and Missouri should be mindful of the circuit split. Ultimately, there are several constitutional arguments that challengers can present in their efforts to take down Ag-Gag statutes within Eighth Circuit Court of Appeals.

287. The provision is underinclusive to preventing animal abuse and not necessary to pursue that stated goal. Missouri already has an animal abuse statute, meaning if they wanted stronger protections an entirely new statute was not necessary. *See, Id.* at 635; MO. REV. STAT. § 578.012 (2017). Additionally, the statute is underinclusive in that it only requires video to be turned over within twenty-four hours while photography goes unmentioned. Photography can easily capture animal abuse as well. *See Strong, supra* note 63, at 635.

288. *Strong, supra* note 63, at 634 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

289. *Id.*

290. *Riley*, 487 U.S. at 797 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

291. *See Id.* at 797–98 (highlighting that laws which compel speech are also subject to strict scrutiny under the First Amendment).

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