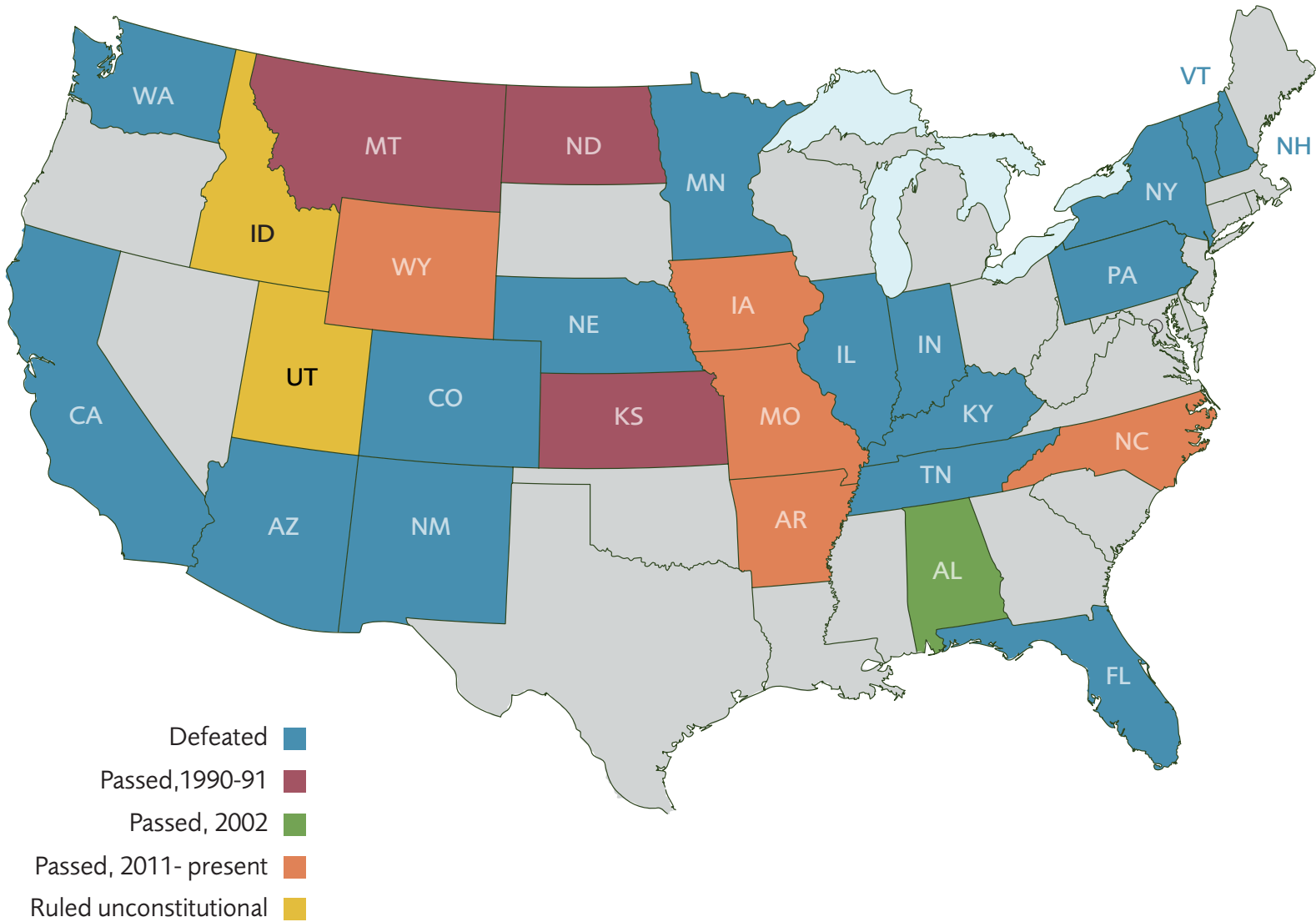


# Ag-Gag Across America

Corporate-Backed Attacks on Activists and Whistleblowers



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## Executive Summary

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Since 2011, there has been a marked proliferation of state laws targeting undercover investigations and whistleblowing in animal agriculture. These ag-gag laws vary, but all include one or more of three key elements: (1) prohibiting documentation of agricultural practices; (2) prohibiting misrepresentations in job applications utilized to gain access to closed facilities; and (3) requiring immediate reporting of illegal animal cruelty.

This report, the first of its kind, discusses ag-gag laws in historical and political context, catalogues an earlier wave of ag-gag legislation, examines each recent law in detail, explores constitutional concerns and current lawsuits, and documents several successful campaigns to defeat ag-gag legislation.

Animal rights and environmental activism increased significantly in the late 1900s. People for the Ethical Treatment of Animals pioneered undercover exposés documenting violence against animals in fur, agriculture, and experimentation, resulting in animal cruelty prosecutions and increased public awareness of the mistreatment of animals as a social issue. As animal rights activism increased, so too did corporate and governmental targeting of that activism. The FBI began describing certain animal rights actions as “terrorism” and a first wave of ag-gag laws passed in Kansas, Montana and North Dakota.

This report details important developments between the first wave of ag-gag laws in the early 1990s and a second wave in the current decade. In 2002, Alabama passed the Farm Animal, Crop, and Research Facilities Protection Act, prohibiting theft of records and other materials from animal facilities, and use of such records by third parties, including the media. A high-profile federal prosecution of six animal rights activists and their nonprofit organization in 2004 set the stage for amending the federal Animal Enterprise Protection Act, as prosecutors and industry groups sought additional tools to fight “eco-terrorism.” In 2006, Congress passed the Animal Enterprise Terrorism Act, broadening protections for industries that use animals and increasing penalties for those who damage or cause the loss of animal enterprise property, including profits. Around the same time, the American Legislative Exchange Council (ALEC) drafted the “Animal and Ecological Terrorism Act.” This model legislation would make it a crime to enter an animal or research facility without consent and take pictures. The bill would not only criminalize undercover investigations and whistleblowing, it would label such acts “terrorism,” and require those convicted to register with their State Attorney General.

On the heels of these developments a second wave of ag-gag laws emerged. Between 2011 and 2017 Iowa, Missouri, Utah, Idaho, Wyoming, North Carolina, and Arkansas enacted ag-gag laws. In many of these states, the new legislation followed a recurring pattern: an animal rights investigation uncovered evidence of illegal animal abuse, shocking footage was shared with the public, and the industry sought

legislation to prevent future documentation. While early ag-gag laws protected animal enterprises only, a new breed of ag-gag has dropped the “ag,” criminalizing whistleblowing across industries and targeting environmental data collection in particular.

Though this new wave of ag-gag bills passed, far more were defeated. Between 2012 and 2014, ag-gag bills were defeated in 20 states, many repeatedly. Successful campaigns involved efforts by animal rights and environmental groups allied with civil liberties, free press, food safety, and labor coalitions, and highlighted the importance of whistleblowing and the dubious constitutionality of the laws. Those laws that did pass have been mired in constitutional challenges. As this report details, ag-gag laws violate the First Amendment and Equal Protection. Lawsuits are ongoing in Idaho, Utah, Wyoming, and North Carolina, and the first court to rule on the substance of an ag-gag law – the Idaho District Court – found it unconstitutional.

## Introduction

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Across the United States the right to dissent is under attack. On the federal level, the Trump Administration has attacked the media, assailed whistleblowers, and issued “gag” orders against agencies tasked with reporting on climate change and environmental degradation. At the state level, the picture is equally troubling. A growing number of states are passing laws burdening the right to protest, leading UN officials to issue a statement warning that this trend will “jeopardize one of the United States’ constitutional pillars: free speech.”<sup>1</sup>

As one legal expert recently noted, the latest round of anti-protest bills have a recent precedent, the Animal Enterprise Terrorism Act (AETA).<sup>2</sup> The AETA was the codification at the federal level of a successful campaign by legislators, law enforcement, and corporate interests, often called the “Green Scare,” to conflate animal rights and environmental activism with terrorism and use fears of so-called “eco-terrorism” to chill, repress, and criminalize activism. At the state level, this same campaign has led to the proliferation of anti-whistleblower legislation, known as ag-gag laws.



Image courtesy of Mercy for Animals

A Mercy For Animals undercover investigation at Iowa Select Farms in Kamrar, Iowa, exposed miserable conditions for mother sows and their piglets confined to small gestation crates. See [pigabuse.mercyforanimals.org](http://pigabuse.mercyforanimals.org)

By filming violence against animals on farms, slaughterhouses, and laboratories, or gathering samples from a polluted stream, investigators and whistleblowers have changed the public debate around the agriculture industry and put powerful corporations on the defensive. Ag-gag laws are the result. They aim to stifle public criticism of animal agriculture, targeting undercover investigations and whistleblowing as criminal activity.

This report documents the early days of the Green Scare, the first ag-gag laws in the early 1990s, and a new wave of ag-gag legislation that emerged with a vengeance in 2011. Paul McCartney famously stated that if “slaughterhouses had glass walls, everyone would be a vegetarian.” Whether glass walls would really lead to a universal wave of vegetarianism is debatable,<sup>3</sup> but the animal agricultural industry clearly worries it is true—the industry has worked diligently to keep its walls opaque.

In recent years, these measures have expanded beyond the agricultural industry to target whistleblowers more broadly. In 2017, the governor of Arkansas signed into law an expansive ag-gag bill that aims to silence whistleblowers in agriculture, child care, and nursing facilities. Today, ag-gag laws are part of a sweeping crackdown on dissent.

## Defining Ag-Gag Laws

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The term “ag-gag” was coined in 2011 by former *New York Times* columnist Mark Bittman to describe a series of state bills appearing across the country that criminalized photographing and video recording inside agricultural facilities.<sup>4</sup> Ag-gag laws include one or more of three key elements:

- (1) Prohibiting documentation, i.e. banning photography, video recordings, and collection of documents;
- (2) Prohibiting misrepresenting oneself in order to gain access to an animal agriculture facility, for example, failing to answer truthfully when asked if an applicant is a member of an animal rights group;
- (3) Requiring the quick reporting to authorities of illegal animal cruelty.

While the intent to hide industry practices is obvious in points (1) and (2), point (3) could be misunderstood as protective of animals. This is not the case. Mandatory reporting requires those who witness illegal animal cruelty to report it to authorities within a short time period, usually between 24 and 120 hours.<sup>5</sup> This requires undercover investigators to out themselves, rendering them unable to document larger patterns of violence—including *legal* violence<sup>6</sup>—and allowing industry spokespeople to dismiss individual violations as aberrations. Without documentation of a larger pattern prosecutions are unlikely, especially of anyone except low level employees.<sup>7</sup>

Despite these general similarities, ag-gag laws vary widely. Some impose criminal liability; others impose civil liability. Some ag-gag laws directly prohibit filming, photography, or other forms of documentation; others impose burdens that make investigations effectively impossible. Sometimes ag-gag provisions are included along with prohibitions on unlawful activity, such as vandalism; other ag-gag provisions stand on their own. Some laws single out only animal enterprises for special protection, while others are blanket prohibitions on whistleblowing in all industries.



## Repression of Animal Rights Activism and the Rise of “Terrorist” Rhetoric

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Ag-gag laws did not emerge in a vacuum. As the environmental and animal rights movements have gained increasing acceptance since the 1970s, this development has been “paralleled by another, virtually unnoticed trend: a methodical, expanding government crackdown against animal-rights and environmental activists.”<sup>8</sup> This crackdown has been labeled the “Green Scare,” in reference to the anti-communist hysteria of the “Red” Scares.

Beginning in the late 1980s and accelerating throughout the 1990s, politicians, law enforcement, and big business promoted a narrative of an industry under siege by “eco-terrorists” and “animal rights extremists.” The term “eco-terrorist” is believed to have first been used in a 1983 article that accused environmental groups of engaging in or tacitly approving of “terrorism.”<sup>9</sup> In 1988, the FBI first used the label “domestic terrorism” to describe an act committed by animal rights activists,<sup>10</sup> and for the first time included an animal rights group, the Animal Liberation Front (ALF), in its annual “Terrorism in the United States” report<sup>11</sup>— despite the fact that no one has ever been injured or killed in an ALF action and ALF guidelines explicitly require “tak[ing] all necessary precautions against harming any animal, human or non-human.”<sup>12</sup>

In 1989, Congress first considered making crimes against animal enterprises federal offenses when Rep.



Image courtesy of Direct Action Everywhere

Andrew Sharo, a biophysics PhD candidate at UC Berkeley, documents a pig in a gestation crate.



Image courtesy of Direct Action Everywhere

Direct Action Everywhere investigator Wayne Hsiung filming chickens at Rainbow Farms cage free egg farm in California.

Charles W. Stenholm (D-TX) introduced the Farm Animal and Research Facility Protection Act. The bill died in the House Committee on Agriculture after a contentious hearing.<sup>13</sup> Animal welfare groups testified against the bill, as did the George H.W. Bush Department of Justice, which argued that there were already sufficient laws to deal with the types of crimes it said were committed by animal rights activists.<sup>14</sup> Committee members, too, noted that the actions at issue were already illegal under state law, and questioned why crimes relating to animal facilities warranted special protection and whether animal rights “terrorism” was really a large problem. They also attacked the bill as unconstitutionally vague and potentially infringing upon the First Amendment.<sup>15</sup> One committee member, Rep. Charles Rose (D-NC), even went on the offensive against the biomedical industry, drawing attention in the committee hearing to his own plan to amend the Animal Welfare Act to cover the abduction of companion animals with the purpose of selling them to laboratories.<sup>16</sup>

During the same period, activists were increasing their use of undercover investigations to expose violence against animals in agriculture, experimentation, textiles (fur, leather, etc.), and entertainment. People for the Ethical Treatment of Animals (PETA) led this trend when, in 1981, PETA co-founder Alex Pacheco took a job at a research lab in Silver Spring, Maryland, and photographed the conditions the monkeys were confined in.<sup>17</sup> The result was historic: for the first time in the United States an animal researcher was convicted for animal cruelty.<sup>18</sup> The National Institutes of Health, which had funded the lab’s experiments, conducted its own investigation and suspended the lab’s funding.<sup>19</sup> In 1985, Congress

responded by passing the Improved Standards for Laboratory Animals Act, which amended the Animal Welfare Act.<sup>20</sup>

Many subsequent undercover investigations in the 1980s and 1990s had similarly historic results. A 1984 investigation shut down a Texas horse slaughterhouse. The first-ever law enforcement raid on a factory farm occurred in 1992 after a PETA investigation into foie gras production. In 1994, a furrier was charged with animal cruelty stemming from a PETA undercover investigation, and the first time anyone at a factory farm was indicted on felony animal cruelty charges stemmed from a 1999 undercover investigation.<sup>21</sup>

With current technology, undercover video footage of animal agriculture is easier to obtain and has become more widespread, galvanizing public pressure and sometimes resulting in animal cruelty enforcement actions, prosecutions,<sup>22</sup> and food safety recalls. News programs, including two HBO documentaries, *Dealing Dogs* (2006) and *Death on a Factory Farm* (2009), have also relied heavily on undercover footage of violence against animals. This success has raised the stakes, leading animal agriculture to fight for repressive legislation targeting investigators.

## Ag-Gag Laws: Past and Present

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To date, 11 states have adopted ag-gag laws. With one exception,<sup>23</sup> the laws can be classified into a first wave (1990 – 1991) and a second wave (2011 – present). Between 1991 and 2011, groups connected to the animal agricultural industry drafted model bills and strategized about how to enact the laws. When ag-gag legislation reemerged in 2011, it was part of a carefully crafted plan to squelch animal rights investigations, undermine free speech, and protect corporate profits.

### Wave I: 1990-1991

Kansas, Montana, and North Dakota were able to accomplish what Congress had failed to do in 1989, passing laws that single out agriculture and research facilities for special protection. In these states, politicians were able to capitalize on fears of “eco-terrorism” to enact specific penalties for property damage or freeing animals and include provisions banning photography and filming. These were the first ag-gag laws.

#### *Kansas*

The first ag-gag law was enacted in Kansas in 1990. The Farm Animal and Field Crop and Research Facilities Protection Act prohibits the destruction of property at an “animal facility” as well as “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means . . . without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility.”<sup>24</sup> Violating the provision prohibiting photography and video is a misdemeanor, punishable by up to a year in jail. The law also provides for civil liability, allowing the agricultural facility to recover court costs, attorney’s fees, and three times all actual and consequential costs of a defendant’s actions.

#### *Montana*

In 1991, Montana passed the Farm Animal and Research Facility Protection Act,<sup>25</sup> making it a crime to “damage or destroy an animal facility or an animal or property in or on the premises of an animal facility” and to “enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation.”<sup>26</sup> Penalties vary depending on how much “damage or destruction” occurs. If an individual causes less than \$500 in “damage or destruction,” they can be fined up to \$500 and imprisoned for up to six months; if the “damage or destruction” exceeds \$500, they may be fined up to \$50,000 and imprisoned for up to 10 years.

#### *North Dakota*

Also in 1991, North Dakota passed the Animal Research Facility Damage Act,<sup>27</sup> which makes it a crime to “damage or destroy an animal facility, an animal or property in or on the animal facility,” or to “[i]ntentionally turn out or release any animal in or on an animal facility.” The law also bans unauthorized

recording: “[e]nter[ing] an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment” is a misdemeanor, punishable by up to thirty days in jail and/or a fine of \$1,500. The law includes civil penalties of “an amount equal to three times all actual and consequential damages and court costs and reasonable attorney fees.”

While they received little attention at the time, these three early ag-gag laws and the failed federal Farm Animal and Research Facility Protection Act described above represent important milestones in the evolution of ag-gag legislation and other repression of animal rights activism. They legitimized the idea that animal industries should receive special protection, that animal rights activists should be singled out for special punishment, and that documentation of animal agriculture should be criminalized.<sup>28</sup>

## Setting the Stage: 1992-2011

Only one ag-gag law was enacted between 1992 and 2011: the 2002 Alabama Farm Animal, Crop, and Research Facilities Protection Act.<sup>29</sup> However, two important developments during these years set the stage for ag-gag’s strong resurgence in 2011: Congress’s passage of the Animal Enterprise Protection Act (which was later amended as the Animal Enterprise Terrorism Act), and the drafting, by industry groups, of the “Animal and Ecological Terrorism Act” model legislation.

In 1992, Congress passed the federal Animal Enterprise Protection Act (AEPA) “in response to concerns about what was perceived by many to be the rapidly expanding use of violence” and “other disruptive expressions of extremism on behalf of animal rights.”<sup>30</sup> It created the new statutory offense of “animal enterprise terrorism,” criminalizing one who:

“(1)travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility in interstate or foreign commerce, for the purpose of causing physical disruption to the functioning of an animal enterprise”; and

“(2)intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals or records) used by the animal enterprise, and thereby causes economic damage exceeding \$10,000 to that enterprise, or conspires to do so [...]”<sup>31</sup>

While not an ag-gag law, AEPA singled out animal enterprises for special protection—and therefore animal rights activists for special punishment—feeding the overall climate of the Green Scare.

Over the next dozen years, Congress held multiple hearings on the supposed threats posed by “eco-terrorism” and “animal rights extremism.”<sup>32</sup> Lawmakers heard testimony from industry and government

officials about the supposed deficiencies of the AEPA. The Animal Enterprise Protection Coalition (AEPC), made up of industry groups including the National Association for Biomedical Research, National Cattlemen's Beef Association, the Fur Commission, Pfizer, Wyeth, and GlaxoSmithKline lobbied to amend the law.<sup>33</sup> Internal documents from the AEPC show that its members went to great lengths to get the media to use the words "terrorism" and "terrorist" when describing animal rights actions.<sup>34</sup> These efforts were successful, creating an echo chamber in which industry groups and law enforcement parroted claims about the growing threat of animal rights "terrorism."

In 2004, Deputy Assistant FBI Director John Lewis told Congress that AEPA was insufficient for tackling the threat of animal rights "terrorism,"<sup>35</sup> particularly that posed by groups, such as the ALF and Stop Huntingdon Animal Cruelty (SHAC). Nonetheless, two days later seven activists were indicted on "animal enterprise terrorism" charges for publishing a website and newsletter, giving speeches, and organizing protests as part of the SHAC campaign.<sup>36</sup> In 2005, FBI Deputy Director John Lewis claimed that, not only were environmental or animal rights activists engaged in "terrorism," they were the greatest domestic terrorism threat in the United States.<sup>37</sup> These efforts paid off when, in 2006, as the SHAC activists were waiting to report to prison to serve terms of one to five years, Congress enacted the Animal Enterprise *Terrorism* [emphasis added] Act (AETA).



Credit: Norbert Nagel, Mörfelden-Walldorf, Germany

Pharmaceuticals conglomerate Pfizer was one of several industry groups that lobbied to enhance penalties for "animal enterprise terrorism."

The AETA broadens the range of activity criminalized under the law, as well as the range of "victims," and provides stiffer penalties. The AETA is violated anytime a person, with the purpose of "damaging or *interfering* [emphasis added] with the operations of an animal enterprise" "intentionally damages or causes the loss of any real or personal property" or places "a person in reasonable fear" of bodily injury or death.<sup>38</sup>

While Congress was considering the need for heightened protection of animal enterprises, the American Legislative Exchange Council (ALEC) drafted the Animal and Ecological Terrorism Act to serve as a model legislation for state elected officials and corporate lobbyists. According to ALEC, every year its legislative members introduce over 1,000 bills to state legislatures based on the ALEC agenda; 1/5 of them actually become law.<sup>39</sup> The Animal and Ecological Terrorism Act would have made it a crime

to, without the effective consent of the owner, enter an “animal or research facility to take pictures by photograph, video camera, or other means with the intent to commit criminal activities or defame the facility or its owner.” The bill would not only criminalize undercover investigations and whistleblowing, it would require those convicted under the law to register with the state attorney general as terrorists. Convicted “animal and ecological terrorists” would have been required to provide the attorney general of the state where they were convicted with their name, current residential address, a recent photograph, and their signature. All of this information would be publicly available online. Registered “animal and ecological terrorists” would have to notify the attorney general within 30 days of moving or changing their name. After three years, an individual could petition to be removed from the list. While no bill comes with a “Made by ALEC” stamp on it, *The Columbia Review of Journalism*,<sup>40</sup> *In These Times*,<sup>41</sup> *Mother Jones*,<sup>42</sup> and *Bill Moyers and Company*<sup>43</sup> have all drawn connections between the second wave of ag-gag bills and ALEC’s model bill.

As discussed below, attempts to apply the “terrorism” label to the work of undercover investigators has largely backfired. Ag-gag laws remain fiercely unpopular and, more have failed to become law than have been enacted and those that have passed are embroiled in litigation.

## Wave II: 2011 – present

In 2011, efforts to enact ag-gag laws reemerged with a vengeance. Since then, nearly half the states in the country have considered an ag-gag bill, though most bills have not passed.<sup>44</sup>

The introduction of several second-wave ag-gag bills followed a new pattern: animal welfare and animal rights organizations would conduct undercover investigations at animal agriculture facilities, documenting violence and sometimes uncovering actions that violate state animal cruelty laws. Lawmakers would respond not by aiming to prevent the abuse, but by criminalizing the types of investigations that brought the violence to light. Politicians and industry representatives working to enact ag-gag laws have employed the rhetoric of the Green Scare, complete with condemning undercover animal rights investigators as “terrorists.”

### *Iowa*

In 2008, activists with PETA conducted an undercover investigation at MowMar Farms in Iowa, where they documented workers hitting pigs with metal rods, using electric prods on injured pigs, and kicking pregnant pigs in the stomach.<sup>45</sup> A particularly jarring scene documented the standard method of killing piglets at MowMar Farms: grabbing the piglet by his hind legs and bashing his head into the floor.<sup>46</sup> Prior to the PETA investigation, no one had ever been charged with “criminal livestock neglect” on a Midwestern farm, and only seven individuals had ever been convicted of animal cruelty in the entire meat industry.<sup>47</sup> After the MowMar investigation, six individuals pled guilty to animal cruelty. While

only underpaid and overworked workers were charged—and not the farm owners or the company itself—the charges demonstrated the game-changing potential of undercover video footage.<sup>48</sup>

PETA's video of MowMar Farms presented a huge PR problem for animal agriculture. The Associated Press released the video on its website and sent out over its wire a description of its contents.<sup>49</sup> The violence documented at MowMar quickly became an international news story.

The Iowa agricultural industry, which boasts the most hog farms of any state in the country, was less than pleased. Lynn Becker, chief operating officer of LB Pork, which owns MowMar Farms, later referred to the video “as the ‘9-11’ event of animal care in our industry.” Becker's story was repeated in *National Hog Farmer* magazine, under the title “It Can Happen to You.”<sup>50</sup>



Image courtesy of PETA

Industry groups responded to this “9/11” by proposing an ag-gag law. In 2011, Rep. Annette Sweeney, former head of the Iowa Angus Association, claimed she crafted the bill around her kitchen table,

A PETA undercover investigation at a Hormel supplier found this sow with an open sore on her nose from an apparent beating with a metal gate rod. See [investigations.peta.org/mother-pigs-piglets-abused-hormel-supplier/](http://investigations.peta.org/mother-pigs-piglets-abused-hormel-supplier/)

though the Iowa Poultry Association admits it played a part.<sup>51</sup> Who exactly sat around Rep. Sweeney's kitchen table and drafted the bill is not clear, but *Mother Jones* noted her bill bore a strong resemblance to ALEC's model Animal and Ecological Terrorism bill.<sup>52</sup>

Sweeney's bill was backed by the full force of the Iowa agricultural industry. The Agribusiness Association of Iowa, Iowa Select Farms, Iowa Cattlemen's Association, Iowa Dairy Association, Iowa Farm Bureau, the Iowa Corn Growers Association, Monsanto, and the Institute for Cooperatives all lobbied the Iowa State Legislature for its passage.<sup>53</sup>

Sweeney's bill, which passed Iowa's House of Representatives and the Senate Agriculture Committee, but not the full Senate, would have made it illegal to possess or distribute undercover videos.<sup>54</sup> The Iowa Attorney General advised that the bill was “clearly unconstitutional.”<sup>55</sup> And a 2011 poll found that 65% of Iowans opposed the bill, with only 21% in support.<sup>56</sup>



In 2012, the Iowa Senate revised the bill.<sup>57</sup> Instead of focusing on videotaping inside animal agriculture facilities, the revised bill made it a crime for anyone to “make[] a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.”<sup>58</sup> A first conviction of “animal facilities fraud,”<sup>59</sup> is punishable by imprisonment for up to two years and/or a fine of up to \$6,250.00. Subsequent convictions risk up to five years imprisonment and/or a fine of up to \$7,500.00. The bill also punishes conspiracy to commit animal facility fraud and aiding and abetting animal facility fraud.

Usually, passing such a bill would involve weeks of deliberation,<sup>60</sup> but Iowa’s revised ag-gag bill passed with unusual speed. The Senate spent just a few hours on the new bill before approving it, whereupon the House immediately took it up and passed it. Declared an “emergency” measure, it went into effect as soon as it was signed.

### *Missouri*

In 2012, Missouri passed an ag-gag law imposing a mandatory 24-hour reporting requirement for employees who videotape illegal animal abuse. As in Iowa, the initial bill proposed in the Missouri House of Representatives would have criminalized photography and videotaping, as well as failing to disclose any affiliation with an animal rights group on a job application. A Senate version of the bill, however, included only the mandatory reporting time for animal cruelty, and ultimately passed as part of an omnibus agriculture bill.<sup>61</sup>

The law requires that “[w]hensoever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect” they turn over the recording “to a law enforcement agency within twenty-four hours of the recording.” The recording cannot be “spliced, edited, or manipulated in any way prior to its submission.”<sup>62</sup> An intentional violation of this statute is a class A misdemeanor, which carries a penalty of up to one year in jail or a fine up to \$1,000, or both.

### *Utah*

Utah was the next state to pass an ag-gag law. It also has the dubious honor of being the only state to ever attempt to prosecute someone under its ag-gag law—twice.

The Agricultural Interference Act was introduced and passed in 2012. It punishes recording in an agricultural operation without consent or obtaining access to an agricultural operation under false pretenses,<sup>63</sup> its sponsor, Rep. John Mathis, a part-time farmer and veterinarian, stated that the purpose of

the bill was to stop “animal rights terrorists.”<sup>64</sup> Other supporters also invoked the specter of terrorism, stating for example that undercover investigations are “just another version of domestic terrorism.”<sup>65</sup>

Violating the recording provision is a class A misdemeanor, and carries a penalty of imprisonment of up to one year and/or a fine of up to \$2,500. Violating the other provisions is a class B misdemeanor and can result in imprisonment of up to six months and/or a fine of up to \$1,000.<sup>66</sup>

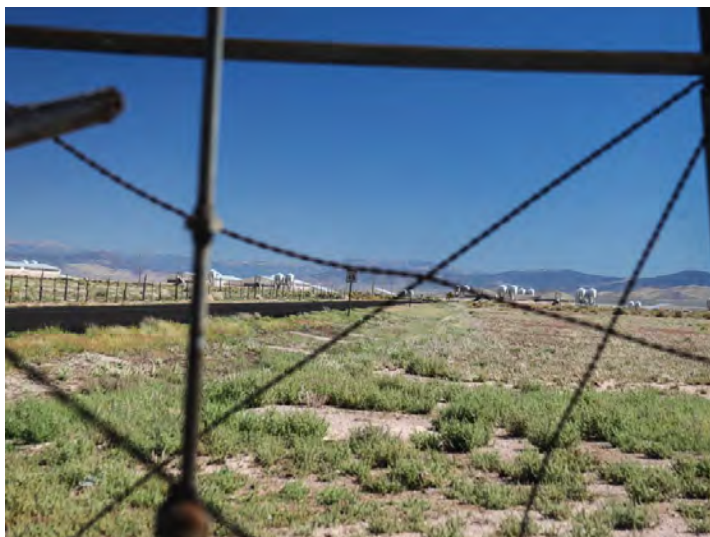


Image courtesy of FARM Utah

View of the Dale T. Smith and Sons Meat Packing Company in Draper, Utah. The Utah slaughterhouse filmed by Amy Meyer.

In 2013, Utah became the first state to charge an individual under an ag-gag law. On February 8, 2013, animal rights activist Amy Meyer filmed a slaughterhouse from a public road. She documented employees picking up what looked like a “downer” cow (i.e. an animal so sick she cannot walk) with a forklift.<sup>67</sup> The slaughterhouse was separated from public land by a barbed wire fence. As footage of the incident makes clear, Meyer did not cross over the fence onto private property. Still, a manager from the slaughterhouse confronted Meyer and told her that he had seen her trespassing on private property and filming. He then (incorrectly) told Meyer that she could not film private property from public property and called the police. Seven police cars arrived on the scene. Meyer was not arrested, but 11 days later she was charged with “agricultural operation interference” and faced up to six months in jail.<sup>68</sup> The charges were dropped within 24 hours of the story breaking, after widespread public outrage.<sup>69</sup>

In 2014, Utah again used its ag-gag law, this time to arrest four activists from the Farm Animal Rights Movement. Much like Meyer, the activists claimed they were on public property when they took pictures of farm buildings.<sup>70</sup> Also like Meyer, prosecutors dropped the ag-gag charges.<sup>71</sup> Three of the four activists eventually pled guilty to criminal trespass; the fourth had all charges dismissed at trial.

### *Idaho*

Nowhere is the coordination between politicians and industry on ag-gag more obvious than in Idaho. Industry groups backing Idaho’s ag-gag bill, as well as the legislators who sponsored it, made no attempt to hide that their agenda was targeting animal rights activists in hopes of curtailing negative publicity about the agricultural industry.

Idaho’s ag-gag bill arose in response to a 2012 undercover investigation by Mercy for Animals at

Bettencourt Dairies' Dry Creek Dairy in Hansen, Idaho.<sup>72</sup> The resulting video and images made national headlines for their depiction of employees beating, kicking, stomping on, and dragging dairy cows, and three employees were charged with misdemeanor animal cruelty.<sup>73</sup>

Bettencourt responded to press inquiries about the footage by insisting that the company did not tolerate animal abuse, but the broader response of the Idaho dairy industry showed less concern with animal cruelty than bad publicity. Drafted by the Idaho Dairymen's Association,<sup>74</sup> the Agricultural Security Act would make "interference with agricultural production" punishable by a \$5,000 fine and up to one year in prison. As the Association's chair, Tony VanderHulst, told a legislative committee:

This is about exposing the real agenda of these radical groups that are engaging in farm terrorism. Activists use intimidating tactics to damage the business of the producers and their customers. These farm terrorists use media and sensationalism to attempt to steal the integrity of the producer and their reputation, and their ability to conduct business in Idaho by declaring him guilty in the court of public opinion.<sup>75</sup>

Similarly, the bill's sponsor, Sen. Jim Patrick, stated that undercover investigations were the kind of "terrorism [that] has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety."<sup>76</sup> He also compared animal rights and animal welfare activists to "marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission."<sup>77</sup>

While the Dairymen's Association wrote the bill<sup>78</sup> and made some of the most inflammatory remarks about "farm terrorism," Idaho's entire agricultural industry threw its weight behind the act. The Food Producers of Idaho unanimously voted to support the bill, and the Idaho Grain Producers and Idaho-Eastern Oregon Seed Association lobbied for its passage. Idaho's agriculture industry as a whole described the ag-gag bill as the most important bill of the session and one of the most important pieces of agriculture legislation in years.<sup>79</sup>

The Agricultural Security Act passed amidst this inflammatory rhetoric, portrayed as a "security" measure against "terrorism." The law prohibits intentionally causing physical damage, as well as obtaining employment 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." Interference with agricultural production also includes "audio or video recordings of the conduct of an agricultural production facility's operations" "without the facility owner's express consent or pursuant to judicial process or statutory authorization." It also punishes obtaining records or entering an animal production facility one is not employed at "by force, threat, misrepresentation or

trespass.”<sup>80</sup> A conviction for interference with agricultural production is a misdemeanor punishable by imprisonment of up to one year and/or a \$5,000.00 fine.

## Wyoming

The most dramatic evolution during the second wave has been the expansion of ag-gag bills beyond the agricultural and animal industries. In 2015, Wyoming passed a law criminalizing what legislators and lobbyists referred to as “data trespass,” the collection of resource data on open land with the intent to submit that data to a federal or state regulatory agency – for example, collecting water samples to test for the presence of E. coli bacteria in streams.

Non-professional, “citizen scientists” who collect data on pollution have played a vital role in the enforcement of the Clean Water Act.<sup>81</sup> For example, in 2015, *Dissent NewsWire* interviewed citizen scientist Jonathan Ratner, who explained how he visited streams throughout Wyoming in order to test water samples and send the results to the Wyoming Department of Environmental Quality.<sup>82</sup> E. coli is of particular concern in Wyoming, because the state is home to 1.3 million cows whose waste often makes its way into streams, creating a potential health hazard.

People like Ratner *help* state and federal agencies charged with enforcing environmental laws and regulations that protect the public’s access to fresh drinking water, but which are hampered by limited resources. However, state legislators and the Wyoming Farm Bureau Federation, which supported the data trespass law, felt differently about their efforts. As the bill’s sponsor Senator Larry Hicks explained, “I want to remind the body that this information, this data, is private information. In a lot of ways it is no different than your social security number. It has some of the same ramifications if that resides in the public domain.”<sup>83</sup>

Just as ag-gag bills followed successful undercover investigations on factory farms, Wyoming’s data trespass law seems tailor-made to thwart the work of Ratner and others. The data trespass law broadly prohibits (as a felony) collection of “resource data” on “open land.”<sup>84</sup> “Open land” is defined as “land outside the exterior boundaries of any incorporated city, town, or subdivision,” and “resource data” is “data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species.” “Collect[ing]” resource data includes taking a sample or a photograph, or otherwise preserving the information in any form from open land, if it is submitted or intended to be submitted to any agency of the state or federal government. This means that an individual standing on public land photographing a public stream is committing a felony, so long as they plan to share the photograph with any governmental agency.

Violating the criminal data trespass statute can result in imprisonment of up to one year and/or a fine of up to \$1,000.00. The law also excludes data collected in violation of the law from being used in any civil, criminal, or administrative proceeding against the polluter—though it can be used to criminally prosecute the individual who collected the data. In addition to the criminal data trespass law, Wyoming also passed a nearly identical law creating a civil data trespass offense.

In response to legal challenges (see below) the Wyoming legislature amended both data trespass laws in 2016. “Open lands” was replaced by the phrase “private land” and the definition of “collect” was altered to strike the requirement the data be submitted or intended to be submitted to government agency. Despite that change, access to open lands remains restricted for animal rights and environmental activists seeking to collect water samples, because of a quirk in Wyoming’s roads. In sparsely populated areas, many roads commonly used by the public cross private land, requiring drivers to trespass. The revised law “clarified that a trespass of private land to get to public land to collect data is a violation of the data trespass laws.”<sup>85</sup>



Photo: Bigstock

Wyoming's ag-gag law would make it difficult to test the quality of water in streams like this one.

Though Wyoming’s law has important differences from other ag-gag laws, it functions similarly. Just like earlier ag-gag laws, the data trespass law is designed to prevent the public, as well as state and federal regulatory agencies, from knowing certain information about the agricultural industry. The agricultural industry has just as much to lose if the public concludes that meat is unsafe and environmentally destructive as if the public decides eating animals is unethical.

### *North Carolina*

North Carolina’s 2015 ag-gag law also represents a significant broadening of ag-gag legislation. Unlike earlier ag-gag laws in other states and a previous version of the bill in North Carolina, it does not single out the agricultural industry for protection. Rather, it allows employers to sue any employee of any business who takes photographs of a “nonpublic” area of the business without their employer’s permission.<sup>86</sup> This effectively drops the “ag” from “ag-gag,” resulting in a sweeping “gag” law. Additionally, the law creates liability for employees who remove “data, paper, records, or any other documents” from a nonpublic area or engage in an “act that substantially interferes with the ownership or possession of real property.” In

spite of the law's broad reach, animal rights and animal welfare organizations like the Humane Society of the United States, and journalists like Will Potter, who have tracked ag-gag legislation, maintain that protecting the agricultural industry was the main intent behind the law.<sup>87</sup> Indeed, North Carolina is the second largest hog-farming state<sup>88</sup> and third in poultry production,<sup>89</sup> and has been the site of multiple undercover investigations into the animal agriculture industry.<sup>90</sup>

A wide range of organizations, including the American Association of Retired Persons (AARP), Wounded Warrior Project, and Domestic Violence Council, opposed the North Carolina bill, and, after it passed, called on the governor to veto it.<sup>91</sup> AARP noted that, while it had originally been designed to protect "agriculture and poultry industries," the law had been expanded in such a way as to create "new risks for workers, older adults, families and children because it extends to all industries including nursing homes, hospitals, group homes, medical practices, charter and private schools, daycare centers, and so forth."<sup>92</sup>

North Carolina's Governor Pat McCrory vetoed the bill, making clear that while he supported its purpose, the bill was so broad and encompassed so much activity that it "[did] not adequately protect or give clear guidance to honest employees who uncover criminal activity. [McCrory was] concerned that subjecting these employees to potential civil penalties [would] create an environment that discourages them from reporting illegal activities."<sup>93</sup>

Legislators were able to come up with the two-thirds vote needed to override a veto and the bill became law on January 1, 2016.<sup>94</sup> According to the Humane Society of the United States, lobbyists for the poultry industry played a significant role in pushing for the veto to be overridden.<sup>95</sup>

## *Arkansas*

In March 2017, Arkansas Governor Asa Hutchinson signed a sweeping ag-gag bill into law.<sup>96</sup> The law follows the North Carolina model, imposing civil (as opposed to criminal) liability, and targeting whistleblowers generally, instead of singling out agricultural industry for special protection.

Under Arkansas's ag-gag law, employers have a civil cause of action against a "person who knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the non public area." A commercial property is defined as business properties, residential properties used for business purposes, and "[a]gricultural or timber production operations, including buildings and all outdoor areas that are not open to the public." A nonpublic area is anywhere not open to the general public. Exceeding authority includes placing "an unattended camera or electronic surveillance device and us[ing] the unattended camera or electronic surveillance device to record images or data for an unlawful purpose" along with capturing and removing "the employer's data, paper, records, or any other documents and us[ing] the information contained on or in the employer's data,

paper, records, or any other documents in a manner that damages the employer[...]. Any person who “knowingly directs or assists” such activities is jointly liable.<sup>97</sup>

Since the purpose of whistleblowing is to expose malfeasance, it would be highly unusual for an employer to authorize an employee to record evidence of wrongdoing or misconduct. Thus nearly any whistleblower or activist who relies on undercover video footage would be “exceeding their authority.” As the Humane Society of the United States explained, “The bill is so sweeping that it would . . . gag employees who try to expose the abuse of children at a daycare center.”<sup>98</sup>

This bill was deeply unpopular in Arkansas, with seventy-five percent of polled Arkansas residents saying they opposed it.<sup>99</sup> Yet, it managed to overwhelmingly pass out of the Arkansas state legislature and be signed into law.

## Successful Campaigns to Oppose Ag-Gag Bills

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Ag-gag laws have powerful backers and many have passed quickly. But they are not unstoppable. Between 2012 and 2014, activists defeated ag-gag bills in 20 states, many repeatedly.<sup>100</sup> Indeed, in Tennessee and Arizona ag-gag bills were approved by the state legislatures only to be vetoed by the governor. Efforts to oppose ag-gag bills have been most successful when animal rights and environmental advocates are joined by civil liberties, press freedom, food safety, and labor groups to form strong coalitions. As Chris Holbein, Public Policy Director of Farm Animal Protection at the Humane Society of the United States, explained:

In 2015, the Arizona state legislature passed HB2150, which would've significantly weakened protections for farm[ed] animals and suppressed whistleblowers. Advocates for animal welfare and constitutional liberties launched a major, multi-pronged campaign for a veto, both in the media and in the capitol building. But most importantly, we mobilized the people of Arizona. When Americans learn the truth about attempts to suppress whistleblowers and gut protections for animals, they are disgusted. The job of the Humane Society of the United States and our allies is to make as many people as possible aware of the true intent behind these measures, and encourage them to take action. The governor vetoed the bill! Afterwards, a reporter contacted the governor's office to gauge public opinion regarding HB2150. The reporter was told that more than 19,000 calls and emails had urged the governor to veto HB2150; only three asked him to sign it.

The strong response we consistently receive from the public has demonstrated to many lawmakers and governors that this is not a fight they want; this has allowed us to quash numerous ag-gag bills early in the process.<sup>101</sup>

While powerful industries support ag-gag laws, the bills have frequently garnered significant opposition. As described below, proposed bills have sparked waves of critical editorials, and opinion polls consistently show low public support. Ag-gag laws generally have received significant, negative national media coverage, and popular mobilizations of constituents and grassroots activists have defeated multiple ag-gag bills. Three examples are described below.

### *California*

In 2013, the California State Assembly considered an ag-gag bill backed by the California Cattlemen's Association<sup>102</sup> that would have required reporting of illegal animal cruelty within a short time frame. Eventually, the bill was amended to exclude animal cruelty accidentally caught on tape by security cameras.

The bill was widely opposed. Nineteen California newspapers published negative editorials and both the



National Press Photographers Association and the California Newspaper Publishers Association testified against the bill. A wide range of groups, including the American Civil Liberties Union of California, the California Teamsters Public Affairs Council, and the California Labor Federation, opposed the bill.<sup>103</sup> Amidst this unexpected wave of opposition, Assemblyman Jim Patterson withdrew his own bill.<sup>104</sup>

## Florida

In 2011, one of the most severe and far-reaching ag-gag bills in the country was proposed in Florida. The initial version of the bill would have criminalized any photography or video of an agricultural facility without the owner's consent, including images captured from public roads. The bill made such photography or videotaping a first-degree felony, a category of offenses that includes murder and rape. The bill was amended to criminalize only images captured while on the property of the agricultural facility, to exempt law enforcement and Department of Agriculture and Consumer Services agents from its prohibitions, and to reduce the offense to a misdemeanor. The revised bill passed unanimously in the Senate Agricultural Committee but did not pass.

A year later, an agriculture omnibus bill was proposed that included the same ag-gag language. Sen. Jim Norman, who authored the initial ag-gag bill, was also one of two cosponsors of the omnibus agriculture bill. Like many ag-gag supporters, Norman has connections to the agriculture industry and a history



Image courtesy of : Iowa Citizens for Community Improvement

of inflammatory comments about animal welfare and animal rights activists, stating for example that undercover investigations are “almost like terrorism.”<sup>105</sup> He authored the ag-gag bill at the behest of egg farmer Wilton Simpson, who was angered by Proposition 2, a successful California ballot measure that placed limits on confining farmed animals, including egg-laying hens.<sup>106</sup>

Animal activists opposed the Florida measure and staged a lobby day, after which another of the bill's cosponsors suggested striking the ag-gag language. The agriculture omnibus bill passed without the ag-gag language.<sup>107</sup>

## Tennessee

In 2013, Tennessee's legislature voted for a bill that would have created a mandatory reporting period, requiring individuals who possessed video footage or photographs of illegal animal cruelty to turn over

such footage to law enforcement within 48 hours. The bill's main sponsor, Rep. Andy Holt, was a hog farmer who had courted controversy during the previous legislative session when he left the session to go on a trip to Hawaii paid for by the American Farm Bureau Federation.<sup>108</sup> Rep. Holt also made waves when an email he sent to the Humane Society was published by the press:

I am extremely pleased that we were able to pass HB 1191 today to help protect livestock in Tennessee from suffering months of needless investigation that propagandist groups of radical animal activists, like your fraudulent and reprehensibly disgusting organization of maligned animal abuse profiteering corporatists, who are intent on using animals the same way human-traffickers use 17 year old women. You work for a pathetic excuse for an organization and a pathetic group of sensationalists who seek to profit from animal abuse. I am glad, as an aside, that we have limited your preferred fund-raising methods here in the state of Tennessee; a method that I refer to as "tape and rape." Best wishes for the failure of your organization and it's true intent.<sup>109</sup>

While Holt's bill passed both houses of the Tennessee state legislature, it came under intense public scrutiny. The *Knoxville News Sentinel*, for example, wrote that "[i]f the Ag Gag bill happens to pass and the *News Sentinel* records images of animal cruelty, we will not consider ourselves bound to turn those images over to law enforcement" and recommended that anyone else who "believes in freedom of expression" take the same position.<sup>110</sup>

The Tennessee attorney general declared the bill to be "constitutionally suspect" and multiple district attorneys said the bill would make it more difficult to prosecute animal cruelty. Citing these reasons, along with concerns that the ag-gag law would change the state's shield law protecting reporters from turning over information to law enforcement, Governor Bill Haslam vetoed the bill.<sup>111</sup> To date no ag-gag legislation has become law in Tennessee.

## The Constitutionality of Ag-Gag Laws

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While many ag-gag bills have passed, the story has not ended there: successful ag-gag laws have been quickly subjected to constitutional challenges in the courts.

Speech on matters of public concern occupies the highest rung on the hierarchy of First Amendment values and is afforded the greatest degree of protection. Yet ag-gag laws silence speech about public concerns. Undercover investigations into animal agriculture raise important questions about our treatment of animals, environmental degradation, and public health, as well as overarching philosophical questions about eating animals. Even exposés of perfectly legal behaviors can lead to changes in the law, as exemplified by the impact of Upton Sinclair's *The Jungle*.<sup>112</sup>

The First Amendment requires that prohibitions on speech be content and viewpoint neutral. Laws that target speech based on content or viewpoint are presumptively unconstitutional and may be justified only if they pass *strict scrutiny*, a legal test that requires the government to prove that the law in question is narrowly tailored to serve compelling state interests.

Image courtesy of Iowa Citizens for Community Improvement



According to Iowa Citizens for Community Improvement, 8,000 factory farms dominate the Iowa landscape, packing thousands of hogs, chickens, and their billions of gallons of manure into one small space in order to maximize profit.

the agricultural industry for protection are not viewpoint neutral, as general “gag” laws also target only speech critical of the enterprise in question.

These content- and viewpoint-based laws cannot pass strict scrutiny because they are both over-inclusive and under-inclusive. Ag-gag laws are over-inclusive because they are not narrowly tailored to a

Laws that regulate only speech about the agriculture industry are not content-neutral because they single out the agricultural industry for special protection. Nor are ag-gag laws viewpoint neutral, because they only burden speech that is critical of the agricultural industry, not speech that is supportive of that industry. By requiring consent from the industry for any photographs or recordings, ag-gag legislation will naturally privilege speech that favors the agricultural industry, while chilling critical speech.

Even ag-gag laws that do not single out

state's purported interest in protecting private property rights and preventing trespass and fraud. These interests are already covered by generally applicable tort laws that protect property rights; ag-gag laws do not provide additional protections to property owners' rights to exclude persons and control their property. Many ag-gag provisions do not require trespass as a predicate to liability. Nor do they require an essential element of fraud: injury or damage resulting from a misstatement of fact. Ag-gag laws are also underinclusive because they only protect the property rights of certain industries, without justifying this special protection.

The First Amendment also guarantees freedom of the press, yet ag-gag laws target the press's ability to report on the agricultural industry. Legislative histories show that lawmakers have often been concerned with the disclosure of industry practices to the media. Ag-gag laws target not only the act of recording, but also the distribution of a recording to the public by the media.

When ag-gag laws deliberately restrict an individual's ability to report violations of the law to government bodies, they also violate the First Amendment's guarantee of the right to petition the government for a redress of grievances.

Ag-gag laws also run afoul of the 14<sup>th</sup> Amendment's guarantee of Equal Protection. As detailed above, legislatures made no secret of their dislike of animal rights activists, whistleblowers, and undercover investigators. Many ag-gag laws are explicitly motivated by animus against animal rights activists, a politically unpopular group. This is particularly true in areas where the economy is heavily dominated by the agricultural industry.



Image courtesy of Direct Action Everywhere

Conditions uncovered at Circle Four Farms in Utah by a Direct Action Everywhere investigation.

## Legal Challenges to Ag-Gag

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Ag-gag laws have been challenged in four states. As of this publication, all of the litigation is ongoing. The Center for Constitutional Rights has filed amicus briefs in support of those challenges in Idaho and Utah.<sup>113</sup>

### *Idaho*

Idaho's ag-gag law<sup>114</sup> prohibits misrepresenting one's political affiliations when applying for employment with an agricultural company, and filming inside an agricultural facility. The Animal Legal Defense Fund and other plaintiffs filed suit in March 2014, shortly after the law was passed, claiming these two provisions violate the First and Fourteenth Amendments and that the statute is preempted by federal law.<sup>115</sup> In August 2015, the Idaho District Court held that the law violates the First and 14<sup>th</sup> Amendments.

First, the Court struck down Idaho's prohibition on obtaining employment by misrepresentation. While activists might make false statements to gain access to an agricultural facility (e.g., saying "no" if asked whether they belong to any animal rights groups), this speech is protected by the First Amendment, because unlike fraud or perjury, the deceptive speech in question does not cause a direct material harm. The only likely harm that could be caused by misrepresenting oneself on an employment application



Image courtesy of Mercy for Animals

Protest at the State Capitol in Raleigh, North Carolina.

is *indirect* injury to reputation resulting from the published findings of an investigation, not from the misrepresentation itself. The Court also found it important that the misrepresentations at issue are not made for material gain; they are made so that undercover investigators can make the public aware of an issue of public concern, which is precisely the kind of speech the First Amendment is designed to protect.

Next, the court found that Idaho's prohibition on recording inside an agricultural facility constituted an unconstitutional content-based restriction on speech. While the state argued that the law prohibited acts, not speech, the district court reasoned that the First Amendment offers the same protection to the means used to create speech as to the speech itself. For example, writing and painting, while acts, cannot be separated from the speech they create. The district court concluded that making a recording is an expressive act, just like writing on paper or painting on a canvas:

[a]udio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate an undercover investigator or whistleblower who is otherwise disbelieved or ignored. Prohibiting undercover investigators or whistleblowers from recording an agricultural facility's operations inevitably suppresses a key type of speech because it limits the information that might later be published or broadcast.<sup>116</sup>

Idaho's law constituted a content-based restriction because it only criminalized recordings on certain topics; if someone recorded a conversation without permission inside the agricultural facility, whether or not a crime was committed would depend on whether the recorded conversation pertained to

agricultural production. Additionally, an intent to suppress particular speech supports an inference that a restriction is content-based, and the legislative record showed that the Idaho law was intended to suppress speech critical of the agricultural industry.<sup>117</sup> The Court also found that the law discriminates based on viewpoint, because the provisions only burden speech critical of the agricultural industry.

As a content- and viewpoint-based restriction on speech, in order to pass constitutional muster the law would have to be narrowly tailored to serve a compelling government interest. The state cited as its “compelling interest” the protection of personal privacy and private property. The district court disagreed, noting the law would give special protections to the agricultural industry, even though such industries actually have less of a right to personal privacy and property protection given the public interest in safe production of food and related regulations. Even if such an interest were compelling, the court further found the ag-gag law did not use the least restrictive means to achieve the stated ends. The state has other tools at its disposal to protect personal privacy and private property, like laws prohibiting trespass or theft of private documents, which do not burden speech.

The district court also found that the Idaho law violated the Equal Protection Clause of the Fourteenth Amendment on two separate theories. First, equal protection requires that a state-imposed classification be rationally related to a government interest. While the state argued that Idaho’s ag-gag law was meant to protect private property, there was little to show why laws against trespass, conversion, or fraud were somehow not sufficient. The state could not show a legitimate reason why agricultural businesses required more protection than other businesses. Moreover, the legislative history made clear that the law was meant to target animal rights activists, and not merely to protect private property. A classification that is rooted in animus toward one group is not rationally related to a legitimate government interest. As the court said, “[p]rotecting the private interests of a powerful industry, which produces the public’s food supply, against public scrutiny is not a legitimate government interest.”

Second, the district court acknowledged an amicus argument that since the classification involved the exercise of a fundamental liberty (freedom of speech) it should be subjected to strict scrutiny. As the classification could not survive even rational basis review, it certainly could not survive the higher strict scrutiny standard.

Idaho is currently appealing this loss to the Ninth Circuit Court of Appeals.

### *Utah*

Utah’s ag-gag law<sup>118</sup> makes it a crime to obtain access to an agricultural facility under false pretenses, record an agricultural facility without the owner’s consent, or apply for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation. In 2014, a

group of animal rights organizations, journalists, scholars, news publications, and Amy Meyer (the first individual ever charged under an ag-gag law) brought a lawsuit against the state of Utah alleging its ag-gag law violated the First Amendment, the Supremacy Clause, and the 14<sup>th</sup> Amendment. Like the Idaho case, the plaintiffs challenged Utah's ag-gag law as content- and viewpoint-based and in violation of Equal Protection. The plaintiffs in the Utah case also alleged that their First Amendment rights were being violated because the law is overbroad, criminalizing speech that is protected by the First Amendment. On July 8, 2017, the court granted the plaintiff's motion for summary judgement, finding that both the misrepresentation and the recording provisions of Utah's ag-gag law violate the First Amendment.<sup>119</sup> It is likely the State will appeal.

### *Wyoming*

Environmental, press, animal rights, and food safety groups are challenging Wyoming's data-trespass laws. As explained above, the data trespass laws created criminal and civil liability for collecting resource data from open lands if the individual submits or intends to submit the data to a government body. Along with viewpoint, content, and Equal Protection claims, plaintiffs also allege that the law violates freedom to petition the government for a redress of grievances, as well as the Supremacy Clause of the U.S. Constitution, because it frustrates the purpose of federal environmental law and is thus preempted.

In 2015, the district court rejected in part and granted in part the state's motion to dismiss.<sup>120</sup> The judge found that the plaintiffs had alleged plausible First Amendment and Equal Protection claims, but dismissed the Supremacy Act claim. In 2016, Wyoming legislators responded by amending both the civil and criminal data trespass statutes. The prohibition against collecting resource data on "open lands" was changed to "private lands," and the requirement that the individual intend to submit the data collected to a government agency was removed. Plaintiffs amended their complaint in light of these changes, but on July 6, 2016, the district court dismissed the whole case, holding that there is no First Amendment right to access private property.<sup>121</sup> The court further noted that even if the earlier law had been based on animus the amendments had cured it and therefore the equal protection claim failed. The court compared data trespass to prior prohibitions on specific types of trespass considered particularly problematic, such as hunting and fishing, which similarly do not require that a trespasser be given notice or asked to leave before they may be prosecuted. The plaintiffs appealed the court's ruling, and a decision from the 10<sup>th</sup> Circuit Court of Appeals is expected in 2017 or 2018.

### *North Carolina*

In January 2016, a group of animal rights, food safety, and open government groups filed suit against North Carolina's ag-gag, or "anti-sunshine," law.<sup>122</sup> As described above, North Carolina's ag-gag law burdens whistleblowers in all industries, not just agriculture, establishing civil liability for an employee who takes photographs of a "nonpublic" area of a business without their employer's permission. Still,





Image courtesy of Direct Action Everywhere

Turkeys at Jaindl Farms in Pennsylvania.

plaintiffs argued that the broad, sweeping law is unconstitutional for many of the same reasons as more targeted ag-gag legislation, specifically, that the law stifles their ability to investigate employers for illegal or unethical conduct, and restricts information from these investigations, in violation of the First Amendment and Equal Protection.

On May 2, 2017, the District Court dismissed the entire case for lack of standing. It held that Plaintiffs were not being injured by the act, and the threat that it might be used against them in the future was too speculative to allow the lawsuit to move forward.<sup>123</sup> The plaintiffs have appealed this ruling to the Fourth Circuit Court of appeals.

## Conclusion

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In 2013, the American Agricultural Alliance made the subject of their annual stakeholder meeting “Activist at Your Door: Protecting, Animals, Farms, Food, and Consumer Confidence.”<sup>124</sup> In 2015, the industry magazine *National Hog Farmer* devoted substantial space to threats posed by undercover investigations, publishing articles including *When Bad Videos Happen to Good Pork Producers, It [undercover videos] Can Happen To You*, and *Why Do Consumers Believe HSUS [Humane Society of the United States] and Not You?*<sup>125</sup> Big Ag has made it clear that stemming the tide of investigations, and ensuring that the public never sees the unsanitized version of animal agriculture is crucial for ensuring that consumers continue to spend their dollars on animal products. Thus it follows that ag-gag bills are among the animal agricultural industry’s top legislative priority. But the public has a right to know how food is produced, what animal agriculture entails, and if the rivers and streams they depend on are polluted. The violence consistently documented by investigators and the trampling of the First Amendment by those working to enact these laws make clear why Big Ag’s gag agenda must not be allowed to succeed.

## Endnotes

- 1 *UN Rights Experts Urge Lawmakers to Stop “Alarming” Trend to Curb Freedom of Assembly in the US*, OHCHR (March 30, 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID=E>
- 2 Traci Yoder, *New Anti-Protesting Legislation: A Deeper Look*, Dissent NewsWire (March 16, 2017), <https://rightsanddissent.org/news/new-anti-protesting-legislation-deeper-look/>
- 3 See Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (2013). See also Joseph Erbentraut, *This Slaughterhouse Will Let You Watch What Actually Happens Inside*, Huffington Post (August 25, 2016), [http://www.huffingtonpost.com/entry/slaughterhouse-photos-transparency-vermont\\_us\\_57bde785e4b085c1ff270085](http://www.huffingtonpost.com/entry/slaughterhouse-photos-transparency-vermont_us_57bde785e4b085c1ff270085); Stephens Messenger, *To End Cruelty, Country Orders Cameras To Be Installed In Every Slaughterhouse*, The Dodo (January 12, 2016), <https://www.thedodo.com/country-orders-cameras-slaughterhouses-1550465068.html>; Alastair Philip Wiper, *Take a Visual Tour of the World’s Most Modern Slaughterhouse*, Gizmodo (January 21, 2014) <http://gizmodo.com/take-a-visual-tour-of-the-worlds-most-modern-slaughter-1505070438>; *Plan Your Visit, Fair Oaks Farms*, <http://fofarms.com/plan-your-visit/general-admission> (last visited June 5, 2017).
- 4 Mark Bittman, *Who Protects the Animals*, N.Y. Times (April 26, 2011), [http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0). Bittman’s article chronicled undercover footage of workers at the E6 Cattle Company in Texas, which raises calves for dairy farms. Workers were videotaped bashing in cows’ heads with pickaxes and hammers, among other acts of cruelty. The owner of E6 Cattle Company claimed that such actions had never happened before at his facility and would never happen again, but, as Bittman pointed out, such acts are far from isolated incidents. Instead of taking action to prevent such violence, Bittman explained that some states were moving to criminalize taking photos or videos at animal agriculture facilities.
- 5 Those who are required to report animal cruelty and the timeframe in which they are required to report it varies from law to law. For example, Missouri enacted a mandatory reporting requirement that only applies to employees of the agricultural facility, requiring them to report illegal animal abuse within 24 hours, whereas a proposed ag gag bill in California would have required anyone who documented evidence of illegal animal cruelty to “provide a copy of the applicable form of documentary evidence obtained by the person to local law enforcement or an associated animal control officer within 120 hours. . . .” A.B. 343, 2013-14 Reg. Sess. (Ca. 2013).
- 6 Animal cruelty laws routinely exempt standard industry practices, which render even the most painful practices perfectly legal simply because they are widespread. Thus, the more common a practice the less likely it is to be unlawful.
- 7 Bittman, *Who Protects the Animals*.
- 8 Will Potter, *The Green Scare*, 33 Vt. L. Rev. 671 (2009) [http://www.greenisthenewred.com/blog/wp-content/Images/vermont\\_law\\_review\\_potter\\_green\\_scare.pdf](http://www.greenisthenewred.com/blog/wp-content/Images/vermont_law_review_potter_green_scare.pdf)
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- 29 Farm Animal, Crop, and Research Facilities Protection Act, Ala. Code §§ 13A-11-150 - 158 (2002) <https://www.animallaw.info/statute/al-ecoterrorism-article-6a-farm-animal-crop-and-research-facilities-protection-act>. The law made it a crime to "[i]ntentionally release, steal, destroy, demolish, obliterate, or otherwise cause loss of any animal or crop from an animal or crop facility without the consent of the owner" or "[d]amage, vandalize, or steal any property on or from an animal or crop facility." The law not only created a new offense of breaking and entering an animal facility with the "intent to destroy, alter, duplicate, or obtain unauthorized possession" of records, materials, and data, along with obtaining such items by "theft or deception," it made possessing, using, copying, or reproducing such documents illegal if the person who did so knew or had reason to believe they were obtained by deception, theft, or "without authorization of the rightful owners or administrators of the animal or crop facility." If a whistleblower removed documents from an animal facility and a newspaper reproduced them, the newspaper would technically be in violation of this statute. During this period, at least one other ag-gag bill was proposed, in Illinois in 2001, but it went nowhere. The Farm Animal and Agricultural Crop and Research Facilities Protection Act, would have made it illegal to "without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility[...] enter an animal facility to take pictures by photograph, video camera, or by any other means," Farm Animal and Agricultural Crop and Research Facilities Protection Act., Ill. HB 5793 (2001).
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- 113 Brief of Amici Curiae Professors Brooke Kroeger and Ted Conover In Support of Affirmance, U.S. Court of Appeals for the Ninth Circuit, June 27, 2016; Brief of Amicus Curiae Center for Constitutional Rights, U.S. District Court for the District of Utah, Central Division, June 23, 2016. <http://www.ccrjustice.org/home/what-we-do/our-cases/ag-gag-litigation-amicus> (last visited June 5, 2017);
- 114 Idaho Code § 18-7042. Interference with agricultural production.
- 115 *Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015).
- 116 118 F. Supp. 3d at 1204
- 117 *Id.* at 1206
- 118 Utah Code Ann. § 76-6-112 Agricultural operation interference — Penalties
- 119 *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS, 2017 U.S. Dist. LEXIS 105331 (D. Utah July 7, 2017); <http://www.npr.org/sections/thetwo-way/2017/07/08/536186914/judge-overturms-utahs-ag-gag-ban-on-undercover-filming-at-farms>
- 120 *Western Watersheds Project v. Michael*, No. 15-CV-0169-SWS, 2015 U.S. Dist. LEXIS 183762 (D. Wyo. Dec. 28, 2015)
- 121 *Western Watersheds Project v. Michael*, 196 F. Supp. 3d 1231 (D. Wyo. 2016)
- 122 *People for the Ethical Treatment of Animals v. Stein*, No. 1:16CV25, 2017 U.S. Dist. LEXIS 66310 (M.D.N.C. May 2, 2017)
- 123 *Id.*; “Lawsuit challenging N.C. ‘ag gag’ law dismissed” *Agri Pulse* (May 3, 2017). <https://www.agri-pulse.com/articles/9214-lawsuit-challenging-nc-ag-gag-law-dismissed>
- 124 Will Potter, *Industry Tries to Hide “Ag-Gag” Efforts, Turns Away Journalists From #AAA13 Conference*, Green is the New Red (May 1, 2013), <http://www.greenisthenewred.com/blog/ag-gag-conference-denies-journalist/7006/>
- 125 Laura Berg, *When Bad Videos Happen to Good Pork Producers*, National Hog Farmer (November 1, 2013), <http://www.nationalhogfarmer.com/blog/when-bad->



[videos-happen-good-pork-producers](#) ; Jon Vansickle, *It Can Happen to You*, National Hog Farmer (July 16, 2012), <http://nationalhogfarmer.com/animal-well-being/it-can-happen-you> ; Laura Berg, *Why Do Consumers Believe HSUS and Not You?*, National Hog Farmer (January 11, 2013), <http://nationalhogfarmer.com/blog/why-do-consumers-believe-hsus-and-not-you>