

**FRAUD AND FIRST AMENDMENT PROTECTIONS  
OF FALSE SPEECH:  
HOW *U.S. v. ALVAREZ* IMPACTS  
CONSTITUTIONAL CHALLENGES TO AG-GAG LAWS**

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## INTRODUCTION

In recent years, an increasing number of state legislatures are enacting laws, known as “Ag-Gag Laws,” aimed at preventing undercover investigators from gaining access to, and disseminating information recorded at, agricultural production facilities. These laws raise important First Amendment questions about the ability of an industry to insulate itself from critique by stifling the speech of those who work to create transparency. Integral to the work of groups seeking transparency is the right to make false speech, a right articulated by the United States Supreme Court in a 2012 ruling in *U.S. v. Alvarez*.<sup>1</sup> This decision provides insight into the potential success of First Amendment challenges to the Ag-Gag laws by illuminating the level of scrutiny a court would utilize for a law restricting false speech. It also poses the question of whether the Ag-Gag laws would be classified as restrictions on fraudulent speech by a court, and thereby treated as an exception to the heightened scrutiny utilized by the Court in *U.S. v. Alvarez*.

This paper first explains the background and functions of undercover investigations of agricultural production facilities, and explains the bases upon which states pass laws intended to prevent these investigations. It then examines the relevance of the Supreme Court case *U.S. v. Alvarez*. Based on the analysis provided in *U.S. v. Alvarez*, it demonstrates that Ag-Gag laws would not be exempted from a heightened First Amendment scrutiny as fraud statutes. Moreover, it demonstrates that, in particular, the Iowa and Utah Ag-Gag laws would not survive the heightened scrutiny outlined in *U.S. v. Alvarez* due to a lack of both compelling interest and narrow tailoring.

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<sup>1</sup> United States v. Alvarez, 132 S. Ct. 2537 (2012).

## **I. UNDERCOVER INVESTIGATIONS INTO AGRICULTURAL PRODUCTION FACILITIES**

Animal protection groups utilize undercover investigations into agricultural productions facilities to uncover and publicize abuses of animals such as cattle and chickens.<sup>2</sup> Undercover investigators most often gain access to these facilities by obtaining employment at an agricultural production facility and recording or otherwise documenting any abuses witnessed.<sup>3</sup> By acquiring footage of the conditions that exist in these facilities, animal protection organizations hope to reveal illegal or inhumane behavior, and gain public support for more humane farming methods.<sup>4</sup> These investigations have revealed major food safety and humane farming practices violations, and have prompted action by both the United States Department of Agriculture and by companies that purchase products from the facilities investigated.<sup>5</sup> This can cause economic and other consequences for companies engaging in unlawful or inhumane practices.<sup>6</sup>

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<sup>2</sup> See, e.g., MERCY FOR ANIMALS, *Undercover Investigations*, <http://www.mercyforanimals.org/investigations.aspx> (last visited Apr. 25, 2013) (describing the most recent undercover investigations done by Mercy for Animals).

<sup>3</sup> See, e.g., COMPASSION OVER KILLING, *Rampant Cruelty at California Slaughterhouse* (Aug. 21, 2012), <http://www.cok.net/californiacows/> (“The video, filmed by a COK investigator who worked at the facility in June and July 2012, documents egregious inhumane treatment, improper slaughter methods, and intentional cruelty forced upon these animals in the last moments of their lives.”).

<sup>4</sup> See, e.g., MERCY FOR ANIMALS, *The Hidden Cost of Walmart’s Pork*, <http://www.walmartcruelty.com/> (last visited Dec. 10, 2012) (“A new Mercy For Animals investigation provides a shocking look into blatant animal abuse at a Walmart pork supplier.”), see also ANIMAL LEGAL DEF. FUND, *Protect Animals from Corporate Greed*, <http://protectyourfood.org/article.php?id=1940&cache=0> (last visited Apr. 25, 2013) (“Under the guise of property rights, ag gag bills are intended to prevent consumers from ever seeing the horrors of animal abuse, contaminated crops, illegal working conditions, and risky food safety practices.”).

<sup>5</sup> See, e.g., *Central Valley slaughterhouse reopens after animal abuse claims*, LA TIMES, Aug. 27, 2012, available at <http://latimesblogs.latimes.com/lanow/2012/08/central-valley-slaughterhouse-reopens.html>.

<sup>6</sup> See *id.*; see also, Matthew L. Wald, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. TIMES, Mar. 13, 2008, available at [http://www.nytimes.com/2008/03/13/business/13meat.html?ref=westlandhallmarkmeatcompany&\\_r=0](http://www.nytimes.com/2008/03/13/business/13meat.html?ref=westlandhallmarkmeatcompany&_r=0).

## II. THE IOWA AND UTAH AG-GAG LAWS

In March 2012, the legislatures of both Iowa and Utah passed laws aimed at limiting the ability of groups and individuals to perform these undercover investigations on agribusiness.<sup>7</sup> Because of the intent and effect of these laws, they are classified as “Ag-Gag Laws.” Ag-Gag laws can be defined as laws intended to undermine the ability of groups to conduct long-term, employment-based undercover investigations.<sup>8</sup>

Obtaining employment at an agribusiness facility is often the only way to gain access to the facility, since it is a privately owned enterprise.<sup>9</sup> Therefore, a necessary aspect of these undercover investigations is that the investigators apply for employment without revealing that their intention is to find, record, and share evidence of abuses at the facility.<sup>10</sup> In response to this, a component of each of the Ag-Gag laws is the restriction on what potential employees must reveal upon applying to employment at an agricultural production facility.<sup>11</sup>

The law in Iowa creates the crime of “agricultural production facility” fraud in the case of a person willfully

[m]ak[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 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>12</sup>

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<sup>7</sup> See, e.g., Flynn Dan, *Utah Joins Iowa in Protecting Factory Farms From Cameras*, FOOD SAFETY NEWS, (March 23, 2012) <http://www.foodsafetynews.com/2012/03/utah-joins-iowa-in-protecting-factory-farms-from-cameras/>.

<sup>8</sup> See, e.g., Sara Lacy, *HARD TO WATCH: HOW AG-GAG LAWS DEMONSTRATE THE NEED FOR FEDERAL MEAT AND POULTRY INDUSTRY WHISTLEBLOWER PROTECTIONS* 65 Admin. L. Rev 127 (2013) (“These laws . . . focus instead on deterring activists from working on undercover to expose violations.”).

<sup>9</sup> See, e.g., Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny*, The Atlantic (Mar. 20, 2012) <http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/#>.

<sup>10</sup> See *id.*; see also Interview by Amy Goodman with “Pete,” Undercover Animal Rights Investigator, DEMOCRACYNOW.ORG (Apr. 9, 2013) [http://www.democracynow.org/2013/4/9/undercover\\_activist\\_details\\_secret\\_filming\\_of](http://www.democracynow.org/2013/4/9/undercover_activist_details_secret_filming_of).

<sup>11</sup> Iowa Code § Ann 717A.3A (West 2012), Utah Code Ann. § 76-6-112 (West 2012).

<sup>12</sup> Iowa Code Ann. § 717A.3A (West 2012).

Based on this law, employers at agricultural production facilities could include a question on the application to the effect of: “Do you seek employment at this facility for the purpose of making unauthorized recordings?” and if an applicant does not answer truthfully, and has the intent of engaging in the unauthorized activity, even without the actual act of doing the unauthorized activity, the person could face criminal charges.

The aim of the law in Utah is the same, though the restrictions on employment are not as far-reaching. In Utah, a person can be found guilty of “agricultural operation interference” if the person (1) “applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation,” (2) “knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation,” and (3) “while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation.”<sup>13</sup> In contrast to the Ag-Gag law in Iowa, the Utah law requires the unauthorized activity to take place in order for criminal consequences to result.

In addition to creating harsh criminal sanctions, both Iowa and Utah law allow for agribusiness to recover money damages resulting from breaches of the law from those convicted under it.<sup>14</sup> This could mean that a conviction under either law would allow the agricultural production facility to obtain damages that result from the dissemination of the information gathered from the facility by the undercover investigation.<sup>15</sup>

### **III. THE PROLIFERATION OF AG-GAG LAWS AND CONCERNS**

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<sup>13</sup> Utah Code Ann. § 76-6-112 (West 2012).

<sup>14</sup> Iowa Code Ann. § 910.2 (West 2012), Utah Code Ann. § 77-38a-302 (West 2012).

<sup>15</sup> *Id.*

In 1990 and 1991, Kansas,<sup>16</sup> North Dakota,<sup>17</sup> and Montana<sup>18</sup> passed laws similar to those recently passed in Utah and Iowa.<sup>19</sup> Since 2011, Ag-Gag laws are being introduced in a growing number of states, in varying forms.<sup>20</sup> Most of these bills also have provisions that mirror the aspect of the Utah law prohibiting recording and dissemination of images or sounds collected at an agricultural production facility.<sup>21</sup> Other bills, including a law passed in Missouri in 2012, take another form of Ag-Gag bill, which establish reporting requirements related to recordings of animal abuse at agricultural operations.<sup>22</sup>

Regardless of the form of the Ag-Gag bill or statute, the proliferation of these types of legislation has led to concern among a wide variety of advocacy groups.<sup>23</sup> This concern is based on the fact that these laws have the effect of insulating the activities within agricultural production facilities from public eye.<sup>24</sup> Therefore, these bills, by decreasing transparency in the industry, are seen as not only a barrier to animal protection efforts, but also a threat to food safety, journalism and newsgathering, worker's rights, and the right for the public to have access to information about their food production and distribution.<sup>25</sup>

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<sup>16</sup> Kan. Stat. Ann. § 47-1825 (West 2011)

<sup>17</sup> N.D. Cent. Code § 12.1-21.1-01 (West 2011).

<sup>18</sup> Mont. Code Ann. § 81-30-101 (West 2011).

<sup>19</sup> See Jessica Pitts, "AG-GAG" LEGISLATION AND PUBLIC CHOICE THEORY: MAINTAINING A DIFFUSE PUBLIC BY LIMITING INFORMATION, 40 Am. J. Crim. L. 95, 110 (2012) (giving an overview of Ag-Gag laws).

<sup>20</sup> See, e.g., THE HUMANE SOC'Y, *Anti-Whistleblower Laws Hide Abuses from the Public*, [http://www.humanesociety.org/issues/campaigns/factory\\_farming/fact-sheets/ag\\_gag.html](http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html) (last visited Apr. 17, 2013).

<sup>21</sup> See e.g., S. 13, 2013 Leg. 89th Sess. (Ark 2013), S.B. 14, 2013 Leg. 89th Sess. (Ark 2013), S.B. 468, 2013 Leg. Reg. Sess. (N.C. 2013), S.B. 552, 2013 Leg. 51st Sess. (N.M. 2013) (died), H.B. 683, 2013 Leg. 197th Sess. (Pa. 2013). *But see* S.B. 162, 2013 Leg. 113th Sess. (Vt. 2013).

<sup>22</sup> See Mo. Ann. Stat. § 578.013 (West); A.B. 343, 2013 Leg. Reg. Sess. (Cal. 2013) (died April 17, 2013); L.B. 204, 2013 Leg. Reg. Sess. (Neb. 2013); H.B. 110, 2013 Leg. Reg. Sess. (N.H. 2013) (Died); S.B. 1248, 2013 Leg. 108<sup>th</sup> Sess. (Tenn. 2013), H.B. 1191, 2013 Leg. 108<sup>th</sup> Sess. (Tenn. 2013) (Passed House and Senate, vetoed by governor on May 13, 2013). *See also* S.B. 468, 2013 Leg. Reg. Sess. (N.C. 2013) (including both the reporting requirement and the employment restriction).

<sup>23</sup> See e.g., THE HUMANE SOC'Y, *Statement of Opposition to Proposed "Ag-Gag" Laws From Broad Spectrum of Interest Groups*, available at [http://www.humanesociety.org/assets/pdfs/farm/statement\\_opposition\\_ag-gag.pdf](http://www.humanesociety.org/assets/pdfs/farm/statement_opposition_ag-gag.pdf).

<sup>24</sup> *See id.*

<sup>25</sup> See THE HUMANE SOC'Y, *supra* note 30.

#### **IV. BACKGROUND OF THE CONSTITUTIONAL ANALYSIS OF THE AG-GAG LAWS**

In response to these laws, groups that support undercover investigations are seeking means by which these laws may be challenged.<sup>26</sup> Since Ag-Gag laws seek to stifle access to and exchange of information, and utilize means that criminalize the use of false speech or, the laws are vulnerable to challenges under the freedom of speech protected by the First Amendment.<sup>27</sup> To determine the potential success of a First Amendment challenge, it is essential to first determine which level of scrutiny a court might apply in determining the constitutionality of the Ag-Gag laws.

An important aspect of this determination is the Supreme Court's support of First Amendment protections for false speech in the case *U.S. v. Alvarez* might have on a court's scrutiny of the Ag-Gag laws. In particular, this analysis would apply to Ag-Gag laws that criminalize gaining access through misstatements, or by making misrepresentations on employment applications. This is because, like a false statement about having the Medal of Valor, a false statement on an employee application is a form of speech protected by the First Amendment. Material misrepresentations on an employment application can be grounds for termination of employment;<sup>28</sup> however, there is scant evidence of private businesses having criminal protection against employees lying on job applications.<sup>29</sup>

#### **V. IMPACT OF U.S. V. ALVAREZ ON CHALLENGES TO THE AG-GAG LAWS**

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<sup>26</sup> See ANIMAL LEGAL DEF. FUND, *supra* note 4.

<sup>27</sup> See, e.g.,

<sup>28</sup> See e.g., Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1255 (N.D. Ohio 1993) (discussing wrongful dismissal claim based on misrepresentations made in a job application), *Duart v. FMC Wyoming Corp.*, 72 F.3d 117, 120 (10th Cir. 1995) (noting that material misrepresentations on a job application can be rightful grounds for termination of employment).

<sup>29</sup> See e.g., *Blake v. United States*, 323 F.2d 245, 246 (8th Cir. 1963). *But see* 18 U.S.C.A. § 1001 (2006) (making it a crime to lie to a government agent, including on material misstatements on a job application for a federal job).

In *U.S. v. Alvarez*, the Stolen Valor Act was found to be unconstitutional as a violation of the First Amendment.<sup>30</sup> The Stolen Valor Act made it a crime to lie about receiving the Congressional Medal of Honor.<sup>31</sup> Since the Stolen Valor Act targeted the content of a certain type of speech – the act of lying about having the medal – the law was categorized as a content-based restriction on speech.<sup>32</sup> The plurality agreed that content-based restrictions of speech should be subject to heightened scrutiny, although three judges relied on “exacting scrutiny,” while two judges relied on “intermediate scrutiny.”<sup>33</sup>

Despite this split in the applicable level of scrutiny, the Court clearly held that false statements are not subject to lower First Amendment protection than true statements.<sup>34</sup> The Court recognized that there is an important public interest in providing false speech First Amendment protection,<sup>35</sup> and observed that giving the government the power to punish false speech could lead to the government selectively enforcing the law against certain groups, thereby chilling free speech.<sup>36</sup> Because of this, the Court rejected the idea that the government may make laws that punish falsity and nothing more.<sup>37</sup> Accordingly, the Court found that the Stolen Valor law was

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<sup>30</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>31</sup> *See* 18 U.S.C. §§ 704(b), (c).

<sup>32</sup> *See Alvarez*, 132 S. Ct. at 2543, *see also Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, (2002) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>33</sup> *Alvarez*, 132 S. Ct. at 2537.

<sup>34</sup> *See id.* at 2544. *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789 (1974) (“But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”)

<sup>35</sup> *See id.* at 2541 (“False factual statements serve useful human objectives in many contexts. Moreover, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby “chilling” a kind of speech that lies at the First Amendment's heart.”)

<sup>36</sup> *See id.* at 2553 (“the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.”)

<sup>37</sup> *Id.* at 2539.

unconstitutional as a broad, content-based restriction that was not the least burdensome means by which to accomplish its goals.<sup>38</sup>

In reaching its decision, the Court discussed a limited field of traditional areas where the government may create content-based restrictions on speech.<sup>39</sup> One of these areas is fraudulent speech, described by the court as “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment.”<sup>40</sup> The plurality did not provide further clarification as to what exactly is required for false speech to be categorized as “fraudulent speech.”

However, the concurrence of Justices Breyer and Kagan sheds some light on what differentiates a statute targeting fraud. The government argued that the constitutionality of 18 U.S.C § 1001, which makes it a crime to make false statements to government official, suggests that there are no constitutional protections for false speech. The Justices rejected this assertion, stating “[s]tatutes forbidding lying to a government official (not under oath) are typically limited to circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department, and those statutes also require a showing of materiality.”<sup>41</sup> After looking at other similar statutes, the Justices noted that in most statutes criminalizing false statements, proof of harm was required.<sup>42</sup>

The Supreme Court’s strong language regarding First Amendment protection for false speech provides support for a constitutional challenge to the aspects of the Ag-Gag laws

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<sup>38</sup> *Id.* at 2548-49.

<sup>39</sup> *See id.* at 2539 (“Content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.”)

<sup>40</sup> *Id.* at 2547.

<sup>41</sup> *Id.* at 2554.

<sup>42</sup> *Id.* at 2555.

criminalizing misrepresentations on employment applications. The analysis that the Court applied to the Stolen Valor Act suggests that Ag-Gag laws could be subject to a heightened level of First Amendment scrutiny despite their language aimed at preventing false speech. However, if a court finds that the Ag-Gag laws fall into the fraudulent speech exemption articulated in *U.S. v. Alvarez*, this heightened scrutiny may not be applied. Therefore, the remainder of this paper will focus on first, whether Ag-Gag laws would be considered content-based restrictions on speech subject to strict scrutiny, and second, whether these laws would be categorized as restricting fraudulent speech. Finally, it will analyze whether Ag-Gag laws would survive the type of scrutiny applied in *U.S. v. Alvarez*.

**A. The Ag-Gag Laws Are Content-based Restrictions on Speech.**

The Ag-Gag laws passed in Utah and Iowa could be understood to be content-based restrictions on speech. A law will be considered content-based when “the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>43</sup> The Stolen Valor Act was a restriction on the content of speech because it criminalized lying about having the Medal of Valor.<sup>44</sup> The content of speech being restricted was the ability for someone to give false information about the Medal of Valor, and the Stolen Valor Act acted as an expression by the government that it disagreed with this content. This made it a content-based restriction subject to a heightened level of First Amendment scrutiny.<sup>45</sup>

The Ag-Gag laws in Utah and Iowa criminalize lying on an employment application at an agricultural production facility.<sup>46</sup> These laws restrict the content of the speech given by a person

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<sup>43</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>44</sup> *Alvarez*, 132 S. Ct. at 2544.

<sup>45</sup> *Id.*

<sup>46</sup> Iowa Code Ann. § 910.2 (West 2012), Utah Code Ann. § 77-38a-302 (West 2012).

when he or she applies for employment at an agricultural facility. Through Ag-Gag laws, the government expresses its disapproval with certain types of speech made in the context of an employment application. A conviction under these laws is contingent upon on whether or not the statements made are false. Therefore, the Ag-Gag laws restrict the content of speech by punishing a person based on what sort of speech the person makes. Accordingly, they are content-based restrictions on speech subject to strict scrutiny under the First Amendment.

**B. The Ag-Gag Laws Should Not Be Considered Statutes Targeting Fraud for the Purposes of Determining the Standard of First Amendment Review.**

Even if a law clearly restricts content-based speech, there are certain types of speech that courts have ruled that the First Amendment does not prevent the government from regulating. These include obscenity, fraud, speech integral to criminal conduct, and incitement.<sup>47</sup> If a court were to find that Ag-Gag laws are aimed at preventing fraud, the laws would be subject to lower standard of review.<sup>48</sup> However, since the Ag-Gag laws fail to demonstrate a causal link between the restricted speech and harm alleged to result from the speech, the laws cannot be considered fraud statutes.

***1. The Exemption for Fraudulent Speech Requires a Causal Link Between the Restricted Speech and Harm Targeted by the Statute.***

It is well established that a restriction on speech is not considered a restriction on fraudulent speech merely by virtue of it being labeled as such.<sup>49</sup> In order to determine if a court would find the Iowa and Utah Ag-Gag laws restrictions on fraudulent speech, it is necessary to see if the laws have the elements necessary to be categorized as laws preventing fraud. Typically, for a misrepresentation to give rise to actionable fraud, it must be a misrepresentation

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<sup>47</sup> United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

<sup>48</sup> United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

<sup>49</sup> See Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 601(2003).

or concealment of a fact that is material, reasonably calculated to deceive, made with the intent to deceive, that succeeds in deceiving the victim, who suffers an injury as a result.<sup>50</sup>

When misrepresentations are criminalized as fraud by a statute, they do not require all the elements of common law fraud.<sup>51</sup> It is undisputed that false speech can only be considered fraudulent if it has the potential to cause some harm.<sup>52</sup> All criminal statutes imposing penalties for misrepresentations are created with the understanding that the fraudulent speech, in the very least, has the potential to cause some harm, as there would be no need to criminalize speech that no one perceives to be harmful.<sup>53</sup>

The Supreme Court, in discussing fraudulent speech in *U.S. v. Alvarez*, suggests that fraudulent speech requires more than the mere potential to cause harm. The Court recognized the importance of the Congressional Medal of Honor, and understood the harm that the government sought to prevent by punishing those who misrepresent that they had received this honor.<sup>54</sup> However, this potential for harm was not enough to compel the Court that the Stolen Valor Act targeted fraud. Instead the Court asserted that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>55</sup>

This suggests that, for a statute to fall under the fraud exception, there must also be a direct causal link between the targeted false speech and the perceived harm. Therefore, it is likely that any fraud statute that would fall under the exception to First Amendment protection

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<sup>50</sup> See, e.g., Restatement (Second) of Torts § 525 (1976).

<sup>51</sup> See *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 476 (2006).

<sup>52</sup> Natali Wyson, DEFINING FRAUD AS AN UNPROTECTED CATEGORY OF SPEECH: WHY THE NINTH CIRCUIT SHOULD HAVE UPHELD THE STOLEN VALOR ACT IN UNITED STATES V. ALVAREZ, 2012 B.Y.U. L. Rev. 671, 682 (2012).

<sup>53</sup> See, e.g., 18 U.S.C.A. § 1341 (West) (Criminalizing mail fraud), and 15 U.S.C.A. § 78j (West) (Criminalizing manipulative and deceptive devices in commerce).

<sup>54</sup> See *Alvarez*, 132 S. Ct at 2549 (“The Government's interest in protecting the integrity of the Medal of Honor is beyond question.”)

<sup>55</sup> *Id.* at 2549.

would need to have the same type of causal link between the misrepresentation and the harm sought to redress as is needed in civil fraud actions.

The requirements for civil actionable fraud can vary from state to state, though all require that the misrepresentation induce another party to act or fail to act, leading to damage.<sup>56</sup> For civil actions regarding fraud perpetrated in the context of job applications, courts have required the typical elements of common law fraud, and have emphasized the need for the harm to be proximately caused by the misrepresentation.<sup>57</sup>

The case of *Food Lion, Inc. v. Capital Cities/ABC, Inc.* provides a useful lens to view the issue of misrepresentation to gain employment, as the action for fraud in this case was based on a report of food handling violations at a grocery chain made by undercover investigators.<sup>58</sup> To access the information, the investigators gained employment at the grocery chain by misrepresenting information on their job applications.<sup>59</sup> The resulting report showed employees of Food Lion engaging in unsanitary meat-handling practices, and caused Food Lion substantial losses in profits, good will, and stock value.<sup>60</sup> In a civil suit, Food Lion sought recovery of “publication damages,” the losses that occurred as a result of the public’s response to the report created by the investigation.<sup>61</sup> In addition, it sought recovery of wages paid and administrative costs incurred from hiring the investigators based on their misrepresentations.<sup>62</sup>

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<sup>56</sup> *See, e.g.*, 37 C.J.S. Fraud § 12.

<sup>57</sup> 194 F.3d 505, 512 (4th Cir. 1999).

<sup>58</sup> *Id.* at 510.

<sup>59</sup> *See id.* (“With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters’ concurrent employment with ABC and otherwise misrepresented their educational and employment experiences.”)

<sup>60</sup> *See id.* at 511.

<sup>61</sup> *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 959 (M.D.N.C. 1997) *aff’d* on other grounds, 194 F.3d 505 (4th Cir. 1999).

<sup>62</sup> *See Food Lion, Inc.*, 194 F.3d at 511.

The district court found that, since Food Lion made no claim of defamation, there was no assertion that the report was false, and therefore the misrepresentations made by the investigators were not the proximate cause of the publication damages.<sup>63</sup> Rather, it was the mishandling of food that proximately caused the losses, and the mishandling interrupted any causal chain of harm created by the misrepresentations.<sup>64</sup> On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision on First Amendment grounds, but gave no indication that it disagreed with the district court's reasoning.<sup>65</sup> Further, the Fourth Circuit found that Food Lion could not recover for administrative costs or lost wages, due to lack of proximate cause.<sup>66</sup>

This requirement of proximate cause for recovery from a misrepresentation is analyzed by courts on a state-by-state basis.<sup>67</sup> However, it is an established element of common law fraud, and there is no evidence of a court rejecting the idea that there must be a close causal link between the misrepresentation and the harm asserted from fraud.<sup>68</sup> Courts are hesitant to find

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<sup>63</sup> *See Food Lion, Inc.* 964 F. Supp. at 963 (“tortious activities may have enabled access to store areas in which the public was not allowed and the consequent opportunity to film people, equipment and events from a perspective not available to the ordinary shopper, but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence.”)

<sup>64</sup> *See id.*

<sup>65</sup> *See Food Lion, Inc.*, 194 F.3d at 522 (“We do not reach the matter of proximate cause because an overriding (and settled) First Amendment principle precludes the award of publication damages in this case, as ABC has argued to the district court and to us.”).

<sup>66</sup> *See id.* at 512 (finding that wages were paid for work well done).

<sup>67</sup> *See, e.g. Shalaby v. Bernzomatic*, 281 F.R.D. 565, 574 (S.D. Cal. 2012) (analyzing the proximate cause requirement for fraud based on California law), *and* *Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d 508, 532 (D.N.J. 2011) (analyzing the proximate cause requirement for fraud based on New Jersey law), *and* *Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765, 771 (3d Cir. 2009) (analyzing the proximate cause requirement for fraud based on Pennsylvania law).

<sup>68</sup> *See, e.g. 37 Am. Jur. 2d Fraud and Deceit* § 280 (“To support an action for fraud, the fraud or misrepresentation must be the proximate cause of the damages upon which the action is based.”). *But see* Restatement (Second) of Torts § 548A (1977) (“In general, the misrepresentation is a legal cause only of those pecuniary losses that are within the foreseeable risk of harm that it creates.”).

proximate cause when there are other intervening or underlying factors more directly linked to the damages.<sup>69</sup>

**2. *The Ag-Gag laws Are Not Fraud Statutes Because They Lack a Causal Link Between the Misrepresentation and the Harm Sought to Be Prevented.***

For Ag-Gag laws to be considered restrictions on fraudulent speech, there must be a causal link between misrepresentation targeted and the harm the law intends to address. In order to assess whether the provisions in Ag-Gag laws criminalizing employment have this required link, the harm that the laws intend to prevent must first be identified.

Neither law states within its text what the harm is that it seeks to prevent, and there is no legislative history available on either law.<sup>70</sup> Both laws lack a committee report and a preface.<sup>71</sup> Therefore, the statements of supporters of the laws might provide the only available illumination into the intent of the laws. Unfortunately, these statements are not particularly unified or well recorded. This following overview focuses on statements by state representatives regarding Ag-Gag laws and two major non-profits supporting Ag-Gag laws.

In regards to the Iowa Ag-Gag law, state Senator Joe Seng stated that the law was intended to protect the investments of livestock producers and to prevent exposure to disease and other problems that may arise from unauthorized access to agricultural production facilities.<sup>72</sup> The Iowa Farm Bureau's president supported the law on the basis that it would help keep farms

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<sup>69</sup> See *Sonfast Corp. v. York Int'l Corp.*, 875 F. Supp. 1088, 1097 (M.D. Pa. 1994). *But see* *Kelley Metal Trading Co. v. Al-Jon/United, Inc.*, 835 F. Supp. 1339, 1343 (D. Kan. 1993) (noting that, under Kentucky law, proximate cause does not mean the only cause, as long as but for the reliance, the damages would not have occurred").

<sup>70</sup> Iowa Code Ann. § 910.2 (West 2012), Utah Code Ann. § 77-38a-302 (West 2012).

<sup>71</sup> *See id.*

<sup>72</sup> See Rob Boshart, *Bill Creates 'agricultural production facility fraud,'* QUAD CITY TIMES, (Feb. 28, 2012), [http://qctimes.com/news/local/bill-creates-agricultural-production-facility-fraud/article\\_df54ddd6-6245-11e1-b371-0019bb2963f4.html](http://qctimes.com/news/local/bill-creates-agricultural-production-facility-fraud/article_df54ddd6-6245-11e1-b371-0019bb2963f4.html).

safe by assuring transparency regarding the character of workers.<sup>73</sup> Iowa's Governor Terry Branstad supported the bill as a protection of property rights, and as means to prevent illegal and deceptive practices being used to disrupt agricultural facilities.<sup>74</sup>

In Utah, state Senator David Hinkins described the law as one intended to prevent trespass and espionage on the operations, protect property rights, and protect the livestock business from “the vegetarian people.”<sup>75</sup> Utah State Representative John Mathis voiced similar reasons for his support, such as a desire to stop the groups investigating agricultural production facilities from being able to use footage from farms to aid their agenda.<sup>76</sup>

The non-profit Animal Agricultural Alliance touts Ag-Gag bills as “Farm Protection Acts” and supports them as a response to protect farms from the impact of undercover investigations into agricultural production facilities.<sup>77</sup> In particular, the group stated:

[i]t is imperative that activists be held accountable for their actions to undermine farmers, ranchers and meat processors through use of videos depicting alleged mistreatment of animals for the purposes of gaining media attention and fundraising – all in an effort to drive their vegan agenda.<sup>78</sup>

The Animal Agricultural Alliance further alleges that videos released from undercover investigations are “heavily edited” and “attempt to use emotional images and scare tactics to

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<sup>73</sup> See Laurie Johns, *Iowa Farm Bureau Supports Revised HF 589 to Protect Integrity and Safety of Family Farms*, IOWA FARM BUREAU PRESS RELEASE, (Feb. 28, 2012), <http://www.iowafarmbureau.com/article.aspx?articleID=54372>.

<sup>74</sup> See Mike Glover, *Branstad defends signing livestock bill into law*, THE HUTCHINSON NEWS (Mar. 6, 2012), [http://www.kansasagland.com/index.php?option=com\\_content&view=article&id=6543:branstad-defends-signing-livestock-bill-into-law-&catid=42:regional-ag-news&Itemid=84](http://www.kansasagland.com/index.php?option=com_content&view=article&id=6543:branstad-defends-signing-livestock-bill-into-law-&catid=42:regional-ag-news&Itemid=84).

<sup>75</sup> See Majorie Cortez, *Bill on interfering with agricultural operations gets preliminary nod in Senate*, DESERT NEWS, (Mar. 6, 2012), <http://politicalnotebook.blogs.deseretnews.com/2012/03/06/bill-on-interfering-with-agricultural-operations-gets-preliminary-nod-in-senate/>.

<sup>76</sup> See Josh Loftin, *Filming on Farms Could Be Banned in Utah*, FOOD MANUFACTURING (Feb. 27, 2012), <http://www.foodmanufacturing.com/news/2012/02/filming-farms-could-be-banned-utah>.

<sup>77</sup> See Interview by Amy Goodman with Emily Meredith, Communications Director, Animal Agriculture Alliance, and Will Potter, Freelance Reporter, DEMOCRACYNOW.ORG (Apr. 9, 2013) [http://www.democracynow.org/2013/4/9/debate\\_after\\_activists\\_covertly\\_expose\\_animal](http://www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal).

<sup>78</sup> See ANIMAL AGRICULTURE ALLIANCE, *Alliance Applauds Introduction of Bill to Protect Farmers From Undercover Extremists*, <http://us1.campaign-archive2.com/?u=69c4e87210c5554923516496c&id=d1dd7fe219> (last visited Apr. 17, 2013).

discourage Americans from eating meat, milk and eggs because they do not believe that we have that right.”<sup>79</sup> Based on this, it seems that the non-profit supports Ag-Gag laws as a means to protect agribusiness from the reputational harm that comes from the allegedly misleading videos produced by undercover investigations. Further, the Animal Agricultural Alliance bases their support on the purported disingenuous intent of animal protection groups.

The American Legislative Exchange Counsel (ALEC) has been credited with the creation of the text of Ag-Gag laws.<sup>80</sup> Spokesperson Bill Meierling explained the intent of the laws as “about personal property rights or the individual right to privacy”.<sup>81</sup> ALEC describes its goals regarding animal agriculture as deterring “extremist attempts to establish animal rights as a public policy objective” and providing “protection of generally accepted agricultural and management practices from public or private nuisance suits.”<sup>82</sup> This suggests that ALEC supports Ag-Gag laws as a means to prevent violations of privacy as well as frivolous and damaging suits against animal agricultural facilities. Further, the Ag-Gag laws are seen as a way to combat the perceived damaging agenda promoted by undercover investigations.

These remarks do not provide a clear insight into precisely what harm the Ag-Gag laws target. To summarize the goals that carry the most logical and factual weight, the laws could be understood to protect property from trespass and privacy violations, prevent any disruptions to the functioning of the facility as a result of unauthorized access, and to protect the reputation of

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<sup>79</sup> See, e.g., ANIMAL AGRICULTURE ALLIANCE, *Deceptive Videos Unfairly Attack Farmers*, [http://animalagalliance.org/current/home.cfm?Section=DeceptiveVideosAttack&Category=Press\\_Releases](http://animalagalliance.org/current/home.cfm?Section=DeceptiveVideosAttack&Category=Press_Releases) (last visited Apr. 17, 2013).

<sup>80</sup> See e.g., GREEN IS THE NEW RED, “Ag Gag” Bills and Supporters Have Close Ties to ALEC, <http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947/> (last visited Apr. 17, 2013).

<sup>81</sup> See ASSOCIATED PRESS, *State bills seek end to farm animal abuse videos* (Mar, 17, 2013) <http://www.foxnews.com/politics/2013/03/17/state-bills-seek-end-to-farm-animal-abuse-videos/#ixzz2Qn96AWv1>.

<sup>82</sup> See AMERICAN LEGISLATIVE EXCH. COUNCIL, *ALEC Agriculture Principles*, <http://www.alec.org/model-legislation/alec-agriculture-principles/> (last visited Apr. 17, 2013).

the animal agricultural industry as a whole.<sup>83</sup> Further, the statements by supporters suggest a desire to stifle efforts by animal protection groups to promote their agendas.

There is no case law that supports the notion that gaining access to a facility by misrepresenting information on a job application can sustain an action for trespass.<sup>84</sup> It is also well established that corporations or other non-human entities have no right to personal privacy.<sup>85</sup> Therefore, by preventing misrepresentation on a job application, the laws cannot be understood to prevent trespass or violations of the privacy of an agricultural facility.

There is limited information available on what specific disruptions at agricultural facilities the laws seek to target. If the disruptions are understood to be the impact that the eventual publications of recordings from the facility could have on operations there, then the precedent of *Food Lion, Inc. v. Capital Cities/ABC, Inc.* would mean that this harm lacks proximate cause to the misrepresentation.<sup>86</sup> Thus, if the recordings accurately portray activities at the facility, any public outcry, lost profits, or governmental investigations would stem directly from the activities taking place at the facility, not from the misrepresentation of the employee on the job application.

If employees that misrepresented information on job applications posed a risk to the day-to-day functioning of the facility, this may be a more direct causal link. However, there is limited evidence of this harm actually occurring, and the Animal Enterprise Terrorism Act already makes it a federal crime for someone to tamper with operations at an agriculture production

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<sup>83</sup> *But see* 18 U.S.C.A. § 43 (2006) (making it a federal crime to intentionally harm the property of an animal enterprise).

<sup>84</sup> *Food Lion, Inc.*, 194 F.3d at 518.

<sup>85</sup> *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

<sup>86</sup> *Food Lion, Inc.* 964 F. Supp. at 963.

facility.<sup>87</sup> In addition, courts might find that the behavior of the employee that causes disruptions at the facility is the direct cause of the harm to the facility, not the misrepresentation on the job application.

Many of the remarks by supporters of the laws suggest that the main purpose of the Ag-Gag laws is to prevent the investigative reports that cause public outcry against agribusiness.<sup>88</sup> This understanding of the laws is promoted by animal protection groups that conduct undercover investigations,<sup>89</sup> and is supported by the statements by Ag-Gag supporters suggesting a desire to protect the reputation of the animal agricultural industry.<sup>90</sup> If the undercover investigations and the impact of the release of records is the harm sought to prevent by Ag-Gag laws, then the restrictions on misrepresentations on employment applications cannot be classified as restricting fraudulent speech. Any losses to an agricultural production facility from the publication of recordings would be the direct result of the activities portrayed, not the misrepresentation. If the recordings do not accurately portray the activities at the facility, then there would be a cause for defamation,<sup>91</sup> but false portrayals of the facilities' activities are not what the laws prohibit.

Ag-Gag laws fail to have a direct link between the harm that the law intends to prevent and the speech restricted. Without this link, it is unlikely that a court would find that the laws meet the requirements set out in *U.S. v. Alvarez* for restrictions on fraudulent speech. As explained, in *U.S. v. Alvarez*, the Court recognized the compelling interest supporting the Stolen

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<sup>87</sup> 18 U.S.C.A. § 43 (2006).

<sup>88</sup> See, e.g., Majorie Cortez, *Bill on interfering with agricultural operations gets preliminary nod in Senate*, DESERT NEWS, (Mar. 6, 2012) <http://politicalnotebook.blogs.deseretnews.com/2012/03/06/bill-on-interfering-with-agricultural-operations-gets-preliminary-nod-in-senate/>.

<sup>89</sup> See, e.g., THE HUMANE SOC'Y, *Ant-Whistleblower Laws Hide Abuses from the Public*, [http://www.humanesociety.org/issues/campaigns/factory\\_farming/fact-sheets/ag\\_gag.html](http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html) (last visited Apr. 17, 2013).

<sup>90</sup> See ANIMAL AGRICULTURE ALLIANCE, *Alliance Applauds Introduction of Bill to Protect Farmers From Undercover Extremists*, <http://us1.campaign-archive2.com/?u=69c4e87210c5554923516496c&id=d1dd7fe219> (last visited Apr. 17, 2013).

<sup>91</sup> *Food Lion, Inc.*, 194 F.3d at 522.

Valor Act and the harm that the law sought to prevent, yet still found that the harm and the restriction lacked a link direct enough to pass First Amendment scrutiny.<sup>92</sup> In comparison, the Ag-Gag laws are based on attenuated and often unclear assertions of harm.<sup>93</sup> Under the Court’s analysis in *U.S. v. Alvarez*, the Ag-Gag laws would not be categorized in the fraud exception to protection of false speech under the First Amendment.

**3. *The Ag-Gag laws Would be Subject to a Heightened Level of First Amendment Scrutiny.***

Since the Ag-Gag laws would not be categorized as an exemption to First Amendment protections, a court should analyze them under the framework set forth in *U.S. v. Alvarez*. If a court finds that the Ag-Gag laws should be viewed as content-based restrictions on free speech, then it would subject the laws to heightened First Amendment scrutiny. In combination with the heightened scrutiny argument based on newsgathering protections, this provides strong support for courts using a heightened level of scrutiny when determining the constitutionality of Ag-Gag laws.

**C. *The Ag-Gag Laws Would Not Pass Scrutiny under a Heightened Level of Review.***

In *U.S. v. Alvarez*, once the Court found that the Stolen Valor Act was a content-based restriction on speech, it was subjected to “exacting scrutiny,” which functionally appears to be similar to strict scrutiny.<sup>94</sup> Because of this, the Court first looked at whether the Stolen Valor Act first had a compelling interest, and then whether the law was narrowly tailored to accomplish the

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<sup>92</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012).

<sup>93</sup> *See supra* notes 91-100 and accompanying text.

<sup>94</sup> *Alvarez*, 132 S. Ct. at 2548.

interest.<sup>95</sup> When the Iowa and Utah Ag-Gag laws are analyzed under this analysis, they do not pass a First Amendment Challenge.

***1. The Ag-Gag Laws Do Not Serve a Compelling State Interest.***

Based on what is known about the intent of Ag-Gag laws, it does not appear that the laws serve a compelling state interest. However, determining this is difficult absent a clear statement from the states passing these laws regarding the motives behind them.

In *U.S. v. Alvarez*, the Court recognized the compelling interest the government had in ensuring people did not lie about having the Medal of Valor.<sup>96</sup> The plurality opinion explained the importance of the Medal and the sacrifice it represents.<sup>97</sup> Further, the Court expressed an understanding that the government had a compelling interest in protecting the sanctity of such a great honor.<sup>98</sup>

The compelling interest of the Stolen Valor Act stands in stark contrast to the interests that Ag-Gag laws seek to promote. In the case of laws impeding the freedom of speech, the burden is on the government to justify the restriction on speech.<sup>99</sup> However, since the states that have enacted Ag-Gag laws have provided little explanation of their purpose, the state interest in passing Ag-Gag laws must once again be divined from the statements of supporters of the Ag-Gag laws.

The statements suggest that that the governmental interest in creating Ag-Gag laws is to prevent the public from being exposed to information gathered in undercover investigations. Further, most statements suggest that the laws are not aimed at protecting the public, but on

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<sup>95</sup> *Id.* at 2548-52

<sup>96</sup> *Id.* at 2548-49.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See* *United States v. Marcavage*, 609 F.3d 264, 279 (3d Cir. 2010).

shielding the agribusiness from the impact that this disclosure to the public has on their businesses.<sup>100</sup>

Keeping truthful information from the public, even if it is thought to protect them from harm, is not recognized as a compelling governmental interest.<sup>101</sup> For example, in *Thompson v. W. States Med. Ctr.*, the Supreme Court rejected “a fear that people would make bad decisions if given truthful information” as a justification for a laws restricting freedom of speech.<sup>102</sup> Similarly, in *Sorrell v. IMS Health Inc.*, the Court noted that, while a governmental interest in protecting the public is compelling, a law cannot be justified on the basis of the need to protect the public from certain truthful information that the government feels will be misused.<sup>103</sup> Therefore, even if the public was adversely impacted by the decisions it made based on being exposed to undercover investigations, a court would not find restricting access to these undercover investigations to be constitutional.

The rhetoric surrounding Ag-Gag laws suggests that the laws are not even created with the protection of the general public in mind. Rather, they are a means to protect agribusiness from harms to reputation and profit that result from the dissemination of undercover investigation information.<sup>104</sup> Insulating agricultural production facilities from outside scrutiny cannot be a compelling governmental interest, as evidenced by the longstanding support in the laws for whistleblower protection.<sup>105</sup> In light of the fact that there seem to be no assertions of trade secrets by the facilities in regards to the need for the Ag-Gag laws, and because of the

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<sup>100</sup> See e.g. AMERICAN LEGISLATIVE EXCH. COUNCIL, *ALEC Agriculture Principles*, <http://www.alec.org/model-legislation/alec-agriculture-principles/> (last visited Apr. 17, 2013).

<sup>101</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670-71 (2011).

<sup>102</sup> 535 U.S. 357, 359 (2002).

<sup>103</sup> 131 S. Ct. at 2670.

<sup>104</sup> See, c.f. ANIMAL AGRICULTURE ALLIANCE, *Deceptive Videos Unfairly Attack Farmers*, [http://animalagalliance.org/current/home.cfm?Section=DeceptiveVideosAttack&Category=Press\\_Releases](http://animalagalliance.org/current/home.cfm?Section=DeceptiveVideosAttack&Category=Press_Releases) (last visited Apr. 17, 2013).

<sup>105</sup> See e.g., 5 U.S.C. § 2302 (2006).

impact that practices in agricultural operations can have on public health, it seems contrary to the public interest to reduce transparency in the agribusiness sector.<sup>106</sup>

Absent better justification of the government regarding the need for Ag-Gag laws, it seems that unlike the Stolen Valor Act, Ag-Gag laws do not serve a compelling government interest. This is because there can be no compelling governmental interest in preventing the dissemination of truthful, unprivileged information to the public.

**2. *The Ag-Gag Laws Are Not Narrowly Tailored to Accomplish the States' Interests.***

Even if a court were to find that the Ag-Gag laws promote a compelling state interest, Ag-Gag laws would not prevail under the “narrowly tailored” prong of strict scrutiny. For a law restricting speech to survive strict scrutiny, the law must be narrowly tailored to achieve a compelling governmental interest.<sup>107</sup> Therefore, if less restrictive means exist to accomplish the same ends, the law cannot withstand strict scrutiny.

In *U.S. v. Alvarez*, the Court focused on two failures of the Stolen Valor Act: the lack of a direct causal link between restriction imposed and harm to be averted, and the government’s failure to demonstrate why the restriction was actually necessary to achieving the desired results.<sup>108</sup> First, the Court saw no evidence that restricting speech about the Medal actually promoted the stated interests of protecting the sanctity of the Medal.<sup>109</sup> Second, the Court found that the government “has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.”<sup>110</sup> The Court recognized that any harm caused by the lie could easily be

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<sup>106</sup> See e.g., Sarah Damien, *Beef Whistleblower Details Failure of USDA Inspection System*, FOOD INTEGRITY CAMPAIGN, (Oct. 20, 2011) <http://www.foodwhistleblower.org/blog/22/238>.

<sup>107</sup> See *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

<sup>108</sup> *Alvarez*, 132 S. Ct. 2537 at 2549.

<sup>109</sup> *Id.* at 2549.

<sup>110</sup> *Id.*

mitigated by truthful speech, and found that the Stolen Valor Act was therefore not a necessary restriction on speech.<sup>111</sup> Since the Stolen Valor Act failed to be narrowly tailored, it was found unconstitutional.

The Ag-Gag laws of Iowa and Utah also fail this test. If preventing undercover investigations and the dissemination of information from them are understood by a court to be a compelling interest, the laws are still not narrowly tailored enough to survive strict scrutiny. Evidence that the laws are not the least restrictive means on speech to accomplish the goals can be seen through the other versions of these bills being proposed in states. Not all proposed Ag-Gag laws include the provision criminalizing lying on an employment application.<sup>112</sup> These bills all have the same intent as the Ag-Gag laws in Utah and Iowa.<sup>113</sup> For example, bills that require reporting of recordings of animal cruelty within a certain period of time are understood as attempts to prevent the dissemination of information gathered during undercover investigations directly to the public.<sup>114</sup> Though these types of bills may give rise to their own set of constitutional challenges,<sup>115</sup> they more directly address the perceived issue of the release of information from undercover investigation.

The language in *U.S. v. Alvarez* also hints at an even less restrictive means to prevent the harms that occur to agribusiness as a result of the undercover investigation videos. The Court

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<sup>111</sup> *Id.* at 2551.

<sup>112</sup> See Mo. Ann. Stat. § 578.013 (West); A.B. 343, 2013 Leg. Reg. Sess. (Cal. 2013); L.B. 204, 2013 Leg. Reg. Sess. (Neb. 2013); H.B. 110, 2013 Leg. Reg. Sess. (N.H. 2013) (Died); S.B. 1248, 2013 Leg. 108<sup>th</sup> Sess. (Tenn. 2013), H.B. 1191, 2013 Leg. 108<sup>th</sup> Sess. (Tenn. 2013).

<sup>113</sup> See Richard A. Oppel, *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES, Apr. 6, 2013, <http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html?pagewanted=2>.

<sup>114</sup> See *id.*

<sup>115</sup> See e.g. Natalie Perrin-Smith Vance, MY BROTHER'S KEEPER? THE CRIMINALIZATION OF NONFEASANCE: A CONSTITUTIONAL ANALYSIS OF DUTY TO REPORT STATUTES, 36 Cal. W. L. Rev. 135, 143 -54 (1999) (outlining possible constitutional challenges to a bill making it a duty to report certain crimes), see also Heidi Hall, *Humane Society Calls for Veto of 'Ag Gag' Bill*, THE TENNESSEAN, May 9, 2013, <http://www.tennessean.com/article/20130509/NEWS0201/305090083/Tennessee-AG--Ag-bill-is--constitutionally-suspect> (Stating that the Tennessee state's attorney general labeled the bill "constitutionally suspect").

found that that the government had not shown why counterspeech was insufficient to combat the harms that the Stolen Valor Act sought to address. In recognizing this, the Court declared: “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.”<sup>116</sup> Through this, the Court strongly suggests that, when an identified harm can be combated by greater transparency and freedom of speech, that should be the means used.

This reasoning supports the idea that there might be more effective ways to address the alleged harms to agribusiness that result from undercover investigations. Undercover investigations cause this harm largely because of the reaction that the public, businesses, and regulatory agencies have to the information gathered and disseminated.<sup>117</sup> Following this reasoning, a possible solution is to compel animal agriculture operations address the content of the information that is causing outcry, as well as legal and economic repercussions. Similarly, if the products of undercover investigations are indeed misleading, as the Supreme Court noted, rather than passing laws restricting speech, counterspeech is most often the most effective means to combat speech that is in fact misleading or false. By targeting the dissemination of the information, the states passing Ag-Gag bills make a choice to restrict the freedom of speech rather than address the conditions in animal agricultural facilities causing negative repercussions to the facilities when brought to light.

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<sup>116</sup> United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012).

<sup>117</sup> See Animal Agriculture Alliance, *Extremists Attempt To Mislead Public* (Feb. 15, 2012) [http://www.animalagalliance.org/current/home.cfm?Section=20120215\\_Extremists&Category=Press\\_Releases](http://www.animalagalliance.org/current/home.cfm?Section=20120215_Extremists&Category=Press_Releases) (last visited Apr. 18 2013) (alleging undercover videos depicting are used to mislead the public about commonly used farming practices).

The Ag-Gag laws are not narrowly tailored to address the harm that the government seeks to address. There are means by which to accomplish the goal of protecting the reputation of agricultural facilities that more directly address the cause of the harm, and do not involve restrictions on speech.

### **CONCLUSION**

The Supreme Court case *U.S. v. Alvarez* provides an important lens through which to analyze a First Amendment challenge to Ag-Gag laws that criminalize lying on an employment application. Based on the precedent of *U.S. v. Alvarez*, these laws would be classified as content-based restrictions on speech subject to heightened scrutiny. While *U.S. v. Alvarez* outlines certain restrictions on speech that are not subject to heightened scrutiny, such as fraud statutes, it is clear that Ag-Gag laws are not in fact statutes targeting fraud and therefore do not fall within the exceptions requiring a lesser level of scrutiny. When the heightened scrutiny analysis used by the Court in *U.S. v. Alvarez* is applied to the Ag-Gag laws, there are strong arguments that the laws lack a compelling interest and are not narrowly tailored. Therefore, it is likely the Ag-Gag laws are not constitutional under the First Amendment.