

# AG-GAG CHALLENGED: THE LIKELIHOOD OF SUCCESS OF *ANIMAL LEGAL DEFENSE FUND v. HERBERT'S* FIRST AMENDMENT CLAIMS

## INTRODUCTION

On February 8, 2013, Amy Meyer visited Dale Smith Meatpacking Company in Draper City, Utah, to witness the treatment of animals on a typical factory farm.<sup>1</sup> A self-described animal rights activist, Meyer chose this particular slaughterhouse because she heard spectators could get a glimpse of the conditions from a public sidewalk across the street.<sup>2</sup> While standing on the sidewalk, she pulled out her cellphone and recorded what she saw: piles of horns strewn across the property and a tractor carrying away an injured cow.<sup>3</sup> The slaughterhouse manager confronted her and demanded that she leave, but she refused, stating that she was on public property and had the right to film.<sup>4</sup> When the police arrived, Meyer left the scene without incident.<sup>5</sup> The State of Utah later charged her with “agricultural operation interference”<sup>6</sup> under Utah’s recently enacted ag-gag law<sup>7</sup>—the nation’s first ag-gag prosecution. On May 31, 2013, prosecutors dropped the charges after analyzing new video evidence that confirmed Meyer had filmed from public property.<sup>8</sup>

But a second legal battle was only beginning. On July 22, 2013, Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), Amy Meyer, and a handful of other animal activists sued the State of Utah, claiming that Utah’s ag-gag law is overbroad, constitutes content-based discrimination, is preempted by the federal False Claims Act, and violates animal protection groups’ equal protection and due process

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1. Leighton Akio Woodhouse, *Charged with the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), <http://www.thenation.com/article/175506/charged-crime-filming-slaughterhouse#>.

2. Eli Epstein, *Nation’s First ‘Ag Gag’ Prosecution Dismissed in Utah*, MSN NEWS (May 1, 2013), <http://news.msn.com/us/nations-first-ag-gag-prosecution-dismissed-in-utah?stay=1>.

3. Will Potter, *First “Ag-Gag” Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/>.

4. *Id.*

5. *Id.*

6. Epstein, *supra* note 2.

7. See UTAH CODE ANN. § 76-6-112 (West 2014) (criminalizing certain conduct, including knowingly or intentionally recording an image or sound from an agricultural operation by leaving a recording device on the premises without the owner’s consent, committing criminal trespass, or by applying for employment at an agricultural operation with the intent to record an image or sound from the operation).

8. Epstein, *supra* note 2.

rights.<sup>9</sup> The suit is the first legal challenge to any ag-gag law in the nation.<sup>10</sup> It is “landmark” in its novelty and in the importance of the issues it entails: “The American public relies on journalists and activists to expose inhumane and unsafe food production practices in industrial facilities.”<sup>11</sup>

This Note analyzes the likelihood of success of each of the plaintiffs’ First Amendment claims: overbreadth and content-based discrimination. Although the plaintiffs advance additional claims, an analysis of each is beyond the scope of this Note. Part I provides an overview of ag-gag laws, including a history of Utah’s law. Part II examines the standing obstacles the plaintiffs will likely face. Part III analyzes the likelihood of success of plaintiffs’ First Amendment claims by comparing their arguments to the reasoning and outcomes in analogous cases. Part IV discusses the significant policy concerns implicated in this case, namely the invaluable role that whistleblowers play in advancing the humane treatment of farmed animals and the safety of our food supply.

## I. OVERVIEW OF AG-GAG LAWS

A series of undercover videos exposing inhumane conditions on factory farms have sprung up in recent years.<sup>12</sup> In 2011, an activist working for Mercy for Animals filmed undercover at Sparboe Egg Farms, McDonald’s main egg supplier.<sup>13</sup> Among other acts of animal cruelty, the video showed workers burning off the beaks of young chicks and throwing them into cages, rotting birds left in cages with hens still laying eggs for human consumption, chicks with open wounds and torn beaks, and workers swinging a bird around in the air while her legs were caught in a grabbing device.<sup>14</sup> In 2009, an activist working for the Humane Society of the United States (HSUS) filmed equally disturbing acts of cruelty at a Bushway

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9. See Complaint at 34–39, *Animal Legal Def. Fund v. Herbert*, 2013 WL 4017889 (2013) (No. 2:13-CV-00679) (asserting four separate causes of action).

10. Andrea Germanos, *Landmark Lawsuit Challenges ‘Ag-Gag’ Law*, COMMON DREAMS (July 23, 2013), <http://www.commondreams.org/news/2013/07/23/landmark-lawsuit-challenges-ag-gag-law>.

11. Stephen Wells, *Landmark ‘Ag Gag’ Lawsuit Fights Threat to Freedom of Speech*, HUFFINGTON POST (July 23, 2013, 4:51 PM), [http://www.huffingtonpost.com/stephen-wells/ag-gag-bill\\_b\\_3635527.html](http://www.huffingtonpost.com/stephen-wells/ag-gag-bill_b_3635527.html).

12. 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](http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html?_r=0) (describing three videos documenting farm animal cruelty that were made in the last two years).

13. *McDonald’s Animal Cruelty: McDonald’s Drops Supplier Sparboe Egg Farms After Undercover Investigation*, HUFFINGTON POST (Nov. 18, 2011, 12:38 PM), [http://www.huffingtonpost.com/2011/11/18/mcdonalds-animal-cruelty\\_n\\_1101519.html](http://www.huffingtonpost.com/2011/11/18/mcdonalds-animal-cruelty_n_1101519.html).

14. *Id.*

Packing slaughterhouse in Grand Isle, Vermont.<sup>15</sup> The film showed “days-old calves being dragged, kicked and shocked as they were loaded off a truck and taken to slaughter.”<sup>16</sup> In one particularly troubling scene, a worker shocked a downed calf eleven times in an attempt to get it to stand up, then poured water on its head to enhance the electrical current before shocking it seven more times.<sup>17</sup> In a similar investigation by HSUS at Hallmark Meat Packing in Chino, California, undercover video footage showed workers using forklifts to push sick and injured cows to a standing position for inspection and workers shooting high-intensity water sprays up animals’ noses.<sup>18</sup>

When leaked to the public, the footage obtained during these undercover investigations can have dramatic, tangible effects.<sup>19</sup> As a result of Mercy for Animals’ investigation, the Food and Drug Administration issued a warning letter to Sparboe, citing “serious violations,” and McDonald’s dropped the company as its supplier.<sup>20</sup> As of November 11, 2014, the video had over 1.2 million views on YouTube.<sup>21</sup> Following HSUS’s investigation at Grand Isle, Vermont, officials shut down the slaughterhouse<sup>22</sup> and charged two former employees with animal cruelty.<sup>23</sup> HSUS’s investigation in Chino caused the United States Department of Agriculture (USDA) to recall 143 million pounds of ground beef—the largest meat recall in U.S. history.<sup>24</sup> One commentator noted, “[n]o events generated more publicity than the video footage obtained when an undercover investigator associated with the Humane Society of the United

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15. See John Curran, *2 Vt. Slaughterhouse Workers Charged with Cruelty*, BOSTON.COM (June 4, 2010), [http://www.boston.com/business/articles/2010/06/04/2\\_vt\\_slaughterhouse\\_workers\\_charged\\_with\\_cruelty/](http://www.boston.com/business/articles/2010/06/04/2_vt_slaughterhouse_workers_charged_with_cruelty/) (explaining that HSUS hired an independent contractor to conduct an undercover operation at Bushway Packing Inc. in Grand Isle, Vermont, which involved instances of animal cruelty).

16. *Id.*

17. *Id.*

18. Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST (Jan. 30, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012903054.html>.

19. See Oppel, *supra* note 12 (describing the “swift response” of federal prosecutors and local authorities, as well as the disintegration of commercial partnerships, following the release of the videos).

20. Emily York, *McDonald’s Drops Egg Supplier over Animal Cruelty Report*, CHI. TRIB. (Nov. 18, 2011), [http://articles.chicagotribune.com/2011-11-18/news/chi-mcdonalds-drops-egg-supplier-over-animal-cruelty-report-20111118\\_1\\_egg-farmers-animal-welfare-egg-supplier](http://articles.chicagotribune.com/2011-11-18/news/chi-mcdonalds-drops-egg-supplier-over-animal-cruelty-report-20111118_1_egg-farmers-animal-welfare-egg-supplier).

21. *McDonald’s Cruelty: The Rotten Truth About Egg McMuffins*, YOUTUBE (Nov. 17, 2011), <http://www.youtube.com/watch?v=r6E8H3C1CrU>.

22. *Vermont Slaughterhouse Closed Amid Animal Cruelty Allegations*, L.A. TIMES (Nov. 3, 2009, 4:12 PM), <http://latimesblogs.latimes.com/unleashed/2009/11/vermont-slaughterhouse-closed-amid-animal-cruelty-allegations.html>.

23. Curran, *supra* note 15.

24. Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 679 (2010).

States gained access to the Hallmark/Westland plant in Chino, California.”<sup>25</sup>

Politicians and the agricultural industry have responded to these damaging exposés by aggressively pursuing ag-gag laws, which generally prohibit undercover filming of animal cruelty on factory farms.<sup>26</sup> The first laws resembling ag-gag laws appeared in Kansas, Montana, and North Dakota in the early 1990s.<sup>27</sup> Seven states—Utah, Iowa, North Dakota, Montana, Kansas, Missouri, and Idaho—now have ag-gag laws that criminalize hidden camera recording.<sup>28</sup> In 2013 alone, legislators in eleven states introduced ag-gag bills, although none passed.<sup>29</sup> As of February 2014, legislatures in three other states—Arizona, New Hampshire, and Indiana—were considering ag-gag laws.<sup>30</sup> There are three types of ag-gag laws: those that (1) prohibit recording an agricultural operation without the consent of its owner; (2) make it illegal to falsify a resume to gain employment at an agricultural facility; and (3) require anyone who suspects he or she has recorded animal cruelty to turn the recording over to the police.<sup>31</sup> Some states’ ag-gag laws fall into more than one of these categories;<sup>32</sup> indeed Utah’s law includes both recording and employment prohibitions but does not include a mandatory reporting requirement.<sup>33</sup>

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25. *Id.*

26. Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to “Ag-Gag” Laws*, 23 DUKE ENVTL. L. & POL’Y F. 377, 378 (2013); see Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS, 10960, 10962 (2012) (“Ag-gag laws are a response to increasingly effective and numerous undercover investigations on farms by animal activists.”).

27. See Dan Flynn, *Five States Now Have ‘Ag-Gag’ Laws on the Books*, FOOD SAFETY NEWS (Mar. 26, 2012), <http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books/> (explaining that Iowa and Utah were not the first states to pass ag-gag laws, as Kansas, Montana, and North Dakota passed ag-gag laws in 1990 and 1991).

28. Cindy Galli, *Turn Off that Camera! Idaho Gov Signs Tough ‘Ag-Gag’ Into Law*, ABCNEWS (Feb. 28, 2014), <http://abcnews.go.com/Blotter/turn-off-camera-idaho-gov-signs-tough-ag/story?id=22726424>; Dan Flynn, *Idaho Governor Signs ‘Ag-Gag’ Bill into Law*, FOOD SAFETY NEWS (Feb. 28, 2014), <http://www.foodsafetynews.com/2014/02/governor-otter-should-reconsider-idaho-ag-gag-bill-says-chobani-founder/>.

29. Galli, *supra* note 28.

30. *Id.*

31. Gabe Rottman, “Ag-Gag” Not Just about Animal Welfare, AM. CIVIL LIBERTIES UNION (May 3, 2013), <https://www.aclu.org/blog/free-speech/ag-gag-not-just-about-animal-welfare>. While it would seem that animal activists would support this last type, its effect is to make long-term investigations of animal cruelty impossible. *Id.*; see Sarah Damian, *Ag Gag 2013: A Continued Attempt to Silence Whistleblowers*, HUFFINGTON POST (Feb. 5, 2013), [http://www.huffingtonpost.com/food-integrity-campaign/food-industry-whistleblower-laws\\_b\\_2593152.html](http://www.huffingtonpost.com/food-integrity-campaign/food-industry-whistleblower-laws_b_2593152.html) (noting the many benefits of long-term investigations for the purpose of effecting change).

32. Rottman, *supra* at 31.

33. See UTAH CODE ANN. § 76-6-112(2) (West 2014) (prohibiting any person from knowingly or intentionally recording an image or sound from an agricultural operation without the consent of the

Proponents of ag-gag laws cite a variety of reasons for opposing what they call “industrial terrorism.”<sup>34</sup> Democrat John P. Kibbie of Iowa has stated that he supports ag-gag bills to “make producers feel more comfortable” in response to farmers’ fears that they “might be found in a compromising position.”<sup>35</sup> The chief executive of the Iowa Poultry Association has suggested another motivation behind the laws: “[T]hose willing to lie on an application might go further and stage fake videos, destroy equipment or carry diseases onto farms.”<sup>36</sup> Indeed, proponents of ag-gag laws sometimes claim that undercover investigations unfairly misrepresent conditions on factory farms: “Often the recordings capture episodes of animal abuse, which the industry claims are rare occurrences and thus, when published, misleading as representative of all farms.”<sup>37</sup> Some worry that activists may be able to convince disgruntled employees to stage animal abuse for filming in an attempt to embarrass the industry.<sup>38</sup>

Utah’s ag-gag bill was first introduced in February 2012<sup>39</sup> and was signed into law on March 20, 2012.<sup>40</sup> The law states that:

A person is guilty of agricultural operation interference if the person:

- (a) without consent from the owner of the agricultural operation, or the owner’s agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;
- (b) obtains access to an agricultural operation under false pretenses;

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owner, and prohibiting any person from applying for employment at an agricultural operation with the intent to record when the applicant knows that the owner of the operation prohibits such recording). A discussion of mandatory-reporting ag-gag laws is beyond the scope of this Note.

34. See Stephanie Armour, “Industrial Terrorism” of Undercover Livestock Videos Targeted, BLOOMBERG NEWS (Feb. 21, 2012), <http://www.businessweek.com/news/2012-02-21/-industrial-terrorism-of-undercover-livestock-videos-targeted.html> (explaining that proponents argue the depictions are misleading and that activists have misrepresented themselves to gain access to farms).

35. A.G. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. TIMES (Apr. 13, 2011), [http://www.nytimes.com/2011/04/14/us/14video.html?\\_r=0](http://www.nytimes.com/2011/04/14/us/14video.html?_r=0).

36. *Id.*

37. Dara Lovitz, *Clash at the Farmer’s Fence*, 35 PA. LAW. 36, 37 (2013).

38. See Lee Davidson, *Animal Rights Groups Seek Veto of Utah’s ‘Ag-Gag’ Bill*, SALT LAKE TRIB. (Mar. 9, 2012), <http://www.sltrib.com/sltrib/politics/53684910-90/activists-animal-bill-farm.html.csp> (reporting that the CEO of the Utah Farm Bureau stated that “ranchers worry that activists can cajole disgruntled employees ‘to manufacture circumstances to discredit animal agriculture operations’”).

39. H.B. 187, 59th Leg., Gen. Sess. (Utah 2012).

40. Robert Gehrke, *Herbert Signs So-Called ‘Ag-Gag’ Bill*, SALT LAKE TRIB. (Mar. 20, 2012), <http://www.sltrib.com/sltrib/politics/53758916-90/animal-bill-brown-farm.html.csp>.

- (c) (i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;
- (ii) 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
- (iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or
- (d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass . . . on the agricultural operation.<sup>41</sup>

Utah's law imposes a fine of up to \$2,500 and a prison sentence of up to one year on anyone who leaves a device to record images or sounds.<sup>42</sup> Similarly, the law imposes a fine of \$1,000 and a prison sentence of up to six months on anyone who obtains access to an agricultural operation under false pretenses, records images or sounds after applying for employment with an intent to record, or willfully records images or sounds without consent while committing trespass.<sup>43</sup> Utah senator and co-sponsor of Utah's ag-gag law, David Hinkins, stated that the purpose of the law was "to push back against animal rights groups bent on harming the livestock industry . . . ."<sup>44</sup> Hinkins also stated the bill targets people "who have no reason to be there except espionage, to spy on the operation" and "people

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41. UTAH CODE ANN. § 76-6-112(2) (West 2014).

42. See *id.* § 76-6-112(3) (providing that a person who "knowingly or intentionally" records an image or sound from an agricultural operation without the consent of the owner "is guilty of a class A misdemeanor"); *id.* § 76-3-204(1) (providing that a person convicted of a class A misdemeanor may be imprisoned "for a term not exceeding one year"); *id.* § 76-3-301(1)(c) (providing that a person convicted of a class A misdemeanor may be sentenced to pay a \$2,500 fine).

43. See *id.* § 76-6-112(4) (providing that a person who obtains access to an agricultural operation under false pretenses, records images or sound after applying for employment with an intent to record, or willfully records images or sound without consent while committing trespass "is guilty of a class B misdemeanor"); *id.* § 76-3-204(2) (providing that a person convicted of a class B misdemeanor may be imprisoned "for a term not exceeding six months"); *id.* § 76-3-301(1)(d) (providing that a person convicted of a class B misdemeanor may be sentenced to pay a \$1,000 fine).

44. Marjorie Cortez, *Bill to Prohibit Trespassing, Photographing at Agriculture Operations Heads to Final Passage*, DESERET NEWS (Mar. 6, 2012), <http://www.deseretnews.com/article/865551684/Bill-to-prohibit-trespassing-photographing-at-agriculture-operations-heads-to-final-passage.html>.

hired under false pretenses who are ‘working for activist companies.’”<sup>45</sup> The law remained unused for about a year, until Amy Meyer’s arrest in February 2013.<sup>46</sup> As noted above, Meyer’s arrest inspired the current lawsuit against the State of Utah, which seeks to declare the law an unconstitutional deprivation of Meyer’s First Amendment rights.

## II. STANDING

As a preliminary matter, all plaintiffs in federal court must have standing under Article III of the Constitution.<sup>47</sup> The standing requirement ensures that the court can hear the plaintiff’s case and prevents plaintiffs from bringing frivolous or speculative lawsuits.<sup>48</sup> To establish standing, an individual must have suffered an injury in fact that is fairly traceable to the defendant’s action and will likely be redressed by a favorable decision.<sup>49</sup> Federal courts also subject organizations to stringent standing requirements: The organization must show that its members would have standing to sue in their own right; the interests the group seeks to protect must be germane to the organization’s purpose; and the claim must not require participation of individual members.<sup>50</sup>

Both individual activists and animal protection groups have often found it difficult to establish standing.<sup>51</sup> A plaintiff cannot establish standing by proving only that an animal has suffered an injury; the plaintiff must show that he or she personally has suffered an injury.<sup>52</sup> Courts sometimes recognize injury when a plaintiff experiences distress as a result

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45. *Id.*

46. *See* Epstein, *supra* note 2 (noting that Meyer’s prosecution was the first under Utah’s ag-gag law).

47. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (stating that Article III “confines the judicial power of federal courts” to deciding cases and controversies and therefore requires federal litigants to demonstrate standing to invoke the court’s power).

48. Kristen Stuber Snyder, *No Cracks in the Wall: The Standing Barrier and the Need for Restructuring Animal Protection Laws*, 57 CLEV. ST. L. REV. 137, 143 (2009).

49. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

50. Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333, 343 (1977).

51. Snyder, *supra* note 48, at 150.

52. *Id.* at 144.

of witnessing an animal's injury,<sup>53</sup> but activists still struggle to demonstrate injury outside of this narrow context.<sup>54</sup>

Perhaps most relevant to the ag-gag context, activists have also tried to assert an "informational injury," meaning that a statute has undermined the plaintiff's ability to gather and disseminate information related to animal issues.<sup>55</sup> However, courts have held that an informational injury is generally not sufficient for purposes of standing.<sup>56</sup> The overall theme, especially in the environmental and animal rights contexts, appears to be that a mere interest in the subject matter of a case will not confer standing.<sup>57</sup> Moreover, even when activists have shown a cognizable interest, they have struggled to satisfy the causation and "redressed injury" requirements: Both the relationship between the plaintiff's injury and the defendant's action, and the likelihood that the injury will be redressed must be more than merely speculative.<sup>58</sup> Overall, standing presents one of the biggest challenges for activists seeking legal action on behalf of animals.<sup>59</sup>

Indeed, standing presents a serious challenge for the plaintiffs in *ALDF v. Herbert*, one they are not likely to overcome. Amy Meyer almost

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53. See, e.g., *Am. Soc'y For Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003) (reasoning that a former elephant caretaker had shown an injury in fact because he had an emotional attachment to the animals and witnessed their mistreatment); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 438 (D.C. Cir. 1998) (reasoning that a zoo patron had shown an injury in fact because he witnessed zoo animals that he regularly visited living under inhumane conditions).

54. See Snyder, *supra* note 48, at 150 (noting that individuals and organizational animal advocates still have great difficulty establishing standing because of the courts' extremely strict interpretation of standing requirements).

55. See Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1344–45 (2000) (detailing activists' attempt in *Animal Legal Def. Fund, Inc. v. Espy* to challenge the Animal Welfare Act's "narrow definition of animal," arguing that it undermined their ability to gather information on laboratory conditions).

56. *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 501–02 (D.C. Cir. 1994) ("Although informational injury satisfies the minimum requirements of Article III standing . . . it does not fall within the 'zone of interests' protected or regulated by the Animal Welfare Act.").

57. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself . . .").

58. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976) ("[I]t must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"); *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 936–37 (Fed. Cir. 1991) (holding that the organizations' general interest in preventing cruelty to animals was an insufficient injury, and that even if it were sufficient, the plaintiffs had not shown that the Commissioner of Patent and Trademark's interpretation of federal patent law caused the injury).

59. See Emily A. Beverage, Note, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Brothers*, 13 VAND. J. ENT. & TECH. L. 155, 161 (2010) ("[A] person seeking to employ the judicial process to protect animals routinely runs into the barrier of lacking standing.").

certainly would have been able to show a cognizable injury as a result of being charged with “agricultural operation interference” because the charge injured her reputation,<sup>60</sup> the injury was directly traceable to the state’s action,<sup>61</sup> and dropping the charges would at least partially redress her injury.<sup>62</sup> However, the charges have already been dropped, and Meyer may run into difficulty asserting a continuing injury if the state has already taken action that would likely redress it.<sup>63</sup> She could potentially claim an injury from witnessing the cows’ mistreatment while filming, but the cases that have recognized such an injury have only done so at least in part because the plaintiffs had an ongoing relationship with the abused animals and an intent to visit them again in the future.<sup>64</sup> In contrast, Meyer had never before seen the animals she filmed, so she would be unlikely to establish standing on that theory.

One hope for Meyer is that standing requirements are less stringent for First Amendment claims. Courts have allowed parties to bring overbreadth claims on the ground that the statute will be applied unconstitutionally to parties not before the court,<sup>65</sup> even if the litigant’s own activities are unprotected.<sup>66</sup> Some courts have gone so far as to say that, in First Amendment claims, “the inquiry tilts dramatically toward a finding of standing.”<sup>67</sup> However, the U.S. Supreme Court has cautioned that the party bringing the claim must assert “more than allegations of a subjective chill”; instead “[t]here must be a claim of specific present objective harm or a

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60. See *Lujan*, 504 U.S. at 560–61 (articulating the elements of standing).

61. *Id.*

62. *Id.*

63. Utah’s assistant attorneys general argue that “to challenge the validity of a criminal statute that is not being prosecuted requires that there be someone who is under a ‘real and immediate threat of future prosecution.’” Dan Flynn, *Utah Argues Plaintiffs Have No Standing to Challenge State’s New ‘Ag-Gag’ Law*, FOOD SAFETY NEWS (Oct. 17, 2013), <http://www.foodsafetynews.com/2013/10/plaintiffs-have-no-standing-to-challenge-utah-ag-gag-law/>.

64. *Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003) (“[The plaintiff] says he became attached to the elephants when he worked with them and would like to ‘visit’ them again ‘so that he can continue his personal relationship with them, and enjoy observing them.’”); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 432 (D.C. Cir. 1998) (“[The plaintiff] has made clear that he has an aesthetic interest in seeing exotic animals living in a nurturing habitat, and that he has attempted to exercise this interest by repeatedly visiting a particular animal exhibition to observe particular animals there.”).

65. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) (“[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’”).

66. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 834 (1980).

67. *Libertarian Party v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (quoting *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)).

threat of specific future harm.”<sup>68</sup> Meyer could easily claim that Utah’s law poses a threat to other animal activists who wish to film animal cruelty, but it is hard to say whether this claim would be sufficiently specific to warrant standing.

Even if Meyer successfully establishes standing on specific harm to third parties, the organizations in this case likely will face standing obstacles as well. The organizations, ALDF and PETA, certainly have a strong argument that their members would have standing to sue in their own right under an informational standing theory: Utah’s ag-gag law directly interferes with the members’ ability to gather and disseminate information regarding the treatment of animals on factory farms.<sup>69</sup> However, as noted above, courts do not recognize informational injuries for the purposes of standing.<sup>70</sup> The groups probably could show that their interest in protecting farm animals is germane to the organizations’ purpose. PETA and ALDF both include in their mission statements the goals of combating animal cruelty and advancing animal interests through public education, and PETA specifically includes cruelty investigations in that effort.<sup>71</sup> In addition, the claim does not require participation of individual members. However, the groups likely will have difficulty establishing that they have a cognizable injury in the first place, if they are able to at all.

### III. THE CONSTITUTIONAL ARGUMENTS

If the plaintiffs are able to surmount the standing obstacle, the court will proceed to analyze the plaintiffs’ constitutional claims. Many animal protection groups have opposed ag-gag laws from the beginning and have vowed to challenge their constitutionality should they take effect.<sup>72</sup> In *ALDF v. Herbert*, ALDF, PETA, and Amy Meyer have done just that by advancing two First Amendment challenges to Utah’s ag-gag law: overbreadth and impermissible content-based restriction.<sup>73</sup> Generally, a law is overbroad if it prohibits a substantial amount of speech that the First

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68. *Bigelow v. Virginia*, 421 U.S. 809, 816–17 (1975) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)) (internal quotation marks omitted).

69. See Sarah Damian, *Ag Gag 2013: A Continued Attempt to Silence Whistleblowers*, HUFFINGTON POST (Feb. 5, 2013), [http://www.huffingtonpost.com/foodintegrity-campaign/food-industry-whistleblowerlaws\\_b\\_2593152.html](http://www.huffingtonpost.com/foodintegrity-campaign/food-industry-whistleblowerlaws_b_2593152.html) (noting the many benefits of long-term investigations for the purpose of effecting change); UTAH CODE ANN. § 76-6-112 (West 2014).

70. *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 501–02 (D.C. Cir. 1994).

71. *Our Mission Statement*, PETA, <http://www.peta.org/about-peta/> (last visited Mar. 4, 2014); *About Us*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/about-us/> (last visited Nov. 20, 2014).

72. See Davidson, *supra* note 38 (noting that Mercy for Animals’ executive director has vowed to “challenge [Utah’s ag-gag law] all the way to the Supreme Court”).

73. Complaint, *supra* note 9, ¶ 15.

Amendment protects.<sup>74</sup> A law imposes an impermissible content-based restriction if: (1) it regulates speech based on its content, and (2) the restriction is not narrowly tailored to promote a compelling government interest.<sup>75</sup>

### A. Overbreadth

Courts will hold that a statute is unconstitutionally broad only if the statute prohibits a *substantial* amount of protected speech.<sup>76</sup> Courts look first to the language in the challenged statute to determine whether it “reaches too far.”<sup>77</sup> This high burden of proof is necessary to maintain a balance between competing social costs: “On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects.”<sup>78</sup> The risk of deterring protected speech was one of the primary reasons the U.S. Supreme Court developed the overbreadth doctrine in the first place, noting that, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”<sup>79</sup> However, courts have long considered the doctrine of overbreadth to be “strong medicine” and have used it “only as a last resort” when striking down laws as unconstitutional.<sup>80</sup>

#### 1. Overbreadth in *ALDF v. Herbert*

The plaintiffs begin their argument by establishing that the recording of images or sound is speech.<sup>81</sup> Like most overbreadth claims, the thrust of the

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74. *United States v. Williams*, 553 U.S. 285, 292 (2008).

75. *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”)).

76. *Williams*, 553 U.S. at 292.

77. *Id.* at 293.

78. *Id.* at 292.

79. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citations omitted).

80. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (“The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute . . . is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence . . .”).

81. Complaint, *supra* note 9, ¶ 114.

plaintiffs' argument is that the law reaches too much speech and too many people.<sup>82</sup> Specifically, the plaintiffs claim that Utah's ag-gag law "targets a wide range of politically salient speech," including speech related to animal welfare, worker safety, food safety, and illegal conduct.<sup>83</sup> The law also criminalizes the conduct of a large group of people, namely "any person or group that would seek to investigate an 'agricultural operation,'" including employees, journalists, concerned citizens,<sup>84</sup> labor organizations,<sup>85</sup> and federal officers.<sup>86</sup>

## 2. Overbreadth in Similar Cases

In *United States v. Stevens*,<sup>87</sup> Robert Stevens was convicted under 18 U.S.C. § 48, a federal statute that prohibits animal crush videos, for filming dogfights.<sup>88</sup> Although animal crush videos typically depict women crushing animals to death for the viewer's sexual titillation, the government applied the statute to Stevens's dogfighting business, in which he filmed dogs viciously attacking other animals.<sup>89</sup> The statute criminalized the act of creating, selling, or possessing a depiction of animal cruelty for commercial gain.<sup>90</sup> "Depiction of 'animal cruelty'" was defined as a portrayal "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place."<sup>91</sup> The statute also contained an exemptions clause, which allowed any depiction that had "serious religious, political, scientific, educational, journalistic, historical, or artistic value."<sup>92</sup>

Stevens moved to dismiss the charges, arguing that § 48 was facially invalid under the First Amendment.<sup>93</sup> The district court denied the motion, holding that depictions of animal cruelty subject to § 48 are categorically

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82. *See id.* ¶¶ 117–18 (listing the types of speech and those groups most directly affected by Utah's ag-gag law).

83. *Id.* ¶ 117.

84. *Id.* ¶ 118.

85. *Id.* ¶ 119.

86. *Id.* ¶ 120.

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

88. *Id.* at 466; 18 U.S.C. § 48 (2006) (amended 2010), *invalidated by* *United States v. Stevens*, 559 U.S. 460 (2010).

89. *Stevens*, 559 U.S. at 466–67.

90. *Id.* at 464–65.

91. *Id.* at 465 (quoting 18 U.S.C. § 48(c)(1) (2006)).

92. *Id.* (quoting 18 U.S.C. § 48(b) (2006)).

93. *Id.* at 467.

unprotected.<sup>94</sup> Although Stevens did not specifically raise an overbreadth challenge, the district court held that § 48 was not overbroad because the statute's exemptions clause narrowed its scope to constitutional applications.<sup>95</sup> The Third Circuit Court of Appeals reversed, holding that § 48 was facially unconstitutional, and vacated Stevens's conviction.<sup>96</sup> Although the court declined to hold § 48 unconstitutional on grounds of overbreadth, it suggested in a footnote that the statute "potentially covers a great deal of constitutionally protected speech."<sup>97</sup>

After declining to carve out a new category of unprotected speech, the U.S. Supreme Court held that § 48 was unconstitutionally overbroad.<sup>98</sup> First, the Court reasoned the statute did not require that the depiction of animal cruelty actually be cruel because, while the terms "maimed, mutilated [and] tortured" necessarily imply cruelty, the terms "wounded" or "killed" do not.<sup>99</sup> In response, the government argued that the terms "wounded" and "killed" imply cruelty when read according to the canon of *noscitur a sociis*, which states that ambiguous terms take on a more precise meaning when considered among the neighboring words.<sup>100</sup> The Court rejected this argument, holding that "wounded" and "killed" were not ambiguous and should be read according to their ordinary meaning.<sup>101</sup>

Second, the Court reasoned that the requirement that the cruelty be "illegal" did not sufficiently narrow the statute because many laws prohibiting certain treatment of animals do not prohibit animal cruelty.<sup>102</sup> In fact, the provision that made the depiction of animal cruelty illegal regardless of where it took place greatly expanded the law's application because certain depictions are legal in some states but not in others.<sup>103</sup> In other words, "[a] depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful."<sup>104</sup>

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94. *Id.*

95. *Id.*

96. *Id.* (citing *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008)).

97. *Id.* (quoting *United States v. Stevens*, 533 F.3d 218, 235 n.16 (3d Cir. 2008)).

98. *Id.* at 468, 482.

99. *Id.* at 474 (internal quotation marks omitted).

100. *Id.* at 474–75.

101. *Id.*

102. *Id.* at 475 ("Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules . . . can be designed to raise revenue, preserve animal populations, or prevent accidents.").

103. *Id.* at 475–76.

104. *Id.*

Third, the statute's exemptions clause did not sufficiently limit the statute because the term "serious" created too high of a threshold.<sup>105</sup> The government argued that "serious" included any material with "redeeming societal value"<sup>106</sup> or maybe even anything more than "scant social value,"<sup>107</sup> but the Court held that the term "serious" usually means "a good bit more" than that.<sup>108</sup> Moreover, the speech that escapes prohibition under the statute must fall into one of the enumerated categories, and the Court noted that a lot of speech does not.<sup>109</sup> Lastly, the Court noted that it would not uphold the statute simply because the government promised it would use sound "prosecutorial restraint" when enforcing the statute.<sup>110</sup>

In his dissent, Justice Samuel Alito took the majority to task for failing to follow the established principle that an overbreadth claim is a last resort.<sup>111</sup> Justice Alito argued that an overbreadth claim should be reserved for cases where the litigants are arguing only for the rights of third parties not before the court; such claims are generally inappropriate when the statute is unconstitutional as applied to the litigant.<sup>112</sup> However, because the majority chose to apply the overbreadth doctrine, Justice Alito continued his analysis by arguing that the law was not overbroad.<sup>113</sup> He noted that federal courts have a duty to construe a challenged statute as overbroad in a way that avoids constitutional problems.<sup>114</sup> In addition, courts must judge the degree of overbreadth in relation to the statute's "plainly legitimate sweep."<sup>115</sup> Section 48, he argued, did have a "substantial core" of permissible applications.<sup>116</sup> Justice Alito likened *Stevens* to *New York v. Ferber*,<sup>117</sup> in which the Court held that child pornography is not protected speech because creating child pornography involves committing a crime that inflicts severe injury on the subjects of the film, the crimes could not be combated without targeting the films themselves, and child pornography

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105. *Id.* at 478.

106. *Id.* (quoting Brief for the United States at 9, 16, 23, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769)).

107. *Id.* (quoting Reply Brief for the United States at 11, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769)).

108. *Id.*

109. *Id.*

110. *Id.* at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

111. *Id.* at 483 (Alito, J., dissenting).

112. *Id.* at 483–84 (Alito, J., dissenting).

113. *Id.* at 484.

114. *Id.* at 486 (quoting *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)).

115. *Id.* at 491 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)).

116. *Id.*

117. *New York v. Ferber*, 458 U.S. 747 (1982).

has almost no value.<sup>118</sup> Similarly, the conduct depicted in crush videos is criminal in all fifty states, it cannot reasonably be prevented without targeting the depictions, and the conduct's harm greatly outweighs any minimal value the depiction might have.<sup>119</sup> Despite this persuasive argument, the majority declined to follow Justice Alito's reasoning.

Courts have also considered overbreadth arguments in privacy law cases. In *Vera v. O'Keefe*,<sup>120</sup> the defendants, who were investigative journalists, visited the plaintiff, an employee of a low-income community organization, at his office.<sup>121</sup> Although the facts are rather sparse, it is undisputed that the defendants assured Vera their conversation would remain confidential.<sup>122</sup> In reality, however, the defendants were secretly videotaping the entire conversation.<sup>123</sup> Vera sued under the California Invasion of Privacy Act, which makes it a crime to record a confidential communication "intentionally and without the consent of all parties to . . . [the] confidential communication . . ."<sup>124</sup> The statute defines "confidential communication" as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties," and expressly excludes communications "made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties . . . may reasonably expect that the communication may be overheard or recorded."<sup>125</sup> Both defendants moved for judgment on the pleadings, with O'Keefe challenging the statute as overbroad.<sup>126</sup> The district court rejected this argument, finding that the requirement of a reasonable expectation that the conversation is not being overheard sufficiently narrowed the statute because it kept the statute from criminalizing all recordings.<sup>127</sup> The court specifically noted that this analysis applied in the case of "exposé news gathering" because newsgathering does not enjoy immunity from generally applicable laws, such as the California statute at issue.<sup>128</sup>

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118. *Id.* at 753, 759, 762–63.

119. *Stevens*, 559 U.S. at 495 (Alito, J., dissenting).

120. *Vera v. O'Keefe*, 791 F. Supp. 2d 959 (S.D. Cal. 2011).

121. *Id.* at 961.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 962.

126. *Id.* at 965.

127. *Id.* at 966–67.

128. *Id.* at 967.

### 3. Likelihood of Success in *ALDF v. Herbert*

The first issue the *Herbert* court will likely consider is whether the terms used to define the proscribed conduct are overbroad.<sup>129</sup> In *Stevens*, the Court looked to the breadth of the words used to define a “depiction of animal cruelty,” and determined that the statute was overbroad because the words did not require that the depiction actually be cruel.<sup>130</sup> Although the terms “maimed, mutilated [and] tortured” necessarily implied cruelty, the terms “wounded” or “killed” did not, and the statute therefore encompassed a substantial amount of protected speech.<sup>131</sup> Here, § 76-6-112(2)(a) prohibits the recording of any image or sound from an agricultural operation.<sup>132</sup> The statute’s prohibition of any “image” or “sound” is quite broad because the statute does not even define these terms, and without a narrowing definition, these terms encompass a great deal of protected speech. If the *Stevens* Court found the terms used to define “depiction of animal cruelty” to be insufficiently narrow, surely a lack of any definition suggests an overly broad prohibition.

If the court determines that the terms “image” and “sound” are not overbroad, the plaintiffs may have more success with the “false pretenses” language in § 76-6-112(2)(b). That section prohibits anyone from obtaining access to an agricultural operation under “false pretenses.”<sup>133</sup> Again, the statute fails to define this term. In addition, the court may be more likely to reject the “false pretenses” provision as overbroad because it does not amount to the types of false statements, such as fraud, defamation, and perjury, that the U.S. Supreme Court has held are unprotected. In *United States v. Alvarez*, the Court stated that the prohibitions on fraud, defamation, and perjury do not extend to all false statements.<sup>134</sup> The Court distinguished statements that simply contain a false statement with statements where the falsity causes a legally cognizable harm, and noted that the prohibition on the latter type “does not lead to the broader proposition that false statements are unprotected when made to any person,

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129. See *United States v. Williams*, 553 U.S. 285, 293 (2008) (“The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”).

130. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

131. *Id.*

132. UTAH CODE ANN. § 76-6-112(2)(a) (West 2014).

133. *Id.* § 76-6-112(2)(b).

134. See *United States v. Alvarez*, 132 S. Ct. 2537, 2545–46 (2012) (explaining that the restrictions on fraud, defamation, and perjury “do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny”).

at any time, in any context.”<sup>135</sup> Here, the false pretenses provision broadly prohibits gaining access to an agricultural facility under false pretenses, without defining this term or in any way narrowing it to falsities that cause a legally cognizable harm. Thus, the court may find the false pretenses provision to be overbroad because it prohibits a wide range of false statements, including those that do not rise to the level of fraud, defamation, or perjury.

On the other hand, the plaintiffs may run into a problem defending the right to lie in light of *Food Lion v. Capital Cities/ABC, Inc.*, which held, among other things, that two undercover reporters breached their duty of loyalty to Food Lion when they falsified resumes to gain employment and subsequently filmed unsanitary food-processing practices.<sup>136</sup> However, that case differed from *Herbert* in several significant respects. The most obvious example is that *Food Lion* involved a tort claim<sup>137</sup> while the statute at issue here imposes criminal liability. In addition, the court’s breach-of-loyalty analysis in *Food Lion* focused on the fact that the employees had acted adversely to their second employer—Food Lion—for the benefit of their original employer—ABC News.<sup>138</sup> Here, the statute imposes criminal liability regardless of the person’s employment at adverse organizations. Whether or not the court will find these distinctions material is difficult to predict, but they suggest that *Food Lion*, although often recognized as a formidable obstacle to recording on private property under false pretenses, may not necessarily be controlling precedent.

The second issue the *Herbert* court likely will consider is whether any language exists in the statute to sufficiently narrow its scope to constitutional applications. In *Stevens*, the Court considered both the statute’s requirement that the conduct be “illegal” and its inclusion of an exemptions clause for this purpose.<sup>139</sup> The Court determined that neither provision sufficiently narrowed the statute because many laws that make certain treatment of animals illegal do not prohibit animal cruelty, and the use of the term “serious” in the exemptions clause created too high of a threshold.<sup>140</sup> Here, the only terms that could possibly be construed as limiting are “records” and “agricultural operation,” which limit the proscribed speech to recordings that take place in a defined area.<sup>141</sup>

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135. *Id.* at 2546.

136. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510, 516 (4th Cir. 1999).

137. *Id.* at 515.

138. *Id.* at 516.

139. *United States v. Stevens*, 559 U.S. 460, 475, 478 (2010).

140. *Id.*

141. UTAH CODE ANN. § 76-6-112 (West 2014).

However, these limitations do not make the statute constitutional because specifying the method of obtaining the information does not make the speech any less protected or any less proscribed, and the fact that the statute applies only to certain locations does not make it any less prohibitive of protected speech under an overbreadth analysis. Additionally, § 76-6-112 does not even contain an exemptions clause.<sup>142</sup> If the Court in *Stevens* found the terms used in the exemptions clause to be insufficiently narrow, a lack of any exemptions clause suggests an overly broad prohibition.

However, it is important to note that some commentators have questioned the precedential weight of *Stevens*, with one going so far as to say that *Stevens* was decided in a “highly unusual manner by limiting existing precedent.”<sup>143</sup> The Court did not regard the overbreadth doctrine as a last resort, as required by *Broadrick v. Oklahoma*.<sup>144</sup> The lower court had not considered an overbreadth challenge, so the U.S. Supreme Court’s inclusion of an overbreadth challenge seemed “hasty” on appeal.<sup>145</sup> In addition, the Court focused its analysis solely on the statute’s unconstitutional applications.<sup>146</sup> It is a settled principle of construction that a court should not hold a law unconstitutional unless it first determines that a “validating construction” cannot save the law.<sup>147</sup> Yet, the *Stevens* court failed to consider any validating constructions of § 48, choosing instead to analyze only its unconstitutional applications.<sup>148</sup>

The Court’s alleged failure in *Stevens* to regard the overbreadth doctrine as a last resort is not a concern here. The plaintiffs specifically assert an overbreadth claim, so the court need not worry about appearing “hasty” by considering this claim. However, it is worth remembering that courts regard the overbreadth doctrine as “strong medicine” and will not strike down a law if a limiting construction could save the challenged statute.<sup>149</sup> Indeed, the Court’s alleged failure to consider potentially validating constructions of § 48 is one challenge to its precedential

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142. *See id.* (setting forth various prohibitions without any exceptions).

143. Christopher A. Pierce, Note, *The “Strong Medicine” of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo*, 64 FED. COMM. L.J. 177, 183 (2011).

144. Meredith L. Shafer, Note, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of “Entertainment”*, 19 VILL. SPORTS & ENT. L.J. 281, 330 (2012).

145. *Id.*

146. *Id.* at 329.

147. *Id.* (quoting Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1067 (1997)).

148. *Id.*

149. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

weight.<sup>150</sup> Here, the only validating construction that could save § 76-6-112 is one that limits the terms “record,” “image,” and “sound” so as to avoid proscribing a substantial amount of protected speech. However, the statute’s failure to define these terms again becomes a problem because the court may be unable to interpret the terms in a way that sufficiently narrows them. The court may not rewrite the statute so as to save it from an overbreadth challenge, and anything less than adding definitions to clarify the scope likely will not save the statute.

Others have noted that *Stevens*’s precedential weight is especially unclear when applied to ag-gag laws due to critical differences between undercover filming and dogfighting videos.<sup>151</sup> First, the holding in *Stevens* applied only to the sale of depictions of animal cruelty, whereas undercover films are distributed for free to educate the public.<sup>152</sup> Further, *Stevens* did not involve property rights, whereas ag-gag laws arguably implicate property rights.<sup>153</sup> Activists film ag-gag videos without the farm owner’s permission, and their actions can involve an element of trespass, whereas people generally film dogfighting with the property owner’s permission.<sup>154</sup> Nonetheless, the principles of the overbreadth analysis and the Court’s application of these principles to the statutory language in *Stevens* remain relevant regardless of factual differences between the two cases. The Court has long compared cases that implicate different issues when conducting overbreadth analyses because the doctrine applies to all types of statutes.<sup>155</sup>

Before concluding, it is worth noting that the reasoning in *Vera v. O’Keefe* is also helpful here.<sup>156</sup> Although that case did not involve animal issues, it is analogous because it involved undercover filming on private property, and it serves as a helpful example of the kind of language that a court found sufficiently limiting. While the definition of “confidential communication” in *Vera* limited the statute’s application only to situations where the parties had a reasonable expectation that the conversation was not being overheard, § 76-6-112 contains no such limitation. The court in *Vera* found it significant that the statute did not criminalize all recordings,

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150. See Shafer, *supra* note 144, at 329 (arguing that the *Stevens* Court’s failure to consider any validating constructions of § 48 “was inconsistent with precedent”).

151. Landfried, *supra* note 26, at 381–82.

152. *Id.* at 382.

153. *Id.*

154. *Id.*

155. See *United States v. Williams*, 553 U.S. 285, 293 (2008) (comparing a case about mailing unsolicited sexually explicit material to defendant’s conviction under a child pornography statute); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (using *Broadrick* in the Court’s analysis of a trespass statute); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (comparing a law regulating federal employees’ political activities to a law regulating state employees’ political activities).

156. See *supra* notes 121–28 and accompanying text (discussing the reasoning in *Vera*).

but that is exactly the situation here: § 76-6-112 prohibits all recordings of any image or sound from the agricultural operation. In other words, unlike the statute in *Vera*, § 76-6-112 does not include any limits that could restrict it to only constitutional applications.

*Vera* is also useful because it raises the issue of privacy, which is often infringed when people film undercover. *Vera*'s choice to sue under California's Invasion of Privacy Act shows that he felt his privacy had been invaded and is analogous to the ag-gag context because many proponents of ag-gag laws argue they are necessary to ensure farmers' privacy.<sup>157</sup> However, as *Vera* shows, the right to privacy is not unconditional. In fact, one court recently stated that "[t]he right to privacy is not absolute; it is qualified by the rights of others, and it is also limited by society's right to be informed about legitimate subjects of public interest."<sup>158</sup> The court's recognition of the right of others to remain informed is particularly apt in the ag-gag context. Agricultural operations implicate issues of food safety and animal welfare that are critical to the public's health and its interest in maintaining a moral society that does not condone animal cruelty. Courts have restricted individuals' privacy to accommodate the rights of others, and the *Herbert* court should feel free to do the same.

In sum, the text of Utah's ag-gag statute suggests that the plaintiffs will likely be successful on their overbreadth claim. The statute's prohibition of any image or sound is exceedingly broad because it does not define "image" or "sound." Even if the court determines these terms are not overbroad, the plaintiffs may have more success with the "false pretenses" language because the Court has affirmed that the underlying speech—lying (short of fraud, defamation, perjury, or any other false statement that causes a legally cognizable harm)—is protected.<sup>159</sup> Including the terms "records" and "agricultural operation" does not sufficiently narrow the statute because specifying the method of obtaining and expressing the information does not make the speech any less protected or any less proscribed and limiting the statute to certain locations does not make it any less prohibitive of protected speech under an overbreadth analysis. Moreover, § 76-6-112 does not contain any definitions or exemptions clauses carving out exceptions to its proscription of speech. The *Herbert* court may be wary of striking down § 76-6-112 because overbreadth is "strong medicine," but the court is still likely to do so because no limiting construction saves the statute.

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157. See Cortez, *supra* note 44 (explaining that the cosponsor of Utah's ag-gag law supports the bill as a way to fight back against those who "spy" on farmers).

158. *Beckett v. Serpas*, 112 So. 3d 348, 352 (La. Ct. App. 2013).

159. *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012).

*B. Content-Based Discrimination*

The *Herbert* plaintiffs also assert that § 76-6-112 is an impermissible content-based restriction on speech.<sup>160</sup> Laws that prohibit certain speech based on its ideas or views are content-based.<sup>161</sup> Content-based laws must meet strict scrutiny, meaning they “must be narrowly tailored to promote a compelling Government interest.”<sup>162</sup> If an alternative that restricts less speech would serve the government interest equally well, the legislature must use the alternative.<sup>163</sup> In other words, a content-based restriction is only acceptable if less restrictive alternatives would not be as effective in achieving the government interest.<sup>164</sup> The government has the burden of proving that the alternatives will not be as effective.<sup>165</sup> A party does not have to show that the law has a content-based purpose in order to show that it is content-based.<sup>166</sup> In fact, proving that a law has a content-neutral purpose will not change its content-based effect.<sup>167</sup> In contrast, laws are content-neutral if they operate without reference to the content of the restricted speech.<sup>168</sup> Content-neutral restrictions are subject to intermediate scrutiny, meaning they must be substantially related to “important governmental interests unrelated to the suppression of free speech.”<sup>169</sup> Laws that regulate the time, place, or manner in which protected speech may be expressed are permissible as long as they are content-neutral.<sup>170</sup>

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160. See Complaint, *supra* note 9.

161. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”).

162. *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

163. *Id.*

164. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

165. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004).

166. *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (“But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.”).

167. *Id.* at 642–43 (“Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.”).

168. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

169. *Turner Broad. Sys., Inc.*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

170. *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication . . . .’”)).

### 1. Content-Based Discrimination in *ALDF v. Herbert*

The plaintiffs claim Utah's ag-gag law is a content-based restriction because it "singles out recording the activities of agricultural operations for special, discriminatory treatment."<sup>171</sup> Comments made by the law's sponsors, mentioned earlier, make clear that the purpose of the law is to "suppress the message of national animal protection groups,"<sup>172</sup> and, therefore, "the law ensures that only one side of the debate on food safety and animal welfare is raised."<sup>173</sup> The restriction is particularly harmful because it prohibits activists from engaging in speech that "is of the utmost public concern."<sup>174</sup> The plaintiffs also observe that Utah has not limited whistleblowing in other "highly regulated" industries—such as health care, defense, and banking—suggesting that the law is truly intended to restrict animal activists' ability to express their viewpoints.<sup>175</sup> The plaintiffs conclude by claiming that the law does not survive strict scrutiny because it is not narrowly tailored to a compelling government interest.<sup>176</sup>

### 2. Content-Based Discrimination in Similar Cases

In *Stevens*,<sup>177</sup> the U.S. government attempted to defend § 48, the "crush video" statute, by arguing that depictions of animal cruelty should be considered an unprotected class of speech under the First Amendment.<sup>178</sup> The government proposed a balancing test for designating categories of speech as unprotected: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."<sup>179</sup> The Court declined to recognize depictions of animal cruelty as an unprotected class—calling the proposed test "startling and dangerous"—and held that § 48 was a content-based restriction.<sup>180</sup> The Court reasoned that § 48 "explicitly regulates expression based on content" because it "restricts 'visual [and] auditory depiction[s],' such as photographs, videos, or sound recordings, depending on whether

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171. Complaint, *supra* note 9, ¶ 128.

172. *Id.* ¶ 129.

173. *Id.* ¶ 132.

174. *Id.* ¶ 130.

175. *Id.* ¶ 131.

176. *Id.* ¶ 133.

177. *United States v. Stevens*, 559 U.S. 460 (2010); see *supra* Part III.A.2 (discussing the Supreme Court's reasoning in *Stevens*).

178. *Stevens*, 559 U.S. at 468.

179. *Id.* at 470.

180. *Id.* at 468, 470.

they depict conduct in which a living animal is intentionally harmed.”<sup>181</sup> The Court went on to explain that the existence of a content-based restriction rendered the statute “presumptively invalid” and put the burden on the government to rebut that presumption.<sup>182</sup>

In *Showing Animals Respect & Kindness v. West Hollywood*,<sup>183</sup> the plaintiff animal rights organization drove a truck with four video screens mounted on its sides that depicted people injuring or killing animals.<sup>184</sup> Below the screens were signs containing messages that protested animal cruelty.<sup>185</sup> Plaintiff Steve Hindi received a citation for violating a city ordinance that prohibits conducting any mobile billboard advertising in public places within the city.<sup>186</sup> The plaintiff challenged the constitutionality of the ordinance, claiming it was an impermissible content-based restriction.<sup>187</sup> The California Court of Appeals disagreed, holding that the ordinance was a content-neutral time, place, and manner regulation because the full text of the ordinance states that it does not apply to “[a]ny vehicle which displays an advertisement or business identification of its owner, so long as such vehicle is engaged in the usual business or regular work of the owner, and not used merely, mainly or primarily to display advertisements.”<sup>188</sup> The court reasoned that this provision made the ordinance a content-neutral restriction because the manner in which a person drives the vehicle determines whether the conduct violates the ordinance.<sup>189</sup> In addition, the ordinance’s inclusion of the words “carries,” “conveys,” “pulls,” and “transports” in its definition of “mobile billboard advertising” showed that the ordinance was concerned with the speaker’s acts and not the content of the speech.<sup>190</sup>

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181. *Id.* at 468 (quoting 18 U.S.C. § 48 (2006)).

182. *Id.* (quoting *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803, 817 (2000)).

183. *Showing Animals Respect & Kindness v. W. Hollywood*, 83 Cal. Rptr. 3d 134 (Cal. Ct. App. 2008).

184. *Id.* at 136–37.

185. *Id.*

186. *Id.* at 137.

187. *Id.* at 140.

188. *Id.* (emphasis omitted).

189. *Id.* (“[T]he vehicle does violate the ordinance if the vehicle is driven ‘merely, mainly or primarily to display advertisements.’”).

190. *Id.*

The court further held that the restriction was permissible because it was narrowly tailored to a significant government interest.<sup>191</sup> The purpose of the ordinance was “to promote the safe movement of vehicular traffic, to reduce air pollution, and to improve the aesthetic appearance of the city,” and the court found that the ordinance served these significant government interests because they would be achieved less effectively without the restriction.<sup>192</sup> Furthermore, the ordinance left open ample alternative channels for communication, such as advertisements on buses and in newspapers, mailings, and speeches in public places.<sup>193</sup>

### 3. Likelihood of Success in *ALDF v. Herbert*

Because the U.S. Supreme Court declined to recognize depictions of animal cruelty as an unprotected class of speech, the *Herbert* court will have to determine whether § 76-6-112 constitutes an impermissible content-based restriction. In *Stevens*, the Court held that § 48 was a content-based restriction because it restricted visual and auditory depictions based on whether a living animal was intentionally harmed.<sup>194</sup> Specifically, § 48 defined the proscribed “animal crush videos” as recordings that depict “actual conduct in which [one] or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury. . . .”<sup>195</sup>

Here, the plaintiffs likely will struggle to show that § 76-6-112 regulates speech based on its content because the statute does not specifically define the content of the proscribed recordings. Section 76-6-112 states only that “[a] person is guilty of agricultural operation interference if the person . . . without consent from the owner of the agricultural operation, or the owner’s agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation.”<sup>196</sup> The fact that § 76-6-112 narrows the proscribed recording to agricultural operations suggests a content-based restriction because any recording on an agricultural operation

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191. *Id.* The court used the “narrowly tailored” test even though “substantially related” is usually all that is required for content-neutral restrictions. *Id.*; accord *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

192. *Showing Animals Respect & Kindness*, 83 Cal. Rptr. 31 at 141.

193. *Id.* at 142.

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

195. 18 U.S.C. § 48 (2006).

196. UTAH CODE ANN. § 76-6-112(2)(a) (West 2014).

will necessarily involve images or sounds of farm animals, the conditions they live in, or the treatment they receive from farm employees. However, the lack of more specific language modifying “image” and “sound” in § 76-6-112 means that the statute does not “explicitly regulate[ ] expression based on content,”<sup>197</sup> as § 48 did. Because the court will likely determine the statute is not a content-based restriction, the court will not treat it as presumptively invalid, and the government will not have to rebut the presumption.

The complaint raises several facts that suggest a content-based purpose behind § 76-6-112, with the implication that these facts make the statute content-based. For example, the complaint alleges that comments made by the law’s sponsors make clear that its purpose is to “suppress the message of national animal protection groups”<sup>198</sup> and that Utah has not limited whistleblowing in other “highly regulated” industries, suggesting that the intent behind § 76-6-112 is to restrict animal activists’ ability to express their viewpoints.<sup>199</sup> Although these facts do suggest a content-based purpose, directing the court’s attention to the statute’s alleged purpose may actually cut against the plaintiffs’ claims. Courts have tended to consider the purpose behind a law only when that law appears content-based, and the court is determining whether the law should actually be construed as content-neutral.<sup>200</sup> Given that the language of the statute is neutral, proof of its alleged purpose will not render it content-based, and the plaintiffs’ reliance on this alleged purpose suggests they have a weak content-based claim.

*Showing Animals Respect & Kindness v. West Hollywood* raises the possibility that the court will decline to hold § 76-6-112 as a content-based restriction by declaring it a content-neutral time, place, and manner regulation. In *Showing Animals Respect & Kindness*, the court found that a city ordinance that prohibited mobile billboard advertising was a permissible time, place, and manner regulation because the manner in which a person drives a vehicle determines whether the conduct violates the

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197. *Stevens*, 559 U.S. at 468 (2010).

198. Complaint, *supra* note 9, ¶ 129.

199. *See id.* ¶ 131 (listing those regulated industries in which whistle blowing activities are not limited by state law).

200. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–50 (1986) (upholding an ordinance that prohibited adult movie theaters in certain neighborhoods because the city’s purpose in enacting the ordinance was to preserve the quality of urban life); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1374 (2006) (arguing that *Renton v. Playtime Theatres, Inc.* and *Boos v. Barry* established that a content-neutral government purpose could save a content-based law).

ordinance.<sup>201</sup> The court further held that the ordinance's inclusion of the words "carries," "conveys," "pulls," and "transports" in its definition of "mobile billboard advertising" showed that the ordinance was concerned with the speaker's acts and not the content of the speech.<sup>202</sup>

Section 76-6-112's terms similarly focus on the speaker's acts, suggesting the court may construe the statute as a time, place, and manner regulation. Section 76-6-112 prohibits a person from "leaving a recording device on the agricultural operation," "obtain[ing] access to an agricultural operation under false pretenses," or "appl[y]ing for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation."<sup>203</sup> Under the reasoning in *Showing Animals Respect & Kindness*, § 76-6-112's focus on the way in which activists obtain their images and sound, as opposed to the content of the images and sound, suggests the *Herbert* court may hold that the statute is a time, place, and manner regulation. The fact that the statute does not contain language to show that it "explicitly regulates expression based on content" further supports this result.

If the court does find § 76-6-112 to be a time, place, and manner regulation, it would also have to find that the statute was substantially related to an important government interest in order to uphold it.<sup>204</sup> In *Showing Animals Respect & Kindness*, the court found that the statute's stated purposes of promoting traffic safety and reducing pollution were significant government interests, and the statute was narrowly tailored to these purposes because they would be achieved less effectively without the statute.<sup>205</sup> Section 76-6-112 does not have a stated purpose section, but comments made by the law's sponsors suggest the court would find that its purpose is protecting farmers' property and privacy rights.<sup>206</sup> Especially in a state that relies so heavily on agriculture, the court likely would hold that interest to be significant, and the interest would be achieved less effectively without the statute.

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201. *Showing Animals Respect & Kindness v. W. Hollywood*, 83 Cal. Rptr. 3d 134, 141 (Cal. Ct. App. 2008).

202. *Id.* at 140.

203. UTAH CODE ANN. § 76-6-112 (West 2014).

204. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) (explaining that content-neutral laws are subject to intermediate scrutiny).

205. *Showing Animals Respect & Kindness*, 83 Cal. Rptr. 3d. at 142.

206. UTAH CODE ANN. § 76-6-112(1) (West 2014).

Also, the state may rely heavily on the fact that § 76-6-112 applies only to private property in rebutting the plaintiffs' claims. Unlike most time, place, and manner regulations, which restrict speech in public or quasi-public areas, § 76-6-112 prohibits filming only on agricultural operations, which the statute defines as "private property used for the production of livestock, poultry, livestock products, or poultry products."<sup>207</sup> In response, the plaintiffs may be able to rely on the reasoning from *State v. Shack*.<sup>208</sup> In that case, a doctor and a lawyer from two nonprofits aimed at aiding migrant farmworkers entered a private farm to perform respective medical and legal services for the migrant workers living there.<sup>209</sup> The farm owner confronted them and subsequently brought suit for trespass under a New Jersey statute.<sup>210</sup> The New Jersey Supreme Court reversed their convictions,<sup>211</sup> holding that their act of entering the farm was beyond the statute's reach because the fact that migrant farmworkers are a "highly disadvantaged segment of our society" limited the owner's property rights.<sup>212</sup> The court stated that "the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity."<sup>213</sup>

Here, the plaintiffs could make an argument that the animals on factory farms are a highly disadvantaged segment of society and that the necessity to their welfare of filming abuse should restrict the farm owners' property rights. The obvious difference between the two cases is that the "occupants" in *Shack* were humans and the "occupants" here are animals. For that reason, the court may decline to extend the reasoning in *Shack* to this case. Yet, the policy arguments behind the two cases are quite similar: Both occupants' welfare depend in large part on the ability of outsiders to enter onto the private property in which they reside. The plaintiffs should be open to raising this argument because there is at least some support for limiting private property rights for the sake of the occupants' welfare.

Returning to the time, place, and manner analysis, the statute would likely fail the last requirement: Time, place, and manner regulations must

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207. *Id.*

208. *See State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (reasoning that an individual's real property rights may be limited when his or her title includes dominion over persons residing on the property whose "well-being must remain the paramount concern of a system of law").

209. *Id.* at 370.

210. *Id.* at 370-71.

211. *Id.* at 375.

212. *Id.* at 372, 375.

213. *Id.* at 372.

leave open ample alternative channels of communication.<sup>214</sup> In *Showing Animals Respect & Kindness*, the court found that the group had alternative channels of communication because the fact that the proscribed channel was the most cost-effective and visible channel through which the group could broadcast its images did not mean it was the *only* sufficient channel.<sup>215</sup> In the ag-gag context, the situation is quite different: Prohibiting activists from filming the conditions on factory farms ensures there are *no* other channels through which they can broadcast their images. Ag-gag laws prohibit people from obtaining the images in the first place because activists cannot obtain them anywhere other than the agricultural operation.

In sum, the *Herbert* court will likely decline to hold that the statute imposes a content-based restriction. Section 76-6-112 does not specifically define the content of the proscribed recordings. As compared to § 48's explicit content-based restriction, the lack of specific language modifying "image" and "sound" in § 76-6-112 suggests that the statute is not focused on the content of the recordings. The complaint raises several facts that suggest a content-based purpose behind § 76-6-112, but a law's alleged purpose does not make it content-based. The terms in § 76-6-112 focus on the speaker's acts, suggesting the court could attempt to construe the statute as a time, place, and manner regulation. However, the court would likely invalidate the statute because it does not leave open ample alternative channels of communication.

#### IV. THE POLICY ARGUMENTS: WHY WHISTLEBLOWERS ARE ESSENTIAL IN PROTECTING ANIMAL WELFARE

Whether or not the plaintiffs in *ALDF v. Herbert* are ultimately successful, there are numerous reasons why courts should protect animal activists' right to film in factory farms. Whistleblowers are vital to animal protection groups because no laws currently exist that specifically protect farm animals,<sup>216</sup> and factory farm workers are unlikely to report abuse.<sup>217</sup>

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214. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

215. *Showing Animals Respect & Kindness v. W. Hollywood*, 83 Cal. Rptr. 3d 134, 142 (Cal. Ct. App. 2008).

216. Amy Mosel, Comment, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 139 (2001); see Amy B. Draeger, *More than Property: An Argument for Adoption of the Universal Declaration on Animal Welfare*, 12 DRAKE J. AG. L. 277, 279 (2007) ("Where federal animal welfare law exists in the United States today, it excludes or insufficiently protects farm animals."). The Animal Welfare Act specifically excludes "other farm animals" from its definition of the word "animal." *Id.*

Those who do speak up are often “met with swift and strong retaliatory actions.”<sup>218</sup> Of particular concern among many workers is the threat of deportation: “The enterprises with the worst records of food-safety and animal-cruelty violations have long been the target of immigration officials.”<sup>219</sup> Even USDA workers are unlikely to report abuse, as they often have their own incentives to keep quiet.<sup>220</sup> In one example, Dr. Dean Wyatt, supervisory public health veterinarian for the USDA’s Food Safety and Inspection Service, witnessed abuse including conscious animals being shackled to conveyor lines and crushed to death while being unloaded from trucks.<sup>221</sup> When Dr. Wyatt reported these abuses, he was demoted and transferred to Bushway Packing, where he observed additional abuses and was again reprimanded for his attempts to enforce compliance with USDA regulations.<sup>222</sup>

This regulatory scheme leaves a gap that animal activists successfully fill when they film undercover.<sup>223</sup> As detailed in Part I, undercover investigations have led directly to the largest meat recalls in the United States and the closure of several abusive slaughterhouses.<sup>224</sup> However, the man behind one of HSUS’s investigations aptly points out that “without investigations like the ones I did in Iowa, the impetus behind this progress would be gone.”<sup>225</sup> Specifically with regard to food safety, one commentator asks: “If the industry will not police itself, and forms of whistleblowing are criminalized, how can consumers possibly have confidence that the food they are consuming is safe?”<sup>226</sup> Many animal welfare groups simply do not have any other tools that are as effective as recorded images of animal cruelty, and the public loses out on valuable information if this channel of information is foreclosed.

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217. See Hill, *supra* note 24, at 675–76 (noting that factory farm workers cannot be expected to report abuse because of deportation threats).

218. *Id.* at 675.

219. *Id.* at 676.

220. *Id.*

221. *Id.*

222. *Id.*

223. See Oppel, *supra* note 12 (describing the “swift response” of federal prosecutors and local authorities, as well as the disintegration of commercial partnerships, following the release of undercover videos from factory farms).

224. See *supra* Part I.

225. 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/>.

226. Sonci Kingery, *The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 680 (2012).

Indeed, courts have recognized the importance of the public's access to this valuable information. In *Ouderkirk v. People for the Ethical Treatment of Animals*,<sup>227</sup> the court upheld two PETA activists' right to film euthanasia on a chinchilla farm, holding that the activists "had a constitutional right to report on matters of public concern."<sup>228</sup> Although that case may be distinguishable from the ag-gag context because the activists obtained consent before filming, the court stated that "[t]he methods and practices of raising and destroying animals, especially for commercial purposes, has been recognized as a matter of public concern."<sup>229</sup> The farm owners argued, like proponents of ag-gag laws, that the filming went beyond simply reporting on matters of public concern because the activists had invaded the farmers' privacy.<sup>230</sup> The court, however, rejected this claim, holding that the film did not disclose sufficiently "personal and intimate" details to overcome the public's interest in the material or the activists' First Amendment rights.<sup>231</sup>

The publication of this information is especially important given the public's misconceptions about the conditions on factory farms. Numerous public polls demonstrate that the majority of American consumers at least claim to care about the conditions under which farm animals live.<sup>232</sup> Consumers support this claim by stating that they would purchase animal products with a "humanely raised" label<sup>233</sup> and would be willing to pay more for meat they believed had been ethically raised.<sup>234</sup> However, a

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227. *Ouderkirk v. PETA*, No. 05-10111, 2007 WL 1035093 (E.D. Mich. March 29, 2007).

228. *Id.* at \*18.

229. *Id.* at \*19.

230. *Id.* at \*18.

231. *Id.* at \*20.

232. See *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST., [https://awionline.org/sites/default/files/uploads/documents/fa-consumer\\_perceptionsoffarmwelfare\\_112511.pdf](https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_112511.pdf) (last visited Nov. 24, 2014) (summarizing research on consumer perception of farm animals); K. Grimshaw et al., *Consumer Perception of Beef, Pork, Lamb, Chicken, and Fish*, 96 MEAT SCI. 443, 443-44 (2014) (reporting that 69% of consumers stated animal welfare was somewhat important, very important, or extremely important to them); Jayson L. Lusk et al., *Consumer Preferences for Farm Animal Welfare: Results of a Nationwide Telephone Survey 13* (Aug. 17, 2007) (unnumbered working paper), <http://asp.okstate.edu/baileynorwood/bailey/research/initialreporttoafb.pdf> (finding that 95% of respondents agreed with the following statement: "It is important to me that animals on farms are well cared for").

233. See HUMANE HEARTLAND FARM ANIMAL WELFARE SURVEY, AM. HUMANE ASS'N (2013), available at <http://www.americanhumane.org/assets/humane-assets/humane-heartland-farm-animals-survey-results.pdf> (reporting that consumers ranked a "humanely raised" label as more important than "organic," "natural," or "antibiotic free" labels).

234. See ETHICAL FOOD: A RESEARCH REPORT ON THE ETHICAL CLAIMS THAT MATTER MOST TO FOOD SHOPPERS AND HOW ETHICAL CONCERNS INFLUENCE FOOD PURCHASES, CONTEXT MKTG 6 (2010), available at <http://www.contextmarketing.com/sources/feb28-2010/ethicalfoodreport.pdf>

disconnect exists between the public's desire to treat animals humanely and its access to information that would allow them to bring this desire to fruition. The vast majority of Americans will never set foot on an agricultural operation or otherwise see the conditions under which factory farm animals live.<sup>235</sup> The fact that factory farming operates largely in secrecy could be one reason why farm animals continue to be abused despite public opposition.<sup>236</sup> Providing the public with accurate and compelling information is, therefore, critical: "Repeated exposure to graphic (and therefore presumably 'true') evidence of disturbing practices intuitively cannot help but break down barriers of ignorance and apathy."<sup>237</sup>

Some proponents of ag-gag laws acknowledge that whistleblowers supply the public with important information and provide a check on industry abuses, but maintain that whistleblowers have other effective options that do not involve trespassing onto agricultural facilities. Utah State Senator David Hinkins observes that animal activists are always free to contact the authorities if they suspect abuse, noting "[T]hey don't need to be detectives or the Pink Panther sneaking around . . . ."<sup>238</sup> However, video footage is far more persuasive than a mere tip or description of abuse; in fact, video is sometimes the best way to prove allegations.<sup>239</sup> It is undoubtedly the animal activist's most powerful weapon due to its virtually unmatched ability to influence public sentiment.<sup>240</sup> Several studies have indicated the lasting impact that images can have on the minds of the public versus the far more modest impact of written descriptions. One such study concluded that people remember approximately 10% of what they hear,

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(reporting that 57% of consumers would be willing to pay 1% to 10% more "for food that promises to be produced to higher ethical standards").

235. See Sidney H. Storozum, *Why A Duck? California Pokes a Hole in the "Iron Curtain" of Factory Farming*, 1 LIBERTY U. L. REV. 193, 216 (2006) (noting that Americans rarely have the opportunity to observe agricultural practices); Draeger, *supra* note 216, at 287–88.

236. See Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 79 (2011) (arguing that factory farm abuses taking place behind closed doors could be one reason they are allowed to continue in a society where the vast majority of people oppose animal suffering).

237. Storozum, *supra* note 235, at 216–17.

238. Kevin C. Adams, Note, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1163 (2012).

239. See Amanda Hitt, *Utah's Misguided 'Ag Gag' Bill*, SALT LAKE TRIB., (Mar. 3, 2012), <http://www.sltrib.com/sltrib/opinion/53626155-82/video-public-undercover-whistleblowers.html.csp> (noting that undercover videos have been "indispensable" in documenting practices on factory farms and calling these videos the "arbiter of truth").

240. See Michael Hill, Note, *United States v. Fullmer and the Animal Enterprise Terrorism Act: "True Threats" to Advocacy*, 61 CASE W. RES. L. REV. 981, 985 (2011) (explaining the power of undercover videos in the early years of the animal rights movement due to its ability to spur strong public sentiment for animals used in laboratories).

30% of what they read, but 80% of what they see or personally experience.<sup>241</sup> For these reasons, the ability of animal activists to record inhumane treatment is an instrumental tool for improving the treatment of animals—one that courts should continue to recognize regardless of the outcome of *ALDF v. Herbert*.

#### CONCLUSION

Ag-gag laws have been controversial since their inception, but Amy Meyer's arrest in 2013 brought them into the spotlight. The lawsuit generated by the arrest challenges Utah's ag-gag law under two First Amendment doctrines: overbreadth and content-based restriction. Before reaching these claims, the court will first have to determine that the plaintiffs have standing—a considerable hurdle in animal protection cases. As an individual plaintiff, Meyer faces a serious challenge in convincing the court she has been injured because the state dropped her charges and she does not have a relationship with the animals she filmed. However, she may benefit from the relaxed standing requirements for First Amendment claims. As organizational plaintiffs, ALDF and PETA face the equally serious challenge of establishing an injury because courts do not recognize informational standing.

If the court does reach the merits of the case, it will likely find § 76-6-112 overbroad because the statute's failure to define "image" or "sound" makes it exceedingly broad, and no language in the statute sufficiently limits it to constitutional applications. If the court determines that these terms are not overbroad, the plaintiffs may have more success with the "false pretenses" language in § 76-6-112(2)(b) because that section prohibits a wide range of false statements, including those that do not rise to the level of fraud, defamation, or perjury. The court likely will decline to hold that the statute imposes a content-based restriction because the lack of specific language modifying "image" and "sound" in § 76-6-112 suggests that the statute is not focused on the content of the recordings. In fact, the statute's inclusion of terms that focus on the speaker's acts suggests the court could construe it as a time, place, and manner regulation. However, the lack of ample alternative channels of communication means that the court would likely find the law invalid.

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241. HEWLETT-PACKARD, THE POWER OF VISUAL COMMUNICATION 2 (2004) (citations omitted), available at <http://www.hp.com/large/ipg/assets/bus-solutions/power-of-visual-communication.pdf>.

Whether or not the plaintiffs in *ALDF v. Herbert* are ultimately successful, there are numerous reasons why courts should protect animal activists' right to film in factory farms. Whistleblowers are vital to animal protection groups because no laws currently exist that specifically protect farm animals, and factory farm workers are unlikely to report abuse. This regulatory scheme leaves a gap that animal activists successfully fill when they film undercover. In fact, undercover filming is undoubtedly the animal activist's most powerful weapon due to its virtually unmatched ability to generate public sentiment that actually has the power to effect change for the nation's billions of factory-farmed animals.

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† The author would like to thank Professor Reed Loder for her invaluable recommendations in improving the analysis and overall quality of this Note. Thanks also to Kelli Rockandel for her substantive editing throughout the writing process.

