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ALDF v. Otter: What does it mean for other State's "Ag-gag" Laws?

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I. INTRODUCTION

Upton Sinclair famously commented about his 1906 novel

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The Jungle, which was based on his undercover investigation of the inhumane conditions of Chicago's slaughterhouse workers, that he "aimed at the public's heart, and by accident I hit it in the stomach."[1] The public was far more disgusted by the way their food was being handled, rather than the conditions of the workers.[2] Today, similarly, animal rights activists are looking to draw attention to the inhumane treatment of animals by conducting undercover investigations to expose animal abuse and mistreatment.[3] However, these activists are being met with state laws criminalizing undercover investigation at agricultural facilities, also known as "ag-gag laws."[4] Many of these state laws would have exposed Sinclair and his groundbreaking investigation of the meat packing industry to criminal liability.[5] And while animal rights activists may be looking to aim for the public's hearts with their investigation, the response by agricultural interest groups may very well be creating a constitutional free speech issue.

In 2012, Mercy for Animals released a film by undercover investigators, showing Idaho dairy farm workers abusing cows.[6] The video showed the workers repeatedly beating, kicking, and jumping on cows, as well as dragging one cow across the floor by a chain attached to its neck.[7] Idaho charged the workers with

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1. Upton Sinclair, *What Life Means to Me,* 41 *COSMOPOLITAN MAGAZINE* 591, 594 (1906) *available at* http://dlib.nyu.edu/undercover/sites/dlib.nyu.edu.undercover/files/documents/uploads/editors/WhatLifeMeansToMe.pdf.

2. Adam Cohen, *100 Years Later, the Food Industry Is Still the 'The* Jungle', NEW YORK TIMES (Jan. 2, 2007) http://www.nytimes.com/2007/01/02/opinion/02tue4.html.

3. Jesse Paul, *Colorado authorities investigating dairy cow abuse video; worker fired*, DENVER POST (Jun. 11, 2015), *http*://www.denverpost.com/news/ci_28295679/colorado-authorities-investigating-dairy-plant-abuse-video-workers.

4. Richard A. Oppel Jr., *Taping of Farm Cruelty Is Becoming the Crime*, NEW YORK TIMES (Apr. 6 2013), http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html.

5. *See* IDAHO CODE ANN. § 18-70-42 (West 2015).

6. Arin Greenwood, *Court Says No To Gagging Those Who Reveal Farm Animal Abuse*, HUFFINGTON POST (Aug. 4, 2015), http://www.huffingtonpost.com/entry/idaho-ag-gag-law_55c0b399e4b06363d5a35543.

7. Lorene D. Park J.D., *Criminalizing whistleblower activity in 'ag gag' law violated free speech ad equal protection rights*, EMPLOYMENTLAWDAILY.COM, http://www.employmentlawdaily.com/index.php/news/criminalizing-whistleblower-activity-in-agricultural-industry-violated-free-speech-and-equal-protection-rights/ (last

misdemeanors of animal cruelty.[8] Instead of looking to curb future animal abuse, Idaho responded by passing a law in 2014, drafted by the Idaho Dairymen's Association,[9] criminalizing unauthorized video recordings at agricultural production facilities, as well as obtaining employment by misrepresentation.[10]

In the recent U.S. District Court case, *Animal Legal Defense Fund v. Otter*, an Idaho judge struck down Idaho's law.[11] This is the first instance a federal court has struck down an "ag-gag law."[12] The court found that Idaho's law violated both the constitutional rights to free speech and equal protection.[13] They reasoned it violated free speech because the law criminalized a form of protected speech, and was both a content-based and viewpoint based-discrimination.[14] The court also determined that the Idaho statute violated equal protection because it created a distinction between whistleblowers in the agricultural industry to those of other industries, and was enacted with a discriminatory purpose.[15]

ALDF v. Otter establishes a strong precedent that casts doubt upon many similar laws in other states. Currently, Montana, Utah, North Dakota, Missouri, Kansas, Iowa and Wyoming have laws in place that in one or another criminalizes undercover investigations of agricultural facilities.[16]

North Carolina has also passed a bill that will be effective

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visited Nov. 2 2015).

8. Rebecca Boone, *Dairy workers accused of beating, stomping cows in video*, ASSOCIATED PRESS (Oct. 10, 2012), *http*://www.kboi2.com/news/local/Idaho-Dairy-Cows-Mercy-Animals-173483161.html.

9. Luke Runyon, *Judge Strikes Down Idaho 'Ag-Gag' Law, Raising Questions For Other States*, NPR.ORG (Aug. 4, 2015), http://www.npr.org/sections/thesalt/2015/08/04/429345939/idaho-strikes-down-ag-gag-law-raising-questions-for-other-states.

10. IDAHO CODE ANN. § 18-70-42

11. Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104-BLW, 2015 WL 4623943 at *4 (D. Idaho 2015)

12. Dan Flynn, *Federal Judge in Boise Strikes Down Idaho's New 'Ag-Gag' Law*, FOOD SAFETY NEWS (Aug. 4, 2015), http://www.foodsafetynews.com/2015/08/federal-judge-in-boise-strikes-down-idahos-new-ag-gag-law/#.VhA7r_lVhBc.

13. Otter, 2015 WL 4623943 at *4.

14. *Id.*

15. *Id.*

16. *Ag-Gag Legislation by* State, ASPCA.ORG, https://www.aspca.org/animal-protection/public-policy/ag-gag-legislation-state (last visited Mar. 15 2016).

January 1, 2016, providing for the civil recovery of damages by an employer when any employee makes an audiovisual recording and uses that recording to breach the employee's duty of loyalty to the employer.[17] Notably, this bill is not specific to the agricultural industry.[18] North Carolina, along with Wyoming,[19] have established the newest trend in prohibiting undercover recording by restricting it on any private property, regardless of industry. Compared to its predecessors, these broad bans to data collection present a different kind of problem to those seeking to challenge these laws.

Part I of this analysis describes the laws or proposed laws which seek to prevent undercover investigation of animal production facilities. Part II further unpacks the *Otter* ruling. Part III applies and evaluates the cases ruling and reasoning to other state's statutes to determine how they would fare under such analysis. Part IV explores and evaluates the law surrounding the broad data collection bans in North Carolina.

II. HISTORY OF "AG-GAG" LAWS

"Ag-gag laws" come in many different forms, but all generally aimed at preventing undercover investigators from making audiovisual recordings at agricultural facilities. This section explores how the efforts to limit undercover investigation on agricultural facilities have changed overtime.

A. *The First Wave: No Recording Statutes – Kansas, North Dakota, and Montana*

In 1990, Kansas became the first state to pass a law criminalizing undercover recording at animal facilities.[20] The

17. H.R. Res. 405 2015-2016 Leg. (N.C. 2015).

18. *Id.*

19. WYO. STAT. ANN. §6-3-414(a) (West 2015). ("(a) A person is guilty of trespassing to collect resource data if he: (i) enters onto open land for the purpose of collecting resource data, and (ii) does not have: (A) An ownership interest in the real property. . .; or (B)Written or verbal permission from the owner [. . .].").

20. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015) ("(c) NO person shall without the effective consent the owner and with intent to damage the enterprise conducted at the animal facility: (4) enter an animal facility to take pictures by photograph, video camera or

statute requires there be "intent to damage the enterprise conducted at the animal facility."[21] Montana's 1991 statute also incorporated this language.[22] In addition to requiring intent to damage, Montana further limited the scope of its statute by also requiring "intent to commit criminal defamation."[23] Montana's defamation standard provides that if "the defamatory matter is true" or "consist[s] of fair comment made in good faith with respect to a person participating in matters of public concern" then the speech is justified.[24] These two intent requirements make Montana's statute the narrowest in terms of heightened intent requirements.[25]

North Dakota's 1991 statute requires no such intent for their ag-gag act.[26] It plainly criminalizes the unauthorized use or attempted use of recording equipment, without regard to the intent or what is being recorded.[27] Thus, anyone who records anything on an animal facility in North Dakota and is not part of governmental agency carrying out their duties, or has not obtained the consent of the owner, is guilty of a class B misdemeanor.[28] Violators may be subject to a max of 30 days in prison or a fine of $1500, or both.[29]In practice, a person could be prosecuted for taking a photo of oneself in the break room of an animal facility, or any other number of innocuous circumstances. However, no one has ever prosecuted under any of these three states' laws.[30]

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by any other means[.]").

21. *Id.*

22. MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

23. *Id.*

24. MONT. CODE ANN. § 45-8-212(3)(a), (e) (West 2015).

25. Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and The Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL'Y 31, 34 (2015).

26. *See* N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).

27. *Id.* ("No person with the effective consent of the owner. . .6. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment").

28. N.D. CENT. CODE ANN. § 12.1-21.1-04 (West 2015).

29. N.D. CENT. CODE ANN. § 12.1-32-01 (West 2015).

30. Reid, *supra* note 25, at 37.

B. *The Second Wave: Forbidding Misrepresentations – Utah, Idaho, Iowa*

"Ag-gag" legislation did not re-emerge again until 2012 when Iowa and Utah passed legislation criminalizing agricultural interference.[31] Idaho followed suit by passing its own in 2014.[32] These laws made it a crime to lie to obtain access to an agricultural facility.[33]

Iowa forbids both "obtain[ing] access to an agricultural operation under false pretenses" and knowingly making a false statement as part of a job application with an intent to commit an act not authorized by the owner.[34] Thus, Iowa's ag-gag law takes a different route from the earlier laws as it does not specifically target audiovisual recording, only lying to gain access to the facility. Utah and Idaho took it a step further by not only including Iowa's language criminalizing misrepresentations to gain employment or access, but also prohibited unauthorized audiovisual recording similar to the first wave statutes.[35] The combination of these provides agricultural production facilities with two layers of protection. On the front end, it deters animal rights activists from applying for jobs for the purpose of going undercover, as they could be subject to criminal liability if the activists are questioned about their affiliation with animal rights groups and they conceal such affiliation. Regardless, if activists

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31. Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-gag Laws*, 48 Colum, J. OF L. & SOC. PROBS. 337,

32. *See* IDAHO CODE ANN. § 18-70-42 (West 2015).

33. Shea, *supra* note 31.

34. IDAHO CODE ANN. § 18-7042 (West 2015). ("1. A person is guilty of agricultural facility fraud if the person willfully does any of the following: a. Obtains access to an agricultural facility by false pretenses. b. Makes a false statement or representation as part of an application agreement. . . 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.").

35. *See* IDAHO CODE ANN. §18-7042 (West 2015) ("(1) A person commits the crime of interference with agricultural production if the person knowingly: . . . (c) Obtains employment with an agricultural by . . . misrepresentation with the intent to cause economic injury to facility's operations. . . [.]"); UTAH CODE ANN. § 76-6-112(2) (West 2015) ("(2) A person is guilty of agricultural operation interference if the person: (a) without consent from the owner. . .records an image [or sound] from the agricultural operation by leaving a recording device. . .(b) obtains access to an agricultural facility under false pretenses[.]").

are employed, whether under false pretenses or not, they are still prohibited from filming. This combination likely makes Utah and Idaho's ag-gag laws two of the strictest in the nation.

C. *The Third Wave: Rapid Reporting – Missouri*

Laws forbidding recording or lying to gain access to agricultural facilities have recently fallen out of favor.[36] Many states proposed ag-gag bills in 2013, but they failed to become law.[37] Animal activists were successful in rallying public opinion and creating a large and diverse coalition to help defeat ag-gag laws behind a simple message: "if there is nothing to hide, why ban the cameras?"[38] Additionally, lawmakers themselves raised concerns as to the constitutionality of agricultural protectionist laws.[39] In response, legislatures have attempted to pass statues requiring rapid reporting of any instance of animal abuse. The laws do not explicitly forbid unauthorized recording of animal abuse, but instead require that any recorded animal abuse be reported to the appropriate agency, usually within a 24 to 48 hour timeframe.[40] This would seem to be a good middle ground solution for both parties. However, the effect is that it becomes next to impossible to establish a pattern of abuse or neglect, and it enables an agricultural facilities to say that a particular occurrence of abuse was just a one-time problem.[41]

Missouri's ag-gag law illustrates rapid reporting statutes. Missouri's law provides that when anyone makes a digital recording of a farm animal being abused, there is duty to submit it to a law enforcement agency within 24 hours.[42] Additionally, it mandates that the recording may not be edited or manipulated

36. Shea, supra note 31, at 346-47
37. Reid, *supra* note 25, at 40.
38. Shea, supra note 31, at 349-50
39. *Id.* at 351-352
40. *See* MO ANN. STAT. 578.013 (West 2015) ("1. Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or or she believes to depict a farm animal subjected to abuse or neglect. . .such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.").
41. Reid, *supra* note 25
42. MO ANN. STAT. 578.013 (West 2015)

in any way.[43] Other states which have attempted to enact rapid reporting bills include Nebraska, California, Tennessee, North Carolina, New Hampshire, and Arizona.[44]

D. *The Fourth Wave: Broad Restrictions to Data Collection – North Carolina, Wyoming*

The latest trend in agricultural protectionist legislation is difficult to categorize as such, as it affects far more than the agricultural industry. North Carolina's "Property Protection Act" was passed over Governor Pat McCrory's veto on June 3, 2015.[45] Its purpose is to provide for the recovery of damages for exceeding the scope of authorized access to property.[46] Damages can be recovered when,

An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.[47]

Under this language, it appears that any employee could be subject to civil liability for recording at their place of employment. The bill does not identify any particular industry, so it appears to be a blanket ban.[48] Lawmakers assert that it will not prevent whistleblowers from reporting illegal activity.[49] However, Governor McCrory and other opponents of the bill believe there is no such adequate protection for honest employees who uncover illegal activity.[50] Activists have criticized the act as just being a way to disguise an ag-gag bill,[51]

43. *Id.*

44. Shea, supra note 31, at 356-61

45. Mark Binker & Laura Leslie, *Lawmakers override McCrory veto on controversial 'ag-gag' bill,* WRAL.com (Jun. 3, 2015), *http*://www.wral.com/lawmakers-override-mccrory-veto-on-controversial-private-property-bill/14687952/

46. H.R. Res. 405 2015-2016 Leg. (N.C. 2015).

47. *Id.*

48. *See Id.*

49. Binker & Leslie, *supra* note 45.

50. *Id.*

51. Rob Verger, *North Carolina's Ag-Gag Law Might Be the Worst in the Nation,*

and it is worth noting that North Carolina is the second largest hog producer in the United States, totaling about $2.9 billion dollars in sales.[52] There is also concern that this bill will also chill abuse reporting in veteran treatment centers, child care facilities, and nursing homes.[53]

Wyoming's statute, which became effective March 5, 2015,[54] is similarly broad in its language. Wyoming makes it unlawful to collect resource data on private open land.[55] Open land is defined as "land outside the exterior boundaries of an incorporated city, town, [or] subdivision."[56] While not specifically mentioning the agricultural industry, the areas being protected are rural unincorporated areas where farms and factory farms are likely to be. In addition to the concerns of animal welfare groups, environmental groups also take issue with the law, as it precludes them from collecting environmental data on water pollution.[57]

III. EVALUATING ALDF V. OTTER

Idaho's "ag-gag" law prohibits recording at agricultural production, as well as using misrepresentation to gain employment at such facilities.[58] It reads in pertinent part:

A person commits the crime of interference with agricultural production if the person knowingly: . . . obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations; [or] enters an

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VICE NEWS (Jun. 9 2015), https://news.vice.com/article/north-carolinas-ag-gag-law-might-be-the-worst-in-the-nation.

52. *2012 Census Highlights,* UNITED STATES DEPARTMENT OF AGRICULTURE, http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Hog_and_Pig_Farming/ (last updated Mar. 19, 2015).

53. Verger, *supra* note 51.

54. *See* WYO. STAT. ANN. § 6-3-414 (West 2015).

55. WYO. STAT. ANN. § 6-3-414(b) (West 2015) ("A person is guilty of unlawfully collecting resource data if he enter onto private openland and collects resource data without: (i) [a]n ownership interest. . .or (ii) [w]ritten or verbal permission of the owner. . . [.]").

56. WYO. STAT. ANN. § 6-3-414(d)(ii) (West 2015).

57. Natasha Geiling, *Wyoming Made It Illegal to Take A Photo of A Polluted Stream. Now They're Being Sued For It.*, THINKPROGRESS.ORG (Oct. 1 2015), http://thinkprogress.org/climate/2015/10/01/3707798/wyoming-data-trespass-lawsuit/

58. IDAHO CODE ANN. §18-7042(1)(c-d) (West 2015).

agricultural facility. . . and without owner's express consent. . .makes audio or video recording of the conduct of an agricultural facilities' operations[.][59]

Chief Judge B. Lynn Winmill issued his opinion in *ALDF v. Otter* on August 3, 2015, holding that the law violates the right to free speech and equal protection.[60] The ruling deals a significant blow to the agricultural interest groups that advance these laws by asserting that they violate very important constitutional protections.

A. *First Amendment Violation*

Typically, a First Amendment challenge proceeds in three steps.[61]First, it must be determined whether the speech is protected under the First Amendment.[62] Next, it must be determined what standards of review apply to the alleged suppression of speech.[63] Finally, the court must assess whether the government's justifications for restricting speech satisfy the applicable standard of review.[64] This section follows this dichotomy and breaks down the ruling into its constitutional principles, so that its reasoning may be applied to different states' laws.

B. *Protected Speech*

The court addressed whether §18-7042 criminalizes protected speech.[65] Previously, the determined it did in a ruling on an earlier motion to dismiss.[66] The court found the statute prohibited protected speech in two ways.[67] First, it forbade using misrepresentations to gain employment with agricultural facilities.[68] Second, it prohibited unauthorized audiovisual

59. *Id.*
60. Otter, 2015 WL 4623943 at *4.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See* Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2015) [hereinafter "Motion to Dismiss"].
67. *See* IDAHO CODE ANN. §18-7042 (West 2015).
68. *Id.*

recording of an agricultural production facilities' operations.[69] The court held that both of these were protected expressions under the framework of the First Amendment.[70]

Lying to Gain Employment

In *US v. Alvarez*, the Court struck down the Stolen Valor Act,[71] which made it a crime to lie about receiving military medals.[72] The Court found that the Stolen Valor Act constituted a ban on speech without regard to any kind of material harm or advantage.[73] "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power."[74] specifically, it would "endorse government's authority to compile a list of subjects about which false statements are punishable" akin to Oceania's Ministry of Truth from George Orwell's novel *1984*.[75] However, the Court explained that "false claims made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the government may restrict speech without affronting the First Amendment."[76]

The Idaho District Court held that 18-4072 is similar to the Stolen Valor Act in that it merely prohibits speech without regard to the causal link to the harm.[77] The State argued that there is no direct harm from an undercover investigator's misrepresentations to gain access to the agricultural facility.[78] The court disagreed. Instead, the harm that might arise would be from the publication of a false story about the agricultural facility.[79] The court held that this is not the type of direct

69. *Id.*
70. Otter, 2015 WL 4623943 at *5, 9.
71. *Id.*
72. U.S. v. Alvarez, 132 S. Ct. 2537, 2539 (2012).
73. *Id.* at 2547-48.
74. *Id.*
75. *Id.*
76. *Id.*
77. Otter, 2015 WL 4623943 at *5-6.
78. *Id.*
79. *Id.*

material harm that *Alvarez* contemplates.[80] Nor is it the type of material advantage envisioned in *Alvarez*, as the undercover investigators were not seeking the material gain from employment, but rather the purposes of their misrepresentation was to uncover animal abuse and other unsafe practices.[81] The courts asserted that this is the type of speech First Amendment seeks to protect, as it exposes misconduct to the public and facilitates dialogue on issues of public interest.[82]

The State further argued that the misrepresentation is unprotected because it prohibited conduct, not speech.[83] The court ruled that no reading of the statute permits this view, as misrepresentations cannot be construed to mean anything except a form of speech, and any interpretation it only forbids trespass and conversion is plainly erroneous from a statutory interpretation view.[84]

Thus, the court finds that these misrepresentations are entitled to some First Amendment protection.[85] The primary focus of this analysis was whether a material benefit or harm arose from the lie. It would be difficult to argue that employment has no material benefits, as employees are compensated at the very least. But, the court seems to believe that because these employment benefits are merely incidental to animal rights activist's actual goal of uncovering potential animal abuse it is not the type of harm the Supreme Court was concerned about, as in *Alvarez*.

Prohibiting Audiovisual Recordings

The court also found the ban on audiovisual recording to be a regulation of protected speech.[86] The State argued that the ban is a regulation of conduct that does not affect speech.[87] The court disagreed because prohibiting recording would have the

80. *Id.* at 6.
81. *Id.* at 6.
82. *Id.* at 6.
83. Motion to Dismiss, 44 F. Supp. 3d at 1021-22.
84. *Id.* at 1021.
85. *Id.*
86. *Id.* at 1023.
87. *Id.* at 1023.

same effect as a ban on the publication of agricultural videos.[88] Making an audiovisual recording is a corollary right to the dissemination of such message, and is therefore protected under First Amendment.[89]

Laws of General Applicability

The State argued that §18-7042 was not subject to the First Amendment because it applied broadly, not just to individuals conducting undercover investigations.[90] In other words, it is a law of general applicability.[91] The State relied on the Supreme Court's decision in *Cohen v. Cowles Media Co.* to make this argument.[92] In *Cohen*, the Court held that the First Amendment did not prohibit a confidential source from recovering damages from a publisher revealing his identity when publisher had made a promise of confidentiality.[93] The Court reasoned that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[94]

The Idaho District Court distinguished §18-7042 from facts of the *Cohen* case.[95] First, *Cohen* involved promissory estoppel, a common tort claim applied equally to all citizens.[96] Thus, the Court in *Cohen* was simply refusing to provide an exception in a generally applicable law.[97] However, the court in *Otter* asserted that §18-7042 targeted undercover investigators who intend to publish videos critical of the agricultural industry.[98] Such laws "are always subject to at least some degree of heightened First Amendment scrutiny."[99] The legislative record reflects that it was not meant to be generally applicable, but rather targeted

88. *Id.* at 1023
89. Motion to Dismiss, 44 F. Supp. 3d at 1023.
90. *Id.* at 1019.
91. *Id.* at 1019.
92. *Id.*
93. Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991).
94. *Id.* at 669
95. Motion to Dismiss, 44 F. Supp. 3d at 1019-20.
96. *Id.*
97. *See Id.*
98. *Id.* at 1020.
99. *Id.* at 1020 (citing Turner Broad. Sys. v. Fed. Commc'ns Comm'n., 512 U.S. 622 at 640 (1994)).

animal rights groups. Idaho State Senator Patrick likened the animal rights investigators to "marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission," and in defending the §18-7042, stated he that "[t]his is the way you combat your enemies."[100] Undercover investigators were also referred to as "terrorists," "extremists," and "vigilantes."[101]

The court held that the statute also differs from *Cohen* because only compensatory damages were sought in that case.[102] A violation of §18-7042 could result in either monetary damages or state-imposed criminal sanctions, or both. [103] The court held that the criminal sanctions place the statute out of *Cohen* analysis, and under the purview of *Smith v. Daily Mail Publishing Co.*[104] In *Smith,* the Supreme Court held that a state cannot make it a crime to publish lawfully obtained, truthful material about a matter of public significance, "absent a need to further a state interest of the highest order."[105]

Further, the *Otter* court stated that even if the law were generally applicable that it does not mean it automatically escape First Amendment scrutiny.[106] A law prohibiting demonstrations, for example, would not exempt it from First Amendment analysis simply because it applies to everyone.[107] Thus, the court finds that §18-7042 is not a general law of applicability.

Strict Scrutiny Applies

Having determined that both the misrepresentation provision and the audiovisual recording provision prohibit speech protected by the First Amendment, the court turned to what level of scrutiny to apply.[108] The court held that strict

100. Otter, 2015 WL 4623943 at *2.
101. *Id.*
102. Motion to Dismiss, 44 F. Supp. 3d at 1020.
103. *Id.*
104. *Id.*
105. *Id.* (citing Smith v. Daily Mail Publ'g. Co., 443 U.S. 97, 99 (1979)).
106. *Id.*
107. *Id.*
108. *See* Motion to Dismiss, 44 F. Supp. 3d at 1023.

scrutiny applies because §18-7042 is both a content and viewpoint restriction of speech.[109]

States may regulate protected speech, but generally any regulation must be content neutral.[110] "A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas or if the regulation, by its very terms, singles out particular content for differential treatment."[111] The court held that, on its face, §18-7042 targeted one type of speech, specifically "the conduct of an agricultural production facility's operations."[112] It created a prohibition differentiating filming an agricultural production facility's operations from all other types of speech on agricultural production facilities that it leaves unburdened.[113] Thus, the statute discriminated based on the content of the speech.[114]

The court further evidenced that the statute was content-based by pointing to the legislative history and the restitution provision.[115]The record is rife with instances of legislators referring to animal rights activists in menacing terms, such as "terrorists," "extremists," "vigilantes," and "marauding invaders."[116] These statements suggest that the law was enacted with the specific purpose of targeting animal rights activists, and thus serves the legislative purpose of silencing animal rights activists' speech. Further, the restitution provision, which provides for double the loss for any violation of the statute, also reinforces the content ruling.[117] Effectively, the only way to violate the audiovisual recording part of the statute and be liable for damages would be to publish a video critical of the agricultural production facility.[118] Ironically, the more successful that video is in animating public opinion against the facility, the more the activist will be punished.[119] Likewise, it

109. *Id.* at 1023-24.
110. *Id.*
111. *Id.* at 1023 (citing Berger v. City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009).
112. *Id.* at 1023.
113. *Id.*
114. Motion to Dismiss, 44 F. Supp. 3d at 1023.
115. *Id.* at 1024.
116. *Id.* at 1024
117. *Id.* at 1024
118. *Id.* at 1024
119. *Id.* at 1024

permits a facility owner to recover damages for defamation, without proving the constitutional defamation standards.[120]

The court also holds that §18-7042 is a viewpoint-based discrimination because, in effect, it privileges speech that is supportive of the agricultural industry.[121]It allows job applicants who make misrepresentations with the goal of praising the agricultural facility to skate by unpunished, while penalizing those that wish to expose abusive or unsafe conditions at the facility.[122] A person with the goal of praising the facility cannot be punished by definition under the "double the loss" provision. Additionally, since the law prohibits only unauthorized filming, an owner is far more likely to permit filming that portrays the facility in a positive light, rather than a negative.[123]Therefore, because §18-7042 discriminates between speech based upon both content and viewpoint, it is subject to strict scrutiny under the First Amendment.[124]

The law appears to be inescapably a regulation of content and viewpoint. It overtly targets animal rights groups' message, as clearly evidenced by the legislative history, and the means in which they convey that message.

Fails Strict Scrutiny

The court ruled that §18-7042 cannot survive strict scrutiny.[125] "Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest."[126] The proffered state interest in *Otter* was protecting personal privacy and private property, which the court does not find to be enough.[127] The court reasoned that agricultural production facilities are already heavily regulated, and are subject to numerous regulations governing food and

120. Motion to Dismiss, 44 F. Supp. 3d at 1024.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. Otter, 2015 WL 4623943 at *9.
126. *Id.* (citing Turner, 501 U.S. at 680).
127. *Id.*

animal safety.[128] And given the public's strong interest in the safety of food production, the court did not see fit to afford the industry extra protection from public scrutiny.[129]

Even if this was a compelling interest, the court does not find §18-7042 to be narrowly tailored.[130] The court pointed to laws already in place that make it illegal to trespass and steal property, as well as laws against fraud and defamation for any false statements made about them.[131] The court did not see a need for agricultural production facilities to be afforded extra protection when it would burden free speech.[132] The court expressed concern that §18-7042 not only targets animal rights activists, but also fails to protect diligent and trusted longtime employees.[133]If such an employee were to witness and film abuse or safety violations, they would face jail time and owe twice the economic loss the owner suffers, even if the video is completely accurate.[134]This circumvents defamation law and whistleblowing statutes by punishing employees for publishing true and accurate recordings on matters of public concern.[135] Because of this, the court saw a disconnect between the statute and the State's interest in protecting personal privacy and private property.[136] Further, the court did not see a reason why counter speech would not be an effective method of refuting a negative recording taken at an animal agricultural production facility.[137]Thus, the court found that §18-7042 fails strict scrutiny, and is therefore unconstitutional under the First Amendment.[138]

Equal Protection Violation

The court also found that §18-7042 violates the Equal Protection Clause of the Fourteenth Amendment for many of the

128. *Id.* at 10.
129. *Id.* at 10.
130. *Id.* at 10.
131. Otter, 2015 WL 4623943 at *10.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 11.
137. Otter, 2015 WL 4623943 at *11.
138. *Id.*

same reasons it violated the First Amendment freedom of speech provision.[139]

Again, the court did not observe and the State did not provide a reason why existing laws against trespass, fraud, and defamation cannot adequately protect the interests of agricultural production facilities.[140] The existence of these laws "necessarily casts doubt upon the proposition that [§18-7042] could have rationally been intended to prevent those very same abuses," particularly where such action is out of desire to harm a politically unpopular group.[141] The State argues that agricultural facilities deserve more protection because they are a major part of Idaho's economy, and are often targets of undercover investigations.[142] The court found this logic to be unconvincing, as larger industries do not deserve more protection than smaller industries and there is not a legitimate government interest in protecting a powerful industry, which produces the public's food supply, from public scrutiny.[143] Because there was not a legitimate reason for §18-7042, the *Otter* court held that it could not even pass rational basis review.[144]

The State argued that §18-7042 cannot violate the Equal Protection Clause because it did not create an impermissible classification.[145] An improper classification may be created in three ways: showing the law discriminates on its face; showing that the law is applied in a discriminatory manner; or by showing that the law was enacted with discriminatory purpose.[146]The court found that law discriminates both on its face and by its purpose.[147] §18-7042 discriminates on its face because it discriminates between whistleblowers in the agricultural industry and whistleblowers in other industries.[148]It discriminated in its purpose because it was enacted with the

139. *Id.* at 12.
140. *Id.* at 12.
141. *Id.* at 12-13 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533-34 (1973)).
142. *Id.* at 12.
143. Otter, 2015 WL 4623943 at *12.
144. *Id.*
145. *Id.* at 13.
146. *Id.* at 13 (citing Christy v. Hodel, 857 F.2d 1324, 1331 (9th Cir. 1988)).
147. *Id.* at 13.
148. *Id.* at 13.

discriminatory to silence animal rights activists who conduct undercover investigations in the agricultural industry.[149]

The court also emphasized that when a state discriminates based on the exercise of fundamental right, strict scrutiny may apply.[150] §18-7042 discriminated based on the content of speech.[151] "Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, and deny use to those wishing to express less favored or more controversial views."[152] Thus, §18-7042 cannot stand under the Equal Protection Clause because it classifies activities protected by the First Amendment based on content.[153] The *Otter* court did not explicitly hold that strict scrutiny applied, likely because it was unnecessary as they held the statute was not even permissible under rational basis. Clearly, the district court wanted to send a strong message that it believes such laws are highly unconstitutional and are bad policy. It plainly does this by ruling §18-7042 cannot even pass the minimal burden of rational basis review.

In sum, the *Otter* held that §18-7042 violates both the First and Fourteenth Amendments. The case is currently on appeal to the 9th Circuit.[154] If upheld, this challenge could establish significant precedent to challenge "ag-gag" laws in other states. Regardless of the outcome, *Ottter*'s reasoning could still have implications in other jurisdictions. The following section explores that possibility.

IV. APPLYING THE RULING

The ruling in *Otter* casts doubt up on many states' "ag-gag" laws, particularly those that criminalize misrepresentations to gain access and audiovisual recordings on agricultural facilities, as the Idaho law did. However, applying the *Otter* decision to

149. Otter, 2015 WL 4623943 at *13; *See supra* note 108 and accompanying text.

150. Otter, 2015 WL 4623943 at *13 (citing City of Cleburne, TX. v. Cleburne Living Center, 473 U.S. 432, 440).

151. *See supra* notes 102-111 and accompanying text.

152. Otter, 2015 WL 4623943 at *13 (citing Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

153. *Id.* at 14.

154. ALDF et al. v. Wasden, No. 15-35950 (9th Cir. filed Dec. 14, 2015).

"ag-gag" laws requiring rapid reporting or are broad ban type statutes is not as straightforward because they are fundamentally different from the earlier ag-gag laws.

A. *No Recording Statutes*

The *Otter* ruling applies fairly significantly to states' statutes forbidding audiovisual recording on agricultural production facilities, as the overturned Idaho statute also explicitly banned recording.[155] However, a key difference between the first wave states' statutes is that Idaho's statute forbids both unauthorized audiovisual recording on, and lying to gain access to, agricultural production facilities[156], whereas the first wave of ag-gag statutes, only forbid unauthorized audiovisual recording.[157] Additionally, the first wave statutes vary from each other and the Idaho statute as to the level of intent required for a violation.[158]

Montana, Kansas

Montana's statute makes it a crime "to enter an animal facility to take pictures by photograph, video, camera, or other means with the intent to commit criminal defamation" without the authorization of the owner and with intent to damage the enterprise.[159] Under the *Otter* ruling and reasoning, Montana's statute is closer to being content neutral, but is still likely viewpoint-based discrimination. Unlike Idaho's statute, Montana's statute does not limits its scope to the "agricultural facilities' operations,"[160] but rather it extends to all audiovisual recordings on the facility.[161] This was a major point of contention for the court because it differentiates based on the content of speech by forbidding audiovisual recording of only

155. IDAHO CODE ANN. §18-7042 (West 2015).

156. *Id.*

157. *See supra* notes 19-28 and accompanying text.

158. *See* IDAHO CODE ANN. §18-7042 (West 2015); *supra* notes 19-28 and accompanying text.

159. MONT. CODE ANN. § 81-30-103(3)(e) (West 2015)

160. IDAHO CODE ANN. §18-7042(d) (West 2015).

161. *See* MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

certain areas of agricultural production facilities.[162] However, Montana's statute similarly bases recovery on the amount of damages that occur,[163] which would likely be the result of a negative publication.[164] Thus, Montana's statute is a content-based discrimination in that regard.

Montana's statute would likely be viewpoint discrimination under *Otter*, because it specifically punishes speech that is unpraiseworthy of an agricultural facility due to its intent to damage language. Meanwhile, it leaves unpunished speech that would praise the facility and its practices.[165] Indeed, similar to *Otter*, the owner has the right to approve any recording, and it is unlikely that an owner would approve of an audiovisual recording that portrays the facility in a negative light.[166] The statute by its term cannot simply be applied to someone who would portray the facility in a positive light; it could only apply to someone with the intent to damage the facility. Arguably that is the point a defamation suit, to stop untruthful, negative view of a person or entity. It is harder to argue that defamation applies to an unaltered, unfabricated audiovisual recording. Thus, the statute would likely be subject to strict scrutiny under the framework First Amendment because it differentiates between positive and negative viewpoints.

The Kansas statue excludes the criminal defamation standard present in the Montana statute, but includes the same "intent damage the enterprise" language.[167] It similarly does not single out a type of recording forbidden on agricultural facilities.[168] The listed violation level, a class A, nonperson misdemeanor, has been repealed,[169] but the punishment was formerly no more than a year in jail or a fine not exceeding $2500, or both.[170] So, the punishment was not based upon the amount of damages caused and would not be affected, at least

162. *See* supra notes 102-6 and accompanying text.
163. *See* MONT. CODE ANN. § 81-30-104 (West 2015).
164. *See* supra notes 109-10 and accompanying text.
165. See MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).
166. *See* supra note 114 and accompanying text.
167. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015); MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).
168. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015).
169. KAN. STAT. ANN. § 21-4502 (West 2015).
170. KAN. STAT. ANN. § 21-4503a available at http://law.justia.com/codes/kansas/2006/chapter21/statute_11828.html.

from statutory view, by the amount of damages resulting from a publication. This makes the Kansas' statute fairly content neutral under the analysis of *Otter*. Yet, the intent to damage language, likely makes this statute a viewpoint-based discrimination for the same reasons it did for Montana's statute.[171] Thus, Kansas' statute would likely be subject to strict scrutiny.

North Dakota

The North Dakota statute is more akin to the Idaho statute in that neither requires a specific intent.[172] Idaho does have the broader intent language by requiring that person knowingly violated statute, however, the North Dakota statute is completely devoid of intent language,[173] making it look more like a strict-liability offense.

North Dakota's statute is not likely a content-based restriction. It does not single out any particular part of agricultural production facilities; it appears to be a ban on all unauthorized recording.[174] The punishment is not based on restitution for the damages that would flow from a negative publication, instead the listed punishment level is a class B misdemeanor,[175] which is punishable by a maximum penalty of thirty-day imprisonment, a fine $1500, or both.[176] Thus, the statute appears to be content neutral.

North Dakota's statute may also be viewpoint neutral. It does not appear to differentiate between positive and negative viewpoints through its punishments, as the Idaho statute.[177] It does not limit enforcement to only those with intent to damage as the Montana and Kansas statutes do either.[178] However, it still allows the owner to authorize what may and may not be

171. *See supra* text accompanying note 158.
172. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).
173. *Id.*; IDAHO CODE ANN. § 18-7042 (West 2015).
174. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).
175. N.D. CENT. CODE ANN. § 12.1-21.1-04 (West 2015).
176. N.D. CENT. CODE ANN. § 12.1-32.01(6) (West 2015).
177. *Supra* notes 112-14 and accompanying text.
178. *Supra* notes 158-63 and accompanying text.

recorded.[179] The court in *Otter* was concerned with turning agricultural facility owners into "state-backed" censors,[180] but it is unclear if this factor alone is enough to make it a viewpoint discrimination. It relies on the reasonable assumption that an agricultural facility owner would not approve of recordings which would portray a facility in a negative light.[181] Thus, North Dakota's statute seems to be the closest in avoiding strict scrutiny as to the free speech challenge among the first wave of ag-gag laws.

B. *Statutes Criminalizing Misrepresentation*

The Idaho statute overturned in *Otter* was part of the second wave of ag-gag laws, along with Iowa and Utah that included a provision criminalizing misrepresentations to gain access to agricultural facilities.[182] Iowa's statute focuses only on misrepresentations used to gain access to agricultural production facilities, whether part of an employment application or otherwise.[183] However, Utah and Idaho not only make it a crime to make a misrepresentation to gain access to an agricultural production facility, but also to make an audiovisual recording on the premises.[184] The constitutionality of the Iowa and Utah's statutes depends largely upon whether misrepresentations are protected speech. The *Otter* court found the "misrepresentation to gain employment" provision of the Idaho statute to be protected speech because the misrepresentation is not linked to the envisioned direct harm done by it, or the material advantage gained.[185]

Indeed, the same analysis used in *Otter* can apply to Iowa and Utah's statutes. The material harm would not arise from an animal investigator lying to gain employment.[186] Rather, the harm would be from the publication of those recordings, which

179. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).
180. Otter, 2015 WL 4623943 at *9.
181. *See id.*
182. *Supra* notes 29-33 and accompanying text.
183. *See* IOWA CODE ANN. § 717A.3A. (West 2015
184. *See* IDAHO CODE ANN. § 18-7042 (West 2015); UTAH CODE ANN. § 76-6-112(2) (West 2015).
185. *See supra* notes 66-80 and accompanying text.
186. *See supra* notes 66-80 and accompanying text.

the *Otter* court argues, is not the direct type of material harm required to prohibit speech.[187] The court in *Otter* argues that the material gain is different in these cases from the type in *Alvarez*, where it was stated that false claims "made to secure money or other valuable consideration, say offers of employment," are not protected.[188] The court states that what is sought and obtained by animal rights activists' misrepresentations is being able to record, undercover, at animal production facilities, not the material gains of employment.[189] Given the indirectness of the harm and gain, Iowa and Utah's statutes likely criminalize protected speech similar to the *Idaho* statute.

However, Iowa and Utah's statutes are likely closer to avoiding strict scrutiny because their punishments are not linked to the damages a negative publication would cause like the Idaho statute did with language providing for an award "twice the value of the damage resulting from a violation."[190] A violation of the Utah and the Iowa code would only result in a fine and/or prison time.[191] This means a violation would not discriminate between the content of a message. Any unauthorized recording would be equally punishable. Thus, it is likely a content neutral law. The only possible viewpoint discrimination would be that it allows the owner to authorize what recording is permissible, and again it is unlikely that he would authorize any recording that portrays the facility in a negative light. It is unclear whether this alone could establish a viewpoint-discrimination argument, therefore Utah and Iowa may be able to avoid strict scrutiny based on the logic of the *Otter* ruling.

C. *Rapid Reporting Statutes*

It is difficult to compare rapid reporting statutes to the Idaho statute or any of the other first or second wave "ag-gag" statutes because they are so fundamentally different in the way

187. *See supra* notes 66-80 and accompanying text.

188. Otter, 2015 WL 4623943 at *6.

189. *Id.*

190. IDAHO CODE ANN. § 18-7042(4) (West 2015).

191. IOWA CODE ANN. 903.1 (West 2015); UTAH CODE ANN. § 76-3-204 (West 2015); UTAH CODE ANN. § 76-3-301 (West 2015).

they attempt to limit recording at agricultural facilities. Indeed, laws which impose a duty to report are exceedingly rare, usually only reserved for serious felonies such as child abuse.[192] Missouri's statute provides that when "[anyone] makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect. . .[there is] a duty to submit such videotape or digital recording with twenty-four hours."[193] No such provision expressly prohibiting audiovisual recordings or lying to gain access to agricultural facilities is present.[194]As such, the constitutional free speech analysis of *Otter* does not significantly apply.

However, rapid reporting statutes may be vulnerable to an Equal Protection claim because it singles out the agricultural industry for special protection and treatment. As such, the statute may create an improper classification on its face, by providing a protection to an industry which others do not enjoy. However, it is unclear whether a court would apply any increased level of scrutiny. Animal investigators are not considered a suspect class. The only argument for would be that it is discriminated based on the exercise of fundamental right, as was argued in *Otter*.[195]

Rapid reporting statutes prevent animal investigators from compiling a record of evidence because the statute requires that they report the first instance of abuse almost immediately, likely outing themselves as an investigator because the agency receiving the recording will undoubtedly contact the facility about the violation. This makes it next to impossible to establish a pattern of abuse.[196] Agricultural facility owners will not face tough consequences, as they probably will only be fined small amounts or have to fire some employees.[197] There will not be large economic penalties that act as deterrents as there have been with the higher profile investigations.[198] Thus, the agricultural industry is shielded in that regard where as other industries may not be. The agricultural industry is subject to more public

192. Shea, *supra* note 31, at 364.
193. MO ANN. STAT. 578.013 (West 2015).
194. *Id.*
195. Supra notes 150-153 and accompanying text
196. Shea, supra note 31, at 339.
197. Shea, supra note 31, at 364.
198. Shea, supra note 31, at 364.

scrutiny than other industries, but as the court points out in *Otter*, this does not mean it should be offered more protection, as food production is a matter of public interest.[199] Even so, rapid reporting statutes appear to be the closest type of "ag-gag" law that can avoid strict scrutiny.

D. *Broad Bans to Data Collection*

North Carolina's statute, which became effective on January 1, 2016,[200] illustrates the new trend in limiting undercover investigative reporting. Undercover investigations of North Carolina's agricultural and food industry have had a major impact in the recent past.[201] Famously, in 1992, two undercover reporters working for ABC posed as employees at Food Lion supermarkets in North Carolina.[202] The reporters secretly recorded unsanitary food handling practices, and later used the footage in a broadcast report on *PrimeTime Live*.[203] The Fourth Circuit found that the reporters breached their duty of loyalty to Food Lion by surreptitiously filming these practices with adverse intent to serve another employer.[204] More recently, in 2012, an undercover investigator exposed animal abuse on a Butterball turkey farm, resulting in six workers being charged in addition to a state worker who tipped off the facility before it was raided by authorities.[205] Butterball accounts for about twenty percent of the turkey production in the US.[206] Seemingly in response to the Butterball investigation, a bill was introduced in 2013 in the North Carolina Senate, which criminalized lying to gain access and audiovisual recording at any employer's

199. *Supra* note 133-134 and accompanying text.

200. N.C. GEN. STAT. ANN. § 99A-2 (West 2015).

201. *See* Greg Toppo, *N.C. poultry worker arrested after video shows him stomping, throwing chickens,* USA TODAY (Dec. 9, 2015) http://www.usatoday.com/story/news/2015/12/09/mercy-for-animals-north-carolina-chicken-processing-abuse/77049796/.

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

203. *Id.*

204. *Id.* at 516.

205. Cindy Galli, *Butterball Workers Arrested on Animal Cruelty Charges*, ABC NEWS (Feb. 16, 2012) http://abcnews.go.com/Blotter/butterball-workers-arrested-animal-cruelty-charges/story?id=15637180 .

206. *Id.*

facility.[207] This bill was not passed by adjournment of the 2013 session, effectively defeating the bill.[208] It is against this backdrop that North Carolina's property protection act came to pass.

North Carolina's property protection act prohibits an employee from intentionally entering nonpublic areas for a reason "other than seeking or holding employment", and then without authorization, "recording images or sounds occurring in the premises", and using those sounds to breach the person's duty of loyalty to the employer.[209] This provision seeks to limit undercover investigations by those who have taken a job to record images, as their intent will always to some degree be related to their investigation. Representative John Szoka, a primary sponsor of the bill, stated that it protects whistleblowers, but at the same time targets employees who are hired under false pretenses, and seek to record breaking their duty of loyalty to the employer.[210]

Setting aside undercover investigators, it is very unclear how this law protects whistleblowers. There seems to be two possibilities: the intent language[211] and the protections vaguely pointing to other areas of law.[212] First, the intent language may protect employee whistleblower when the recording pertains to the employee's job, as employees undoubtedly have reason to enter nonpublic areas when it pertains to their job. However, it does not necessarily follow that this would always protect the employee. An employee could become aware of an illegal act his employer is doing in a different area, not a part of employee's job. If the employee wanted to expose this, it appears he could be liable under the statute. Second, the statute vaguely states that that it does not diminish protections provided to employees under "Article 21 of Chapter 95 or Article 14 of

207. S. Res. 648, 2012-2013 Legis. (N.C. 2013).

208. Bydan Flynn, *2013 Legislative Season Ends with 'Ag-Gag' Bills Defeated in 11 States*, FOOD SAFETY NEWS (July 30, 2013) http://www.foodsafetynews.com/2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/#.Vp7N1CorKhc.

209. N.C. GEN. STAT. ANN. § 99A-2(b)(2) (West 2015).

210. NC House debate 4-22-2015 at1:17:20 available at http://www.ncleg.net/DocumentSites/HouseDocuments/2015-2016%20Session/Audio%20Archives/2015/04-22-2015.mp3.

211. N.C. GEN. STAT. ANN. § 99A-2(b)(2) (West 2015).

212. N.C. GEN. STAT. ANN. § 99A-2(e) (West 2015).

Chapter 126 of the General Statutes, nor may any party who is covered by these articles be liable under this section."[213] Article 14 of Chapter 126 of the General Statutes refers to whistleblowing in the public matters, and has nothing to do with cases of private enterprise whistleblowing.[214] Article 21 of Chapter 95 lists a number of types of employees whom may not be discriminated against if they do certain acts or have certain characteristics , meaning they cannot be fired or other employment action be taken bases upon those acts or characteristics. However, none of these preclude an employee being sued for whistleblowing.[215]

When read with the last part of the vague exceptions section, "nor may any party who is covered by these articles be liable under this section" this becomes even more baffling. Take for example, NC ST § 95-28.1 listed under Article 21 of Chapter 95.[216] NC ST § 95-28.1 provides that employers shall not discriminate making employment decisions on account of the fact a person possesses the sickle cell trait. So, since this "covers" people with the sickle cell trait, it appears that people with sickle cell anemia could not be found liable under North Carolina's property protection act, and could conceivably do any undercover investigation they desired without repercussion. Leaving aside this anecdote, it emphasizes that parts of this bill are poorly conceived.

A few key points which played a part in overturning Idaho's ag-gag law in *Otter* are also present in North Carolina's property protection act. First, the punishment of the North Carolina's act is based upon how much damage is caused to the business, as the remedy it provides for is compensatory damages.[217] Much like Idaho's law,[218] the only conceivable way to damage and thus owe compensatory damages to a business is by recording something on the premises critical of the business somehow injuring the business' reputation and costing it money. A video praising a business would not cost them money, or

213. *Id.*
214. *See* N.C. GEN. STAT. ANN. § 126-14 (West 2015).
215. *See* N.C. GEN. STAT. ANN. § 95-21-241 (West 2015).
216. *Id.*
217. N.C. GEN. STAT. ANN. § 99A-2(d)(2) (West 2015).
218. *See* supra notes 113-14 and accompanying text.

trigger compensatory damages in any conceivable way. Therefore, this is a viewpoint discrimination because through its punishment it permits one view while silencing another. Viewpoint discrimination is subject to the most exacting scrutiny, and is rarely permissible.

Second, while not explicit in the text of the statute, there is ample external evidence that suggests that the statute was enacted with purpose of protecting the agricultural industry. The biggest piece of evidence would simply be the environment that gave rise to the bill.[219] Governor McCrory in his veto message was concerned that bill did not give adequate protection to "honest employees," but remarked that undercover investigation was indeed a problem in the agricultural industry in particular.[220]

North Carolina's property protection act is likely subject to strict scrutiny under the reasoning of the *Otter* ruling because the damages are based upon the publication being negative, and there is ample evidence to suggest that this is a veiled attempt at targeting animal rights activists.

V. CONCLUSION

Rapid reporting statutes and content and viewpoint neutral recording ban statutes, like that in North Dakota, appear to be closest to avoiding strict scrutiny under the *Otter* ruling. However, both may be vulnerable to equal protection claims because they single out the agricultural industry for protection, while others are not. Yet, it would be difficult to apply anything except rational basis review, as there is not likely a suspect class being discriminated against. The *Otter* court only applied rational basis review, but argued it could apply strict scrutiny if the statute was discriminated based on a fundamental right.[221] For states pondering implementing "ag-gag" statutes, these would probably be the safest for the states to avoid them being challenged.

But, as a policy matter, states should not implement these laws. They are too much of an onerous burden on the right to

219. *See* supra notes 191-199 and accompanying text.

220. Pat McCrory, *McCrory Veto Message*, (May 29, 2015), *available at* http://www.ncleg.net/Sessions/2015/h405Veto/letter.pdf.

221. Supra notes 139-53 and accompanying text.

free speech, not only of animal rights activists, but news gathering in general. The public relies on reporters and their ability investigate to inform them of potential wrongdoings. An industry that serves public needs, such as the agricultural industry, particularly should not be shielded from the public eye.

The reasons that give rise to "ag-gag" laws are not completely unreasonable. It is no doubt a burden for the industry to be subject to investigation and public scrutiny. And realistically, animal slaughter is a messy and often brutal process even when properly done. Yet, this should not preclude the industry from public scrutiny and investigation. These investigations continually turn up instances of animal cruelty and abuse, which are in fact crimes. It is difficult to reconcile why an industry should be immune not only from public scrutiny, but from prosecution under laws they have been demonstrated to frequently break. And even beyond animal cruelty, an industry that produces food for the public should not be entirely shielded from it for any number of health concerns. What should logically arise from these investigations is more transparency, but instead the public is seeing far less.