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ARTICLE

Fraud and First Amendment Protections of False Speech: How *United States v. Alvarez* Impacts Constitutional Challenges to Ag-Gag Laws

LARISSA U. LIEBMANN

INTRODUCTION

In recent years, an increasing number of state legislatures have enacted laws aimed at preventing undercover investigators from gaining access to, and disseminating information recorded at, agricultural production facilities. Potential challenges to these laws raise important First Amendment concerns. In the 2012 ruling of *United States v. Alvarez*,¹ the Supreme Court of the United States articulated that false speech is entitled to First Amendment protection. That decision provides important insight into the potential success of First Amendment challenges to the Ag-Gag laws recently passed in various states. Whether the Ag-Gag laws can be classified as restrictions on fraudulent speech is integral to understanding whether a court would subject these laws to the heightened First Amendment scrutiny outlined in *Alvarez*.

Based on the framework set forth in *Alvarez* and principles of common law fraud, the Ag-Gag laws would likely not be considered restrictions on fraudulent speech, and, as content-based restrictions on speech, would be subject to a heightened level of First Amendment scrutiny. Further, based on the

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1. See generally *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

analysis set forth for heightened scrutiny in *Alvarez*, it seems unlikely that the Ag-Gag laws would be found constitutional.

This article 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 gives a background of research already conducted on the constitutionality of Ag-Gag laws, and examines the relevance of the Supreme Court case *Alvarez*. Based on the analysis provided in *Alvarez*, the article demonstrates that Ag-Gag laws would not be exempt from 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 *Alvarez*.

ANALYSIS

I. Undercover Investigations into Agricultural Production Facilities

Animal protection groups utilize undercover investigations into agricultural production facilities to uncover and publicize abuses of animals such as cattle and chickens.² Undercover investigators most often gain access to these facilities by obtaining employment at an agricultural production facility and recording, or otherwise documenting, any abuse witnessed.³ 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.⁴ These investigations have revealed major

2. See, e.g., *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Mar. 16, 2014) (describing recent undercover investigations undertaken by Mercy for Animals).

3. See, e.g., *Rampant Cruelty at California Slaughterhouse*, COMPASSION OVER KILLING (Aug. 21, 2012), <http://www.cok.net/californiacows/> (“The video, filmed by a [Compassion Over Killing] 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 . . .”).

4. See, e.g., *The Hidden Cost of Walmart’s Pork*, MERCY FOR ANIMALS, <http://www.walmartcruelty.com/> (last visited Mar. 16, 2014) (showing video

violations of food safety and humane farming practices, and have prompted action by both the United States Department of Agriculture and by companies that purchase products from the facilities investigated.⁵ This can cause economic and other consequences for companies engaging in unlawful or inhumane practices.⁶

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.⁷ 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 at agricultural production facilities.⁸

Obtaining employment at an agribusiness facility is often the only way to gain access to the facility, since it is a privately owned enterprise.⁹ Therefore, a necessary aspect of these

footage from a Mercy For Animals undercover investigation, revealing blatant animal abuse at a Walmart pork supplier facility); *see also Protect Animals From Corporate Greed*, ANIMAL LEGAL DEF. FUND, <http://protectyourfood.org/the-law/> (last visited Mar. 16, 2014) (“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 . . .”).

5. *See, e.g.*, David Zahniser, *Central Valley Slaughterhouse Reopens After Animal Abuse Claims*, L.A. TIMES, Aug. 27, 2012, available at <http://latimesblogs.latimes.com/lanow/2012/08/central-valley-slaughterhouse-reopens.html>.

6. *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.

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

8. *See, e.g.*, Sara Lacy, Comment, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 128-29 (2013) (“These laws . . . focus instead on deterring activists from working undercover to expose violations.”).

9. *See* Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny*, THE ATLANTIC (Mar. 20, 2012, 9:06 AM), <http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/#>.

undercover investigations is that the investigators apply for employment without revealing that their intention is to find, record, and share evidence of animal abuse at the facility.¹⁰ In response to this, a component of Iowa's and Utah's respective Ag-Gag laws is that potential employees cannot make misrepresentations upon applying for employment at an agricultural production facility.¹¹

The law in Iowa creates the crime of "agricultural production facility fraud" where a person willfully

[m]akes 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.¹²

Based on this law, employers at agricultural production facilities could include a question on their employment applications to the effect of: "Do you seek employment at this facility for the purpose of making unauthorized recordings?" 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, then the person could face criminal charges in Iowa.

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";

10. See *id.*; see also *Undercover Activist Details Secret Filming of Animal Abuse & Why "Ag-Gag" Laws May Force Him to Stop*, DEMOCRACY NOW! (Apr. 9, 2013), http://www.democracynow.org/2013/4/9/undercover_activist_details_secret_filming_of.

11. IOWA CODE ANN. § 717A.3A(1)(b) (West 2013); UTAH CODE ANN. § 76-6-112(2)(c) (West 2013).

12. IOWA CODE ANN. § 717A.3A(1)(b).

and (3) “while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation.”¹³ In contrast to Iowa’s Ag-Gag law, 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 the Iowa and Utah Ag-Gag laws allow for agribusiness to recover money damages from those convicted of breaching the laws.¹⁴ 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 investigator.¹⁵

III. The Proliferation of Ag-Gag Laws and Concerns

In 1990 and 1991, Kansas,¹⁶ North Dakota,¹⁷ and Montana¹⁸ passed laws similar to those recently passed in Utah and Iowa.¹⁹ In 2013, Ag-Gag bills were proposed in eleven other states.²⁰ Of these, seven bills—in Wyoming,²¹ Indiana²², Arkansas,²³

13. UTAH CODE ANN. § 76-6-112(2)(c).

14. IOWA CODE ANN. § 910.2(1) (West 2013); UTAH CODE ANN. § 77-38a-302(1) (West 2013).

15. See IOWA CODE ANN. § 910.2; UTAH CODE ANN. § 77-38a-302.

16. KAN. STAT. ANN. § 47-1827 (West 2013).

17. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2013).

18. MONT. CODE ANN. § 81-30-103 (West 2013).

19. See Jessica Pitts, Note, “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).

20. See *Anti-Whistleblower Bills Hide Factory-Farming Abuses From the Public*, HUMANE SOC’Y (Jan. 7, 2014), http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html.

21. See generally H.R. 0126, 2013 Leg., 62d Sess. (Wyo.).

22. See generally S. 373, 118th Gen. Assemb., Reg. Sess. (Ind. 2013). This bill died in committee. See *Harmful “Ag Gag” Bill Fails in Indiana—The Humane Society of the United States Praises Legislature*, HUMANE SOC’Y (Mar. 12, 2012), http://www.humanesociety.org/news/press_releases/2012/03/harmful_ag_gag_bill_fails_031212.html.

23. See generally S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013). Senate Bill 13 was delivered to the Governor of Arkansas in April 2013, and enacted as Act 1160 in an amended form lacking Ag-Gag provisions. See *SB13 – Providing Legal Protection to Animal Owners and Their Animals and to Ensure that Only Law Enforcement Agencies Investigate Charges of Animal Cruelty*, ARK. STATE LEG.,

Pennsylvania,²⁴ Vermont,²⁵ North Carolina,²⁶ and New Mexico²⁷—include the criminalization of misrepresentations on employment applications. Most of these bills also have provisions that mirror the Utah Ag-Gag law provision prohibiting recording and dissemination of images or sounds collected at an agricultural production facility.²⁸ Other bills, including a law passed in Missouri in 2012, take another form of Ag-Gag bills, which establish reporting requirements related to recordings of animal abuse at agricultural production facilities.²⁹

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, including those working on civil liberties, public health, food safety, animal welfare, environmental protection, and workers' rights.³⁰ This concern is based on the fact that these laws have the effect of insulating the activities within agricultural production facilities from the public

<http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=SB13> (last visited Mar. 16, 2014).

24. *See generally* H.B. 683, 2013 Gen. Assemb., Reg. Sess. (Pa.).

25. *See generally* S. 162, 2013 Leg., Reg. Sess. (Vt.).

26. *See generally* S. 648, 2013 Gen. Assemb., Reg. Sess. (N.C.).

27. *See generally* S. 552, 2013 Leg., 51st Sess. (N.M.).

28. *See, e.g.*, S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 648, 2013 Gen. Assemb., Reg. Sess. (N.C.), S. 552, 2013 Leg., 51st Sess. (N.M.), H.R. 683, 2013 Gen. Assemb., Reg. Sess. (Pa.). *But see* S. 162, 2013 Leg., Reg. Sess. (Vt.).

29. *See* MO. ANN. STAT. § 578.013 (West 2014); A.B. 343, 2013 Leg., Reg. Sess. (Cal.). California Assembly Bill 343 died while in committee. Tracie Cone, *Undercover Animal Abuse Bill Killed Before California's Assembly Agriculture Committee Vote*, HUFFINGTON POST (Apr. 17, 2013), http://www.huffingtonpost.com/2013/04/17/undercover-animal-abuse-bill-jim-patterson_n_3103521.html.

See also L.B. 204, 103d Leg., 1st Sess. (Neb. 2013); H.R. 110, 2013 Leg., Reg. Sess. (N.H.); ; H.B. 1191, 108th Gen. Assemb. (Tenn. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013). Tennessee House Bill 1191 and its companion Senate Bill 1248 were passed by the House and the Senate, but vetoed by the Governor on May 13, 2013. *Tenn. Governor Haslam Vetoes Anti-Whistleblower Bill*, HUMANE SOC'Y (May 13, 2013), http://www.humanesociety.org/news/press_releases/2013/05/gov-haslam-vetoes-tenn-ag-gag-bill-051313.html. *See also* S. 648, 2013 Gen. Assemb., Reg. Sess. (N.C.) (including both the reporting requirement and the employment restriction).

30. *See Statement of Opposition to Proposed "Ag-Gag" Laws From Broad Spectrum of Interest Groups*, ASPCA, <http://www.asPCA.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/statement-opposition> (last visited Mar. 16, 2014).

eye.³¹ Reporting requirements serve the goals of Ag-Gag laws by preventing activists from demonstrating a pattern of abuse and repeated violations of standards.³² Therefore, these bills, by decreasing transparency in the industry, are seen as not only a barrier to animal protection efforts, but also as 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's production and distribution.³³

IV. **Background for 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.³⁴ In July 2013, animal protection groups, activists, and journalists filed a civil rights complaint challenging the constitutionality of the Utah Ag-Gag law.³⁵ Since Ag-Gag laws seek to stifle access to, and exchange of, information, and utilize means that criminalize the use of false speech or pretense, the laws are vulnerable to freedom of speech challenges under the First Amendment of the United States Constitution.³⁶ 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.

In a recent scholarly article, these laws were analyzed from the framework of First Amendment protections for newsgathering

31. *See id.*

32. Alastair Bland, *A Legal Twist in The Effort to Ban Cameras From Livestock Plants*, NPR (Apr. 11, 2013 4:13 PM), <http://www.npr.org/blogs/thesalt/2013/04/10/176843210/a-legal-twist-in-the-effort-to-ban-cameras-from-livestock-plants>.

33. *See* ASPCA, *supra* note 30.

34. *See* ANIMAL LEGAL DEF. FUND, *supra* note 4.

35. *See generally* Complaint, Animal Legal Def. Fund v. Herbert, No. 2:13-CV-00679 (D. Utah July 22, 2013), ECF No. 2.

36. *See* U.S. CONST. amend. I. *See generally* Jessalee Landfried, Note, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377 (2013) (summarizing potential First Amendment challenges to Ag-Gag laws).

to determine what level of scrutiny a court might use.³⁷ As that article concluded, there are a number of aspects of Ag-Gag laws that support a finding that they should be subject to either intermediate or strict scrutiny based on the impact that the laws have on newsgathering.³⁸ The laws can be understood to be “specifically targeting people engaged in First Amendment activities,” and a court may therefore use a heightened level of scrutiny, perhaps even strict scrutiny.³⁹ Further supporting the use of strict scrutiny is the fact that Ag-Gag laws specifically target the expressive activity of activists, and are written so that they are not viewpoint neutral, and can act as prior restraints on speech.⁴⁰ The prohibitions on lying on employment applications criminalize speech about identity and affiliations, also suggesting that strict scrutiny should be used.⁴¹ The article further suggests that there are other reasons that Ag-Gag laws should be subject to at least heightened scrutiny, including because the laws will have an impact on conduct “intimately related” to expression, and will punish false statements without proof of harm.⁴²

If, according to the article, Ag-Gag laws were subjected to a strict scrutiny standard, a court would likely find the laws to be unconstitutional under the First Amendment, in violation of the requirement that the laws be narrowly tailored to a compelling government interest.⁴³ Alternatively, it is also possible that the laws would be found unconstitutional under intermediate scrutiny, if a court finds the laws are intended to suppress speech.⁴⁴

Not explored in this analysis is the impact that the Supreme Court’s support of First Amendment protections for false speech in *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 to agricultural production facilities

37. See generally Lewis Bollard, Note, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960 (2012).

38. See *id.* at 10971.

39. See *id.*

40. *Id.* at 10972-73.

41. *Id.* at 10974.

42. *Id.* at 10974-75.

43. Bollard, *supra* note 37, at 10976.

44. *Id.* at 10977.

through misstatements, or by making misrepresentations on employment applications. This is because, like a false statement about having the Medal of Honor, 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;⁴⁵ however, there is scant evidence of private businesses having criminal protection against employees lying on job applications.⁴⁶

V. **Impact of *U.S. v. Alvarez* on Challenges to Ag-Gag Laws**

In *Alvarez*, the Stolen Valor Act was found to be unconstitutional as a violation of the First Amendment.⁴⁷ The Stolen Valor Act made it a crime to lie about receiving the Congressional Medal of Honor.⁴⁸ This was because the government found the act of lying to be harmful to “the integrity and purpose of the Medal.”⁴⁹ 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.⁵⁰ The Plurality agreed that content-based restrictions of speech should be subject to heightened scrutiny, although three Justices relied on “exacting scrutiny,”⁵¹ while two Justices relied on “intermediate scrutiny.”⁵²

Despite this split in the applicable level of scrutiny, the Court held that false statements can be subject to First Amendment

45. See, e.g., *Duart v. FMC Wyo. 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); *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).

46. See, e.g., *Blake v. United States*, 323 F.2d 245, 246 (8th Cir. 1963) (citing 18 U.S.C. § 1001(a)(2), (c)(1) (2012) (making it a crime to lie to a government agent, including material misstatements on a job application for a federal job)).

47. *Alvarez*, 132 S. Ct. at 2551.

48. See 18 U.S.C. § 704(b), (c) (2012).

49. *Alvarez*, 132 S. Ct. at 2543.

50. See *id.*; see also *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (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.’” (citations omitted)).

51. *Alvarez*, 132 S. Ct. at 2543, 2548.

52. *Id.* at 2551-52.

protection.⁵³ The Court recognized that there is an important public interest in providing First Amendment protection to false speech,⁵⁴ 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.⁵⁵ Because of this, the Court rejected the idea that the government may make laws that punish falsity and nothing more.⁵⁶

Recognizing the compelling government interest behind the Stolen Valor Act, the Court found that the law was nevertheless unconstitutional as a broad, content-based restriction that was not the least burdensome means by which to accomplish its goals.⁵⁷ Emphasizing that restricting speech should be a last resort when no other means can accomplish a compelling government interest, the Court stated, “[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society.”⁵⁸

In reaching its decision, the Court discussed a limited field of traditional areas where the government may create content-based restrictions on speech.⁵⁹ One of these areas is fraudulent speech,

53. *See Alvarez*, 132 S. Ct. at 2544-45. *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (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.” (citation omitted)).

54. *Id.* at 2553 (“False factual statements can serve useful human objectives. . . . 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.”).

55. *See id.* The Court noted that

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. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

56. *See id.*

57. *See id.* at 2548-49.

58. *Id.* at 2550.

59. *Alvarez*, 132 S. Ct. at 2544.

[C]ontent-based restrictions on speech have been permitted . . . only when confined to the few ‘historic and traditional categories [of

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”⁶⁰ 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 a government official, suggests that there are no constitutional protections for false speech.⁶¹ 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.”⁶² After looking at other similar statutes, the Justices noted that in most statutes criminalizing false statements, proof of specific harm was required.⁶³

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 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 *Alvarez*, this heightened scrutiny may not be applied. Therefore, the remainder of this article will focus on, first, whether Ag-Gag laws would be considered content-based restrictions on speech

expression] . . . [including] advocacy intended, and likely to incite imminent lawless action, . . . 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 (citations omitted).

60. *Id.* at 2547.

61. *See id.* at 2545.

62. *Id.* at 2554 (citing 18 U.S.C. § 1001).

63. *Id.*

subject to strict scrutiny; and second, whether these laws would be categorized as restricting fraudulent speech. Finally, the article will analyze whether Ag-Gag laws would survive the type of scrutiny applied in *Alvarez*.

A. 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.”⁶⁴ The Stolen Valor Act was a restriction on the content of speech, because it criminalized lying about having the Medal of Honor.⁶⁵ In this way, the content of speech being restricted, in the case of *Alvarez*, was the ability for someone to give false information about the Medal of Honor. Therefore, the Stolen Valor Act was an expression by the government that it disagreed with the content of speech when that speech was a lie about being awarded the Medal of Honor. Thus, the Court found that the law was a content-based restriction subject to a heightened level of First Amendment scrutiny.⁶⁶

The Ag-Gag laws in Utah and Iowa criminalize lying on an employment application at an agricultural production facility.⁶⁷ These laws restrict the content of speech given by a person when he or she applies for employment at an agricultural production 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 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. The Ag-Gag laws, like the Stolen Valor Act, are content-based restrictions on speech because they aim to restrain the type of speech allowed on an employment application.

64. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).

65. *See Alvarez*, 132 S. Ct. at 2552-53.

66. *See id.* at 2548.

67. IOWA CODE ANN. § 717A.3A(1)(b); UTAH CODE ANN. § 76-6-112(2)(c).

The government's contention in *Alvarez*, that the Stolen Valor Act is similar to a federal statute prohibiting lying to a government official, supports the conclusion that Ag-Gag laws are content-based restrictions on speech.⁶⁸ In defending the Stolen Valor Act's content-based restriction on speech, the government asserted that the Court should treat the law similar to 18 U.S.C. § 1001, which criminalizes lying to a government official about official matters.⁶⁹ If the government asserted that the content-based Stolen Valor Act should be upheld based on the constitutionality of 18 U.S.C. § 1001, it follows that 18 U.S.C. § 1001 must also be considered by courts to be a content-based restriction. If a statute criminalizing lying to a government official is considered a content-based restriction, then, naturally, laws criminalizing lying on an employment application are also content-based restrictions.

Like the Stolen Valor Act, the Ag-Gag laws criminalize speech based on its falsity. Accordingly, since Ag-Gag laws target the content of the speech on an employment application, they are content-based restrictions on speech subject to strict scrutiny under the First Amendment.

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

Even if a law clearly restricts content-based speech, there is a list of 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.⁷⁰ If a court were to find that Ag-Gag laws are aimed at preventing fraud, the laws would be subject to a lower standard of review.⁷¹ However, since the Ag-Gag laws fail to demonstrate a causal link between the restricted speech and the harm alleged to result from the speech, the laws cannot be considered fraud statutes.

68. *See Alvarez*, 132 S. Ct. at 2545-46.

69. *Id.*

70. *See supra* note 59 and accompanying text.

71. *See Alvarez*, 132 S. Ct. at 2551-52.

a. 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.⁷² In order to determine if a court would categorize the Iowa and Utah Ag-Gag laws as 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 or concealment of a fact that is material, reasonably calculated to deceive, made with the intent to deceive, and that succeeds in deceiving the victim, who suffers an injury as a result.⁷³

When misrepresentations are criminalized as fraud by a statute, they do not require all of the elements of common law fraud.⁷⁴ It is undisputed that false speech can only be considered fraudulent if it has the potential to cause some harm.⁷⁵ 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.⁷⁶

The Supreme Court, in discussing fraudulent speech in *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 misrepresented that they had received this honor.⁷⁷

72. See *Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003).

73. See RESTATEMENT (SECOND) OF TORTS § 525 (1977).

74. See *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 476 (2006) (Thomas, J., concurring in part and dissenting in part).

75. Natali Wyson, Note, *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 BYU L. REV. 671, 682 (2012) (footnote omitted).

76. See, e.g., 18 U.S.C. § 1341 (2012) (criminalizing mail fraud); 15 U.S.C. § 78j (2012) (criminalizing manipulative and deceptive devices in commerce).

77. See *Alvarez*, 132 S. Ct at 2549 (“The Government’s interest in protecting the integrity of the Medal of Honor is beyond question.”).

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.”⁷⁸

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. If this proximate cause between the false speech and harm does not exist, then the statute would not have the required “direct causal link” between the restriction and harm that the statute seeks to prevent. Therefore, it is likely that any fraud statute that would fall under the exception to First Amendment protection 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 varies from state to state, though all require “a knowing misrepresentation of a fact by one party which induces another party to act or to fail to act, which in the end, causes damage to the party relying upon the misrepresentation.”⁷⁹ 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.⁸⁰

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 that case was based on a report of food handling violations at a grocery chain made by undercover investigators.⁸¹ To access the information, the investigators gained employment at the grocery chain by misrepresenting information on their job applications.⁸² The resulting report showed Food Lion’s employees engaging in

78. *Id.* at 2549 (citation omitted).

79. *See, e.g.*, 37 C.J.S. *Fraud* § 12 (2013) (footnote omitted).

80. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 513 (4th Cir. 1999).

81. *Food Lion, Inc.*, 194 F.3d at 510.

82. *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.”).

unsanitary meat-handling practices, and caused Food Lion substantial losses in profits, good will, and stock value.⁸³ 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.⁸⁴ In addition, it sought recovery of wages paid, and administrative costs incurred, from hiring the investigators based on their misrepresentations.⁸⁵

The United States District Court for the Middle District of North Carolina 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.⁸⁶ 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.⁸⁷ On appeal, the United States 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.⁸⁸ Further, the Fourth Circuit found that Food Lion could not recover for administrative costs or lost wages, due to lack of proximate cause.⁸⁹

This requirement of proximate cause for recovery from a misrepresentation is analyzed by courts on a state-by-state basis.⁹⁰ However, it is an established element of common law

83. *See id.* at 511.

84. *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).

85. *See Food Lion, Inc.*, 194 F.3d at 511.

86. *See Food Lion, Inc.*, 964 F. Supp. at 963 (noting that “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.”).

87. *See id.*

88. *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.”).

89. *See id.* at 514 (finding that wages were paid for work well done).

90. *See, e.g., Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765, 771 (3d Cir. 2009) (analyzing the proximate cause requirement for fraud based on Pennsylvania law); *Shalaby v. Bernzomatic*, 281 F.R.D. 565, 574 (S.D. Cal. 2012)

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.⁹¹ Courts are hesitant to find proximate cause when there are other intervening or underlying factors more directly linked to the damages.⁹² Based on the analysis in *Alvarez*, a fraud statute must have this causal link to avoid heightened First Amendment scrutiny.

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

Based on common law requirements for recovery from fraud and the Supreme Court's requirement of a direct causal link, for a law to be considered a restriction on fraudulent speech, there must be a causal link between the 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 Iowa's nor Utah's Ag-Gag law states within its text the harm that each seeks to prevent.⁹³ The statements of supporters of each the law may illuminate the intent of the laws. Unfortunately, these statements are not particularly unified or well recorded. The following overview focuses on statements by state representatives regarding Ag-Gag laws and two major non-

(analyzing the proximate cause requirement for fraud based on California law); *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).

91. *See, e.g.*, 37 AM. JUR. 2D *Fraud & Deceit* § 271 (2014) ("To support an action for fraud, the fraud or misrepresentation must be the proximate cause of the damages upon which the action is based." (footnote omitted)). *But see* RESTATEMENT (SECOND) OF TORTS § 548A Comment (a) (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.").

92. *See* *Sonfast Corp. v. York Int'l Corp.*, 875 F. Supp. 1088, 1098 (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 Kansas law, proximate cause does not mean the only cause, as long as but for the reliance, the damages would not have occurred) (citation omitted).

93. *See* IOWA CODE ANN. § 717A.3A; UTAH CODE ANN. § 76-6-112.

profits supporting Ag-Gag laws. It will then analyze the legitimacy of the stated goals of the 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.⁹⁴ The Iowa Farm Bureau Federation's President supported the law on the basis that it would help keep farms safe by assuring transparency regarding the character of workers.⁹⁵ Iowa's Governor Terry Branstad supported the bill as a protection of property rights, and as a means to prevent illegal and deceptive practices being used to disrupt agricultural production facilities.⁹⁶

In Utah, State Senator David Hinkins described the Ag-Gag law as one intended to prevent trespass and espionage on the operations, protect property rights, and protect the livestock business from "the vegetarian people."⁹⁷ 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.⁹⁸

The non-profit Animal Agriculture Alliance (AAA) touts Ag-Gag bills as "farm protection legislation," and supports them as a response to protect farms from the impact of undercover

94. See Rod Boshart, *Bill Creates 'Agricultural Production Facility Fraud,'* QUAD CITY TIMES (Feb. 28, 2012 1:52 PM), http://qctimes.com/news/local/bill-creates-agricultural-production-facility-fraud/article_df54ddd6-6245-11e1-b371-0019bb2963f4.html.

95. See Laurie Johns, *Iowa Farm Bureau Supports Revised HF 589 to Protect Integrity and Safety of Family Farms,* RIVER CITIES' READER, (Mar. 6, 2012 8:12 AM), <http://www.rcreader.com/news-releases/-iowa-farm-bureau-supports-revised-hf-589-to-protect-integrity-and-safety-of-family-farms-/>.

96. See Mike Glover, *Branstad Defends Signing Livestock Bill into Law,* HUTCHINSON NEWS (Mar. 6, 2012 9:00 AM), 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.

97. See Majorie Cortez, *Bill on Interfering With Agricultural Operations Gets Preliminary Nod in Senate,* DESERET NEWS (Mar. 6, 2012 5:53 PM), <http://politicalnotebook.blogs.deseretnews.com/2012/03/06/bill-on-interfering-with-agricultural-operations-gets-preliminary-nod-in-senate/>.

98. See Josh Loftin, *Filming on Farms Could Be Banned in Utah,* FOOD MFG. (Feb. 27, 2012 12:43 PM), <http://www.foodmanufacturing.com/news/2012/02/filming-farms-could-be-banned-utah>.

investigations into agricultural production facilities.⁹⁹ Specifically, the group stated:

It 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.¹⁰⁰

The AAA further alleges that videos released from undercover investigations are “highly edited” and “attempt to use emotional images and scare tactics to discourage Americans from eating meat, milk and eggs because they do not believe that we have that right.”¹⁰¹ Based on these statements, it seems that this 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 AAA bases their support on the purported disingenuous intent of animal protection groups, which the group understands to be the end of all animal agriculture.

The American Legislative Exchange Council (ALEC) has been credited with the creation of the text of Ag-Gag laws.¹⁰² Spokesman Bill Meierling explained the intent of the laws stating, “[a]t the end of the day it’s about personal property rights or the individual right to privacy.”¹⁰³ ALEC describes its goals regarding animal agriculture as deterring “extremist attempts to establish animal rights as a public policy objective,” and

99. *See Debate: After Activists Covertly Expose Animal Cruelty, Should They Be Targeted With “Ag-Gag” Laws?*, DEMOCRACY NOW! (Apr. 9, 2013), http://www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal.

100. *Alliance Applauds Introduction of Bill to Protect Farmers From Undercover Extremists*, ANIMAL AGRIC. ALLIANCE (Mar. 2, 2011), <http://us1.campaign-archive2.com/?u=69c4e87210c5554923516496c&id=d1dd7fe219>.

101. Animal Agric. Alliance, *Deceptive Videos Unfairly Attack Farmers*, FARMS.COM (Dec. 15, 2010), <http://www.farms.com/farmspages/commentary/detailedcommentary/tabid/192/default.aspx?newsid=36655>.

102. *See* Will Potter, “Ag Gag” Bills and Supporters Have Close Ties to ALEC, GREEN IS THE NEW RED (Apr. 26, 2012), <http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947>.

103. Associated Press, *State Bills Seek End to Farm Animal Abuse Videos*, FOX NEWS (Mar. 17, 2013), <http://www.foxnews.com/politics/2013/03/17/state-bills-seek-end-to-farm-animal-abuse-videos/#ixzz2Qn96AWvl>.

providing “protection of generally accepted agricultural and management practices from public or private nuisance suits.”¹⁰⁴ 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 production facilities. Further, the Ag-Gag laws are seen as a way to combat the perceived damaging agenda promoted by undercover investigations by animal rights groups.

These remarks do not provide a clear insight into precisely what harm the Ag-Gag laws target. To summarize, the goals behind the Ag-Gag laws that carry the most logical and factual weight could be understood to protect property from trespass, and privacy violations. The Ag-Gag laws also can be a means to prevent any disruptions to the functioning of the facility as a result of unauthorized access, and to protect the reputation of the animal agricultural production industry as a whole. 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 idea that gaining access to a facility by misrepresenting information on an employment application can sustain an action for trespass.¹⁰⁵ It is also well established that corporations, or other non-human entities, have no right to personal privacy.¹⁰⁶ Therefore, by preventing misrepresentation on an employment 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 production facilities the laws seek to target. If the disruptions were 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.* would mean that this harm lacks proximate cause to the misrepresentation.¹⁰⁷ Thus, if the recordings accurately portray activities at the facility, any public outcry, lost profits, or governmental investigations would stem directly from the

104. *ALEC Agriculture Principles*, AM. LEGIS. EXCH. COUNCIL (Apr. 2011), <http://www.alec.org/model-legislation/alec-agriculture-principles/>.

105. *Food Lion, Inc.*, 194 F.3d at 518.

106. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

107. *See Food Lion, Inc.*, 964 F. Supp. at 962-63.

activities taking place at the facility, not from the misrepresentation of the employee on the employment application.

If employees that misrepresented information on employment 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 facility.¹⁰⁸ In addition, courts might find that the direct cause of the harm to a facility is disruptive employee behavior rather than a misrepresentation on an employment application.

Many of the remarks by supporters of the laws, suggest that the main purpose of Ag-Gag laws is to prevent the investigative reports that cause public outcry against agribusiness.¹⁰⁹ Animal protection groups that conduct undercover investigations promote this same understanding of the Ag-Gag laws.¹¹⁰ If the harm that Ag-Gag laws seek to prevent is the undercover investigations and the impact of the release of records, 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 could be a cause for defamation,¹¹¹ but false portrayals of the facilities' activities are not what the Ag-Gag laws prohibit.

Even though they purport to target fraud, 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 *Alvarez* for restrictions on fraudulent speech. As explained, in *Alvarez*, the Court recognized the compelling government interest supporting the Stolen Valor Act

108. 18 U.S.C. § 43(a) (2012) (making it a federal crime to intentionally harm the property of an animal enterprise).

109. See Cortez, *supra* note 97.

110. See HUMANE SOC'Y, *supra* note 20.

111. *Food Lion, Inc.*, 194 F.3d at 522.

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 heightened First Amendment scrutiny.¹¹² In comparison, Ag-Gag laws are based on attenuated, and often unclear, assertions of harm.¹¹³ Under the Court's analysis in *Alvarez*, the Ag-Gag laws would not be categorized in the fraud exception to the protection of false speech under the First Amendment.

**c. Ag-Gag Laws Would be Subject to a
Heightened Level of First Amendment
Scrutiny**

The Supreme Court in *Alvarez* clearly stated that First Amendment protections apply to false speech.¹¹⁴ The Court further provided insight into the elements that a law must have in order to be categorized as a restriction on fraudulent speech, and therefore not be subject to a heightened level of First Amendment scrutiny.¹¹⁵ Based on the criteria set forth in *Alvarez*, and the principles of common law fraud, the provisions of Iowa's and Utah's Ag-Gag laws targeting misrepresentation on employment applications cannot be considered restrictions of fraudulent speech.

Since the Ag-Gag laws would not be categorized as an exception to First Amendment protections, a court should analyze them under the framework set forth in *Alvarez*. If a court finds that the Ag-Gag laws should be viewed as content-based restrictions on free speech, then it should 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.

112. *Alvarez*, 132 S. Ct. at 2548-49.

113. *See supra* notes 93-107 and accompanying text.

114. *Alvarez*, 132 S. Ct. at 2553.

115. *Id.* at 2547-48.

C. Ag-Gag Laws Would Not Pass Scrutiny Under a Heightened Level of Review

In *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.¹¹⁶ Because of this, the Court first looked at whether the Stolen Valor Act had a compelling government interest, and then whether the law was narrowly tailored to accomplish that interest.¹¹⁷ When the Iowa and Utah Ag-Gag laws are analyzed under this analysis, they do not pass a First Amendment challenge.

a. 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 *Alvarez*, the Court recognized the compelling interest the government had in ensuring people did not lie about having the Medal of Honor.¹¹⁸ The Plurality opinion explained the importance of the Medal and the sacrifice it represents.¹¹⁹ Further, the Court expressed an understanding that the government had a compelling interest in protecting the sanctity of such a great honor.¹²⁰ The concurring opinion of Justices Breyer and Kagan summarizes what the Court considered to be substantial justification for a compelling governmental interest:

[The Stolen Valor Act] seeks to protect the interests of those who have sacrificed their health and life for their country. The statute serves this interest by seeking to preserve intact the country’s recognition of that sacrifice in the form of military

116. *See id.* at 2548.

117. *Id.* at 2548-51.

118. *Alvarez*, 132 S. Ct. at 2548-49.

119. *Id.*

120. *Id.* at 2549.

honors. To permit those who have not earned those honors to claim otherwise dilutes the value of the awards.¹²¹

The Justices recognized that the Stolen Valor Act was motivated by the convincing purpose of preserving the sanctity of military honors.

The compelling interest of the Stolen Valor Act stands in stark contrast to the interests that Ag-Gag laws seek to promote. The Ag-Gag laws' provisions criminalizing misrepresentation is one way the laws seek to reach their intended goal.¹²² In the case of laws impeding freedom of speech, the burden is on the government to justify the speech restriction.¹²³ 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 these laws.

The analysis above suggests that the overall goal of the Ag-Gag laws is to prevent information regarding the operation of agricultural production facilities from being disseminated to the public. Therefore, it seems 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 are meant to shield agricultural production facilities from the impact that this disclosure to the public has on their businesses.¹²⁴

Keeping truthful information from the public, even if it is thought to protect them from harm, is not recognized as a compelling governmental interest.¹²⁵ For example, in *Thompson v. Western States Medical Center*, the Supreme Court rejected "a fear that people would make bad decisions if given truthful information" as a justification for laws restricting freedom of speech.¹²⁶ Similarly, in *Sorrell v. IMS Health Inc.*, the Court

121. *Id.* at 2555.

122. See IOWA CODE ANN. § 717A.3A(1); UTAH CODE ANN. § 76-6-112(2).

123. See *United States v. Marcavage*, 609 F.3d 264, 279 (3d Cir. 2010) (citation omitted).

124. See AM. LEGIS. EXCH. COUNCIL, *supra* note 104.

125. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670-71 (2011).

126. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002).

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.¹²⁷ Therefore, even if the public was adversely impacted by the decisions it made based on exposure 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 they are not 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.¹²⁸ Insulating agricultural production facilities from outside scrutiny is not a compelling governmental interest, as evidenced by the longstanding support of the laws for whistleblower protection.¹²⁹ In light of the fact that there seems to be no assertions of trade secrets by the facilities in regard to the need for Ag-Gag laws, and because of the 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.¹³⁰

Absent better justification by 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.

b. 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

127. See *Sorrell*, 131 S. Ct. at 2670-71.

128. See *Animal Agric. Alliance*, *supra* note 101.

129. See, e.g., 5 U.S.C. § 2302(b)(13) (2012).

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

restricting speech to survive strict scrutiny, the law must be narrowly tailored to achieve a compelling government interest.¹³¹ Therefore, if less restrictive means exist to accomplish the same ends, then the law cannot withstand strict scrutiny.

In *Alvarez*, the Court focused on two failures of the Stolen Valor Act: (1) the lack of a direct causal link between the restriction imposed and harm to be averted; and (2) the government's failure to demonstrate why the restriction was actually necessary to achieve the desired results.¹³² First, the Court saw no evidence that restricting speech about the Medal actually promoted the stated interests of protecting the sanctity of the Medal.¹³³ Second, the Court found that the government "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest."¹³⁴ The Court recognized that any harm caused by the lie could easily be mitigated by truthful speech, and found that the Stolen Valor Act was therefore not a necessary restriction on speech.¹³⁵ Since the Stolen Valor Act failed to be narrowly tailored, it was thus found to be unconstitutional.

The Ag-Gag laws of Iowa and Utah also fail this test. Even if preventing undercover investigations and the dissemination of information from the investigations are understood by a court to be a compelling state interest, these laws are not narrowly tailored to survive strict scrutiny. Evidence that the laws are not the least restrictive means on speech to accomplish their goals can be seen through other versions of these bills being proposed in other states. Not all proposed Ag-Gag laws include a provision criminalizing lying on an employment application.¹³⁶ These bills all have the same intent as the Ag-Gag laws in Utah and Iowa.¹³⁷

131. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

132. *Alvarez*, 132 S. Ct. at 2549.

133. See *id.*

134. *Id.*

135. *Id.* at 2550-51.

136. See MO. ANN. STAT. § 578.013; A.B. 343, 2013 Leg., Reg. Sess. (Cal.); L.B. 204, 103d Leg., 1st Sess. (Neb. 2013); H.R. 110, 2013 Leg., Reg. Sess. (N.H.); H.B. 1191, 108th Gen. Assemb. (Tenn. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013).

137. See Richard A. Oppel, Jr., *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?_r=0.

For example, bills requiring that recordings of animal cruelty be reported within a certain period of time are understood as attempts to prevent the information gathered during undercover investigations from being disseminated directly to the public.¹³⁸ Though these types of bills may give rise to their own set of constitutional challenges,¹³⁹ they more directly address the perceived threat of the release of information from undercover investigation.

The language in *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. In *Alvarez*, the Court found 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.”¹⁴⁰ Through this logic, the Court strongly suggests that when an identified harm can be combated by greater transparency and freedom of speech, then 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. The main reason that undercover investigations cause harm is the reaction that the public, businesses, and regulatory agencies have to the information gathered and disseminated.¹⁴¹ Following this

138. *See id.*

139. *See, e.g.*, Natalie Perrin-Smith Vance, Comment, *My Brother’s Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes*, 36 CAL. W. L. REV. 135, 143-53 (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*, SHREVEPORT TIMES, (May 9, 2013), <http://www.shreveporttimes.com/article/DN/20130509/NEWS0201/305090083/Humane-Society-calls-veto-Ag-Gag-bill> (stating that the Tennessee state attorney general labeled the bill “constitutionally suspect”).

140. *Alvarez*, 132 S. Ct. at 2550 (citations omitted).

141. *See Extremists Attempt To Mislead Public*, ANIMAL AGRIC. ALLIANCE (Feb. 15, 2012), https://secure12.hostek.net/animalagalliance-org/current/home.cfm?Section=20120215_Extremists&Category=Press_Releases (alleging that undercover videos are used to mislead the public about commonly used farming practices).

reasoning, a possible solution is to compel animal agricultural production facilities to address the content of the information that is causing outcry, as well as legal and economic repercussions. Similarly, if the reports by undercover investigators are indeed misleading, as the Supreme Court noted, rather than passing laws restricting speech, counterspeech is 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 made a clear choice to restrict freedom of speech rather than to address the conditions in animal agricultural production facilities that create negative repercussions to the facilities when brought to light.

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

CONCLUSION

The Supreme Court case *United States v. Alvarez* provides an important lens through which to analyze a First Amendment challenge to Ag-Gag laws that criminalize lying on an agricultural production facility's employment application. Based on the precedent of *Alvarez*, these laws would likely be classified as content-based restrictions on speech, subject to heightened First Amendment scrutiny. While *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 *Alvarez* is applied to the Ag-Gag laws, there are strong arguments that the laws lack a compelling government interest and are not narrowly tailored. Therefore, it is likely that the Ag-Gag laws are unconstitutional under the First Amendment.