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Meredith Kaufman

University of Arkansas, Fayetteville

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THE CLASH OF AGRICULTURAL EXCEPTIONALISM AND
THE FIRST AMENDMENT:
A DISCUSSION OF KANSAS' AG-GAG LAW
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Meredith Kaufman*

I. Introduction

A. Overview

Since the Nation's founding, agricultural production has been treated differently than other industries. This concept, known as "agricultural exceptionalism," has manifested in many different ways throughout U.S. history.¹ Since the 1990s, one manifestation of agricultural exceptionalism has been the enactment of "Ag-gag laws," state laws that limit information gathering activities at animal production facilities.² Ag-gag laws are frequently criticized by animal welfare advocates and legal scholars for seeking to shield

* Author received her J.D. from the University of Colorado Law School in 2018 and received her LL.M. in Agriculture and Food Law from the University of Arkansas School of Law in May 2019. She is grateful for Professor Susan Schneider's assistance editing this article.

¹ For example, the agriculture industry is exempted from federal labor laws, environmental regulations, and antitrust restrictions. See Susan Schneider, *A reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY J. ENVTL. L. & POL'Y REV. 935, 935–36 (2010) (discussing the history of agriculture law in the U.S. and arguing for a new paradigm for the special treatment afforded agriculture under the law).

² It should be noted that Ag-gag laws generally apply to "processing activities" and "farming activities." Traditionally, agricultural exceptionalism applies to the latter, but not the former, and the distinction is not trivial. For example, the exemptions afforded to agriculture under the Fair Labor Standards Act is a form of agricultural exceptionalism, and the exemptions do not extend to workers in processing. The Supreme Court has held that chicken catchers are not agricultural workers and therefore not exempt from the Fair Labor Standards Act overtime pay provisions. See *Herman v. Tyson Foods, Inc.* 82 F. Supp. 2d 631 (2000). By contrast, Ag-gag statutes attempt to expand the umbrella of agricultural exceptionalism to also include processing activities.

animal production facilities³ from public scrutiny, a state-sanctioned protection not afforded to other industries.⁴

Early Ag-gag laws were enacted to protect agriculture facilities from trespass and property damage, known as “agriculture interference laws.”⁵ After 2011, a second wave of Ag-gag laws were enacted, focusing solely on information gathering activities.⁶ Six states currently have Ag-gag laws which have not been challenged in court; one state (Kansas) currently has Ag-gag litigation pending; and in four states, Ag-gag laws have been ruled unconstitutional.^{7,8}

³ By “animal production facility” I refer to feedlots, slaughterhouses, and livestock processing facilities, although the term might also include animal research facilities. For example, the Kansas Farm Animal and Field Crop and Research Facilities Protection Act defines “animal facility” as including “any vehicle, building, structure, research facility or premises where an animal is kept, handled, housed, exhibited, bred or offered for sale.” KY. STAT. ANN. § 47-1826(b) (2018). In this paper, I use the terms “animal production facility,” “animal facility,” and “agriculture facility” to mean the same thing.

⁴ See generally Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J. L. & SOC. PROBS. 337 (2015) (discussing the arguments made against Ag-gag laws, particularly the most recent generation of Ag-gag laws requiring rapid reporting to local authorities and the damaging effects these laws have for promotion of animal welfare).

⁵ Alicia Prygoski, *Detailed Discussion of Ag-gag Laws*, MICH. ST. U. ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> (last visited Feb. 28, 2018).

⁶ *Id.*

⁷ The states with Ag-gag laws in the books include Montana, North Dakota, Kansas, Missouri, Arkansas, Alabama and North Carolina. Ag-gag laws in Idaho, Utah, Wyoming, and Iowa have been ruled unconstitutional. *What is Ag-Gag Legislation?*, AM. SOC. FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation#Ag-Gag%20by%20State> (last visited Feb. 28, 2018).

⁸ This paper does not discuss the Wyoming Ag-gag law because it does not solely target speech activities pertaining to animal facilities. WYO. STAT. ANN. § 6-3-414 (2016) and WYO. STAT. ANN. § 40-27-101 (2016) were nearly identical statutes which imposed civil and criminal penalties, respectively, for entering private land for the purpose of collecting resource data or crossing private land to collect resource data. WYO. STAT. ANN. §

6-3-414 (2016), *invalidated by* W. Watersheds Project v. Michael, No. 15-CV-169-SWS, 2018 WL 5318261 (D. Wyo. Oct. 29, 2018); WYO. STAT. ANN. § 40-27-101 (2016), *invalidated by* W. Watersheds Project v. Michael, No. 15-CV-169-SWS, 2018 WL 5318261 (D. Wyo. Oct. 29, 2018). In *Western Watershed Project v. Michael*, the United States District Court for the District of Wyoming held that the statutes were content-based restrictions on speech because they only penalized data “relating to land or land use.” W. Watersheds Project v. Michael, No. 15-CV-169-SWS, 2018 WL 5318261, at *8 (D. Wyo. Oct. 29, 2018) (finding that the laws failed to meet strict scrutiny, the court deemed the laws unconstitutional).

As recent litigation demonstrates, a state's desire to protect animal facilities from public scrutiny through Ag-gag legislation frequently clashes with the First Amendment of the U.S. Constitution. Despite the prominence of agricultural exceptionalism in federal and state laws and in U.S. history, where agricultural exceptionalism clashes with the U.S. Constitution, the former must yield.

The purpose of this article is to discuss the constitutionality of the Kansas Ag-gag law, "The Farm Animal and Field Crop and Research Facilities Protection Act," focusing on the First Amendment. It explores the law in light of Supreme Court jurisprudence and three recent Ag-gag cases, *Animal Legal Defense Fund v. Herbert*, *Animal Legal Defense Fund v. Wasden*, and *Animal Legal Defense Fund v. Reynolds*. The courts in each respective case held the states' Ag-gag laws unconstitutional in part or in whole.⁹

A consideration of the Kansas Ag-gag law's constitutionality is timely because on December 4, 2018, a coalition of public interest groups filed suit against the state, arguing the Kansas Ag-gag law violates the First Amendment. This article argues that the public interest groups should succeed in its lawsuit in part and adds additional perspective on the Kansas Ag-gag law by addressing additional First Amendment issues with the law not raised by the public interest group's complaint.

Section One of this paper looks at the Kansas statute and the complaint filed by the public interest groups. Section Two discusses the holdings in *ALDF v. Herbert*, *ALDF v. Wasden*, and *ALDF v. Reynolds*. Section Three discusses the First Amendment problems with the Kansas law. As this article discusses below, the Kansas law is different from the laws in Idaho, Utah, and Iowa. Nevertheless, the two sections of the law which implicate speech are unconstitutional and should be struck by the U.S. District Court for the District of Kansas.¹⁰

⁹ See *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (upholding and striking aspects of Idaho's Ag-gag law); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017) (striking Utah's Ag-gag law in its entirety); and *Animal Legal Def. Fund v. Reynolds*, No. 417CV00362JEGHCA, 2019 WL 140069 (S.D. Iowa Jan. 9, 2019) (striking Iowa Ag-gag on summary judgement).

¹⁰ See KAN. STAT. ANN. §47-1825(a) (2018); KAN. STAT. ANN. § 47-1827(c)(4) (2018).

B. Undercover Activities at Animal Facilities: Why They Matter

The term “Ag-gag” was coined by food writer Mark Bittman in 2011, though the history of animal activism and undercover activity goes farther back.¹¹ The first animal cruelty indictment occurred in 1999 after People for the Ethical Treatment of Animals (PETA) released footage from a three-month investigation of animal abuse at Belcross Farm in North Carolina.¹² Today, a YouTube search of “animal production undercover investigation” yields countless undercover videos revealing horrific animal abuse at farms, slaughterhouses, and processing facilities for all types of animals.

These investigations matter foremost because no animal should endure abuse. Moreover, a consumer has a right to know how her meat arrived on her plate, and undercover investigations can help consumers make informed decisions when purchasing food. Also, given the expanding disconnect between consumers and food production in our society, and the tight security at animal facilities, these investigations may be the only source of information disseminated to the public.

These investigations can also have serious consequences for exposed facilities. For example, footage of graphic chicken abuse at an egg production facility, Sparboe Farms, released by Mercy for Animals in 2013 led McDonald’s and Target to drop the egg supplier.¹³ In a dramatic example, in 2007, the Humane Society released footage of workers torturing cattle at Hallmark Meat Packing Co., which raised concerns about mad cow disease and led to a massive recall.¹⁴ As a result, the slaughterhouse went bankrupt.

¹¹ Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011) http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0.

¹² Ted Genoways, *Gagged by Big Ag: How Exposing Abuse Became a Crime*, EARTH FIRST! NEWSWIRE (June 17, 2013), <http://earthfirstjournal.org/newswire/2013/06/17/gagged-by-big-ag-how-exposing-abuse-became-a-crime/>.

¹³ Dana Ford, *McDonald’s, Target drops egg supplier after animal cruelty report*, CNN BUSINESS (Nov. 19, 2011), <https://www.cnn.com/2011/11/19/business/sparboe-farms-animal-cruelty/index.html>.

¹⁴ Wayne Pacelle, *Torture on Tape*, HUMANE SOC. OF THE U.S. (Jan. 3, 2008) https://blog.humanesociety.org/2008/01/calif-cow-abuse.html?credit=blog_post_092509_id5103.

C. State's Fight Back: From Property Destruction to Free Speech

As discussed above, the focus of Ag-gag laws has shifted over time. Laws adopted in the 1990s—such as the Kansas law—were enacted in response to groups like the Animal Liberation Front, which engage in illegal tactics, such as fence cutting, animal theft, and arson, to liberate animals.¹⁵ The second wave of Ag-gag laws, which includes the laws in Idaho, Utah, and Iowa, were enacted in response to undercover investigations and do not implicate physical conduct.¹⁶

This article argues that the term “Ag-gag” applies to any law that implicates speech activities at agriculture facilities, including laws that mainly target trespass and physical damage.¹⁷ A full discussion of the evolution of these laws and the semantics of what constitutes “Ag-gag” is beyond the scope of this article, but merits attention in its own right.¹⁸

¹⁵ See Marshall Tuttle, *Finally A Solution? How Animal Legal Defense Fund v. Otter Could Affect the Constitutionality of Iowa's Ag-Gag Law*, 21 DRAKE J. AGRIC. L. 237, 244 (2016) (discussing the history of Ag-gag legislation in the United States).

¹⁶ Prygoski, *supra* note 5.

¹⁷ See Rita-Marie Cain Reid & Amber Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront Agricultural Protectionism*, 11 J. FOOD L. & POL'Y 31, 35–38 (2015) (“The first generation of ‘ag-gag’ laws . . . generally concerned trespass and harm to property at animal facilities and properties with field crops. Additionally, however, they criminalized unauthorized photographing or recording at the agriculture facility.... The second wave of ag-gag enactments emphasized new ways to chill whistleblowing and undercover reporting.”).

¹⁸ For example, whether Ag-gag encompasses “eco-terrorism” laws is open to discussion. See

Will Potter, *Sentinel Species: the Criminalization of Animal Rights Activists as “Terrorists,” and What It Means For Civil Liberties in Trump’s America*, 95 DENV. L. REV. 887, 882–83 (2018) (discussing the history of eco-terrorism laws and arguing that the term ‘eco-terrorism’ was created by corporate interest groups to shift public perception regarding animal activists). See also Kevin Adam, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U.L. REV. 1129, 1166–67 (2012) (“The AETA has been the subject of extreme criticism, primarily because of its disproportionately harsh penalties for conduct that falls outside of what most would consider ‘terrorism.’ For example, six animal-rights activists—known collectively as the ‘SHAC 7’—were convicted of conspiring to violate the AETA and sentenced to four to six years in federal prison for operating a website that was used to organize undercover animal-rights investigations.”).

II. Kansas Farm Animal and Field Crop and Research Facilities Protection Act

A. *The Nation's First Ag-Gag Law: Constitutionally Suspect Sections*

There are many ways for a state to draft Ag-gag legislation. As this paper demonstrates, there are major differences in the Idaho, Utah, Iowa, and Kansas laws, to varying degrees of constitutionality.

The Kansas Farm Animal and Field Crop and Research Facilities Protection Act, enacted in 1990, was the nation's first Ag-gag law.¹⁹ "Animal facility" is defined as "any vehicle, building, structure, research facility or premises where an animal is kept, handled, housed, exhibited, bred or offered for sale."²⁰

The Act broadly criminalizes four types of conduct: (1) damaging or destroying an animal facility; (2) exercising control over an animal facility; (3) entering an animal facility to take pictures or recordings of the facility; and (4) remaining at an animal facility against the owner's wishes.²¹ Each prohibited act requires that the actor have "the intent to damage or destroy" the enterprise or the enterprise's property.²² Violation of the Act varies from misdemeanor to felony depending on the amount of damage caused to the facility.²³

Not all sections of the Kansas law are constitutionally suspect. The sections of the law which this article argues violate the First Amendment are the focus of this paper. First, Section (a) "Prohibited acts; criminal penalties" is void for vagueness and chills protected speech because it is overbroad. Section (a) states: "No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, damage or destroy an animal facility or any animal or property in or on an animal facility."²⁴ However, the terms "intent to damage" and "damage" are not defined in the statute.

¹⁹ KAN. STAT. ANN. §§ 47-1825–47-1828 (2018).

²⁰ KAN. STAT. ANN. § 47-1826(b) (2018).

²¹ See KAN. STAT. ANN. §47-1827(a)–(d) (2018) (providing a more detailed description of the prohibited conduct).

²² *Id.*

²³ KAN. STAT. ANN. § 47-1827(g) (2018).

²⁴ KAN. STAT. ANN. § 47-1827(a) (2018).

Second, Section (c) “Prohibited acts; criminal penalties” of the statute states: “No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the facility: . . . (4) enter an animal facility to take pictures by photograph, video camera or by any other means.”²⁵ As this article discusses in detail below, this section violates the Free Speech Clause of the First Amendment. Before addressing these sections and comparing them with the constitutional issues addressed by the Ninth Circuit, the U.S. District Court for the District of Utah, and the U.S. District Court for the District of Iowa, this article discusses the recent complaint filed against the State of Kansas.

B. Animal Legal Defense Fund Files Suit

i. The Complaint

On December 5, 2018, Animal Legal Defense Fund, Center for Food Safety, Shy 38 Inc., and Hope Sanctuary filed suit against the Kansas Governor and State Attorney General, alleging that the Kansas Farm and Field Crop and Research Facilities Protection Act violates the First Amendment.²⁶ The complaint alleges (1) that the law is an impermissible content and viewpoint-based restriction on protected speech;²⁷ and (2) that the law is overbroad.²⁸

First, Animal Legal Defense Fund (ALDF) alleges that the Act violates the First Amendment because it regulates speech based on the speaker’s message, which is a content-based restriction on protected speech.²⁹ When the Farm Animal and Field Crop and Research Facilities Protection Act was enacted, the state already had content-neutral statutes prohibiting fraud, trespass, adulteration of food products, theft, theft of trade secrets, and destruction of property.³⁰ Because the state has created a separate law to prosecute

²⁵ KAN. STAT. ANN. § 47-1827(c) (2018).

²⁶ Complaint at 1, 6, ALDF v. Colyer, No. 2:18-cv-02657-KHV-JPO (D. Kan. Dec. 5, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/12/KS-Ag-Gag.pdf>.

²⁷ *Id.* at 28–30.

²⁸ *Id.* at 30–31.

²⁹ *See id.* at 28–29 (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972), holding that “laws which target certain messages or speech because of their ‘ideas, subject matter, or content’” violate the First Amendment, and arguing that this designation of content-based restrictions applies to the Kansas Ag-Gag law).

³⁰ *See* KAN. STAT. ANN. § 21-5808 (2018) (creating and describing the state crime of criminal trespass); KAN. STAT. ANN. 65-664 (2018) (describing the conditions

certain conduct and speech at animal production facilities, ALDF argues the law distinguishes favored speech from disfavored speech on the basis of ideas or viewpoints.³¹ The complaint alleges that “the law applies only to speech that involves the subject matter of the animal industry and its practices and is therefore content-based on its face.”³²

As the complaint notes, content-based restrictions regarding speech are subject to strict scrutiny.³³ ALDF argues the law is neither justified by a compelling interest, nor narrowly tailored to protecting privacy, trespass, and biosecurity because the state can do so through less restrictive means.³⁴

ALDF’s second cause of action is that the law’s overbreadth amounts to a restriction on protected speech.³⁵ ALDF also argues that the law has a chilling effect on speech because the text is vague, and violations carry a heavy criminal penalty.³⁶ Specifically, because the law does not define the meaning of “intent to damage,” it is unclear what type of conduct is prohibited.³⁷ Moreover, the “almost limitless” definition of animal facility³⁸ and research facility³⁹ chills speech because the statute covers an expansive number of forums: the complaint notes, “these broad definitions would include not just factory farms . . . but also . . .

under which a food will be deemed adulterated); KAN. STAT. ANN. 21-5801 (2018 (describing the crime of theft)); KAN. STAT. ANN. 60-3320 (2018); KAN. STAT. ANN. 21-5813 (2018) (describing the crime of criminal damage to property).

³¹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (explaining that regulations which differentiate speech on the basis of content are subject to exacting scrutiny, while regulations unrelated to the content of speech are subject to intermediate scrutiny).

³² Complaint, *supra* note 26, at 28–29.

³³ See *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (holding content-based restrictions are subject to strict scrutiny).

³⁴ Complaint, *supra* note 26, at 29.

³⁵ See *United States v. Stevens*, 559 U.S. 460, 473 (2010) (holding that a law prohibiting substantially more speech than necessary is unconstitutional even though some of the conduct targeted by the law does not offend the First Amendment).

³⁶ Complaint, *supra* note 26, at 17–19.

³⁷ Complaint, *supra* note 26, at 13–14.

³⁸ Defined as “any vehicle, building, structure, research facility or premises where an animal is kept, handled, housed, exhibited, bred or offered for sale. KAN. STAT. ANN. § 47-1826(b) (2012).

³⁹ Defined as “any place, laboratory, institution, medical care facility, elementary school, secondary school, college or university, at which any scientific test, experiment or investigation involving the use of any living animal or field crop product is carried out, conducted or attempted.” KAN. STAT. ANN. § 47-1826(i) (2012).

restaurants with lobster or fish tanks, pet stores, circuses, petting zoos, and elementary school classrooms with an ant farm . . . ”⁴⁰

The chilling effect of the law’s vagueness and broad sweep is compounded by the potential for criminal prosecution at the felony level. ALDF indicates that “the criminal penalties are the same for a person who intends to take a picture in an animal facility without the consent of the owner as for a person who knowingly kills or injures an animal.”⁴¹

ii. Assessment of Complaint

This article agrees with ALDF’s claims for relief—that the law violates the First Amendment as a content and viewpoint-based discrimination, and second, that the law’s overbreadth violates the First Amendment—while diverging from the argument that the *entire* statute is unconstitutional.

As a content and view-point based discrimination, this article relies heavily on *Reed v. Town of Gilbert*, discussed in detail below.⁴² While ALDF’s complaint does not cite *Reed*, reference to this important case regarding facially content-neutral laws would strengthen its case.

Regarding the statute’s overbreadth, ALDF focuses on the wide range of conduct prohibited by the law, alleging that the entire law is unconstitutional because “the law as a whole restricts substantially more speech than the First Amendment permits.”⁴³ This article diverges from ALDF in this allegation, because certain prohibited activities in the statute do not implicate speech.

For example, K.S.A. § 47-1827(b) prohibits “acquir[ing] or otherwise exercis[ing] control over an animal facility . . .” and K.S.A. §§ 47-1827(e) and (f) prohibit “dama[ing] or [destroy]ing . . . field crops” at a private research facility or a government agency.

The conduct prohibited in these sections does not implicate the First Amendment, and, despite the statute’s overbreadth and vagueness, there is a significant difference between causing

⁴⁰ Complaint, *supra* note 26, at 20.

⁴¹ *Id.* at 18 (comparing KAN. STAT. ANN. § 47-1827(g)(3) (2006) with KAN. STAT. ANN. § 21-6412(b)(2)(A) (2017)).

⁴² See *Reed v. Town of Gilbert*, 135 S. Ct. 2227 (2015).

⁴³ Complaint, *supra* note 26, at 30–31 (citing *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

physical damage to a facility versus making an undercover recording. While the statute amounts to an unreasonable restraint on protected speech, damaging or destroying another's property is not protected speech. Thus, the Kansas District Court could find the sections of the statute which implicate speech unconstitutional while upholding the sections of the statute targeting conduct.⁴⁴

iii. Comparison to Idaho, Utah, and Iowa Ag-Gag Laws

This section discusses the opinions in the Idaho, Utah, and Iowa cases. Notably, these three Ag-gag statutes all targeted some form of false speech used to obtain entry, access, or employment at an agriculture facility. By contrast, the Kansas statute does not address false speech. Thus, while the courts in these respective cases all apply the Supreme Court's test for laws regulating false speech, this inquiry is not relevant in the Kansas case.⁴⁵

The Idaho statute was deemed unconstitutional in part, while the Utah and Iowa statutes were deemed unconstitutional entirely. While the Kansas statute does not address false speech, it is still at least in-part unconstitutional.

C. *ALDF v. Wasden: Idaho Ag-Gag Held Partially Unconstitutional*

The Idaho Interference with Agricultural Production law was passed in 2014 after an undercover video of abuse at an Idaho dairy was released.⁴⁶ Shortly after the law was enacted, ALDF filed suit. The case was eventually appealed to the Ninth Circuit, and a decision was released in January 2018.

⁴⁴ A discussion of conduct under the First Amendment is beyond the scope of this paper, though it should be noted that damaging or destroying an animal facility would be not considered expressive conduct. See *United States v. O'Brien*, 391 U.S. 367 (1968) (discussing the limits and considerations involved when considering restrictions on symbolic speech).

⁴⁵ See *U.S. v. Alvarez*, 567 U.S. 709 (2012) (holding that false speech which neither causes a legally cognizable harm nor inures a material gain to the speaker is a form of protected speech).

⁴⁶ Arin Greenwood, *Court Says No to Gagging Those Who Reveal Farm Animal Abuse*, HUFFINGTON POST (Aug. 5, 2015), https://www.huffingtonpost.com/entry/idaho-ag-gag-law_us_55c0b399e4b06363d5a35543; *Mercy for Animals, Burger King Cruelty—Video Exposes Horrific Animal Abuse at a Burger King Dairy Supplier*, YOUTUBE (Oct. 9, 2012), https://www.youtube.com/watch?v=INycWOuVqk&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DINycWOuVqk&has_verified1.

In *ALDF v. Wasden*, the Ninth Circuit Court of Appeals held two sections of Idaho’s Interference with Agricultural Production law unconstitutional. First, Section (1)(a), the “Misrepresentation Clause,” stated: “a person commits the crime of interference with agricultural production if the person knowingly: (a) is not employed by an agricultural production facility and enters an agricultural facility by force, threat, misrepresentation or trespass.”⁴⁷

Second, Section (1)(d), the “Recording Clause,” prohibited “enter[ing] an agricultural production facility that is not open to the public and, without the facility owner’s express consent . . . mak[ing] an audio or video recording of the conduct of an agricultural production facility’s operation.”⁴⁸ The remainder of Section A focuses on the Ninth Circuit’s opinion.

i. Misrepresentation Clause

1. *Gaining Entry Through Misrepresentation is Protected Speech*

Assessing the constitutionality of the Misrepresentation Clause, the Ninth Circuit looked to *U.S. v. Alvarez*, in which the Supreme Court held unconstitutional the Stolen Valor Act, which criminalized false claims that the speaker had received the Congressional Medal of Honor.⁴⁹ In *Alvarez*, the Court held that false speech is neither categorically protected nor unprotected; false speech made for the purpose of material gain, material advantage, or that inflicts a legally cognizable harm can be criminalized.⁵⁰ Other forms of false speech, which do not fall into any of the unprotected categories, receive constitutional protection.⁵¹

The Ninth Circuit held that criminalizing entering an agricultural production facility by misrepresentation violated

⁴⁷ IDAHO CODE ANN. § 18-7042(c) (2018).

⁴⁸ IDAHO CODE ANN. § 18-7042(d) (2018).

⁴⁹ *Alvarez*, 567 U.S. at 709.

⁵⁰ *Id.* at 712.

⁵¹ *Cf.* *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1195 (2018). It should be noted that *Alvarez* was a plurality decision, and there has been discussion in lower courts as to whether the plurality’s opinion applies, or the concurrence’s (Breyer, J. concurring, applying a form of intermediate scrutiny to protected false speech). While considering the narrow grounds of the *Alvarez* majority, the Ninth Circuit and the District Courts for Utah and Iowa all applied strict scrutiny.

Alvarez. The court reasoned that “lying to gain entry merely allows the speaker to cross the threshold of another’s property, including public property.”⁵² Lying for this purpose does not necessarily result in material gain or advantage for the speaker, nor does it inflict a legally cognizable harm on the property owner.⁵³

Because lying to gain entry is protected speech under *Alvarez*, the court assessed Section(1)(a) under strict scrutiny. The court held that the state might have a compelling interest in regulating property rights and protecting its farm industry, but “criminalizing access to property by misrepresentation is not actually necessary to protect those rights . . . If . . . [the state’s] real concern is trespass, then Idaho already has a prohibition against trespass that does not implicate speech in any way.”⁵⁴

2. *Obtaining Records Through Misrepresentation is Unprotected Speech*

Conversely, Section (1)(b), which prohibits “obtain[ing] records of an agricultural production facility by force, threat, misrepresentation or trespass”⁵⁵ and Section (1)(c), which prohibits “obtain[ing] employment with an agricultural facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility’s operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers”⁵⁶ were upheld.

The court held that making false statements to obtain records inflicts a property harm upon the owner and could result in material gain to the speaker and is thus unprotected speech under *Alvarez*.⁵⁷ For example, a property owner suffers a legally cognizable harm from records obtained through false speech and

⁵² *Id.* at 1195.

⁵³ *See id.* at 1194–95 (exemplifying this point, the court makes the following analogy: “Take, for example, a teenager who wants to impress his friends by obtaining a highly sought-after reservation at an exclusive pop-up restaurant that is open to the public. If he were to call the restaurant and finagle a reservation in the name of his mother, a well-known journalist, that would be a misrepresentation. If the restaurant offers up a reservation on the basis of the mother’s notoriety, granting a “license” to enter the premises...the teenager would be subject to punishment of up to one year in prison, a fine not to exceed \$5,000 or both.”).

⁵⁴ *Id.* at 1196.

⁵⁵ IDAHO CODE ANN. § 18-7042(1)(b) (2018).

⁵⁶ IDAHO CODE ANN. § 18-7042(1)(c) (2018).

⁵⁷ *Wadsen*, 878 F.3d at 1199.

the speaker may learn trade secrets. Because such speech is unprotected, it is only subject to rational review.

Regarding the Equal Protection Clause, the Ninth Circuit did acknowledge that the law was partially motivated by animus towards animal welfare groups.⁵⁸ However, because animal welfare groups are not a traditionally suspect class, a court may only strike the statute “if [it] serves no legitimate government purpose *and* if impermissible animus towards an unpopular group prompted the statute’s enactment.”⁵⁹ The court acknowledged that animus towards reporters and activists was a factor in passing the statute, but that it also serves the legitimate purpose of protecting agricultural production facilities from interference.⁶⁰

3. *Obtaining Employment Through Misrepresentation is Unprotected Speech*

The Ninth Circuit also held that Section (1)(c), which prohibits obtaining employment through misrepresentation with the intent to cause economic or other injury to the facility, does not offend *Alvarez*. In *Alvarez*, the Supreme Court stated, “[w]here false claims are made to effect a fraud or secure moneys or valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”⁶¹ Moreover, this section is limited to those seeking employment *with intent to cause economic or other injury to the facility*, which further narrows its scope.

While this speech is unprotected, in *R.A.V. v. City of St. Paul*, the Supreme Court held that the government may offend the First Amendment if it makes a viewpoint distinction in regulating unprotected speech.⁶² ALDF argued that the statute’s Restitution Clause, which permits victims to recover twice the amount of the damage resulting from the statute’s violation, violated *R.A.V.*

⁵⁸ See *id.* at 1200–01 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), holding “a bare...desire to harm a politically unpopular group [or] negative attitude[s] or fears about that group [do not constitute] a legitimate government interest for the purpose of this review.”).

⁵⁹ *Id.* at 1200 (citing *Mountain Water Co. v. Mont. Dep’t of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990)).

⁶⁰ *Id.* at 1201.

⁶¹ *Alvarez*, 567 U.S. at 723.

⁶² See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (distinguishing which types of features of speech can be prohibited without violating the First Amendment).

because it was enacted solely to punish whistleblowers and journalists, and thus suppress a specific viewpoint.⁶³ The Ninth Circuit held that because the Restitution Clause is limited to economic loss, rather than “less tangible damage” such as emotional distress, the statute does not punish animal activists any more so than other regulations in the Idaho Penal code.⁶⁴

ii. Recording Clause

The Recording Clause created the crime of interference with agricultural production if a person knowingly “[e]nters an agricultural production facility that is not open to the public and, without the facility owner’s express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility’s operation.”⁶⁵

The Ninth Circuit held that the Recording Clause violated the First Amendment. As a preliminary matter, the court indicated that making an audio or video recording is speech protected by the First Amendment.⁶⁶ The court then determined the Recording Clause was a content-based restriction because law enforcement would be required to view the content of the recording to determine before bringing charges. Because the Recording Clause was deemed to be a content-based restriction, the court assessed it under strict scrutiny. The court held that the clause was not narrowly tailored to protect agriculture production facilities because it was both over and under-inclusive. The clause was held to be under-inclusive because it did not regulate photographs and over-inclusive because it suppressed more speech than necessary to protect property and privacy.⁶⁷

D. ALDF v. Herbert: Utah Ag-Gag Held Unconstitutional

In 2012, the State of Utah enacted the Agricultural Operation Interference law, which created the crime of agricultural interference for certain recording activities; seeking access to an agriculture operation under false pretenses; and seeking

⁶³ IDAHO CODE ANN. § 18-7042(4) (2018); IDAHO CODE ANN. § 19-5304 (2018); *Wasden*, 878 F.3d at 1202.

⁶⁴ *Wasden*, 878 F.3d at 1202

⁶⁵ IDAHO CODE ANN. § 18-7042(1), (2) (2018).

⁶⁶ *Wasden*, 878 F.3d at 1203 (stating “[N]either the Supreme Court nor [the Ninth Circuit] has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of First Amendment protection afforded...” 1203.

⁶⁷ *Id.* at 1204.

employment with the intent to record activities at an agriculture production facility. The United States District Court for the District of Utah held the entire statute unconstitutional, and the State of Utah did not file an appeal.

i. Lying Provision: Unconstitutional Restriction on Protected Speech

Section (2)(b) created the crime of agricultural operation interference if a person “obtains access to an agricultural operation under false pretenses.”⁶⁸ The court assessed this section under the *Alvarez* standard discussed above. The Utah District Court, like the Ninth Circuit in *Wasden*, held that Section (2)(b) infringed on protected speech, noting “[l]ying to gain entry, without more, does not itself constitute trespass.”⁶⁹ Thus, because obtaining access through false pretenses does not necessarily result in a legally cognizable harm, it does not fall into a category of unprotected false speech under *Alvarez*. The court cited numerous examples of speech which could be criminalized under this provision, such as a restaurant critic who hides her identity, a dinner guest who lies to his host, and a job applicant who fabricates his hobbies.⁷⁰

Because Section (2)(b) infringed on protected speech, it was assessed under strict scrutiny. The state cited four interests before the court: 1) protecting animals from injury resulting from unqualified workers; 2) protecting animals from disease brought into the facility by workers; 3) protecting workers from exposure to disease; and 4) protecting workers from injury resulting from unqualified workers.⁷¹

The court held that even if these were compelling interests, the statute was not narrowly tailored to address these problems. The lying provision was over-inclusive in that it criminalized conduct unrelated to protecting these interests, and under-inclusive in that it did nothing to target harmful conduct resulting from “anyone other than an undercover investigator.”⁷²

⁶⁸ UTAH CODE ANN. § 76–6–112.

⁶⁹ *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017).

⁷⁰ *Id.*

⁷¹ *Id.* at 1211.

⁷² *Id.* at 1213.

ii. Recording Provision: Unconstitutional Restriction on Protected Speech

Section (2)(a), (c), and (d) created the crime of agricultural operation interference for various recording activities at an agricultural production facility.⁷³ As a preliminary matter, the court held that recordings were a form of speech for First Amendment purposes.⁷⁴ The state argued that because the Act only applied to speech on private property, First Amendment protections did not apply. The court rejected this argument, stating “a landowner’s ability to exclude from her property someone who wishes to speak, and the government’s ability to jail the person for that speech” are two different concepts which the state incorrectly conflated.⁷⁵

The court then determined that the recording provisions were a content restriction because they required viewing the content of the recordings to determine if they were recordings *of* an agriculture operation. Had the statute supplanted the term “of” with “at” the court indicated it might have assessed the provisions as content-neutral restrictions.”⁷⁶

As a content-based restriction, the court assessed the recording provision under strict scrutiny. The court held that the state offered no clear evidence of how its interests in enacting the statute, discussed above, were furthered by recording restrictions. The recording provisions, like the lying provisions, were deemed unconstitutional.

E. ALDF v. Reynolds: Iowa Ag-Gag Held Unconstitutional

Most recently, in January 2019, the U.S. District Court for the District of Iowa held the state’s “Agricultural production facility fraud” statute unconstitutional in a summary judgement motion.⁷⁷ The Iowa law, enacted in 2012, created the crime of agricultural production facility fraud for “(a). obtain[ing] access to an agricultural production facility by false pretenses” and “(b).

⁷³ IDAHO CODE ANN. § 76–6–112(2)(a), (c), (d).

⁷⁴ *Herbert*, 263 F. Supp. at 1208 (stating that, “[b]ecause recordings themselves are protected by the First Amendment, so too must the making of those recordings be protected. This is not to say that the State cannot regulate the act of recording; it is merely to say that if it wishes to do so, the State must justify and narrowly tailor the restriction, as with any other constraint on speech.”).

⁷⁵ *Id.*

⁷⁶ *Id.* at 1211.

⁷⁷ IOWA CODE ANN. § 717A.3A; *Animal Legal Def. Fund v. Reynolds*, 2019 WL 140069 (S.D. Iowa 2019).

mak[ing] 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 mak[ing] the statement with the intent to commit an act not authorized by the owner . . . ”⁷⁸ For a first conviction, the crime constituted a serious misdemeanor and for a subsequent conviction, the crime constituted an aggravated misdemeanor.⁷⁹

i. False Speech and Employment: A Different Outcome Than *Wasden*

As a preliminary matter, the Iowa District Court determined that the false speech at issue—both making false statements to access an agriculture facility and making false statements to seek employment at an agriculture facility—are protected forms of speech under *Alvarez* because neither instance causes a legally cognizable harm nor provides a material gain to the speaker.⁸⁰ Interestingly, the Iowa District Court came to a different conclusion regarding false speech and employment than the Ninth Circuit, which upheld Idaho’s restriction on obtaining employment at an agriculture facility through false speech.

Unlike the Idaho statute, which prohibited obtaining “employment . . . by force, threat, or misrepresentation with the intent to cause economic or other injury,”⁸¹ the Iowa statute prohibits obtaining employment by false speech “with the intent to commit an act not authorized by the owner.”⁸² In a previous decision addressing the state’s motion to dismiss, the Iowa court held that the Ninth Circuit’s holding regarding Idaho’s employment clause was inapplicable because the court “placed great emphasis on the intent prong of the Idaho statute.”⁸³

The Iowa court reasoned that “[t]his intent provision cabined the application of the Idaho statute so that it only criminalized the sort of false statements that the plurality in [*Alvarez*] recognized the government may target . . . : those likely to cause material harm to others.”⁸⁴ Conversely, the Iowa code

⁷⁸ IOWA CODE ANN. § 717A.3A(1)(a),(b) (2012).

⁷⁹ IOWA CODE ANN. § 717A.3A(2)(a),(b) (2012).

⁸⁰ *Reynolds*, 2019 WL at 10.

⁸¹ IDAHO CODE ANN. § 18-7042(1)(c) (2018).

⁸² IOWA CODE ANN. § 717A.3A(b) (2012).

⁸³ *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 924 (S.D. Iowa 2018).

⁸⁴ *Id.*

prohibits all false speech in a job application if the speaker intends to commit an unauthorized act—a much broader prohibition than the Idaho code. Determining section § 717A.3A(b) to be broader than the type of false speech the Court deemed unprotected in *Alvarez*, the Iowa court assessed section (b) under strict scrutiny.

ii. Iowa Statute Does Not Survive Strict Scrutiny

In the court's summary judgment opinion, it deemed § 717A.3A unconstitutional. First, the court determined the entire statute was a content-based restriction because the content of the speech—whether it was true or false—would need to be assessed to find an individual guilty of agriculture production facility fraud.⁸⁵

As a content-based restriction, the court applied strict scrutiny in assessing the law.⁸⁶ Though dubious of the state's justifications for the law (property interests and biosecurity) it still held that these interests were important, but not compelling.⁸⁷ The law was also deemed unnecessary to protect these interests because the state made no argument explaining how false speech used to access or gain employment at an agriculture facility would compromise biosecurity.⁸⁸ Finally, the court determined that because Iowa already has other content-neutral statutes regarding trespass and biosecurity, the state's interests could be achieved by means which do not affront protected speech.⁸⁹ As of February 14, 2019, the Iowa Attorney General's Office is set to file an appeal brief by March 20, 2019.⁹⁰

III. Kansas Ag-Gag: 'Better' Drafted, But Partially Unconstitutional

As the nation's first Ag-gag law, perhaps there is a reason the Kansas Farm Animal and Field Crop and Research Facilities

⁸⁵ *Reynolds*, 2019 WL at 11 (citing *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984) (holding law that prohibits broadcasting stations which receive federal funds from editorializing is content-based.)).

⁸⁶ *Id.* at 6.

⁸⁷ *Id.* at 7.

⁸⁸ *Id.*

⁸⁹ *Id.* at 8.

⁹⁰ Rox Laird, *Federal Judge Strikes Down Iowa 'Ag-Gag' Law*, <https://www.courthouse.news.com/federal-judge-strikes-down-iowa-ag-gag-law/>, (last visited Jan. 21, 2019); see also *Challenging Iowa's Ag-Gag Law*, Animal Legal Defense Fund (Feb. 14, 2019), <https://aldf.org/case/challenging-iowas-ag-gag-law/> (last visited March 4, 2019).

Protection Act was not challenged until 2018; it is ‘better’ drafted than the Idaho and Utah laws.⁹¹

Notably, there is no section in the Kansas statute which criminalizes false speech used to enter or seek employment at an animal facility, so *Alvarez* is not relevant. However, like the Idaho and Utah statutes, the Kansas statute does criminalize conduct involving recording and photography.

Despite its tactful drafting, certain sections are still constitutionally suspect.⁹² This section assesses these problematic sections of the law in light of the holdings in *Reynolds*, *Wasden*, and *Herbert*.

A. Unconstitutional Aspects of Kansas Law

i. Because Key Terms are Not Defined, the Statute is Overbroad and Vague

*1. The Meddling Student Example*⁹³

The word ‘damage’ and the clause ‘intent to damage’ are not defined in the statute’s definition section. However, each prohibited act under § 47-1827 requires the actor have the ‘intent to damage’ the enterprise.⁹⁴ Because the term ‘damage’ and the clause ‘intent to damage’ are not defined in statute’s definitions section, the statute chills speech and restricts more speech than necessary to serve its purpose. If the term ‘damage’ were defined to only include activities resulting in *physical* damage, the remainder of the statute (excluding § 47-1827(c)(4)) might be constitutional.

The Supreme Court has stated, “a law may be invalidated as overbroad if a substantial number of its applications are

⁹¹ It should also be noted that no one has ever been prosecuted under this law.

⁹² See Complaint, *supra* note 26, at 31 (alleging that the entire statute is unconstitutional on its face or, in the alternative, that Kan. Stat. § 47-1827(c)(4), (c)(1), (c)(3), Kan. Stat. § 47-1827(a), (b), (c)(2), and (d)(1) are unconstitutional as applied to Plaintiff.) For purposes of this paper, I only argue that Sections Kan. Stat. § 47-1827(a) and (c)(4) are unconstitutional.

⁹³This example was inspired by the Ninth Circuit’s factious teenager who lies about his identity in order to secure a reservation at an exclusive restaurant, thus implicating Idaho Code § 18-7042(1)(a). See *Wasden*, 878 F.3d at 1195.

⁹⁴ § 47-1827(b) is the only prohibited act with a different standard, requiring the actor have the “intent to deprive the owner of such facility.”

unconstitutional, judged in relation to the statute's plainly legitimate sweep."⁹⁵ Even if aspects of the law are constitutional, under the overbreadth doctrine, the court considers that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech."⁹⁶

In this instance, the word 'damage' and the term 'intent to damage' could mean many things and runs the risk of criminalizing perfectly legitimate forms of speech. For example, does the statute criminalize economic, emotional, or physical damage, or all three?

There is also a timing issue: must the speaker have the intent to damage the enterprise before she engages in her speech activity, or can she be charged if her intent changes from the time she made a recording or photograph to the time of disseminating the information?

To exemplify the statute's overbreadth, consider the following hypothetical activity which could be criminalized under the statute. A school group offers a tour to a local animal production facility as part of a field trip for a science class. Though the students are told in advance not to take any photos inside, a student nonetheless hides his phone in his pocket before the field trip because he plans to take a photo, just for fun. The student has signed up for the field trip because his friends dared him to take a photo inside.

Once inside, he takes a particularly gruesome photo of an animal carcass being processed. The student entered the facility an omnivore, but, when he returns home and views the photo, he realizes he is disgusted by the facility and becomes a vegetarian. Wanting to share his news and hoping to persuade others in his network to stop eating meat, he posts the photo to his Facebook page, and in the caption, he names the animal production facility and tells his friends that they should stop eating meat because of the atrocities he witnessed at the facility. A few of his friends view the photo, are also disgusted by it, and decide to stop eating meat.

Under Section (c)(4), the student could be criminally prosecuted. By captioning the facility's name in his photo and hoping to convert his friends to vegetarianism, the student had the

⁹⁵ Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615).

⁹⁶ United States v. Williams, 553 U.S. 285, 292 (2018).

“intent to damage the enterprise.” Because he planned to take the photo in advance of entering the facility, he entered “to take pictures.” For his actions, the student could be fined and charged with a misdemeanor or felony, depending on the extent of his damage. Whether the facility owner might have recourse in a private tort action (which is beyond the scope of this paper), the State cannot lawfully criminalize such conduct without infringing on First Amendment rights.⁹⁷

2. *Kansas Attorney General Opinion Letter Does Not Ameliorate Statute’s Issues*

Following the statute’s enactment, the Kansas Attorney General released Opinion Letter No. 90-72 on the issue of the meaning of “intent to damage.”⁹⁸ The letter does little to clarify any confusion surrounding the statute’s vagueness and overbreadth, and moreover, the letter is not binding law.⁹⁹

The letter states that the specific intent to damage the enterprise conducted at the facility is a required element of the crime, and such intent is determined by a judge or jury based on the totality of circumstances surrounding the event.

Responding to the question of what “damages” means, the Opinion Letter essentially ‘punts’ on the issue. The most definitive statement in the letter says, “[u]pon conviction, restitution may be ordered in an amount sufficient to compensate the victim for the loss suffered. In a civil action compensatory damages may include out-of-pocket loss as well as consequential damages.”¹⁰⁰ So, if damages constitute any form of quantifiable harm, perhaps any intent is sufficient to implicate charges so long as the victim’s losses are quantifiable. This logic is purely speculative and does little to clarify the meaning of ‘intent to damage.’

⁹⁷ Note that the State of Utah argued that the First Amendment was inapplicable to its Ag-gag statute because the law only regulated speech on private property. The Utah District Court was quick to reject this argument, noting that the state had conflated the difference between “a landowner’s ability to exclude from her property someone who wishes to speak, and the government’s ability to jail the person for that speech.” The former does not affront the First Amendment, while the latter does. *Herbert*, 263 F. Supp. at 1208.

⁹⁸ See *Livestock and Domestic Animals -- Farm Animal and Research Facilities Protection Act -- 1990 Senate Bill No. 776 Op. Kan. Att’y Gen. No. 90-72 (1990)*, <http://ksag.washburnlaw.edu/opinions/1990/1990-072.pdf> (last visited Ma. 10, 2019).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 10.

i. The Pictures Clause Fails First Amendment Scrutiny as Either Content-Based or Content-Neutral Restriction

Section (c) of Prohibited acts; criminal penalties states: “[n]o person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility . . . (4) enter an animal facility to take pictures by photograph, video camera or by other means.”¹⁰¹ This section infringes on protected speech in violation of the First Amendment as either a content-based or content-neutral restriction on speech.¹⁰²

The first step in assessing this section under the First Amendment is to determine if it infringes on protected speech. The Supreme Court has held movies to be protected by the First Amendment.¹⁰³ And in *United States v. Stevens*, the Court stated “visual [and] auditory depiction[s], such as photographs, videos, or sound recordings” are subject to the First Amendment.¹⁰⁴ It logically follows that the act of creating a film, photo, or recording must receive some level of protection as well, and neither the Ninth Circuit, the Utah District Court, nor the Iowa District Court considered otherwise. Thus, protected speech is at issue.

1. *Assessed as Content-Neutral Restriction*

Section (c)(4) prohibits entering an animal facility “to take pictures by photograph, video camera, or by other means.”¹⁰⁵ This section is notably different from both the Idaho and Utah statutes in that it does not prohibit taking pictures or recordings *of* an agriculture production facility, but rather *at* an animal production facility.¹⁰⁶

Because this section limits *where* a photo or recording can be made, rather than regulating the photo or videos content, it might be deemed a content-neutral regulation. In *Herbert*, responding to the state’s argument that the recording provision was a content-neutral restriction, the Utah District Court stated, “[t]hat might be

¹⁰¹ KAN. STAT. ANN. § 47-1827(c)(4) (2018).

¹⁰² There is also a timing issue here, as discussed above in the meddling student example. Must the actor have the intent to damage the enterprise before she enters? This uncertainty contributes to the statute’s overbreadth and vagueness.

¹⁰³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

¹⁰⁴ *United States v. Stevens*, 559 U.S. 460, 468 (2010).

¹⁰⁵ KAN. STAT. ANN. § 47-1827(c)(4) (2018).

¹⁰⁶ *Id.*

so if the Act criminalized recording an image *at* an agricultural operation. But the Act criminalizes recording an image *of* an agricultural operation. The distinction is not trivial . . . the use of “of” rather than “at” means the Act does not bar all filming at an agricultural operation, so it is not location based.”¹⁰⁷

Following the rationale of the Utah District Court, the Kansas recording provision should be assessed as a content-neutral restriction. Though there are different variations of the content-neutral test, the Supreme Court commonly asks if the law “is designed to serve a substantial government interest and [does] not unreasonably limit alternative avenues of communication.”¹⁰⁸

Even assuming the Kansas legislature has a substantial interest in protecting its farmers and ranchers, it is dubious that the law does not ‘unreasonably limit alternative avenues of communication.’

Individuals and groups who wish to disseminate information and exposés of animal production facilities essentially have no other avenue of communication under this law. The hypothetical “alternative avenues of communication” do not measure up to the prohibited conduct. For example, an individual could seek the owner’s consent to film or photograph, but clearly what the individual would see while undercover at a facility would be different than what the individual would see during a planned visit.

And given the tight security at animal production facilities, there is essentially no way to take photos or recordings from the outside. Alternatively, an entity or individual wishing to expose abuses at an animal production facility could interview a willing employee, but the differences between reading an interview versus viewing images or audio recordings is significant. A business can prohibit individuals from recording or taking photos on its property, but the state cannot lawfully criminalize such conduct. Because the

¹⁰⁷ *Herbert*, 263 F. Supp. at 1211.

¹⁰⁸ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41 (1986). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *United States v. Grace*, 461 U.S. 171, 177; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *U.S. Postal Serv. v. Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981); *Heffron v. Int’l Soc. for Krishna Consc.*, 452 U.S. 640, 647-48 (1981) (illustrating that the Court commonly asks whether a law regarding speech is designed to serve a substantial government interest and does not limit alternate avenues of communication).

law limits the only legitimate avenue for this speech to occur, it infringes on protected speech if it is deemed content-neutral.

2. *Assessed as Content-Based Restriction*

Despite the text of Section (c)(4), and the distinction drawn by the Utah District Court between the term “at” and “of,” it is not clear if the Kansas recording provision is actually content-neutral. Arguably, Section (c)(4) is content-based.

In *Reed v. Town of Gilbert*, the Supreme Court stated, “our precedents have . . . recognized a separate and additional category of laws that, though facially content-neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulation of speech or that were adopted by the government because of disagreement with the message [the speech] conveys. Those laws, like those that are content-based on their face, must also satisfy strict scrutiny.”¹⁰⁹

The Kansas statute is content-based under the *Gilbert* logic. First, the law cannot be justified without reference to its content. For example, although the law prohibits recordings and taking photos at an animal production facility, it only singles out those made with the intent to damage the enterprise. Viewing the contents of the photo or recording is important, if not necessary, to determine the actor’s intent. For example, a photograph of a sunset taken at an animal production facility is probably not taken with the intent to damage the enterprise. But a photograph of animal abuse is likely taken to expose the conduct and cause the enterprise economic damage. Thus, Section (c)(4) cannot be justified without viewing the content of the photo or recording.

Second, the law regulates the content of speech because the government disagrees with the speaker. In *Gilbert*, the Court further stated, “government regulation of speech is content-based if a law applies to a particular speech because of the topic discussed or the idea or message expressed.” In this instance, the state already has other laws on its books which protect privacy, trespass, and biosecurity.¹¹⁰ Why the state should need an additional law singling out speech at an agriculture production facility is unclear

¹⁰⁹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

¹¹⁰ Complaint, *supra* note 26, at 29.

and is only justified by a desire to suppress speech on the topic of animal welfare.¹¹¹

Because Section (c)(4) is content-based under the “additional category” of laws recognized in *Gilbert*, it will only be upheld if it meets strict scrutiny, a standard most laws infringing on protected speech are unable to meet.

Under strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. While the state may have a compelling interest in protecting its agriculture production facilities, the law is not narrowly tailored to this interest because, as mentioned above, other laws are already on the books in Kansas that protect these interests and do not infringe on speech. Under strict scrutiny, this section fails.

IV. Conclusion

The outcome of four prior cases striking Ag-gag legislation indicates an ominous fate for the Kansas Farm Animal and Field Crop and Research Facilities Protection Act. While the statute’s Picture’s Clause uses different language from the Pictures Clauses in Idaho and Utah respectively, it too fails to meet the demands of strict scrutiny for the reasons discussed above. Moreover, the vague meaning of ‘damage’ and ‘intent to damage’ creates an issue of overbreadth.

While the entire Farm Animal and Field Crop and Research Facilities Protection Act might not violate the First Amendment, whether these laws are good public policy is an entirely separate question. The State of Kansas and the remaining six states with Ag-gag laws might rationalize these laws with trespass or property damage concerns, but there is no rational justification to suppress speech in the process. Ag-gag laws are yet another example of legislation which affords agriculture special status. While agricultural exceptionalism’s pervasiveness in U.S. history and law is unlikely to shift in the immediate future, it must always yield to the First Amendment.

¹¹¹ Even if the state has a compelling interest in protecting the property of animal facilities from physical damage—and it is not even clear this was the state’s real interest in enacting the law—prohibiting recording and photography is not necessary to further this interest.