

# COMMENTS

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## Animal Agricultural Exceptionalism in the 21st Century

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## INTRODUCTION

Agriculture has always played a huge role in the American economy and way of life.<sup>1</sup> Many laws today illustrate the singular importance of the agriculture industry and the government's willingness to create legal carve-outs for agriculture.<sup>2</sup> For example, stormwater runoff from agriculture is explicitly excluded from consideration as a point source under the Clean Water Act.<sup>3</sup> Similar protections exist in a wide range of laws, from federal regulatory exemptions<sup>4</sup> to state right-to-farm laws.<sup>5</sup> The agriculture industry also enjoys a "sweeping exemption from FOIA."<sup>6</sup> In short, agriculture "is not subject to the same stringent rules and regulations as other large industries."<sup>7</sup>

These laws show that lawmakers are consistently conscious of a perceived need to protect agriculture from regulation, liability, and exposure. Arguments for protection or special treatment of agriculture come from a perception that agriculture is, as President Eisenhower said, "more than an industry; it is a way of life . . . the family farm has given strength and vitality to our entire social order. We must keep it healthy and vigorous."<sup>8</sup> Those who support agricultural exceptionalism cite food security,<sup>9</sup> food cost, economic health, and employment as justifications for laws and policies protecting agriculture industry interests.<sup>10</sup> But these supporters are no longer speaking just of the

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<sup>1</sup> See Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 183 (2017).

<sup>2</sup> *Id.* at 186.

<sup>3</sup> TODD AAGARD ET AL., PRACTICING ENVIRONMENTAL LAW 374 (1st ed. 2017).

<sup>4</sup> See Vacatur Response, 83 Fed. Reg. 37,444 (Aug. 1, 2018) (announcing reporting exemption from the Comprehensive Environmental Response, Compensation, and Liability Act for animal waste); Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms, 84 Fed. Reg. 27,533 (June 13, 2019) (announcing reporting exemption from the Emergency Planning and Community Right-to-Know Act for animal waste).

<sup>5</sup> Alexandra Lizano & Elizabeth Rumley, *States' Right-to-Farm Statutes*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/right-to-farm/> [<https://perma.cc/83YQ-BQLA>] (last visited Nov. 9, 2021).

<sup>6</sup> YEE HUANG & RENA I. STEINZOR, CTR. FOR PROGRESSIVE REFORM, AGRICULTURAL SECRECY: GOING DARK DOWN ON THE FARM: HOW LEGALIZED SECRECY GIVES AGRIBUSINESS A FEDERALLY FUNDED FREE RIDE 2 (2012).

<sup>7</sup> Weil, *supra* note 1, at 199.

<sup>8</sup> Carsten Daugbjerg & Alan Swinbank, *An Introduction to the 'New' Politics of Agriculture*, 31 POL'Y & SOC'Y 259, 259 (2017) (quoting President Eisenhower).

<sup>9</sup> See *id.* at 260.

<sup>10</sup> 131 CONG. REC. H11,757–59 (daily ed. Oct. 26, 2009).

“family farm[s]” President Eisenhower referenced when he spoke in 1956. Lawmakers today have a soft spot for large-scale agriculture operations. In fall 2019, the U.S. Secretary of Agriculture, Sonny Perdue, while speaking on farming in America, remarked that “the big get bigger and the small go out.”<sup>11</sup> This is not a new phenomenon, as for decades, “Republicans and Democrats, alike, have supported laws that favor corporate agriculture, which continue to drive small farmers out of business.”<sup>12</sup> It is no secret that these large-scale agricultural operations have many adverse effects, including environmental degradation,<sup>13</sup> human health risks,<sup>14</sup> and animal rights abuses.<sup>15</sup> While it seems that many recognize these rampant problems, their sources continue to be swept under the rug and protected.

The truth is that while local and federal leaders tell independent farmers how much they care about them,<sup>16</sup> American agricultural policy has been geared toward consolidation since the 1950s.<sup>17</sup> Placing a premium on efficiency, legislators have for decades drafted agricultural policy that has driven smaller family farms out of business and paved the way for massive agricultural corporations, which are far removed from the pastoral images of farming that Americans have long taken comfort in.<sup>18</sup>

Before diving into such policies, it is important to understand what types of facilities and operations agricultural exceptionalism is

<sup>11</sup> Roger Johnson, *We Must Reject the “Go Big or Go Home” Mentality of Modern Agriculture*, HILL (Oct. 8, 2019), <https://thehill.com/opinion/finance/464856-we-must-reject-the-go-big-or-go-home-mentality-of-modern-agriculture> [<https://perma.cc/2TX8-FBY2>].

<sup>12</sup> Nathan A. Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL’Y 12, 13 (2017).

<sup>13</sup> *The Planet in Crisis*, FARM SANCTUARY, <https://www.farmsanctuary.org/issue/environment/> [<https://perma.cc/FK97-GT6U>] (last visited Nov. 9, 2021) [hereinafter *Crisis*].

<sup>14</sup> Brandon Keim, *Ag-Gag Laws Could Make America Sick*, WIRED (May 2, 2013), <https://www.wired.com/2013/05/ag-gag-public-health/> [<https://perma.cc/857R-3J47>].

<sup>15</sup> *What Is Ag-Gag Legislation?*, AM. SOC’Y FOR PREVENTION OF CRUELTY TO ANIMALS, <https://www.asPCA.org/animal-protection/public-policy/what-ag-gag-legislation> [<https://perma.cc/8ETJ-29RL>] (last visited Dec. 18, 2020) [hereinafter ASPCA OVERVIEW].

<sup>16</sup> Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (Dec. 2012), <https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/> [<https://perma.cc/LEW7-GAVN>].

<sup>17</sup> Siena Chrisman, *Want to Understand Trump’s Rise? Head to the Farm*, CIVIL EATS (Oct. 27, 2016), <https://civileats.com/2016/10/27/want-to-understand-trumps-rise-head-to-the-farm/> [<https://perma.cc/ZJX3-CD83>].

<sup>18</sup> *Id.*; Khan, *supra* note 16.

meant to protect. Large-scale operations involved in animal product production are often referred to as industrial farms,<sup>19</sup> concentrated animal feeding operations (CAFOs),<sup>20</sup> and factory farms.<sup>21</sup> These large-scale facilities are a product of the industrialization of agriculture.<sup>22</sup> Some attribute this industrialization to a growing population and urbanization.<sup>23</sup> Technological and biomedical advances such as genetic engineering, growth hormones, and antibiotics also moved the U.S. away from smaller farms to larger, concentrated operations in the mid-1900s.<sup>24</sup> Others attribute the shift to the agriculture industry's penchant for "maximized profits achieved through consolidation and mechanization."<sup>25</sup>

Industrialization of animal agriculture resulted in a diminished connection between human and animal<sup>26</sup> and "the replacement of the core values of animal husbandry with values of efficiency and productivity."<sup>27</sup> This brought "an ethical collapse"<sup>28</sup> that, as this Article will describe, is facilitated by leaders of the animal agriculture industry,<sup>29</sup> state governments, and the federal government.

This Article focuses on two significant examples of agricultural exceptionalism as it applies to animal agriculture specifically. First, it explores state ag-gag laws, which facilitate and protect rampant unsound practices within the animal agriculture industry. Second, this Article explores federal law exempting animal agriculture facilities from greenhouse gas (GHG) reporting requirements that apply to other industries. These two examples illustrate a deeply rooted and pervasive approach to the agriculture industry. While ag-gag laws are predominantly understood as a threat to animal rights, and GHG

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<sup>19</sup> ASPCA OVERVIEW, *supra* note 15.

<sup>20</sup> EARTH AWARE, CAFO: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES 3 (Daniel Imhoff ed., 2010).

<sup>21</sup> Pamela Fiber-Ostrow & Jarret S. Lovell, *Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation*, 19 CONTEMP. JUST. REV. 230, 230 (2016).

<sup>22</sup> See Weil, *supra* note 1, at 183.

<sup>23</sup> EARTH AWARE, *supra* note 20, at 2.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Raising Animals in an Industrial System*, FOODPRINT, <https://foodprint.org/issues/raising-animals-industrial-system/> [<https://perma.cc/5LHQ-WARM>] (last visited Nov. 9, 2021).

<sup>26</sup> See EARTH AWARE, *supra* note 20, at 5.

<sup>27</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 234. See also EARTH AWARE, *supra* note 20, at 5.

<sup>28</sup> EARTH AWARE, *supra* note 20, at 2.

<sup>29</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 234, 239.

reporting exemptions are predominantly seen as a threat to the environment, these laws, and others like them, have damaging effects reaching far beyond what meets the eye. The harm caused by animal agricultural exceptionalism is great enough that everyone in America, regardless of whether or not they see an overt connection between their interests or values and agricultural practices, should be concerned about these laws and should question their place in state and federal legal frameworks.

## I

### STATE AG-GAG LAWS

In recent years, large-scale animal agriculture has been gaining heightened protection. Recently, states have demonstrated a penchant for allowing those involved in industrial animal agriculture to operate with increasing impunity with the introduction and passage of “ag-gag” or “animal enterprise interference” laws.<sup>30</sup> These laws limit whistleblowers’ ability to record and report animal rights abuses on large-scale farms.<sup>31</sup> Ag-gag laws have outlawed various forms of documentation on farms, putting such documentation “on legal par with child pornography.”<sup>32</sup> But, whereas laws against child pornography are meant to protect the victims, ag-gag laws protect the perpetrators and embolden continued abuses.

Ag-gag laws have wide-ranging consequences and should continue to be called into question. This section begins with a history of ag-gag laws. Next, it explores the current state of ag-gag laws in the country, including currently enacted laws, laws that have died before enactment, and laws that have been struck down in court. Then, it discusses some of the less apparent consequences of ag-gag laws.

#### *A. History and Overview of Ag-Gag Laws*

The animal agriculture industry has unique practices and consequences. Treatment of animals involved in food production “is far from the idyllic image of pastures and open ranches industry advertisements portray.”<sup>33</sup> Laws that do impose limits on the treatment

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<sup>30</sup> *Id.* at 239.

<sup>31</sup> ASPCA OVERVIEW, *supra* note 15.

<sup>32</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 240.

<sup>33</sup> *Id.* at 236.

of animals exclude farm animals.<sup>34</sup> Animals in factory farms are subject to unspeakably cruel practices, including severe confinement, electric stunning, and physical maiming—including tail docking, debeaking,<sup>35</sup> and teeth clipping.<sup>36</sup> Those profiting from large-scale animal agriculture have recognized that acute animal suffering would not be popular among their consumers.<sup>37</sup> Therefore, the industry has gone to great lengths to keep the grisly images out of public view.<sup>38</sup> One way it has done this is “to downplay the fact that” commonplace consumer goods come from animals.<sup>39</sup> This tactic includes careful choice of words when discussing animal products<sup>40</sup> and pushing for ag-gag laws “that would criminalize undercover investigations while neglecting animal welfare entirely.”<sup>41</sup>

Ag-gag laws target those who wish to bring the well-kept secrets of the animal agriculture industry to light. Many credit Upton Sinclair’s 1906 book *The Jungle* with the advent of meat industry exposure.<sup>42</sup> Investigation and documentation have always been a key part of efforts to recognize animal rights,<sup>43</sup> so it is not surprising that those relying on abusive practices want to thwart such investigations.

The first ag-gag law, prohibiting photography and videotaping at animal facilities, was enacted in Kansas in 1990.<sup>44</sup> Montana and North Dakota followed suit, passing laws that banned photography meant to harm the facility and altogether banned photographs without the farm owner’s consent, respectively.<sup>45</sup> These acts were of a different character than those enacted in recent years.<sup>46</sup> The older laws largely

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 234–35.

<sup>36</sup> THE HUMANE SOC’Y OF THE U.S., THE WELFARE OF PIGLETS IN THE PIG INDUSTRY 3–5 (2010), <https://www.humanesociety.org/sites/default/files/docs/hsus-report-piglets-industry-welfare.pdf> [<https://perma.cc/2PCY-5DLG>].

<sup>37</sup> See Fiber-Ostrow & Lovell, *supra* note 21, at 234.

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.* at 239.

<sup>42</sup> See *id.* at 238–39 (describing *The Jungle* as “the most famous condemnation of the meat industry to date”); ASPCA OVERVIEW, *supra* note 15 (crediting *The Jungle* as the beginning of America’s “long and storied history” of whistleblower investigation).

<sup>43</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 238–39.

<sup>44</sup> *Id.* at 239; Weil, *supra* note 1, at 200.

<sup>45</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 239.

<sup>46</sup> Weil, *supra* note 1, at 200.

aim at preventing property damage and release of animals,<sup>47</sup> while the newer laws seek to “silence whistleblowers revealing animal abuses.”<sup>48</sup> After the passage of the Kansas, Montana, and North Dakota laws in 1990–91, there was a hiatus for two decades before the modern rash of laws,<sup>49</sup> with the exception of Alabama’s law, which was passed in 2002.<sup>50</sup>

## **B. Current State of Ag-Gag Laws in the U.S.**

### *1. States with Active Ag-Gag Laws*

As of 2019, eight states had active ag-gag laws: Montana, North Dakota, Iowa, Missouri, Arkansas, Kansas, North Carolina, and Alabama.<sup>51</sup> Since then, the laws in three states have either been struck down or are pending,<sup>52</sup> changes that are discussed in the following subsection. Additionally, Iowa passed a new ag-gag law in June of 2020.<sup>53</sup> Though these laws vary state-to-state, they have one common goal: keep the unappetizing practices involved in industrial animal agriculture out of public view.<sup>54</sup> Ag-gag laws seek to achieve this secrecy with three common provisions:<sup>55</sup> (1) prohibition of photography and recordings without the consent of the facility owner;<sup>56</sup> (2) prohibition of accessing facilities under false pretenses, using deception, or without consent;<sup>57</sup> and (3) mandatory reporting periods

<sup>47</sup> *Id.*

<sup>48</sup> ASPCA OVERVIEW, *supra* note 15.

<sup>49</sup> See Fiber-Ostrow & Lovell, *supra* note 21, at 239; ASPCA OVERVIEW, *supra* note 15.

<sup>50</sup> ASPCA OVERVIEW, *supra* note 15.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; see *infra* Part I.B.2.

<sup>53</sup> Alleen Brown, *Iowa Quietly Passes Its Third Ag-Gag Bill After Constitutional Challenges*, INTERCEPT (June 10, 2020), <https://theintercept.com/2020/06/10/iowa-animal-rights-crime-ag-gag-law/> [<https://perma.cc/7X8G-LTPM>].

<sup>54</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 239; Weil, *supra* note 1, at 199; ASPCA OVERVIEW, *supra* note 15.

<sup>55</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 240.

<sup>56</sup> See *id.*; MONT. CODE ANN. § 81-30-103(2)(e) (West 2019); N.D. CENT. CODE ANN. § 12.1-21.1-02(6) (West 2019); ARK. CODE ANN. § 16-118-113(b), (c)(2)-(3) (West 2019); N.C. GEN. STAT. ANN. § 99A-2(a), (b)(2)-(3) (West 2018); KAN. STAT. ANN. § 47-1827(c)(4) (West 2019).

<sup>57</sup> See Fiber-Ostrow & Lovell, *supra* note 21, at 240; IOWA CODE § 717A.3B(1) (2019); ALA. CODE § 13A-11-153(3); S.F. 2413, 88th Gen. Assemb., Reg. Sess. § 17(2) (Iowa 2020), <https://www.legis.iowa.gov/docs/publications/LGE/88/SF2413.pdf> [<https://perma.cc/62UN-R8K7>].

for documented abuses.<sup>58</sup> Violation of ag-gag laws is a criminal offense in some states<sup>59</sup> and a civil offense in others.<sup>60</sup>

The first of these provisions, restricting image and audio recording, is perhaps what ag-gag laws are best known for.<sup>61</sup> These laws vary in specificity and breadth. For example, Montana's law criminalizes "tak[ing] pictures by photograph, video camera, or other means with the intent to commit criminal defamation."<sup>62</sup> North Dakota's law is broader, criminalizing the use of "any . . . video or audio equipment" without consent from the owner.<sup>63</sup> Several states cover further ground, outlawing the use of unattended surveillance devices.<sup>64</sup> These laws apply to different kinds of facilities. North Carolina's law has very broad applicability in this respect, applying to "nonpublic areas of another's premises."<sup>65</sup> Arkansas's law is also very broad, restricting recording activity on "commercial property," not just agricultural facilities or facilities with animals.<sup>66</sup> North Dakota's law, on the other hand, specifically applies to "animal facilit[ies]."<sup>67</sup> Some of these provisions target employee conduct,<sup>68</sup> reflecting the concern that those seeking to expose negative industry practices may not be outsiders.

The second type of ag-gag law reflects the concerns of state governments and animal agriculture facilities that people may enter agricultural facilities for purposes "other than a bona fide intent of seeking or holding employment or doing business with the employer."<sup>69</sup> In other words, there is concern that people may apply for employment in order to gain access to facilities so that they may document and expose practices from within. This concern for documentation from

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<sup>58</sup> See Fiber-Ostrow & Lovell, *supra* note 21, at 240; MO. REV. STAT. § 578.013(1).

<sup>59</sup> N.D. CENT. CODE ANN. § 12.1-21.1-04; IOWA CODE § 717A.3B(2); KAN. STAT. ANN. § 47-1827(g); MO. REV. STAT. § 578.013(3).

<sup>60</sup> ARK. CODE ANN. § 16-118-113(e); N.C. GEN. STAT. ANN. § 99A-2(d); ALA. CODE § 13A-11-154; MONT. CODE ANN. § 81-30-104(1).

<sup>61</sup> See ASPCA OVERVIEW, *supra* note 15; Weil, *supra* note 1, at 199–200.

<sup>62</sup> MONT. CODE ANN. § 81-30-103(2)(e).

<sup>63</sup> N.D. CENT. CODE ANN. § 12.1-21.1-02(6).

<sup>64</sup> ARK. CODE ANN. § 16-118-113(c)(3); N.C. GEN. STAT. ANN. § 99A-2(b)(3).

<sup>65</sup> N.C. GEN. STAT. ANN. § 99A-2(a); see also *The ASPCA Joins Lawsuit Challenging N.C. Anti-Whistleblower Law*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS (Feb. 25, 2016), <https://www.aspc.org/news/aspc-joins-lawsuit-challenging-nc-anti-whistleblower-law> [<https://perma.cc/3YH9-TPGX>] [hereinafter *ASPCA N.C.*].

<sup>66</sup> ARK. CODE ANN. § 16-118-113(a)(1).

<sup>67</sup> N.D. CENT. CODE ANN. § 12.1-21.1-02(6).

<sup>68</sup> ARK. CODE ANN. § 16-118-113(c); N.C. GEN. STAT. ANN. § 99A-2(b).

<sup>69</sup> ARK. CODE ANN. § 16-118-113(c) (West 2019).



within is also clearly reflected in the laws prohibiting access under false pretenses.<sup>70</sup> Large-scale farms are, by their nature, largely located in sparsely populated areas, and members of the public rarely see inside.<sup>71</sup> Therefore, it makes sense that those hoping to expose the inner workings of the industry would seek entry via employment. To prevent this, Alabama law criminalizes gaining “access to an animal or crop facility by false pretenses for the purpose of performing acts not authorized by that facility.”<sup>72</sup> Similarly, the Iowa law currently subject to preliminary injunction criminalizes the use of “deception” to gain employment at an “agricultural production facility.”<sup>73</sup> Under the Iowa law, this is “trespass.”<sup>74</sup>

The idea that entry based upon misrepresentation or deception automatically constitutes a trespass differs from the common law rule that if one has consent to enter, the fact that that consent was obtained via fraud does not render the entry a trespass.<sup>75</sup> In the context of trespass, among other areas of law, “[c]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him . . . to revoke his consent.”<sup>76</sup> Such entry may become a trespass if it results in some harm interfering with ownership or possession of the owner’s land.<sup>77</sup> These ag-gag laws, however, criminalize dishonest entry regardless of the impact of the entry.<sup>78</sup>

For example, Iowa’s 2020 ag-gag law criminalizes unwanted presence in animal agriculture facilities by establishing the crime of “food operation trespass” whereby an individual “enter[s] or remain[s] on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property.”<sup>79</sup> “Food operation” is broadly defined to include a variety of spaces where agricultural animals and animal products are kept or created, including facilities from “food processing plant[s] and]

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<sup>70</sup> See ALA. CODE § 13A-11-153(3) (2019); IOWA CODE § 717A.3B(1) (2019).

<sup>71</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 233.

<sup>72</sup> ALA. CODE § 13A-11-153(3) (2019).

<sup>73</sup> IOWA CODE § 717A.3B(1)(b) (2019).

<sup>74</sup> *Id.* at § 717A.3B(1).

<sup>75</sup> Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1351–52 (7th Cir. 1995).

<sup>76</sup> *Id.* at 1351.

<sup>77</sup> Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017).

<sup>78</sup> See ALA. CODE § 13A-11-153(3); IOWA CODE § 717A.3B(1).

<sup>79</sup> Iowa S.F. 2413 § 17(2) (2020). See also Brown, *supra* note 53.

... slaughtering establishment[s]” to farmers markets.<sup>80</sup> An offender’s first food operation trespass is an aggravated misdemeanor.<sup>81</sup> Additional offenses are class “D” felonies.<sup>82</sup> This law is Iowa’s third attempt to hinder exposure of animal agriculture practices in recent years.<sup>83</sup>

The last of the three common provisions, mandatory reporting periods, is expressly directed at employees. These laws require that documentation of potential abuse, such as audio recordings or photos, be reported within a specified and limited time frame after the documentation.<sup>84</sup> These provisions typically require reporting within thirty-six or forty-eight hours.<sup>85</sup> Missouri’s law, which passed in 2012, is even more restrictive.<sup>86</sup> The law states that if a “farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect” that employee must turn the recording over to law enforcement within twenty-four hours of recording the material or face criminal charges.<sup>87</sup>

Though this law may at first glance seem to value animal welfare by requiring timely reports of abuse, it actually has quite the opposite effect. First, the law discourages employees from creating the recording in the first place. This is because the law does not create a duty to report abuse or neglect in the absence of a recording.<sup>88</sup> It is only the creation of the recording that triggers a duty to immediately turn evidence over to law enforcement or face criminal charges.<sup>89</sup> Therefore, the law forces an employee to risk criminal charges if he or she wants to report abuses, a risk the employee need not take if he or she simply ignores the abuse. Second, the law prevents one who does turn over recordings from establishing a solid case against the facility by requiring immediate reporting with no time to gather additional evidence.<sup>90</sup> The American Society for the Prevention of Cruelty to Animals has noted that short mandatory reporting periods prohibit employees from establishing

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<sup>80</sup> Iowa S.F. 2413 § 17(1)(d).

<sup>81</sup> *Id.* § 18(8)(a).

<sup>82</sup> *Id.* § 18(8)(b).

<sup>83</sup> Brown, *supra* note 53.

<sup>84</sup> Fiber-Ostrow & Lovell, *supra* note 21, at 240.

<sup>85</sup> *Id.*

<sup>86</sup> See MO. REV. STAT § 578.013(1).

<sup>87</sup> *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at § 578.013(1), (3).

<sup>90</sup> See ASPCA OVERVIEW, *supra* note 15.

“patterns of abuse.”<sup>91</sup> This may hamper successful prosecution of those responsible.<sup>92</sup>

## 2. *Challenging Ag-Gag Laws*

A thorough look at ag-gag laws today is incomplete without appreciating the number of ag-gag laws that have failed to pass, have been judicially invalidated, or are subject to current litigation. Many states around the country began introducing ag-gag bills starting in 2011.<sup>93</sup> Though most of these laws either failed in the legislature or were struck down by courts, laws in Iowa, Arkansas, Missouri, and North Carolina joined the older laws of Montana, North Dakota, Kansas, and Alabama as active ag gag laws.<sup>94</sup> The failed bills and overturned laws had many of the same provisions as the enacted laws discussed above.

Many of the introduced bills would have imposed mandatory reporting periods. A Colorado bill to invoke a forty-eight hour mandatory reporting period was tabled indefinitely after facing much resistance from the animal rights community.<sup>95</sup> Arizona’s 2014 bill, which would have instituted a mandatory reporting period of five business days,<sup>96</sup> also failed.<sup>97</sup> Opponents of the bill, including gameshow celebrity and animal activist Bob Barker, voiced concerns that the law “would . . . interfere with authorities’ ability to hold abusers on factory farms accountable.”<sup>98</sup> A New Hampshire forty-eight-hour mandatory reporting period bill was introduced in 2013 and again in 2014, failing both times.<sup>99</sup> The bill was criticized as an infringement on First Amendment rights, including the rights of

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; Alisa Mullins, *Another ‘Ag-Gag’ Bill Bites the Dust*, PEOPLE FOR ETHICAL TREATMENT ANIMALS, <https://www.peta.org/blog/colorado-ag-gag-bill-shelved/> [https://perma.cc/CS4G-9A4Q] (last updated Feb. 24, 2016).

<sup>96</sup> H.R. 2587, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

<sup>97</sup> ASPCA OVERVIEW, *supra* note 15.

<sup>98</sup> Mary Jo Pitzl et al., *Insider: Bob Barker Speaks Up on HB 2587*, AZCENTRAL, <https://www.azcentral.com/story/politicalinsider/2014/03/23/political-insider-march-23-name/6697791/> [https://perma.cc/4WLJ-LNGD] (last updated Mar. 24, 2014).

<sup>99</sup> ASPCA OVERVIEW, *supra* note 15; *New Hampshire House Bill 110*, MEDIA COALITION, <http://mediacoalition.org/new-hampshire-house-bill-0110/> [https://perma.cc/4ZSV-27SB] (last visited Nov. 9, 2021) [hereinafter MEDIA COALITION].

filmmakers and journalists to operate as investigators.<sup>100</sup> A twenty-four-hour mandatory reporting period bill introduced in New Mexico in 2015<sup>101</sup> also failed after opponents raised First Amendment concerns.<sup>102</sup>

In addition to the mandatory reporting bills, the Florida legislature considered a bill in 2011 that would have criminalized photography and video recordings at agricultural facilities.<sup>103</sup> When the bill died, legislators attempted to include the bill's language in an omnibus bill.<sup>104</sup> The ag-gag language was removed after opposition from the animal rights community.<sup>105</sup>

Some ag-gag bills, however, did become laws only to face challenges in court. By mid-2019, the ag-gag laws of Idaho, Utah, and Wyoming had been ruled unconstitutional.<sup>106</sup> In February 2014, Idaho passed an ag-gag law criminalizing "interference with agricultural production."<sup>107</sup> This included entry or employment obtained through misrepresentation as well as the creation of "audio or video recordings of the conduct of an agricultural production facility's operations" without the consent of the facility owner.<sup>108</sup> Shortly after the law's passage, Animal Legal Defense Fund and others challenged its constitutionality under the First and Fourteenth Amendments.<sup>109</sup> The court recognized the dangerous implications of the law for "the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment."<sup>110</sup> The court also underlined the public

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<sup>100</sup> MEDIA COALITION, *supra* note 99.

<sup>101</sup> S. 221, 52d Leg., 1st Sess. (N.M. 2015).

<sup>102</sup> ASPCA OVERVIEW, *supra* note 15; *New Mexico Legislature Lets Partial 'Ag-Gag' Bill Languish*, FOOD SAFETY NEWS (Mar. 19, 2015), <https://www.foodsafetynews.com/2015/03/new-mexico-legislature-lets-partial-ag-gag-bill-languish-in-committee/> [<https://perma.cc/FQT2-L8U6>].

<sup>103</sup> CHIP GIBBONS, CTR. FOR CONST. RTS & DEFENDING RTS. & DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 23 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> [<https://perma.cc/R9KR-AYKH>].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> ASPCA Overview, *supra* note 15.

<sup>107</sup> IDAHO CODE ANN. § 18-7042(1) (West 2018).

<sup>108</sup> *Id.* § 18-7042(1)(a), (c)–(d).

<sup>109</sup> Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1199–200 (D. Idaho 2015).

<sup>110</sup> *Id.* at 1201.

value of the reporting activity that was criminalized.<sup>111</sup> The court held that the law criminalized protected speech, violating the First Amendment.<sup>112</sup> The court also held that the law violated the Fourteenth Amendment's equal protection clause by targeting a particular group, animal welfare activists.<sup>113</sup> In closing, the court stated:

Although the State may not agree with the message certain groups seek to convey about Idaho's agricultural production facilities, such as releasing secretly-recorded videos of animal abuse to the Internet and calling for boycotts, it cannot deny such groups equal protection of the laws in their exercise of their right to free speech.<sup>114</sup>

The lawsuits overturning the ag-gag laws in Utah and Wyoming were similar. Utah's law criminalized both using deception to gain entry to an agricultural facility and recording inside such a facility.<sup>115</sup> In 2017, a U.S. District Court in Utah held that these provisions violated the First Amendment.<sup>116</sup> As in the Idaho case,<sup>117</sup> the court held that the type of misrepresentation criminalized by the law was protected by the First Amendment.<sup>118</sup> The court also stated that "the act of recording is protectable First Amendment speech" and if the state wished to regulate it, the legislature must "narrowly tailor the restriction."<sup>119</sup> A U.S. District Court in Wyoming also found that Wyoming's ag-gag laws, which outlawed data collection without the owner's consent,<sup>120</sup> violated the First Amendment.<sup>121</sup>

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<sup>111</sup> *Id.* at 1199, 1204.

<sup>112</sup> *Id.* at 1202–03.

<sup>113</sup> *Id.* at 1202.

<sup>114</sup> *Id.* at 1211–12.

<sup>115</sup> UTAH CODE ANN. § 76-6-112 (West 2012); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1195–96 (D. Utah 2017).

<sup>116</sup> *Herbert*, 263 F. Supp. 3d at 1196, 1206, 1208.

<sup>117</sup> *Otter*, 118 F. Supp. 3d at 1203.

<sup>118</sup> *Herbert*, 263 F. Supp. 3d at 1206.

<sup>119</sup> *Id.* at 1208.

<sup>120</sup> WYO. STAT. ANN. § 6-3-414(c) (West 2019); *Id.* § 40-27-101(c).

<sup>121</sup> *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1178, 1191 (D. Wyo. 2018).

The ag-gag laws in Iowa,<sup>122</sup> North Carolina,<sup>123</sup> Kansas<sup>124</sup>, and Arkansas<sup>125</sup> were all subject to litigation within the last few years. Iowa passed a new ag-gag law in March of 2019 after the state's previous 2012 ag-gag law was struck down.<sup>126</sup> The 2019 law criminalized the use of deception to gain access to animal agriculture facilities.<sup>127</sup> Animal Legal Defense Fund immediately brought a suit challenging the constitutionality of the new law, stating the old and new laws are "substantively similar" and that the new law is "a blatant attempt to circumvent the federal court's ruling and stifle free speech."<sup>128</sup> The court agreed, enjoining enforcement of the ag-gag law, denying defendant's motion to dismiss,<sup>129</sup> and holding that the law criminalized speech that is not only protected but may also serve a public good.<sup>130</sup> The court also held that "[p]laintiffs have stated a plausible claim of viewpoint discrimination" because the history of the law reflected "an intent to prevent disparaging remarks about agricultural facilities" and the law "only targets the agricultural industry."<sup>131</sup> Undeterred, Iowa enacted another ag-gag law in April 2021.<sup>132</sup> This law contains familiar prohibitions against recording and surveillance inside animal agriculture facilities.<sup>133</sup> It also prohibits the unauthorized collection of various "samples" from the facilities and the animals within the facilities.<sup>134</sup> This conduct constitutes an "aggravated misdemeanor."<sup>135</sup>

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<sup>122</sup> *Challenging Iowa's Ag-Gag 2.0 Law*, ANIMAL LEGAL DEF. FUND (May 4, 2020), <https://aldf.org/case/challenging-iowas-ag-gag-2-0-law/> [<https://perma.cc/5KU3-DXLC>] [hereinafter *Challenging Iowa*].

<sup>123</sup> *ASPCA N.C.*, *supra* note 65.

<sup>124</sup> *Coalition Challenges Constitutionality of Kansas Ag-Gag Law*, ANIMAL LEGAL DEF. FUND, (Dec. 4, 2018), <https://aldf.org/article/coalition-challenges-constitutionality-of-kansas-ag-gag-law/> [<https://perma.cc/MA36-N4EB>] [hereinafter *Coalition Challenges*].

<sup>125</sup> Barbara Grzincic, *8th Circuit Revives Challenge to Arkansas Ag-Gag Law*, REUTERS (Aug. 10, 2021), <https://www.reuters.com/legal/litigation/8th-circuit-revives-challenge-arkansas-ag-gag-law-2021-08-10/> [<https://perma.cc/T3G9-FW5U>].

<sup>126</sup> *Challenging Iowa*, *supra* note 122; *ASPCA OVERVIEW*, *supra* note 15.

<sup>127</sup> IOWA CODE § 717A.3B (2019).

<sup>128</sup> *Challenging Iowa*, *supra* note 122.

<sup>129</sup> *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124-JEG-HCA, 2019 WL 8301668, at \*20 (S.D. Iowa Dec. 2, 2019).

<sup>130</sup> *Id.* at \*10.

<sup>131</sup> *Id.* at \*11.

<sup>132</sup> H.F. 775, 89th Gen. Assemb., Reg. Sess., (Iowa 2021), <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF775> [<https://perma.cc/4VAJ-YWGN>] (last visited Nov. 9, 2021).

<sup>133</sup> *Id.* § 727.8A (2021).

<sup>134</sup> *Id.* §§ 716.14(2)–(3) (2021).

<sup>135</sup> *Id.* §§ 7.16.14(2)–(3); § 727.8A (2021).

The debate over ag-gag laws in Iowa continues, with the 2021 law facing legal challenges from the same groups who challenged the earlier laws.<sup>136</sup> Additionally, a circuit court in August 2021 held that Iowa may legally criminalize the entrance into animal agriculture facilities under false pretenses, thereby reversing the earlier district court decisions holding this portion of the 2012 law unconstitutional.<sup>137</sup>

North Carolina's ag-gag law was also met with opposition shortly after its passage.<sup>138</sup> This law made it illegal for employees to document and expose abuses and violations in their places of business.<sup>139</sup> Though this law, unlike some other ag-gag laws, did not explicitly focus on animal agriculture facilities, the "underlying intent was to thwart animal rights activists from getting hired at farms and research labs and then conducting undercover investigations."<sup>140</sup> Among the law's critics were those concerned with animal rights, food safety, and government accountability.<sup>141</sup> These parties joined together and filed a suit, claiming that the law violated constitutional principles, including due process, equal protection, free speech, and free press.<sup>142</sup>

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<sup>136</sup> William Morris, *8th Circuit Court Partially Upholds Iowa's 2012 'Ag-Gag' Law; A New Lawsuit Challenges the State's 2021 Statute*, DES MOINES REG. (Aug. 10, 2021), <https://www.desmoinesregister.com/story/news/crime-and-courts/2021/08/10/8th-circuit-partly-upholds-iowa-ag-gag-law-agriculture-animal-rights-trespass-factory-farms/5553466001/> [<https://perma.cc/NQ2B-3575>]. In January of 2022, an Iowa District Court Judge held that part of the Iowa ag-gag law criminalizing trespass was viewpoint neutral and therefore not unconstitutional. Jared Strong, *Judge Upholds Iowa's Retooled 'Ag Gag' Law*, GAZETTE (Jan. 23, 2022), <https://www.thegazette.com/agriculture/judge-upholds-iowas-retooled-ag-gag-law/> [<https://perma.cc/7VAX-Z6NN>]; Kevin Gosztola, *Iowa Judge Upholds Ag-Gag Charge Brought Against Animal Rights Activist Hours Before Dismissing the Case*, DISSENTER (Jan. 19, 2022), <https://thedissenter.org/iowa-judge-upholds-state-ag-gag-law-in-case-against-animal-rights-activist/#:~:text=An%20Iowa%20judge%20upheld%20one,hours%20before%20dismissing%20all%20charges.&text=District%20Court%20Judge%20Derek%20Johnson,the%20viewpoint%20of%20the%20offender> [<https://perma.cc/87SD-JWRV>].

<sup>137</sup> Morris, *supra* note 136; Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 788 (8th Cir. 2021).

<sup>138</sup> *ASPCA N.C.*, *supra* note 65.

<sup>139</sup> N.C. GEN. STAT. ANN. § 99A-2 (West 2018); Lisa Sorg, *Federal Court Strikes Down NC's Controversial "Ag-gag" Law*, N.C. POL'Y WATCH (June 15, 2020), <http://www.ncpolicywatch.com/2020/06/15/federal-court-strikes-down-ncs-controversial-ag-gag-law/> [<https://perma.cc/P6KS-GGF3>].

<sup>140</sup> Sorg, *supra* note 139.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

On June 12, 2020, a North Carolina District Court held multiple parts of this law unconstitutional.<sup>143</sup> The court held that, under the First Amendment, the subsections of the law outlawing recording images and sound and placing recording devices in facilities were “unconstitutional both facially and as applied to [Plaintiffs] in their exercise of speech.”<sup>144</sup> This means the court determined “that there are ‘no set of circumstances’ in which [these subsections] can be validly applied or that [these subsections] lack[] any plainly legitimate sweep”<sup>145</sup> and that “these subsections expressly single out speech.”<sup>146</sup> The court held that the subsections of the law outlawing the removal of “data, paper, records, or any other documentation and [using] the information to breach the . . . duty of loyalty to the employer[,]”<sup>147</sup> and acts “that substantially interfere[] with the ownership or possession of real property”<sup>148</sup> were unconstitutional as applied to plaintiffs.<sup>149</sup> Plaintiffs received permanent injunction for all four of these subsections.<sup>150</sup> North Carolina’s Attorney General Josh Stein appealed the ruling and the case is pending.<sup>151</sup>

Kansas’s 1990 ag-gag law was recently challenged under the First Amendment.<sup>152</sup> K.S.A. section 47-1827 criminalizes, among other things, damage to animal facilities, entry and presence at such a facility without the owner’s consent, and entrance at such a facility with intent to take pictures.<sup>153</sup> This law “has deterred undercover investigations at animal facilities, including factory farms, for nearly three decades.”<sup>154</sup>

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<sup>143</sup> *People for the Ethical Treatment of Animals v. Stein*, 466 F. Supp. 3d 547, 586 (M.D.N.C. 2020).

<sup>144</sup> *Id.* at 587.

<sup>145</sup> *Id.* at 570 (quoting *Educ. Media Co. at Va. Tech., Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013)).

<sup>146</sup> *Stein*, 466 F. Supp. 3d at 571.

<sup>147</sup> N.C. GEN. STAT. ANN. § 99A-2(b)(1) (West 2018).

<sup>148</sup> *Id.* § 99A-2(b)(5).

<sup>149</sup> *Stein*, 466 F. Supp. 3d at 586.

<sup>150</sup> *Id.* at 587.

<sup>151</sup> Lisa Sorg, *Attorney General Josh Stein’s Office Defends State’s “Ag-gag Law,” Appeals Previous Ruling That It’s Unconstitutional*, PROGRESSIVE PULSE (Feb. 23, 2021), <http://pulse.ncpolicywatch.org/2021/02/23/attorney-general-josh-steins-office-defends-states-ag-gag-law-appeals-previous-ruling-that-its-unconstitutional/#sthash.GsQi7Sot.R4AXBSS8.dpbs> [https://perma.cc/88CH-ME8J].

<sup>152</sup> *Coalition Challenges*, *supra* note 124.

<sup>153</sup> KAN. STAT. ANN. § 47-1827(a)–(d) (West 2019).

<sup>154</sup> *Court Rules Kansas Ag-Gag Law Unconstitutional*, ANIMAL LEGAL DEF. FUND (Jan. 22, 2020), <https://aldf.org/article/court-rules-kansas-ag-gag-law-unconstitutional/> [https://perma.cc/AT66-N6ZJ].



On April 3, 2020, the U.S. District Court for the District of Kansas permanently enjoined enforcement of the bulk of this law.<sup>155</sup> This came after the court had previously held in January 2020 that K.S.A. sections 47-1827(b)–(d) were “content-based and viewpoint-discriminatory restrictions on speech that violate the First Amendment.”<sup>156</sup> The January decision did not strike down the section of the law criminalizing “damage or destr[uction of] an animal facility or any animal or property in or on an animal facility”<sup>157</sup> or the section providing for damages.<sup>158</sup> The court acknowledged “the chilling effect of the unconstitutional provisions on . . . First Amendment rights” and that “the public interest favors assertion of First Amendment rights.”<sup>159</sup> This decision was affirmed in August of 2021.<sup>160</sup>

Several organizations, including Animal Legal Defense Fund, brought a suit challenging the 2017 Arkansas ag-gag law.<sup>161</sup> In August 2021, the 8th Circuit held that the plaintiffs had standing, allowing this case to go forward and be heard by the district court.<sup>162</sup>

Courts’ recent reactions to ag-gag laws reflect the legal problems surrounding ag-gag laws. Courts have clearly highlighted the First Amendment issues but have also mentioned in their opinions the broader harms unchecked animal agriculture can cause to workers, animals, the environment, and consumers.<sup>163</sup> These recent decisions, however, have not spelled the end of ag-gag laws. They may not even have a strong deterring effect on the governments of those states with large animal agriculture industries that are determined to limit interference with the industry. Consider the case of Iowa. In the face of recent court opinions repeatedly striking down its various ag-gag laws, Iowa passed yet another ag-gag law in June 2020. The passage of this law, criminalizing “food operation trespass,” as discussed above,<sup>164</sup>

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<sup>155</sup> Animal Legal Def. Fund v. Kelly, No. 18-2657-KH, 2020 WL 1659855, at \*3 (D. Kan. Apr. 3, 2020).

<sup>156</sup> *Id.* at \*2 (summarizing the holding of Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020)).

<sup>157</sup> KAN. STAT. ANN. § 47-1827(a) (West 2019); *Kelly*, 434 F. Supp. 3d at 1002–03.

<sup>158</sup> KAN. STAT. ANN. § 47-1828 (West 2019); *Kelly*, 434 F. Supp. 3d at 1002–03.

<sup>159</sup> *Kelly*, 2020 WL 1659855, at \*2.

<sup>160</sup> Animal Legal Def. Fund v. Kelly, No. 20-3082, 2021 WL 10851549 (D. Kan. Aug. 18, 2021).

<sup>161</sup> Animal Legal Def. Fund v. Kelly, 8 F.4th 714, 721 (8th Cir. 2021); Grzincic, *supra* note 125.

<sup>162</sup> *Kelly*, 8 F.4th at 721.

<sup>163</sup> Animal Legal Def. Fund v. Otter, 118 F. Supp 3d 1195, 1202 (D. Idaho 2015).

<sup>164</sup> *See supra* Part I.B.

illustrates an effort to continue repackaging ag-gag laws in whatever form necessary to allow these facilities to continue operating above the laws and regulations that govern other industries. One journalist following ag-gag law in North Carolina similarly suggested that “Big Meat and their North Carolina legislative enablers will soon be back on the floor with their newest shiny attempt to circumvent the First Amendment.”<sup>165</sup>

### *C. Implications of Ag-Gag Laws: What Is at Stake*

Ag-gag critics have identified a wide range of negative impacts of these laws, including threats to animal rights, constitutional rights,<sup>166</sup> consumer information,<sup>167</sup> public health,<sup>168</sup> worker safety, and the environment.<sup>169</sup> As discussed above, members of the animal rights community have led efforts to challenge these laws. They have been successful with legal arguments based upon the constitutional rights of those reporting the abuses rather than arguments based upon the rights of the animals directly.<sup>170</sup> Animal and constitutional rights are extremely important and may suffer the most obvious infringements under ag-gag laws. However, they are by no means the only things threatened by ag-gag laws.

As noted before, large farms often try to keep members of the public in the dark about the products they are consuming.<sup>171</sup> By obstructing consumers’ ability to see what is really going on in animal agriculture, state governments and those involved in the animal agriculture industry deny consumers the ability to make fully informed decisions. This lack of transparency also affects food safety. Ag-gag laws “cloak disease-spreading industry practices”<sup>172</sup> and make it difficult or impossible for regulators and consumers to identify and stop unsanitary and hazardous

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<sup>165</sup> Dave Dickey, *Commentary: Another Ag Gag ‘Law’ Bites the Dust*, DAILY YONDER (Aug. 17, 2020), <https://dailyyonder.com/commentary-another-ag-gag-law-bites-the-dust/2020/08/17/> [<https://perma.cc/3Q42-5H4Z>].

<sup>166</sup> *ASPCA N.C.*, *supra* note 65.

<sup>167</sup> *See* Fiber-Ostrow & Lovell, *supra* note 21, at 234.

<sup>168</sup> Keim, *supra* note 14.

<sup>169</sup> *See* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015).

<sup>170</sup> *See id.* at 1199, 1204; *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1178, 1191 (D. Wyo. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017).

<sup>171</sup> *See supra* Part I.B.

<sup>172</sup> Keim, *supra* note 14.

practices.<sup>173</sup> Ag-gag laws eliminate a valuable method of oversight that has proven very important in consumer protection.<sup>174</sup> Past exposures of unsanitary practices in animal agriculture have resulted in substantial meat recalls.<sup>175</sup> It is not surprising that multiple food safety groups have joined lawsuits challenging ag-gag laws.<sup>176</sup>

Ag-gag laws infringe the safety of animal agriculture workers, not just the animals.<sup>177</sup> If outsiders are excluded from entry and employees are restricted in how and when they may share information about the inner workings of these facilities, unsafe working conditions and labor violations may go unreported. Animal agriculture employees are often already subject to limited avenues for remedying labor conditions because many are undocumented or otherwise lack resources.<sup>178</sup> Employees are sometimes threatened with termination if they organize or unionize.<sup>179</sup> This is especially troubling given that work in animal agriculture, especially slaughterhouses, is exceptionally dangerous work where employees are subject to injury, illness, and even death.<sup>180</sup> By restricting opportunities to document and report problems, ag-gag laws further prevent these workers from seeking or obtaining changes and improvements in working conditions. Labor and employment advocacy groups are vocal opponents of ag-gag laws.<sup>181</sup>

Ag-gag laws also pose environmental threats.<sup>182</sup> Large-scale animal agriculture facilities generate enormous amounts of manure that pollute air and water.<sup>183</sup> Poor management of animal agriculture waste, such as the creation of manure “lagoons,” may go unnoticed and unremedied if outsiders are unable to observe and employees are unable to report

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*; Fiber-Ostrow & Lovell, *supra* note 21, at 238; Weil, *supra* note 1, at 199.

<sup>175</sup> Keim, *supra* note 14. *See* Fiber-Ostrow & Lovell, *supra* note 21, at 238; Weil, *supra* note 1, at 199.

<sup>176</sup> *See Challenging Iowa, supra* note 122; *Coalition Challenges, supra* note 124.

<sup>177</sup> Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015).

<sup>178</sup> Weil, *supra* note 1, at 193–94.

<sup>179</sup> *Id.* at 195.

<sup>180</sup> *Id.* at 194.

<sup>181</sup> *Statement of Opposition to Proposed “Ag-Gag” Laws from Broad Spectrum of Interest Groups*, AM. SOC’Y FOR PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/improving-laws-animals/public-policy/what-ag-gag-legislation/statement-opposition-proposed-ag-gag> [https://perma.cc/F2DN-VV66] (last visited Nov. 9, 2021) [hereinafter *Statement of Opposition*]; Fiber-Ostrow & Lovell, *supra* note 21, at 240.

<sup>182</sup> *See Otter*, 118 F. Supp. 3d at 1201; Keim, *supra* note 14.

<sup>183</sup> *Crisis, supra* note 13.

conditions on farms.<sup>184</sup> Such practices can cause devastating environmental degradation. For example, the environmental group Western Watershed Project—plaintiffs in the suit that challenged Wyoming's ag-gag law<sup>185</sup>—found that cow manure had contaminated Wyoming's rivers with *Escherichia coli* (*E. coli*).<sup>186</sup> Ag-gag laws make it more difficult to discern industrial animal agriculture's effect on the environment<sup>187</sup> and thwart exposure of environmental crimes.<sup>188</sup>

## II

### ANIMAL AGRICULTURE AND GREENHOUSE GAS EMISSIONS REPORTING

#### *A. Agriculture, Greenhouse Gases, and Climate Change*

It is no secret to those paying attention that agriculture, and animal agriculture in particular, is a significant contributor to climate change.<sup>189</sup> Animal agriculture emits more greenhouse gases (GHGs) into the environment than any other industry, aside from fossil fuels.<sup>190</sup> Some speculate that companies producing animal products may overtake fossil fuels to become the heaviest GHG polluters.<sup>191</sup> Agriculture's main GHG emissions are methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O).<sup>192</sup> Worldwide, animal agriculture is responsible for forty-four percent of human-caused methane emissions and an equal percentage of human-caused nitrous oxide emissions.<sup>193</sup> This is particularly notable given

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<sup>184</sup> Keim, *supra* note 14.

<sup>185</sup> *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1178, 1191 (D. Wyo. 2018).

<sup>186</sup> Dayton Martindale, *Ag-Gag Laws: The Less You Know the Better*, IN THESE TIMES (June 19, 2015), <http://inthesetimes.com/rural-america/entry/18071/ag-gag-laws-what-you-dont-know-might-hurt-you> [<https://perma.cc/8YD9-QM3F>].

<sup>187</sup> See *Otter*, 118 F. Supp. 3d at 1201.

<sup>188</sup> See *Anti-Whistleblower Ag-Gag Bills Hide Factory Farming Abuses from the Public*, HUMANE SOC'Y OF THE U.S., <https://www.humanesociety.org/resources/anti-whistleblower-ag-gag-bills-hide-factory-farming-abuses-public> [<https://perma.cc/Y9WA-UBND>] (last visited Nov. 9, 2021).

<sup>189</sup> See, e.g., *Animal Agriculture's Impact on Climate Change*, CLIMATE NEXUS, <https://climatenexus.org/climate-issues/food/animal-agricultures-impact-on-climate-change/> [<https://perma.cc/LH5K-XCFX>] (last visited Nov. 9, 2021) [hereinafter CLIMATE NEXUS]; CLAUDIA COPELAND ET AL., CONG. RSCH. SERV., R41530, AGRICULTURE AND GREENHOUSE GASES (2010) [hereinafter CRS GHG]; GRAIN & INST. FOR AGRIC. & TRADE POL'Y, EMISSIONS IMPOSSIBLE: HOW BIG MEAT AND DAIRY ARE HEATING UP THE PLANET (2018) [hereinafter EMISSIONS IMPOSSIBLE].

<sup>190</sup> CLIMATE NEXUS, *supra* note 189.

<sup>191</sup> EMISSIONS IMPOSSIBLE, *supra* note 189, at 1.

<sup>192</sup> CRS GHG, *supra* note 189, at 4; CLIMATE NEXUS, *supra* note 189.

<sup>193</sup> CLIMATE NEXUS, *supra* note 189.

that methane is thought to have “a global warming potential that is more than 20 times greater than carbon dioxide.”<sup>194</sup> Most agricultural emissions come from animal agriculture.<sup>195</sup> These significant methane and nitrous oxide emissions come from the large amounts of manure produced by livestock as well as the manure management practices employed by the facilities.<sup>196</sup> Though the federal government has made some efforts to address methane emissions from livestock,<sup>197</sup> emissions figures seem likely to rise as the industry grows.<sup>198</sup>

This section focuses on a failed attempt to hold the animal agriculture industry accountable for its GHG emissions: The Greenhouse Gas Reporting Program (GHGRP), established in 2009. Congress provided funding for this economy-wide mandatory reporting registry.<sup>199</sup> The Environmental Protection Agency (EPA) promulgated rules under which the GHGRP was to be administered.<sup>200</sup> But before any data could be collected, Congress exempted animal agriculture facilities from the reporting requirements by prohibiting use of federal funds to collect data on manure management systems.<sup>201</sup> While this legislation is certainly cause for concern, it is not surprising given the countless examples of protectionist agricultural exceptionalism in the United States.<sup>202</sup>

This section begins with an explanation of the political climate leading to GHG emissions reporting. It then discusses the history and final outcome of GHGRP and its application to the agriculture industry.

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<sup>194</sup> EXEC. OFF. OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 10 (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf> [<https://perma.cc/JC8X-Z4M4>] [hereinafter CLIMATE ACTION PLAN].

<sup>195</sup> CLIMATE NEXUS, *supra* note 189.

<sup>196</sup> See S.O. Petersen et al., *Manure Management for Greenhouse Gas Mitigation*, NAT’L CTR. BIOTECHNOLOGY INFO. (June 2013); Justine J. Owen & Whendee L. Silver, *Greenhouse Gas Emissions from Dairy Manure Management in a Mediterranean Environment*, ECOLOGICAL SOC’Y AM. (Nov. 2016); Dave Chadwick et al., *Manure Management: Implications for Greenhouse Gas Emissions*, ANIMAL FEED SCI. & TECH. (2011).

<sup>197</sup> See, e.g., CLIMATE ACTION PLAN, *supra* note 194, at 10 (discussing federal agency incentives for methane digesters in the dairy industry).

<sup>198</sup> CLIMATE NEXUS, *supra* note 189.

<sup>199</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (2007).

<sup>200</sup> 40 C.F.R. § 98 (2021).

<sup>201</sup> Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88 § 425, 123 Stat. 2904, 2961 (2009).

<sup>202</sup> See, e.g., HUANG & STEINZOR, *supra* note 6, at 1; Weil, *supra* note 1, at 183.

Finally, it looks more broadly at the EPA's treatment of animal agriculture.

### *B. Political Climate*

Growing concern about climate change near the end of the first decade of the twenty-first century led to significant government efforts to address the issue. By 2009, the executive<sup>203</sup> and legislative<sup>204</sup> branches were making serious statements about significant change. President Barack Obama pledged to reduce the United States' GHG emissions by seventeen percent below 2005 emissions levels if other countries would make emissions reduction efforts, too.<sup>205</sup> In May 2009, Congress introduced the American Energy and Security Act, also known as H.R. 2454.<sup>206</sup> The act was ambitious. Its focus was "clean energy, energy efficiency, reducing global warming pollution, and transitioning to a clean energy economy."<sup>207</sup> This included a cap-and-trade system, energy and fuel efficiency incentives, efforts toward carbon capture and sequestration, and improvements to the power grid, among other things.<sup>208</sup>

It is important to note that, despite the bill's sweeping and progressive scope, it left agriculture relatively untouched.<sup>209</sup> Agricultural facilities emitting fewer than 25,000 tons of GHGs annually and all animal agriculture facilities, regardless of size or emissions, were left uncovered by H.R. 2454.<sup>210</sup> In other words, even the more aggressive attempts to address climate change did little to address emissions from the agriculture industry. While legislators felt the time was right to begin earnestly addressing climate change, it seems they did not feel that agriculture needed to play a role in this.

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<sup>203</sup> CLIMATE ACTION PLAN, *supra* note 194, at 4.

<sup>204</sup> MARK HOLT & GENE WHITNEY, CONG. RSCH. SERV., R40643, GREENHOUSE GAS LEGISLATION: SUMMARY AND ANALYSIS OF H.R. 2454 AS REPORTED BY THE HOUSE COMMITTEE ON ENERGY AND COMMERCE (2009) [hereinafter CRS 2454].

<sup>205</sup> CLIMATE ACTION PLAN, *supra* note 194, at 4.

<sup>206</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); see also *H.R.2454 – American Clean Energy and Security Act of 2009*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/house-bill/2454> [https://perma.cc/XG4C-QZ6E] (last visited Nov. 9, 2021).

<sup>207</sup> CRS 2454, *supra* note 204, at 4.

<sup>208</sup> *Id.* at 1–5.

<sup>209</sup> See CRS GHG, *supra* note 189, at 11.

<sup>210</sup> *Id.*

### **C. Greenhouse Gas Reporting Program**

#### *1. Appropriations Act and Proposed Rule*

In 2007, senators were advocating for a GHG reporting system that would allow the government to procure “solid baseline data” on emissions.<sup>211</sup> Senators believed the reporting program was “an essential step in capping global warming emissions [and] an important part of establishing a comprehensive program to combat global warming.”<sup>212</sup> A press release on Senator Feinstein’s website stated that the registry would collect reporting from “*all* sectors of the U.S. economy.”<sup>213</sup> A later 2009 press release similarly sang the praise of the program.<sup>214</sup> The 2009 press release, however, revealed an additional detail: “[M]ost emission sources from the agriculture sector will not be required to report emissions, except for fewer than 50 very large manure management systems . . . .”<sup>215</sup> The press release reported a 25,000 metric ton GHG per year emissions threshold for reporting.<sup>216</sup> Given agriculture’s significant contribution to GHG emissions and global warming discussed above, one must look into the history of the reporting program and the interests involved in the decision-making process to learn how and why the agriculture industry was excluded from the GHGRP.

Congress did not establish the GHGRP in a freestanding piece of legislation. Rather, proponents of the program pushed for an appropriations rider to fund the registry.<sup>217</sup> This is a fairly common strategy for legislators to attach their policies to “must-pass” legislation, such as appropriations bills, without all the floor debates

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<sup>211</sup> *FY 2008 Omnibus Appropriations Bill Includes Feinstein-Boxer Measure to Provide 3.5 Million for the EPA to Develop New Economy-Wide Greenhouse Gas Emissions Registry*, DIANNE FEINSTEIN (Dec. 21, 2007), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=fe4fd65f-d430-38eb-ad97-3e587c81c9d9> [<https://perma.cc/433N-S29A>] [hereinafter FEINSTEIN 2007].

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (emphasis added).

<sup>214</sup> *Senators Feinstein, Boxer, Klobuchar and Snowe Applaud EPA’s Final Rule-Making to Establish Greenhouse Gas Emissions Registry*, DIANNE FEINSTEIN (Sept. 22, 2009), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=E3DEC621-5056-8059-7676-39BC65868886> [<https://perma.cc/3S3Z-TAJP>].

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> FEINSTEIN 2007, *supra* note 211.

and markups that accompany more controversial legislation.<sup>218</sup> Proponents of the GHGRP were successful in procuring funding in the Consolidated Appropriations Act of 2008:

Of the funds provided in the Environmental Programs and Management account, not less than \$3,500,000 shall be provided for activities to develop and publish a draft rule not later than 9 months after the date of enactment of this Act, and a final rule not later than 18 months after the date of enactment of this Act, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States.<sup>219</sup>

On April 10, 2009, the EPA published in the Federal Register its proposed rule for Mandatory Reporting of Greenhouse Gases.<sup>220</sup> In its summary, the proposed rule stated that emissions reporting requirements would apply to “all sectors of the economy.”<sup>221</sup> The rule proposed a reporting threshold of 25,000 metric tons of carbon dioxide emissions per year.<sup>222</sup> The proposed rule announced a comment period lasting through June 9, 2009, in addition to two hearings on the rule.<sup>223</sup>

## 2. Notice and Comment Period

When the EPA tries to regulate agriculture, it often faces opposition from both environmentalists seeking stricter regulations and from agriculture industry insiders seeking weaker regulations.<sup>224</sup> Rulemaking around the GHGRP was no exception. Upon publishing the final rule, the EPA reported holding two public hearings and receiving about 16,800 comments from the public.<sup>225</sup> Unsurprisingly, this included comments both for and against the proposed rule’s inclusion of livestock facilities and their manure management

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<sup>218</sup> *Legislative Process 101- Policy “Riders,”* INDIVISIBLE, <https://indivisible.org/resource/legislative-process-101-policy-%E2%80%9Criders%E2%80%9D> [<https://perma.cc/T7RE-HMP7>] (last visited Nov. 9, 2021).

<sup>219</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (2007).

<sup>220</sup> Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 16,448 (proposed Apr. 10, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 600, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065) [hereinafter Proposed Rule].

<sup>221</sup> *Id.* at 16,448.

<sup>222</sup> *Id.* at 16,503.

<sup>223</sup> *Id.* at 16,448.

<sup>224</sup> See Emily R. Lyons, *EPA’s Authority Gone Awry: The Flawed CAFO Reporting Rule*, 15 VT. J. ENV’T L. 599, 606 (2014).

<sup>225</sup> Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,269 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065) [hereinafter Final Rule].



programs.<sup>226</sup> Some of the comments suggested that livestock facilities should be entirely exempt from the GHGRP.<sup>227</sup> Commenters claimed that the proportion of emissions from such facilities is so low that the cost of reporting outweighed any environmental benefits of reporting.<sup>228</sup> The EPA, however, agreed with other commenters who believed that manure management GHG reporting was critical to the GHGRP's goals of learning more about and reducing GHG emissions.<sup>229</sup> In explaining their position, the EPA cited data from the Inventory<sup>230</sup> supporting manure management's significant contribution to GHG emissions.<sup>231</sup> The agency acknowledged that relatively few livestock facilities would be required to report emissions under the new rule, but that such information would still "help to inform future climate change policy decisions" and "improve the understanding of emission rates and action that facilities take to reduce emissions."<sup>232</sup>

During the comment period, the agriculture industry also voiced concerns that, should certain information required to be reported by the rule become public, it would pose threats to the facilities' biosecurity by exposing their locations, among other things.<sup>233</sup> Some suggested that regulated entities should keep required data available to inspectors for on-site review rather than submitting emissions data to the EPA.<sup>234</sup> Noting that GHGRP data would need to be readily available to the agency when calculating emissions, the EPA dismissed recommendations for on-site data review.<sup>235</sup>

### 3. *Final Rule*

The EPA promulgated the final rule on October 30, 2009.<sup>236</sup> The GHGRP requirements are codified in 40 C.F.R. § 98.<sup>237</sup> The rules clarify, among other things, which entities must report,<sup>238</sup> what their

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<sup>226</sup> *Id.* at 56,338–39.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 56,339.

<sup>230</sup> *See infra* Part II.C.4.

<sup>231</sup> Final Rule, *supra* note 225 at 56,339.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 56,287.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 56,260.

<sup>237</sup> 40 C.F.R. § 98 (2021).

<sup>238</sup> 40 C.F.R. § 98.2 (2021).

responsibilities are, and what they must include in their reporting.<sup>239</sup> Regulated facilities must annually report their total GHG emissions in metric tons of carbon dioxide equivalent (CO<sub>2</sub>e).<sup>240</sup>

The EPA intended for the GHGRP reporting requirements to apply to the agriculture industry as it applies to other industries.<sup>241</sup> As discussed above, the EPA rejected multiple comments suggesting less stringent application of the new rules to the agriculture industry. Additionally, the final Mandatory Reporting of Greenhouse Gases rule specifically includes “Manure Management” as a category of “Affected Entities.”<sup>242</sup> The rule lists examples of regulated facilities, including “[b]eef cattle feedlots . . . [d]airy cattle and milk production facilities . . . [h]og and pig farms . . . [c]hicken egg production facilities . . . [t]urkey production . . . [and b]roilers and [o]ther [m]eat type [c]hicken [p]roduction.”<sup>243</sup> The preamble to the final rule estimated that “approximately 107 livestock facilities . . . will need to report under the rule.”<sup>244</sup> Specifically, “[m]anure management systems with combined CH<sub>4</sub> and N<sub>2</sub>O emissions in amounts equivalent to 25,000 metric tons CO<sub>2</sub>e or more per year” are required to report.<sup>245</sup> With this threshold and other exemptions, the rule required only one percent of facilities engaged in manure management to report.<sup>246</sup>

The source category of manure management is specifically addressed in 40 C.F.R. § 98.360.<sup>247</sup> Such sources are “livestock facilities with manure management systems that emit 25,000 metric tons of CO<sub>2</sub> or more per year.”<sup>248</sup> The section defines a manure management system as “a system that stabilizes and/or stores livestock manure, litter, or manure wastewater” in one of the enumerated manners, which include open lagoons, storage pits, and composting, among other methods.<sup>249</sup> The regulations also provide an estimate of how many animals it takes to emit the threshold amount of GHG.<sup>250</sup> This includes beef, dairy, pigs,

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<sup>239</sup> 40 C.F.R. § 98.3 (2021).

<sup>240</sup> *Id.* § 98.3(c)(4)(i).

<sup>241</sup> *See infra* Part II.C.4.

<sup>242</sup> Final Rule, *supra* note 225, at 56,260–61 tbl.1.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 56,339.

<sup>245</sup> 40 C.F.R. § 98 tbl.A-3 (2021).

<sup>246</sup> CRS GHG, *supra* note 189, at 10.

<sup>247</sup> 40 C.F.R. § 98.360 (2021).

<sup>248</sup> 40 C.F.R. § 98.360(a).

<sup>249</sup> 40 C.F.R. § 98.360(b).

<sup>250</sup> 40 C.F.R. § 98 tbl.JJ-1.

poultry, and turkey, with dairy animals emitting by far the most GHG per individual animal.<sup>251</sup> The EPA estimates that a facility with 3,200 dairy animals would reach the 25,000 ton threshold.<sup>252</sup>

The final rule's preamble explains a narrowed scope of the rule's applicability to livestock facilities.<sup>253</sup> Reporting obligations for livestock facilities exclude emissions "unrelated to the stabilization and/or storage of manure" as well as emissions from manure management processes "located off site from a livestock operation."<sup>254</sup> The EPA also removed from the final rule a monthly manure sampling requirement.<sup>255</sup> Reducing burdens, limiting scope, and responding to public comments shows an effort on the part of the agency to seriously consider the concerns of regulated entities while still working toward a goal of acquiring GHG emissions data upon which to build future policy.<sup>256</sup>

The EPA cited the Clean Air Act (CAA) sections 114 and 208 as its legal authority in the final rule's preamble, rather than the Appropriations Act that established its funding.<sup>257</sup> Section 114, codified in 42 U.S.C. § 7414, authorizes the EPA Administrator to require emissions sources to monitor and report emissions.<sup>258</sup> Section 208 of the CAA, codified in 42 U.S.C. § 7542, authorizes the Administrator to collect information and reporting from motor vehicle manufacturers and directs EPA officials to inspect such information and records provided.<sup>259</sup>

#### 4. *Post-promulgation Events and Emissions Reporting*

The very same day the EPA promulgated the final rule, the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010 became law.<sup>260</sup> Section 425 of this law

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Final Rule, *supra* note 225, at 56,337.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 56,338.

<sup>256</sup> *See id.* at 56,338–39.

<sup>257</sup> *Id.* at 56,264; 42 U.S.C. § 7414; 42 U.S.C. § 7542.

<sup>258</sup> 42 U.S.C. § 7414.

<sup>259</sup> 42 U.S.C. § 7542.

<sup>260</sup> Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88, 123 Stat. 2904 (2009); *H.R. 2996 (111th): Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010*, GOVTRACK, <https://www.govtrack.us/congress/bills/111/hr2996> [<https://perma.cc/F7YW-SKFG>] (last visited Nov. 9, 2021); Final Rule, *supra* note 225.

states, “Notwithstanding any other provision of law, none of the funds made available in this or any other Act may be used to implement any provision in a rule, if that provision requires mandatory reporting of greenhouse gas emissions from manure management systems.”<sup>261</sup> The law also prohibits the use of funds in requiring livestock production facilities to obtain permits under the Clean Water Act.<sup>262</sup> The appropriations statute reflected successful efforts “at insulating agricultural interests from the reach of federal climate regulations.”<sup>263</sup>

Republican members of Congress offered multiple amendments to the Appropriations Act, seeking to limit the EPA’s use of funds to enforce environmental regulations, including multiple GHG regulations.<sup>264</sup> Such proposals included prohibiting the “EPA from using funds to implement, administer or enforce its proposed ‘endangerment’ finding, which would determine that greenhouse gases threaten public health and welfare.”<sup>265</sup> Another sought to limit federal climate change funding to the 2009 amounts.<sup>266</sup> These amendments illustrated a strong resistance on the part of the Republican party to allocate money to the federal government for environmental, and particularly, climate change purposes.<sup>267</sup> Democrats rebuffed most of these efforts,<sup>268</sup> but the Appropriations Committee did adopt an amendment that ultimately barred the application of the GHGRP to agricultural emitters.<sup>269</sup>

The amendment was sponsored by Iowa Republican Congressman Tom Latham.<sup>270</sup> He voiced concerns that mandatory emissions reporting would impose an unknown but potentially catastrophic

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<sup>261</sup> § 425, 123 Stat. at 2961.

<sup>262</sup> § 424, 123 Stat. at 2961.

<sup>263</sup> Robin Bravender et al., *Farm Interests Use Spending Bill to Fight Climate Change Regs*, N.Y. TIMES (June 19, 2009), [https://archive.nytimes.com/www.nytimes.com/gwire/2009/06/19/19greenwire-farm-interests-use-epa-spending-bill-to-fight-85048.html](https://archive.nytimes.com/www.nytimes.com/gwire/2009/06/19/19greenwire-farm-interests-use-epa-spending-bill-to-fight-85048.html?pagewanted=print) [https://perma.cc/3SRV-Q65K].

<sup>264</sup> Noelle Straub & Robin Bravender, *House Democrats Limit Amendments to Interior-EPA Spending Bill*, N.Y. TIMES (June 25, 2009), <https://archive.nytimes.com/www.nytimes.com/gwire/2009/06/25/25greenwire-house-democrats-limit-amendments-to-interior-e-45554.html> [https://perma.cc/P32K-RXU9].

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *See id.*

<sup>268</sup> *Id.*

<sup>269</sup> Bravender et al., *supra* note 263.

<sup>270</sup> *Id.*

burden on the industry.<sup>271</sup> Representative Latham had longstanding close ties to the agriculture field and was later recognized as a leader and champion in the industry, receiving an agronomy award in 2010.<sup>272</sup> Other members of the House Appropriations Committee were divided on whether to adopt the amendment.<sup>273</sup> Opponents echoed sentiments similar to those heard from the senators who proposed the registry back in 2007: the government needs to know who is emitting greenhouse gases and how much.<sup>274</sup> Congressman Norm Dicks of Washington State opposed the amendment, stating that emissions data from large-scale agricultural facilities “is something we need to know. Methane is one of the most important gases that we have to deal with if we’re going to deal with [climate change].”<sup>275</sup> However, those supporting the protectionist amendment carried the vote thirty-one to twenty-seven.<sup>276</sup> Though relatively few agricultural facilities were ever required to report under the rule,<sup>277</sup> the amendment sought to ensure that manure management as a whole would be exempt from any reporting requirements.

Debate on the amendment’s language continued in a House floor debate in October of 2009. Those opposing GHGRP’s application to the livestock industry raised three major concerns. First, they critiqued the manner in which the program came into existence.<sup>278</sup> Representative Latham disapproved of the use of the appropriations rider, lamenting that the GHGRP was “snuck” into the 2008 Appropriations Act without a hearing.<sup>279</sup> He also bemoaned that a single sentence in the Act led to thousands of pages of regulation.<sup>280</sup> Representative Dicks responded that the regulations were, in fact, the product of the EPA’s careful consideration of thousands of comments and dozens of appearances at public hearings.<sup>281</sup> Representative

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<sup>271</sup> *Id.*

<sup>272</sup> *Iowa Congressman Tom Latham Receives Champion of Agronomy Award*, LATHAM SEEDS, <https://www.lathamseeds.com/2010/03/iowa-congressman-tom-latham-receives-champion-of-agronomy-award/> [<https://perma.cc/EP6E-NF5L>] (last visited Nov. 9, 2021).

<sup>273</sup> Bravender et al., *supra* note 263.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> CRS GHG, *supra* note 189, at 10.

<sup>278</sup> 111 CONG. REC. H11,757–58 (daily ed. Oct. 26, 2009).

<sup>279</sup> *Id.* at H11,757.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

Simpson of Idaho maintained that legislation of this sort ought to be drafted by authorizing committees like the Committee on Agriculture, rather than the Committee on Appropriations.<sup>282</sup>

Second, representatives condemned the crippling costs that the regulatory requirements would place on an industry still suffering from an economic downturn.<sup>283</sup> Representatives noted that farmers were already facing extremely difficult times after the 2008 recession, and Congress was liable to “regulate farmers out of business.”<sup>284</sup> Representatives claimed that the regulations would push American jobs overseas and would pass expenses along to consumers who were also struggling financially.<sup>285</sup> Representative Dicks repeatedly emphasized that the regulations applied only to a small percentage of facilities<sup>286</sup> and that these were the largest facilities “who are emitting the equivalent of 58,000 barrels of oil in these emissions. . . . They can afford to [report their emissions].”<sup>287</sup> Representative Latham voiced concern that even those facilities that did not meet the reporting threshold would still be required to spend large amounts of money to determine whether or not they qualified.<sup>288</sup>

Third, opponents of the GHGRP regulations insisted that the program’s application to livestock facilities would not, for all its trouble, do anything to help the environment.<sup>289</sup> Representative Simpson stated that manure management causes less than one percent of anthropogenic GHG emissions, and further, eighty-five percent of all agricultural GHG emissions come from sources that are not regulated under the GHGRP.<sup>290</sup> Representative Latham pointed out that farmers inherently have an interest in preserving the environment and regulating emissions from manure management “doesn’t make manure lagoons smell any better. It doesn’t protect water wells or native species. It doesn’t do one thing to improve the standard of living in . . . any part of this country.”<sup>291</sup> Representative Tiahrt of Kansas similarly claimed that manure management reporting under the GHGRP would

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<sup>282</sup> *Id.* at H11,758.

<sup>283</sup> *Id.* at H11,756–57.

<sup>284</sup> *Id.* at H11,756.

<sup>285</sup> *Id.* at H11,758–59.

<sup>286</sup> *Id.* at H11,756–59.

<sup>287</sup> *Id.* at H11,759.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at H11,756–59.

<sup>290</sup> *Id.* at H11,756.

<sup>291</sup> *Id.* at H11,757.

“do nothing but slow our economy and force more unemployment”<sup>292</sup> and that he “would defy anybody to show a measurable increase or decrease in greenhouse gases because of these regulations . . . .”<sup>293</sup>

In the end, the language prohibiting funding for EPA enforcement of GHGRP reporting against manure management systems was included in the legislation.<sup>294</sup> This language has been incorporated into appropriations acts for the Department of the Interior, Environment, and Related Agencies every year since.<sup>295</sup> The 2011 act provided funding for the EPA “under the authority and conditions provided in . . . [t]he Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010,” thus binding the new year’s funding to the prior year’s restrictions.<sup>296</sup> Similar language was used to impute the limitation to the 2012<sup>297</sup> and 2013<sup>298</sup> appropriations acts. Starting in 2014, the exact language of section 425 of the 2010 Appropriations Act was written into the appropriations acts for each year.<sup>299</sup> Congress has thereby been careful, every year, to continue to prohibit the EPA from enforcing GHGRP requirements against animal agriculture facilities.

Indeed, the GHGRP reports are devoid of data from the agriculture industry.<sup>300</sup> When EPA published the 2018 data for “Direct GHG

<sup>292</sup> *Id.* at H11,758.

<sup>293</sup> *Id.* at H11,759.

<sup>294</sup> Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88 § 425, 123 Stat. 2904, 2961 (2009).

<sup>295</sup> Department of Defense and Full-Year Continuing Appropriations Act 2011, Pub. L. No. 112-10, § 1101(a), 125 Stat. 38, 102 (2011); Continuing Appropriations Act, 2012, Pub. L. No. 112-36, § 101(a), 125 Stat. 386, 386 (2011); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 1101(a), 127 Stat. 198, 412 (2013); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 421, 128 Stat. 5, 343 (2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 420, 128 Stat. 2130, 2448–49 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 418, 129 Stat. 2242, 2579 (2015); Consolidated Appropriations Act, 2017, P. L. No. 115-31, § 418, 131 Stat. 135, 498 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 417, 132 Stat. 348, 691 (2018); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 417, 133 Stat. 13, 262 (2019); Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 438, 133 Stat. 2534, (2019); Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 437 (2020).

<sup>296</sup> § 1101(a) 125 Stat. at 102.

<sup>297</sup> § 101(a), 125 Stat. at 386.

<sup>298</sup> § 1101(a), 127 Stat. at 412.

<sup>299</sup> § 421, 128 Stat. at 343; § 420, 128 Stat. at 2448–49; § 418, 129 Stat. at 2579; § 418, 131 Stat. at 498; § 417, 132 Stat. at 691; § 417, 133 Stat. at 262; § 438; H.R. 133 § 437.

<sup>300</sup> See *GHGRP Reported Data*, EPA, <https://www.epa.gov/ghgreporting/ghgrp-reported-data> [https://perma.cc/5GYV-LEGU] (last visited Nov. 9, 2021).

Emissions Reported by Sector,” agriculture is nowhere to be seen.<sup>301</sup> In explaining the GHGRP, the EPA notes that “entire sectors, such as the agriculture . . . sector[], are not required to report,” though it does not explain why.<sup>302</sup> The EPA, and those paying attention to the data it produces, is well aware that the agriculture sector contributes significantly to greenhouse gas emissions in the United States.<sup>303</sup> The EPA reported that agriculture was responsible for ten percent of GHG emissions in 2018.<sup>304</sup> It also recognized that methane accounted for ten percent of GHG emissions in 2018.<sup>305</sup> The EPA collects such information as part of the Inventory of U.S. Greenhouse Gas Emissions and Sinks, known as the Inventory, as part of its obligations under the United Nations Framework Convention on Climate Change.<sup>306</sup>

The EPA has been preparing Inventory documents since long before the GHGRP was proposed.<sup>307</sup> The Inventory and the GHGRP provide distinct information, and the former is not a replacement for the latter when it comes to collecting data on emissions from specific economic sectors.<sup>308</sup> The Inventory “estimates the total greenhouse gas emissions across all sectors of the economy [while] [t]he . . . Greenhouse Gas Reporting Program . . . collects detailed emissions data from the largest greenhouse gas emitting facilities in the U.S.”<sup>309</sup> In other words, the Inventory provides the agency’s best guess of emissions divided by economic sector, while the GHGRP requires reporting from specific facilities of their *actual* GHG emissions for the reporting period.<sup>310</sup> Like those who proposed the GHGRP over a decade ago,<sup>311</sup> the EPA recognizes the GHGRP as a crucial tool in addressing GHG

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<sup>301</sup> *Id.*

<sup>302</sup> *Greenhouse Gas Reporting Program and the U.S. Inventory of the Greenhouse Gas Emissions and Sinks*, EPA, <https://www.epa.gov/ghgreporting/greenhouse-gas-reporting-program-and-us-inventory-greenhouse-gas-emissions-and-sinks> [<https://perma.cc/GFS3-XFFG>] (last visited Nov. 9, 2021) [hereinafter *GHGRP and Inventory*].

<sup>303</sup> *Greenhouse Gas Inventory Data Explorer*, EPA, <https://cfpub.epa.gov/ghgdata/inventoryexplorer/> [<https://perma.cc/GQ5H-2D8U>] (last visited Nov. 9, 2021).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *GHGRP and Inventory*, *supra* note 302.

<sup>307</sup> *Id.*

<sup>308</sup> *See id.*

<sup>309</sup> *Id.*

<sup>310</sup> *See id.*

<sup>311</sup> FEINSTEIN 2007, *supra* note 211.



emissions.<sup>312</sup> Yet, Congress barred the EPA from collecting agriculture data as soon as the GHGRP came into existence.<sup>313</sup>

#### ***D. Continuing Debates Regarding EPA's Regulation of Agriculture***

Opponents of agricultural regulation in general voice concerns about stunting effects on the industry.<sup>314</sup> Concerns include dwindling innovation, burdensome compliance costs passed on to consumers, and federal intrusion into state authority.<sup>315</sup> One researcher asserted that “the overreach and scope of environmental regulations is inflicting serious harm on farmers and ranchers alike.”<sup>316</sup> In 2011, the Pennsylvania Farm Bureau’s President, Carl Shaffer, called EPA regulatory action “heavy-handed” and “crushing.”<sup>317</sup>

Others view the EPA’s approach to agricultural regulations much differently, decrying the agency’s insufficient efforts to regulate agriculture, particularly large-scale animal agriculture.<sup>318</sup> The agency has been critiqued for giving CAFOs in the country “a free pass to pollute.”<sup>319</sup> One attorney working with the Center for Race, Poverty and the Environment voiced frustration that the EPA “is reluctant to regulate agriculture” in compliance with multiple laws.<sup>320</sup> Unlike the case with the GHGRP, agricultural sources are “not exempt from these laws.”<sup>321</sup> Advocates for greater regulation are concerned with the persistent lack of government data from animal agriculture facilities. The federal government does not even know where within the country

<sup>312</sup> *GHGRP and Inventory*, *supra* note 302.

<sup>313</sup> Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88 § 425, 123 Stat. 2904, 2961 (2009).

<sup>314</sup> See Daren Bakst, *Eliminating and Reducing Regulatory Obstacles in Agriculture*, HERITAGE FOUND. (June 28, 2016), <https://www.heritage.org/government-regulation/report/eliminating-and-reducing-regulatory-obstacles-agriculture> [<https://perma.cc/YWG2-J4SL>].

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *EPA Regulations Suffocating U.S. Agriculture*, FARM PROGRESS (Nov. 23, 2011), <https://www.farmprogress.com/government/epa-regulations-suffocating-us-agriculture> [<https://perma.cc/Z25D-VN59>].

<sup>318</sup> See Georgina Gustin, *EPA's Failure to Regulate Factory Farm Pollution Draws New Scrutiny*, INSIDE CLIMATE NEWS (Nov. 28, 2016), <https://insideclimatenews.org/news/22112016/epa-regulate-factory-farm-emissions-pollution> [<https://perma.cc/QA4J-6CBF>]; J. Nicholas Hoover, *Can't You Smell That Smell? Clean Air Act Fixes for Factory Farm Air Pollution*, 6 STAN. J. ANIMAL L. & POL'Y 1 (2013).

<sup>319</sup> Gustin, *supra* note 318.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

many of these facilities are.<sup>322</sup> Environmental and animal rights groups have grown frustrated with the EPA's continued capitulation to the animal agriculture industry's demands not to be regulated.<sup>323</sup> Such groups have petitioned and even sued the agency for action.<sup>324</sup> People have pointed to the Clean Air Act, the Clean Water Act, and other environmental statutes as sources of EPA regulatory authority over these facilities.<sup>325</sup>

While most Americans are willing to acknowledge climate change,<sup>326</sup> and many want to see more federal action to combat it,<sup>327</sup> lawmakers remain unwilling to hold agricultural entities accountable for their contributions. It may not be readily apparent to most Americans, who are not reading appropriations acts or skimming lengthy laws for loopholes and exceptions, that agriculture is not doing its part to address climate change. And the government is not asking it to. "The exceptional protection afforded to the industry across various areas of law" helps keep Americans from seeing how "hidden costs of [large-scale agricultural operations] are externalized to the environment . . . in the form of environmental degradation."<sup>328</sup>

Those within the industry have their reasons for keeping large-scale animal agriculture in a special cocoon, in which they may operate outside the norms applied to other industries. As Representative Latham said, the agriculture industry is "scared to death" of regulation.<sup>329</sup> There is, however, cause for hope. A growing body of literature is developing, bringing the government's special treatment of agriculture into the light.<sup>330</sup> More information linking animal

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> Lydia Saad, *Americans as Concerned as Ever About Global Warming*, GALLUP (Mar. 25, 2019), <https://news.gallup.com/poll/248027/americans-concerned-ever-global-warming.aspx> [<https://perma.cc/36QS-G3RP>].

<sup>327</sup> Cary Funk & Meg Heffron, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/> [<https://perma.cc/CPU7-X5D3>].

<sup>328</sup> Weil, *supra* note 1, at 183.

<sup>329</sup> Bravender et al., *supra* note 263.

<sup>330</sup> See Weil, *supra* note 1; HUANG & STEINZOR, *supra* note 6; Fiber-Ostrow & Lovell, *supra* note 21, at 239.

agriculture to climate change is becoming available.<sup>331</sup> More Americans are calling for action.<sup>332</sup>

### CONCLUSION

The harmful effects of ag-gag laws, reporting exemptions, and other agricultural exceptionalism laws and policies are wide-ranging. As discussed above, the unbridled and unaccountable practice of industrial animal agriculture harms animals, workers, consumers, and the environment, among other things. Not everyone pays attention to animal rights issues. Not everyone follows climate change and environmental issues. But laws and policies promoting animal agricultural exceptionalism have the potential to negatively affect all of us. The intersectionality of these issues and the far-reaching harms are evidenced in the diverse alliances formed in opposition to these laws. Consider the long list of organizations that signed an ag-gag opposition statement in recent years.<sup>333</sup> Nearly eighty groups with varying interests—including food safety, workers’ rights and safety, animal rights, international issues, water and natural resources protection, and democratic and constitutional rights, among other things—voiced their concern for these laws.<sup>334</sup> Similarly, the Center for Food Safety joined animal rights groups in the recent suit challenging the Kansas ag-gag law.<sup>335</sup>

The current COVID-19 pandemic has put America’s relationship with industrial animal agriculture in sharp relief. By May of 2020, meatpacking facilities had become COVID-19 epicenters.<sup>336</sup> Nevertheless, President Trump declared in an executive order that these facilities are “critical infrastructure” and required that they remain open as the pandemic ravaged the country and other places of business remained closed.<sup>337</sup> The executive order simultaneously shielded owners of these facilities from suits by their employees and neglected

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<sup>331</sup> See EMISSION IMPOSSIBLE, *supra* note 189; CLIMATE NEXUS, *supra* note 189.

<sup>332</sup> See Funk & Heffron, *supra* note 327.

<sup>333</sup> *Statement of Opposition*, *supra* note 181.

<sup>334</sup> *Id.*

<sup>335</sup> Animal Legal Def. Fund v. Kelly, No. 18-2657-KHV, 2020 WL 1659855 (D. Kan. Apr. 3, 2020).

<sup>336</sup> Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/> [<https://perma.cc/G8Q5-P79A>].

<sup>337</sup> *Id.* (quoting President Trump’s executive order).

to require protections for employees.<sup>338</sup> Employees complained of lack of COVID-19 protections.<sup>339</sup> They contracted the virus at rates significantly above average for their communities.<sup>340</sup> Employees and inspectors died.<sup>341</sup> Additionally, industrial meatpacking facilities “are excellent vectors for spreading lethal strains of *E. coli*, antibiotic-resistant *Salmonella*, antibiotic-resistant *Staphylococcus aureus*, and now COVID-19,”<sup>342</sup> making their status as essential businesses a threat to consumers and workers alike. Yet, the facilities remained open. As with other laws promoting animal agricultural exceptionalism, proponents of keeping meatpacking facilities open warned of food security and the unavailability of meat.<sup>343</sup> But it is also clear that the push to keep these facilities operating under conditions that threaten human life was, at least in part, politically motivated as the country approached the 2020 presidential election.<sup>344</sup>

Now, more than ever, every consumer in the United States can see the costs of industrial animal agriculture and the way federal and state laws exacerbate the problems: “[I]ndustrial animal agriculture poses not just short-term problems; it is at the root of so many of the world’s most pressing long-term challenges: climate change, chronic disease, antibiotic resistance, species extinction, and deforestation. Most disturbingly, it is responsible for deadly swine flu and bird flu pandemics of the past.”<sup>345</sup> If we are informed about the special treatment this industry enjoys and the reasons for these protections and loopholes, we can better understand whether and how to combat these practices and bring industrial agriculture into a new era of cooperation, responsibility, transparency, and sustainability. As laws protecting this industry and allowing it to operate with impunity continue to be introduced and debated, we should consider whose interests they serve, whether they are worth the risks, and whether—regardless of these considerations—they are legal.

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *See id.*

<sup>345</sup> Leah Garcés, *COVID-19 Exposes Animal Agriculture’s Vulnerability*, NCBI (Apr. 25, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7221225/> [<https://perma.cc/VB73-MCL4>] (emphasis and internal citations omitted).