

# Incentivizing Transparency: Agricultural Benefit Corporations to Improve Consumer Trust

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\* © 2018 Kathryn E. Smith. J.D. Candidate 2019, University of San Diego School of Law; B.A. 2010, University of California, San Diego. I dedicate this Comment to those actively striving to reduce animal suffering. I thank Jane Susskind for her encouragement, support, and invaluable feedback; Bobby Foster, Robert Bitman, Macklin Thornton, and Danielle Macedo for their precise editing; and Laurence Claus, Miranda Perry Fleischer, and Lynne Dallas for their feedback and inspiration. I am deeply grateful to the *San Diego Law Review* Editorial Board for this opportunity.

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## I. INTRODUCTION

Rene Miller is a resident of “Duplin County, North Carolina—an area known as the ‘hog capital of the world.’”<sup>1</sup> She suffers from asthma and sarcoidosis from bacteria and relies on a pacemaker to regulate her heart, yet she is considered lucky.<sup>2</sup> The alternative is cancer.<sup>3</sup> The predictable culprits are not to blame though; instead, her community’s deteriorating health is the result of geographic location.<sup>4</sup> Rene lives near one of the largest waste lagoons in the country where hogs outnumber Duplin County residents forty to one.<sup>5</sup> To manage the disproportionately large hog population, North Carolina’s pig Concentrated Animal Feeding Operations (CAFOs)<sup>6</sup> regularly spray pig waste into the air<sup>7</sup> and process dead hogs into feed for consumption by other hogs.<sup>8</sup>

Although a century has passed since Upton Sinclair uncovered Chicago’s abysmal slaughterhouse conditions,<sup>9</sup> current industrial agricultural conditions

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1. Julie Gueraseva, *‘What the Health’ Is a Startling Exposé of Corporate Greed Trumping Public Health*, LAIKA MAG. (June 1, 2017), <https://www.laikamagazine.com/what-the-health-film-exposes-truth/> [https://perma.cc/8P4D-A5FF].

2. WHAT THE HEALTH (AUM Films & Media 2017).

3. See Gueraseva, *supra* note 1.

4. See *id.*

5. *Id.* “[L]agoon” is a euphemism here; plainly, hog sewage in Duplin County is channeled into mammoth cesspools. Burr Deming, *Republicans and Hogs, the Tragedy of the Commons*, FAIRANDUNBALANCED (Apr. 27, 2017), <http://fairandunbalanced.com/?tag=rene-miller> [https://perma.cc/A4YK-UGNX].

6. Douglas R. Tompkins, *Foreword* to THE CAFO READER: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES, at ix, ix (Daniel Imhoff, ed. 2010).

7. Gueraseva, *supra* note 1; WHAT THE HEALTH, *supra* note 2.

8. WHAT THE HEALTH, *supra* note 2.

9. Sinclair’s 1906 work, *The Jungle*, exposed the terrible meatpacking conditions for animals and immigrants. Karen Olsson, *Welcome to the Jungle: Does Upton Sinclair’s Famous Novel Hold Up?*, SLATE (July 10, 2006, 12:57 AM), [http://www.slate.com/articles/arts/books/2006/07/welcome\\_to\\_the\\_jungle.html](http://www.slate.com/articles/arts/books/2006/07/welcome_to_the_jungle.html) [https://perma.cc/Q7W9-TWHV]. The book ultimately aided in the passage of the Federal Food and Drugs Act later that year. *Part I: The 1906 Food and Drugs Act and Its Enforcement*, FDA (Feb. 1, 2018), <https://www.fda.gov/oc/ohrt/part-i-the-1906-food-and-drugs-act-and-its-enforcement>.

are still deeply unsatisfactory.<sup>10</sup> At the time, the government ultimately considered Sinclair's exposé a worthy cause for change, but today the government tends to give the benefit of the doubt to corporations.<sup>11</sup> Consumer hope may be on the horizon, however. Recently, the Central Division of the United States District Court of Utah held a Utah "ag-gag" law—a law criminalizing covert agricultural investigations<sup>12</sup>—unconstitutional after an undercover environmentalist was charged for revealing the incidence of a bulldozer moving a sick cow outside a slaughterhouse.<sup>13</sup>

The rise of consumer misinformation and food-borne illness due to substandard agricultural industrial practices<sup>14</sup> has led agricultural corporations

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[www.fda.gov/AboutFDA/History/FOrgsHistory/EvolvingPowers/ucm054819.htm](http://www.fda.gov/AboutFDA/History/FOrgsHistory/EvolvingPowers/ucm054819.htm) [<https://perma.cc/FS66-GBE6>].

10. See generally *Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg65127/html/CHRG-111hhrg65127.htm> [<https://perma.cc/MY8Q-WKN7>] (discussing flaws in the federal government's inspection system).

11. For example, several states including Kansas, Montana, North Dakota, Iowa, Missouri, Idaho, and North Carolina, have passed so-called "ag-gag" legislation that makes it difficult for whistleblowing employees or employee advocacy groups to expose animal cruelty or food safety violations on factory farms. Marshall Tuttle, Note, *Finally a Solution? How Animal Legal Defense Fund v. Otter Could Affect the Constitutionality of Iowa's Ag-Gag Law*, 21 *DRAKE J. AGRIC. L.* 237, 238 (2016). Thus, some argue the true aim of ag-gag legislation is to conceal abuse from the public. See, e.g., Cody Carlson, *The Ad-Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC (Mar. 20, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/> [<https://perma.cc/3ZDN-VCZP>].

12. Former New York Times columnist Mark Bittman first coined the term "ag-gag" in 2011 to describe a series of state bills appearing across the country that criminalized photographing and video recording inside agricultural facilities. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> [<https://perma.cc/9KR9-HK6Q>]. Ag-gag laws typically include one or more of the following elements: (1) "[p]rohibiting documentation," (2) "[p]rohibiting misrepresenting oneself in order to gain access to an animal agriculture facility," and (3) "[r]equiring the quick reporting to authorities of illegal animal cruelty." CHIP GIBBONS, CTR. FOR CONSTITUTIONAL RIGHTS, *AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS* 6 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> [<https://perma.cc/HA3Q-U3HR>].

13. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017). The Animal Legal Defense Fund's complaint represented the first legal challenge to any ag-gag law in the United States. Samantha Morgan, Note, *Ag-Gag Challenged: The Likelihood of Success of Animal Legal Defense Fund v. Herbert's First Amendment Claims*, 39 *VT. L. REV.* 241, 241 (2014).

14. See, e.g., Am. Soc'y for Microbiology, *Foodborne Illness Cause by Common Agricultural Practice, Casts Doubts on Biocidal Product Labeling*, SCI. DAILY (Apr. 17,

to respond in a myriad of ways. On occasion, contamination is purely accidental, and corporations who regularly take every precaution respond diligently and apologetically.<sup>15</sup> On the other end of the spectrum, corporations' inadequate precautions may actually cause illness.<sup>16</sup> Moreover, because outbreaks rarely occur, these corporations have little incentive to implement better practices when doing so would sacrifice efficiency and ultimately, profits.<sup>17</sup> Corporations who reside in states with ag-gag laws and benefit from them have especially little incentive to take care.<sup>18</sup>

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2018), <https://www.sciencedaily.com/releases/2018/04/180417100538.htm> [<https://perma.cc/Y64K-HF4H>] (“Chlorine, commonly used in the agriculture industry to decontaminate fresh produce, can make foodborne pathogens undetectable . . .”); S.E. Smith, *How Industrial Agriculture Promotes Foodborne Illness and Makes Us Sick*, CARE2 (May 6, 2018), <https://www.care2.com/causes/how-industrial-agriculture-promotes-foodborne-illness-and-makes-us-sick.html> [<https://perma.cc/2UUA-S52X>] (“Certain practices associate with industrial agriculture can increase the risk of foodborne illnesses—an even outright promote them.”). “In 2016, 839 foodborne disease outbreaks were reported, resulting in 14,259 illnesses, 875 hospitalizations, 17 deaths, and 18 food product recalls.” DANIEL DEWEY-MATTIA ET AL., NAT’L CTR. FOR EMERGING & ZOONOTIC INFECTIOUS DISEASES, CTRS. FOR DISEASE CONTROL & PREVENTION, SURVEILLANCE FOR FOODBORNE DISEASE OUTBREAKS UNITED STATES, 2016: Annual Report 1 (2016), [https://www.cdc.gov/fdoss/pdf/2016\\_FoodBorneOutbreaks\\_508.pdf](https://www.cdc.gov/fdoss/pdf/2016_FoodBorneOutbreaks_508.pdf) [<https://perma.cc/NVW9-T6Z3>].

15. One such corporation is the restaurant chain, Chipotle Mexican Grill, Inc. Following its two *E. coli* outbreaks in 2015, the exposure of which caused the company a substantial revenue drop, Chipotle took aggressive measures to remedy the food safety issue and apologize to customers. Daniel B. Kline, *Here’s Everything Chipotle Has Done to Handle Its E. Coli Crisis; Is It Enough?*, MOTLEY FOOL (Feb. 10, 2016, 5:40 PM), <https://www.fool.com/investing/general/2016/02/10/heres-everything-chipotle-has-done-to-handle-its-e.aspx> [<https://perma.cc/6J8H-ZEKT>].

16. See, e.g., April K. Bogard et al., *Ground Beef Handling and Cooking Practices in Restaurants in Eight States*, 76 J. FOOD PRODUCTION 2132, 2132 (2013) (“This study revealed the pervasiveness of risky ground beef handling policies and practices in restaurants and the need for educational campaigns targeting food workers and managers.”); Laura Green Brown, *EHS-Net Restaurant Food Safety Studies: What Have We Learned?*, J. ENVTL. HEALTH, Mar. 2013, at 44, 44–45 (“[R]estaurants . . . are an important source of foodborne illness outbreaks; half of all foodborne illness outbreaks are associated with restaurants . . .” (citation omitted) (citing MICHAEL LYNCH ET AL., DIV. OF FOODBORNE, BACTERIAL & MYCOTIC DISEASES, NAT’L CTR. FOR ZOONOTIC, VECTOR-BORNE & ENTERIC DISEASES, SURVEILLANCE FOR FOODBORNE-DISEASE OUTBREAKS—UNITED STATES, 1998–2002 (2006))); Denis W. Stearns, *Pay No Attention to That Man Behind the Curtain: Concealment, Revelation, and the Question of Food Safety*, 38 SEATTLE U.L. REV. 1399, 1407–08 (2015).

17. See Michael Ollinger & Nicole Ballenger, *Weighing Incentives for Food Safety in Meat and Poultry*, USDA (Apr. 1, 2003), <https://www.ers.usda.gov/amber-waves/2003/aril/weighing-incentives-for-food-safety-in-meat-and-poultry/> [<https://perma.cc/WW3J-YU8T>] (“The legal liability system forces producers to make food safety investments up to the point at which the probability that the plant’s products would be identified as the cause of an illness would be . . . very low. However, the incentives of the legal system limit food safety investment.”).

18. For example, an ag-gag law can provide a corporation practicing inhumane treatment of animals with advanced warning before serious enforcement action follows.

Instead, some corporations cheerlead ag-gag legislation, while raking in abundant profits.<sup>19</sup> In these cases, the savvy consumer would wisely assume a corporation has something to hide.<sup>20</sup>

Ideally, well-meaning, ethical producers could gain recognition and instill consumer trust. To some degree, food labels provide such recognition; however, the American consumer deserves more comprehensive reform.<sup>21</sup> Offering agricultural companies the opportunity to belong to a new class of benefit corporations would improve consumer information while incentivizing transparent agricultural standards.<sup>22</sup> Under traditional corporate law, benefit corporations are not required to maximize profits for shareholders and instead may prominently focus on the pursuit of social or environmental missions.<sup>23</sup> Consequently, benefit corporations do not expose corporate directors to the risk of lawsuits from shareholders interested in profits alone.<sup>24</sup>

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Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J.L. & SOC. PROBS. 337, 368 (2015).

19. Monsanto was one such corporation when it lobbied for ag-gag legislation in Iowa. See Rita Lobo, *The Pros and Cons of Ag-Gags*, NEW ECON. (June 11, 2013), <http://www.theneweconomy.com/business/the-pros-and-cons-of-ag-gags> [https://perma.cc/W964-QLGQ]. As the world's largest agricultural biotechnology corporation with a net worth in 2016 of \$1.37 billion, Monsanto can easily afford to lobby for ag-gag laws. See Arathy S. Nair, *Monsanto Beats Thanks to Strong Demand for Its Soybean and Corn Seeds*, BUS. INSIDER (Apr. 5, 2017, 8:44 AM), [www.businessinsider.com/monsanto-earnings-q2-2017-2017-4](http://www.businessinsider.com/monsanto-earnings-q2-2017-2017-4) [https://perma.cc/3GYF-STVW].

20. See James Bennet et al., *Eating with Our Eyes Closed*, N.Y. TIMES (Apr. 9, 2013), <http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html> [https://perma.cc/ZN9S-8HDC].

21. See Zak Franklin, *Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare*, 21 ANIMAL L. 285, 307–13 (2015); see also *infra* Part IV.

22. See Rylee Seymour, Note, *Food Deserts Are Ripe for Business*, 44 B.C. ENVTL. AFF. L. REV. 421, 421 (2017) (proposing the reformation of food desert agriculture through traditional benefit corporation structure); see also William Semaan, Note, *Cultivating Capital: A Look at the Issues Affecting Urban Farms as a Business and How New Innovative Policy Changes at the Federal and State Level Will Impact the Financial Sustainability of Urban Farms*, 91 U. DET. MERCY L. REV. 317, 338–39 (2014) (proposing the utilization of traditional benefit corporation laws to support the unique interests of urban farms).

23. Shelly Alcorn, *Benefit Corporations: A New Formula for Social Change*, ASAE, [https://foundation.asaecenter.org/asae-home/resources/articles/an\\_magazine/2012/april-may/benefit-corporations-a-new-formula-for-social-change](https://foundation.asaecenter.org/asae-home/resources/articles/an_magazine/2012/april-may/benefit-corporations-a-new-formula-for-social-change) [https://perma.cc/DE5H-TJPX].

24. *Id.* (“Benefit corporations create a ‘safe harbor’ for boards of directors who take interests other than profit into account when making decisions on the corporation’s behalf.”).

First, Part II will discuss the current array of agricultural industry standards—many of which negatively impact consumer health—to emphasize the value that offering tailored benefit corporation status to agricultural producers would provide to the American people. Part III will then discuss the link between transparent standards and accountable food safety. Next, Part IV will address existing food safety regulations and the argument that they adequately inform consumers. Part V will discuss the evolution of benefit corporations, highlighting recent debate that *all* benefit corporations should qualify for tax incentives. Lastly, Part VI proposes the enactment of a federal statute classifying a new type of benefit corporation tailored toward the ultimate goals of incentivizing safe and transparent agricultural practices and comprehensively informing consumers.

## II. CURRENT INDUSTRY STANDARDS

The Food and Drug Administration (FDA) is a federal agency under the Department of Health and Human Services (HHS) that enforces laws regulating the safety of food and drugs.<sup>25</sup> The Food and Drugs Act of 1906 was the first of its kind to target public health and consumer protections.<sup>26</sup> “[A]fter a legally marketed toxic elixir killed 107 people,” Congress passed the Federal Food, Drug, and Cosmetic (FD&C) Act of 1938, which “authorized the FDA to demand evidence of safety for new drugs, issue standards for food, and conduct factory inspections.”<sup>27</sup> In 1962, Congress passed the Kefauver–Harris Amendments to the FD&C Act<sup>28</sup> following

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25. *FDA Organization*, FDA (Mar. 28, 2018), <https://www.fda.gov/AboutFDA/CentersOffices/default.htm> [<https://perma.cc/PZ2W-WXG6>]; *Laws Enforced by FDA*, FDA (Mar. 29, 2018), <https://www.fda.gov/RegulatoryInformation/LawsEnforcedbyFDA/default.htm> [<https://perma.cc/3LLH-DNHZ>]; *The History of FDA’s Fight for Consumer Protection and Public Health*, FDA (June 29, 2018), <https://www.fda.gov/AboutFDA/History/default.htm> [<https://perma.cc/5LV3-4UVY>] (“FDA’s modern regulatory functions began with the passage of the 1906 Pure Food and Drugs Act . . . .”); see Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, *repealed by* Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–99 (2012)).

26. *Laws Enforced by FDA*, *supra* note 25.

27. *Id.*; see generally 21 U.S.C. §§ 301–399 (originally enacted as Federal Food, Drug, and Cosmetic Act of 1938).

28. Drug Amendments of 1962 (Kefauver-Harris Amendments), Pub. L. No. 87-781, 76 Stat. 780 (codified as amended in scattered sections of 21 U.S.C. §§ 301–81 (2012)).

the thalidomide tragedy.<sup>29</sup> The amendments tightened restrictions surrounding the regulation of drugs sold in the U.S.<sup>30</sup>

Although the FDA ensures the safety of most food and drugs, including animal drugs and feed, the Department of Agriculture (USDA) primarily regulates the safety of meat, poultry, and some egg products.<sup>31</sup> Under this department, the Federal Meat Inspection Act (FMIA) governs meat inspection.<sup>32</sup> Despite the seemingly clear division of regulation—USDA for meat products and FDA for nonmeat products—many products do not follow this regime.<sup>33</sup> For example, the FDA regulates milk and fish—

29. *Kefauver-Harris Amendments Revolutionized Drug Development*, FDA (Sept. 10, 2018), <https://www.fda.gov/forconsumers/consumerupdates/ucm322856.htm> [https://perma.cc/48K4-LPYN]. The sedative thalidomide held massive appeal in Europe by 1961, as it was the only sedative at the time not acting as a central nervous system depressant. Bara Fintel et al., *The Thalidomide Tragedy: Lessons for Drug Safety and Regulation*, *HELIX* (July 28, 2009), <https://helix.northwestern.edu/article/thalidomide-tragedy-lessons-drug-safety-and-regulation> [https://perma.cc/B558-NYCL]. Its maker claimed the drug was “completely safe” and recommended use to pregnant women for the relief of morning sickness. *Id.* However, many mothers who took the drug ultimately gave birth to babies with phocomelia, resulting in “flipper-like limbs.” *Id.* The FDA inspector during this time equated the tragedy with a “lack of data indicating whether the drug could cross the placenta.” *Id.* The egregious effects of this legal drug ultimately catalyzed U.S. drug regulation reformation. *Id.*

30. *Kefauver-Harris Amendments Revolutionized Drug Development*, *supra* note 29. The amendments required manufacturers to prove that their products were both safe and effective before they were marketed. *Id.* Today, drug approval can take years and may require animal testing and human clinical trials. Indep. Inst., *The Drug Development and Approval Process*, FDA REV., <http://www.fdaireview.org/issues/the-drug-development-and-approval-process/> [https://perma.cc/NJU2-P4UZ].

31. Gretchen Goetz, *Who Inspects What? A Food Safety Scramble*, *FOOD SAFETY NEWS* (Dec. 16, 2010), <http://www.foodsafetynews.com/2010/12/who-inspects-what-a-food-safety-scramble/#.WkrU39-nE2w> [https://perma.cc/YUJ3-UBDG]. The USDA regulates meat and meat products, in cooperation with the states, to ensure “wholesome, not adulterated, properly marked, labeled, and packaged” meat products. 21 U.S.C. § 602 (2018); U.S. DEP’T OF AGRIC., SUMMARY OF FEDERAL INSPECTION REQUIREMENTS FOR MEAT PRODUCTS (2015), <https://www.fsis.usda.gov/wps/wcm/connect/e6658a9c-915f-4283-beaf-a827b35e906a/Fed-Food-Inspect-Requirements.pdf?MOD=AJPERES> [https://perma.cc/HGV2-UNZG].

32. The FMIA “directs USDA to inspect the sanitary conditions of meat processing plants and to ‘prescribe the rules and regulations of sanitation under which these establishments are maintained.’” *Munsell v. Dep’t of Agric.*, 509 F.3d 572, 575 (D.C. Cir. 2007) (quoting 21 U.S.C. § 608). The FMIA specifically requires that “the Secretary shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of” all livestock. 21 U.S.C. § 604.

33. *See* Goetz, *supra* note 31.

except for catfish, which the USDA regulates.<sup>34</sup> Regardless, the Food Safety and Inspection Service (FSIS) enforces the regulation of all products under the USDA's authority.<sup>35</sup> Furthermore, regulations enacted under the FDA are inapplicable to proceedings under the FMIA, and the FMIA does not define adulteration under the FDA.<sup>36</sup>

Currently, neither the USDA nor the FSIS requires food producers to comprehensively disclose content and practice information to consumers. For example, from taste or appearance alone, the average person would probably not know the difference between milk from cows treated with the hormone recombinant bovine somatotropin (rbST), which increases milk production, and cows not treated with rbST<sup>37</sup> or the difference between AquAdvantage salmon and other farmed Atlantic salmon.<sup>38</sup> Because the FDA concludes there is minimal difference between the two variations of products, it does not require companies to flag these distinctions.<sup>39</sup> Although

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34. *Id.*; see also *Food Guidance & Regulation*, FDA (Jan. 30, 2018), <https://www.fda.gov/Food/GuidanceRegulation/> [<https://perma.cc/R596-ZAAB>].

35. U.S. DEP'T OF AGRIC., FOOD SAFETY AND INSPECTION SERVICE: PROTECTING PUBLIC HEALTH AND PREVENTING FOODBORNE ILLNESS 1 (2013), <https://www.fsis.usda.gov/wps/wcm/connect/7a35776b-4717-43b5-b0ce-aeec64489fbd/mission-book.pdf?MOD=AJPERES> [<https://perma.cc/J7QE-3MMJ>]; see also 9 C.F.R. §§ 381.76–94 (2018). The FMIA requires FSIS inspectors to mark all carcasses found to be not adulterated as “Inspected and passed,” or marked with the USDA legend, and all those found to be adulterated as “Inspected and condemned.” 21 U.S.C. § 604; see also 9 C.F.R. §§ 310.5, 310.8, 381.79. If the FSIS inspector finds any condition “that might render the meat or any part unfit for food purposes,” the carcass must be retained for veterinary disposition. 9 C.F.R. § 310.3 (2018). All inspected and condemned adulterated carcasses must be destroyed “in the presence of an inspector.” 21 U.S.C. § 604.

36. See generally 21 U.S.C. §§ 601–24; see also generally *id.* § 342; *United States v. 2,116 Boxes of Boned Beef Weighing Approximately 154,121 Pounds*, 726 F.2d 1481 (10th Cir. 1984) (describing the separation of regulation between meat products and other food, drugs, and cosmetics).

37. See Kitchen Daily, *Organic Milk vs. Regular Milk: Which Tastes Better?*, LIFE (Dec. 6, 2017), [https://www.huffpost.com/entry/milk-taste-test\\_n\\_1213895](https://www.huffpost.com/entry/milk-taste-test_n_1213895) [<https://perma.cc/BJG6-J5EE>] (“‘They taste more or less exactly the same.’ . . . There is not a huge taste difference between organic milk compared to [rbST treated cow] milk.”). RbST, which also refers to recombinant bovine growth hormone (rbGH), is an animal drug application—hormone—that the FDA approved in 1993 for use in lactating dairy cows to increase the production of marketable milk. *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 632, 634 (6th Cir. 2010).

38. See Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 ARIZ. L. REV. 421, 422–23 (2016) (“The [FDA] has determined that there is ‘no biologically relevant difference’ between AquAdvantage salmon and other farmed Atlantic salmon . . .”).

39. *Boggs*, 622 F.3d at 637; Adler, *supra* note 38 (citing CTR. FOR VETERINARY MED., U.S. FOOD & DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., AQUADVANTAGE SALMON: ENVIRONMENTAL ASSESSMENT 1–2 (2015), <https://wayback.archive-it.org/7993/20171101203725/https://www.fda.gov/downloads/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/UCM466218.pdf>).



some states go the extra mile by regulating the practices government agencies have yet to regulate, consumers living outside of these states are left in the dark.<sup>40</sup>

Although full disclosure is not an industry standard, regulatory silencing of independent disclosure is on the rise. Such regulations often come in the form of ag-gag laws, which criminalize covert filming or photography on agricultural farms.<sup>41</sup> The first ag-gag laws arose in the 1990s, and, despite the defeat of proposed legislation in sixteen states, new legislation has passed in five states since 2011, bringing the current number of states with ag-gag laws to nine.<sup>42</sup> Although organizations like the Center for Constitutional Rights assert ag-gag laws are clearly unconstitutional,<sup>43</sup> ag-gag laws have proliferated. For example, in March 2017, Arkansas lawmakers passed House Bill 1665, broadly allowing a cause of action for unauthorized access to another's property.<sup>44</sup> The Arkansas bill allows businesses to file lawsuits against people who share documents, pictures, videos, or recordings that damage these businesses if taken from nonpublic areas.<sup>45</sup> Such general

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40. For example, Vermont is one of few states to require that milk handlers separate the milk from cows not treated with rbST from other milk, despite the FDA's lack of regulation on the matter. 20-021-005 VT. CODE R. §§ 5.1, 6.1 (2018). However, in 1996, Vermont lost its battle requiring dairy producers to label milk from hormone-treated cows after conceding that the rbST disclosure was not related to any health or safety concerns. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69, 73–74 (2d Cir. 1996). The court held that Vermont's interest was nothing more than gratification of "consumer curiosity," which did not meet any known test under the First Amendment. *Id.* at 74. Perhaps Vermont's concession was its downfall, for consumer worries about possible adverse health effects from consumption of rbST is seemingly a substantial interest worthy of First Amendment protection. *See id.* (Leval, J., dissenting). Elanco, the producer of rbST—which is sold as a "treatment for dairy cattle" under the name Posilac—provides various warnings that cows may experience reproductive and digestive disorders. Elanco Animal Health Co., Eli Lilly & Co., *Posilac*, DRUGS.COM (Oct. 31, 2018), <https://www.drugs.com/vet/posilac.html> [<https://perma.cc/4KWW-75CW>]; *see also* ELANCO, POSILAC (2010), <https://assets.ctfassets.net/fistk1blxig0/200AfTdbQIM0AqmWWWkoQ6/b7a1e06ac01152a4dae71dadb78f031b/Posilac.pdf> [<https://perma.cc/Z2BJ-P4DT>].

41. GIBBONS, *supra* note 12, at 2, 6.

42. *Id.* at 2; *see supra* note 11.

43. GIBBONS, *supra* note 12, at 25–26.

44. H.B. 1665, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); *see also* ARK. CODE ANN. § 16-118-113 (2018).

45. ARK. CODE § 16-118-113(c). Companies can sue for up to \$5000 a day in damages for each day of violation. *Id.* § 16-118-113(e)(4). Although the law applies to employees, it excludes law enforcement officers conducting investigations, state agencies, institutes of higher education, and healthcare providers. *Id.* § 16-118-113(g).

language prohibits whistleblowers from exposing animal abuse, or even child abuse, if witnessed on private property.<sup>46</sup>

Despite such unsavory advances in ag-gag legislation, there have been many victories worth noting. In 2015, for example, the United States District Court of Idaho held an Idaho law criminalizing interference with agricultural production facilities unconstitutional for violating First Amendment free speech protections and the Equal Protection Clause.<sup>47</sup>

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46. *Why Are Ag-Gag Laws Harmful?*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> [<https://perma.cc/5C23-JBE6>] (“‘Ag-Gag’ laws seek to ‘gag’ would-be whistleblowers and undercover activists by punishing them for recording footage of what goes on in animal agriculture. They were originally designed to prevent the public from learning about animal cruelty. More recently . . . states are passing laws [that also] criminalize whistleblowing in . . . any private business including hospitals . . . and schools.”); *see also* Shawnya Meyers, *Controversial New Arkansas ‘Ag Gag’ Law Could Penalize Whistleblowers*, 5NEWS (Mar. 27, 2017 5:07 PM), <http://5newsline.com/2017/03/27/controversial-new-arkansas-ag-gag-law-could-penalize-whistleblowers/> [<https://perma.cc/YJ88-PWF6>].

47. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015), *aff’d in part, rev’d in part*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). *But see* *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 909, 928–29 (S.D. Iowa 2018) (holding that an Iowa ag-gag law criminalizing “agricultural production facility fraud” satisfied rational basis review). The Ninth Circuit partially reversed the *Otter* district court’s holdings in 2018. *See Wasden*, 878 F.3d at 1190. The court affirmed the lower court’s ruling that the Idaho statute violated the First Amendment with regard to (1) criminalizing entry into an agricultural production facility (APF) by misrepresentation and (2) prohibiting a person from entering a private APF without express consent from the facility owner and making audio or video recordings of the conduct of an APF’s operations. *Id.* at 1194, 1203–06. However, the Ninth Circuit reversed the lower court’s remaining holdings and found that the statute did not violate the First Amendment or Equal Protection clauses with regard to (1) criminalizing obtaining records of an APF by misrepresentation and (2) criminalizing obtaining employment with an APF by misrepresentation with the intent to cause economic or other injury to the facility’s operations, property, or personnel. *Id.* at 1194, 1199–1201, 1203–05. The Ninth Circuit based its decision on *United States v. Alvarez*, in which the Supreme Court ruled that “a false statement made in association with a legally cognizable harm or for the purpose of material gain is not protected.” *Id.* at 1199 (citing 567 U.S. 709, 719, 722–23 (2012) (plurality opinion)). First, the Ninth Circuit explained that obtaining

records by misrepresentation inflicts a ‘legally cognizable harm’ by impairing an [APF] owner’s ability to control who can assert dominion over, and take possession of, his property. Additionally, obtaining records through misrepresentation may also . . . expos[e] proprietary formulas, trade secrets, or other confidential business information to unwanted parties.

*Id.* (citing Idaho Code § 48-801 (2018)). Arguably, the extent to which misrepresentation affects dominion of an APF’s property or exposes trade secrets is variable. To the extent that an individual’s conscious presence—and nothing more—at an APF equals dominion, misrepresentation causes no cognizable harm. Likewise, an individual may perceive a practice harmful to animals without otherwise exposing trade secrets. As such, subsection (1)(b) of the Idaho statute, if upheld, should at the very least require narrow tailoring so as not to chill speech. *See* IDAHO CODE § 18-7042(1)(b) (2018); *see also* *Ashcroft v. Civil Liberties Union*, 542 U.S. 656, 666 (2004). Second, to uphold the criminalization of

Additionally, between 2012 and 2014, ag-gag bills in twenty states were defeated.<sup>48</sup>

In 1966, federal law began regulating the “humane care and treatment” of animals used for research, exhibition, and interstate commerce,<sup>49</sup> yet laws enacted since then starkly contrast with any alleged priority of compassion. In 2006, Congress effectively codified ag-gag at the federal level by introducing what is now the Animal Enterprise Terrorism Act (AETA).<sup>50</sup> Animal rights activists criticized the act—deemed the “Green Scare”—as the government’s attempt “to conflate animal rights and environmental activism with terrorism.”<sup>51</sup> Indeed, many state lawmakers have attempted “to chill, repress, and criminalize activism” by stirring up fears of “eco-terrorism.”<sup>52</sup> Similar to the Arkansas law, the overly-broad

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misrepresentation for material gain, the Ninth Circuit relied upon the *Alvarez* plurality which stated that “where false claims are made to effect a fraud or secure moneys or other valuable considerations, *say offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment.” *Wasden*, 878 F.3d at 1201 (quoting *Alvarez*, 567 U.S. at 723). However, individuals who misrepresent themselves to gain employment at an APF with the larger intention of reporting malfeasance likely agree to receive pay collaterally. Furthermore, the Ninth Circuit’s application of *Alvarez* in this context convolutes the notion of criminalizing misrepresentation for criminal gain. Although the court acknowledged that “the goal of undercover employment-based investigations [may not be] to ‘secure moneys or other valuable considerations’ for the investigator, but rather to expose threats to the public,” the court nevertheless concluded that the compensation aspect of employment implements *Alvarez*. *Id.* at 1201–02 (quoting *Alvarez*, 567 U.S. at 723). Therefore, the statute, if upheld, should require narrow tailoring because the statute should only criminalize misrepresentation where “false claims are made to effect a fraud or secure moneys or other valuable considerations.” *Id.* at 1201 (quoting *Alvarez*, 567 U.S. at 723). And in the latter case, securing moneys must not be collateral to the intent of the misrepresentation. Otherwise, little would prevent the criminalization of harmless resume fibs that consequently lead to employment. *See Alvarez*, 567 U.S. at 723; *Wasden*, 878 F.3d at 1195–96.

48. GIBBONS, *supra* note 12, at 22. In 2015, for example, the Arizona State Legislature passed ag-gag legislation. *Id.* However, a joint campaign by advocates for animal welfare and constitutional liberties ultimately led the Arizona governor to veto the bill. *Id.* Similarly, in 2013, a proposed California ag-gag bill was ultimately withdrawn after widespread media opposition. *Id.* at 22–23.

49. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., USDA ANIMAL CARE: ANIMAL WELFARE ACT AND ANIMAL WELFARE REGULATIONS 1 (2017), [https://www.aphis.usda.gov/animal\\_welfare/downloads/AC\\_BlueBook\\_AWA\\_FINAL\\_2017\\_508comp.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/AC_BlueBook_AWA_FINAL_2017_508comp.pdf) [<https://perma.cc/EV74-NEYL>].

50. *See* Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2018).

51. GIBBONS, *supra* note 12, at 4.

52. *Id.* In 2012, Senator Jim Patrick, sponsor of Idaho’s Agricultural Security Act, equated undercover investigations with “terrorism that has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food’s safety.”

language of the AETA threatens to limit free speech that serves the public interest.<sup>53</sup>

In recent years, states have proposed new legislation to complement failing ag-gag laws. Mandatory—or “rapid”<sup>54</sup>—reporting laws require those who witness illegal animal cruelty to report it to authorities within a short period of time.<sup>55</sup> These laws are especially problematic because they bear the semblance of virtuous intent—protecting animals.<sup>56</sup> While seemingly benign, such laws require investigators to out themselves, inhibiting them from continuing more fruitful investigations in the future and enabling industry reporters “to dismiss individual violations as aberrations.”<sup>57</sup>

The question is, how do such broadly-written statutes succeed? Perhaps the threat of chilled free speech is less recognizable in successful ag-gag laws because most have detailed language with only a few problematic lines.<sup>58</sup> The more concise rapid reporting laws have likely succeeded for the opposite reason: they are brief and feign animal protection.<sup>59</sup> Both ag-gag and rapid reporting laws threaten to leave consumers in the dark by silencing opposition. Thus, transparency is critical to shed light on undercover scandals rampant in the agricultural industry.

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*Id.* at 17 (quoting *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015)).

53. The AETA broadly punishes those who cause the loss of records, requiring “the replacement costs of lost or damaged property or records.” 18 U.S.C. § 43. Additionally, the AETA punishes

[w]hoever travels in interstate or foreign commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise; and . . . in connection with such purpose . . . intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.

*Id.* § 43(a).

54. Shea, *supra* note 18, at 340.

55. GIBBONS, *supra* note 12, at 6. Missouri passed the first rapid reporting ag-gag statute in the country in 2012, making it a class A misdemeanor for failing to report farm animal abuse or neglect to law enforcement within twenty-four hours of recording the abuse. *See* MO. REV. STAT. § 578.013 (2018).

56. *See* GIBBONS, *supra* note 12, at 6; Shea, *supra* note 18, at 340.

57. GIBBONS, *supra* note 12.

58. *See, e.g.*, ARK. CODE ANN. § 16-118-113 (2018).

59. *See, e.g.*, MO. STAT. § 578.013.

### III. WHY TRANSPARENCY PROMOTES SAFETY AND BETTER-INFORMED CONSUMERS

#### A. *The Need for Transparency: Critical Cases*

In 2008, the revelation of California's Westland/Hallmark Meat Packing Company taking downer cows to slaughter<sup>60</sup> highlighted the critical need for agricultural transparency. In an undercover operation, the Humane Society of the United States recorded "workers kicking sick cows and using forklifts to force them to walk" to their deaths.<sup>61</sup> The USDA bans the sale of meat from downer cows because consumption of the meat poses "an increased risk of E. coli, salmonella, and mad cow disease."<sup>62</sup> Despite the recall of 143.4 million pounds of beef at Hallmark—the vast majority of which had already been consumed—the incident only resulted in a Class II recall.<sup>63</sup>

Class II recalls involve situations "where there is a *remote* probability of adverse health consequences from the product."<sup>64</sup> Class I recalls, in contrast, are the most serious and involve situations "where there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death."<sup>65</sup> More alarming than the classification of the

60. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES (Feb. 18, 2008), [www.nytimes.com/2008/02/18/business/18recall.html](http://www.nytimes.com/2008/02/18/business/18recall.html) [<https://perma.cc/8G28-DD43>]. Downer cows raise "questions about the safety of . . . meat, because [they] cannot walk [and] pose an added risk of diseases including mad cow disease. The federal government had banned downer cows from the food supply." *Id.*

61. *Id.*

62. Lobo, *supra* note 19.

63. CYNTHIA BROUGHER & JOEL L. GREENE, CONG. RESEARCH SERV., THE USDA'S AUTHORITY TO RECALL MEAT AND POULTRY PRODUCTS 13 (2011), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL34313.pdf> [<https://perma.cc/DY96-7ZBB>]. The USDA issued a Class II recall because the cows had already passed pre-slaughter inspection. FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., CALIFORNIA FIRM RECALLS BEEF PRODUCTS DERIVED FROM NON-AMBULATORY CATTLE WITHOUT THE BENEFIT OF PROPER INSPECTION 1 (2008), [https://www.fsis.usda.gov/wps/wcm/connect/8c3e741f-4d49-4530-812c-72a65ea50e43/Recall\\_005-2008\\_Release.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/8c3e741f-4d49-4530-812c-72a65ea50e43/Recall_005-2008_Release.pdf?MOD=AJPERES) [<https://perma.cc/JC44-ET6H>]. Additionally, the USDA relied on the general proposition that mad cow disease is unlikely to enter the human food chain because it manifests in the brains and spinal cords of cows. Martin, *supra* note 60.

64. BROUGHER & GREENE, *supra* note 63 (emphasis added) (quoting FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC. FSIS DIRECTIVE 8080.1: RECALL OF MEAT AND POULTRY PRODUCTS 2 (2013), <https://www.fsis.usda.gov/wps/wcm/connect/77a99dc3-9784-4a1f-b694-ecf4eea455a6/8080.1.pdf?MOD=AJPERES> [<https://perma.cc/6Z4T-599D>]).

65. *Id.* (quoting FOOD SAFETY & INSPECTION SERV., *supra* note 64).

Hallmark incident is the horrific reality that neither the USDA nor FSIS even has the authority to mandate a recall of meat and poultry products.<sup>66</sup> Only companies themselves can initiate recalls.<sup>67</sup>

One can only imagine what result might have occurred had footage of Hallmark's practice not been released.<sup>68</sup> Indeed, the USDA is supposed to monitor slaughterhouses for abuse.<sup>69</sup> Slaughterhouses are supposed to alert federal veterinarians when cows become unable to walk after passing inspection.<sup>70</sup> But what if neither happens, as in this case—or what if one such scenario does occur—yet the company chooses not to recall its product? Hopefully federal agencies would at least publicize the situation.<sup>71</sup> But what if the situation *only* fits Class II, as it did in Hallmark? Assuming no one dies from the failure, what incentive remains to inform the public? What if, on top of this harrowing scenario, undercover investigators actually uncovered a problem, but they were *gagged* from reporting it? Herein lies the dangers in ag-gag statutes. More broadly, producers might engage in substandard practices that do not pose risks of acute illness or death, but which no consumer would endorse knowing all of the facts.

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66. *Id.* at 2. Despite the USDA not possessing the authority to recall meat, it can still put pressure on a company to issue a recall by withdrawing its inspectors from a plant. Martin, *supra* note 60.

67. BROUGHER & GREENE, *supra* note 63, at 2.

68. At the very least, the entirety of a substandard product could have reached the public. Hallmark, “a leading supplier to the National School Lunch Program,” thus could have caused harm to a child. Bill Marler, *Hallmark/Westland Meat Packing Co to Shut Down? In Wake of Massive Recall*, MARLER BLOG (Feb. 23, 2008), <https://www.marlerblog.com/legal-cases/hallmarkwestland-meat-packing-co-to-shut-down-in-wake-of-massive-recall/> [<https://perma.cc/ASA8-2SC6>]. Although there were no serious health consequences following Hallmark's recall, had it not been brought to the public's attention, Hallmark might have continued the practice of slaughtering downer cows for consumption. *See id.* Left unchecked, Hallmark's risky practices inevitably might have led to more serious consequences for American consumers. Instead, Hallmark was forced to shut down following the recall. *Meatpacker to Shut Down Permanently After Recall: Report*, REUTERS (Feb. 24, 2008, 10:15 AM), <https://www.reuters.com/article/us-hallmark-westland-meat-idUSN24205620080224> [<https://perma.cc/N7N9-THKQ>].

69. Martin, *supra* note 60.

70. *Id.*

71. The USDA and Centers for Disease Control and Prevention (CDC) have reported large meat recalls due to listeria and E. coli contamination. *See, e.g.*, Brittany Shoot, *What's in Your Kitchen? See if You Are Impacted by Recent Food Recalls for Ground Beef, Curry Powder Recalled Due to Salmonella, Lead*, FORTUNE (Oct. 29, 2018), <http://fortune.com/2018/10/29/cdc-fda-usda-meat-beef-salmonella-curry-powder-recall/> [<https://perma.cc/8X9P-CZAC>] (“A joint recall effort between the CDC and USDA is pulling back up to 6.5 million pounds of beef . . .”). The Hallmark recall was the largest to date. U.S. News Library Staff, *Top Six Meat Recalls in U.S. History*, U.S. NEWS (Feb. 20, 2008, 3:03 PM), <https://www.usnews.com/news/national/articles/2008/02/20/top-six-meat-recalls-in-us-history>.

### B. Transparent Standards to Enable Consumer Choice

The stakes are not always so high. When egregious standards lead to E. coli or listeria, consumers react severely and companies must address those standards.<sup>72</sup> Yet, even the savvy consumer remains ignorant without the necessary information to make an informed choice. For example, the FDA claims there is minimal difference when it comes to consumer health between milk from cows treated with hormones and milk from cows not treated with hormones.<sup>73</sup> Regardless of whether this is correct, consumers ought to be able to decide which type of milk they want to consume. The law currently allows dairy producers to advertise a product as “rbST-free” so long as they also disclose that “no significant difference has been shown” between the two classes of milk.<sup>74</sup> Meanwhile, producers of milk from cows treated with hormones are not required to disclose that information.<sup>75</sup> The notion that the government knows best or that more information will confuse consumers is paternalistic at best. A consumer might learn that rbST-treated cows experience more mastitis—which causes resistance to antibiotics and leads to allergic reactions in people who consume the milk<sup>76</sup>—and then decide to buy milk *without* rbST. Even more casually,

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72. See Tyco Integrated Sec., *Recall: The Food Industry's Biggest Threat to Profitability*, FOOD SAFETY MAG. (Oct. 2012), <https://www.foodsafetymagazine.com/signature-series/recall-the-food-industrys-biggest-threat-to-profitability/> (“Today’s consumer cannot help but be aware of food recalls [and in] a Harris Interactive poll, consumers indicated that 55% would switch brands temporarily following a recall, and 15% said they would never purchase the recalled product and 20% would avoid purchasing any brand made by the manufacturer of the product.”). “Pathogens like *Listeria monocytogenes* or *Salmonella* on ready-to-eat products, or *E. coli* O157:H7 on raw beef products [warrant] Class I recalls.” BROUGHER & GREENE, *supra* note 63; see, e.g., U.S. FOODS, FOOD INNOVATIONS—SALMONELLA CLASS I RECALL (2015), [https://www.usfoods.com/content/dam/usf/pdf/product\\_recalls/Food%20Innovations%20FF.pdf](https://www.usfoods.com/content/dam/usf/pdf/product_recalls/Food%20Innovations%20FF.pdf) [<https://perma.cc/B7NT-JSQU>] (highlighting Food Innovations’ self-reported Salmonella Class I recall of Cheese Ravioli Pasta).

73. The FDA has found “that there is no measurable compositional difference between the two” types of milk. *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 636 (6th Cir. 2010).

74. *Id.* at 634. In its interim guide, the FDA approved the voluntary labeling of milk products that had not been treated with rbST but did not require that companies using the hormone disclose that fact. Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6279–80 (Feb. 10, 1994) [hereinafter Interim Guidance].

75. See Interim Guidance, *supra* note 74, at 6280.

76. See Robert Collier, *Regulation of rbST in the U.S.*, 3 AGBIOFORUM 156, 160 (2000), <http://agbioforum.org/v3n23/v3n23a14-collier.pdf> [<https://perma.cc/4XKM-94U5>].

consumers might realize that their skin reacts more severely to milk from cows treated with rbst than to milk from untreated cows.<sup>77</sup>

Although the FDA does not acknowledge the significance of these differing reactions, these types of decisions impact both consumer health and company marketing. Perhaps dairy producers are not even aware that a demand for an altered product exists. Producers may save money by injecting their cows with hormones, but fully-informed consumers may pay more for hormone-free milk.<sup>78</sup> The root of the problem is a lack of information. To insist that companies list all research pertaining to their product on their labels, or even on their company websites, would likely overburden them. However, when companies omit basic information concerning content, practice, and standards, the consumer remains uninformed, save only independent diligence.

Because only policymakers and corporations can currently decide what aspect of products, production, and processes are relevant to disclose, consumers miss out on making informed decisions.<sup>79</sup> Under the commercial-speech framework, “misleading advertising may be prohibited entirely” where speech “is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.”<sup>80</sup> Where speech is only potentially misleading, however, “the preferred remedy is more disclosure, rather than less.”<sup>81</sup> As such, “transparency” is the appropriate remedial approach to allow consumers to decide what is relevant to them making informed decisions.<sup>82</sup> Only when more information is disclosed may consumers determine what information they find relevant.

A court’s definition of “misleading advertising” determines how liberally the commercial-speech framework applies. In 2008, in response to Ohio governor Ted Strickland’s executive order directing Robert Boggs, the

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77. *See id.*

78. Moreover, the First Amendment does not protect advertising that contains “misleading” information that deceives consumers. *In re R.M.J.*, 455 U.S. 191, 202–03 (1982). Thus, “misleading” information can be prohibited from advertising. *Id.*

79. *See generally* Jonathan H. Alder, *Compelled Commercial Speech & The Consumer “Right to Know,”* 58 ARIZ. L. REV. 421 (2016).

80. *R.M.J.*, 455 U.S. at 202. Where commercial speech concerns lawful activity and is not misleading, First Amendment protection only yields to the proposed regulation if the government “interest to be served by the restriction on commercial speech is substantial [and] not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 557 (1980).

81. *R.M.J.*, 455 U.S. at 201 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 (1977)); *see also* *Bates*, 433 U.S. at 374, 384 (striking down a ban on price advertising for “routine legal services” in part because “it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision”).

82. Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U.L. REV. 1345, 1374 (2015).



Ohio Director of Agriculture (ODA), to “define what constitutes false and misleading labels on milk and milk products,” Boggs issued a rule that categorized claims of hormone-free or rbST-free milk as “misleading.”<sup>83</sup> The Sixth Circuit concluded that *Boggs*’s “prophylactic ban” on “rbST-free” labeling was unconstitutional.<sup>84</sup> It found that Boggs’s interest in protecting consumers from a potentially misleading label that defines a product as “rbST-free” was unwarranted given that composition content could be presented in a way that is not deceptive.<sup>85</sup> Furthermore, the Sixth Circuit maintained that because advertising the exclusion of hormone content qualified as potentially misleading, the rule’s language requiring a disclaimer of “no significant difference” was valid.<sup>86</sup>

Seemingly, informing consumers of a product’s content is straightforward, rather than misleading. Yet, the district court in *Boggs* found that composition claims were inherently misleading because they contrasted with the FDA’s finding that there was minimal compositional difference between milk from treated and untreated cows.<sup>87</sup> Beside the glaring problem that the *FDA decides* whether a producer *can include factual content information on the label of its product*, it can apparently do so with little qualification as to what “compositional difference” means.<sup>88</sup> Fortunately, the Sixth Circuit found flaws in both the FDA’s and district court’s analyses.<sup>89</sup> First, the Sixth Circuit upheld the FDA’s original labeling guidance,<sup>90</sup> which prevented Boggs from imposing a prophylactic ban on labels that

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83. Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 633–34 (6th Cir. 2010) (quoting OHIO ADMIN. CODE 091:11-8-01 (2008) (repealed 2012)).

84. *Id.* at 639–40 (“[The] prophylactic ban of composition claims such as ‘rbST free’ is more extensive than necessary to serve the State’s interest in preventing consumer deception.”).

85. *Id.* at 639 (citing *R.M.J.*, 455 U.S. at 203).

86. *Id.*

87. *Id.*

88. *Id.*; Interim Guidance, *supra* note 74; *see supra* Part II.

89. *See Boggs*, 622 F.3d at 636–37. The Sixth Circuit found that “a compositional difference *does* exist between milk from untreated cows and conventional milk.” *Id.* at 636 (emphasis added). Relying on its amici parties, it found that rbST “has been shown to elevate the levels of insulin-like growth factor 1 (IGF–1), a naturally-occurring hormone that in high levels is linked to several types of cancers, among other things”; that it induces an “unnatural period of milk production during a cow’s ‘negative energy phase,’ [producing milk] considered to be low quality”; and “that milk from treated cows contains higher somatic cell counts, which makes the milk turn sour more quickly.” *Id.* at 636–37.

90. *See* Interim Guidance, *supra* note 74.

highlight an absence of rbST.<sup>91</sup> Despite this victory, it likewise relied upon the FDA’s original language<sup>92</sup> regarding compositional difference as “weak evidence of deception” sufficient to warrant approval of Boggs’s disclosure requirement.<sup>93</sup> Yet, by acknowledging that there was in fact a compositional difference between milk from treated and untreated cows<sup>94</sup>—a distinction that the FDA has never acknowledged<sup>95</sup>—the Sixth Circuit made significant progress toward transparency.

Recently, milk producers have pushed the envelope even further in attempts to gain a marketplace advantage. Dairy farmers have alleged that calling plant-based products yogurt, milk, or cheese is misleading to consumers because it implies nondairy milk is “nutritionally similar” to cow’s milk.<sup>96</sup> Although such attempts might be admirable in the name of business—after all, the FDA defines milk as an animal’s “lacteal secretion,”<sup>97</sup>—denying nondairy products the label *milk* at this point would only serve to confuse consumers further. They know what they are buying.<sup>98</sup>

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91. *Boggs*, 622 F.3d at 639. The Sixth Circuit held that the Ohio rule was “more extensive than necessary to serve the [State’s] interest” in preventing consumer deception. *Id.*

92. See Interim Guidance, *supra* note 74.

93. *Boggs*, 622 F.3d at 642. The language of the ODA rule deemed a dairy product misbranded if it contained a false or misleading statement. See OHIO ADMIN. CODE 091:11-8-01 (2008) (repealed 2012). It also stated that a label claiming that a milk product was not supplemented with rbST was misleading unless it also disclosed that “[t]he FDA has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows.” *Id.*

94. *Boggs*, 622 F.3d at 636.

95. The FDA’s position on rbST has largely remained stagnant since rbST’s introduction in 1993. See *Report on the FDA’s Review of the Safety of Recombinant Bovine Somatotropin*, FDA (Oct. 27, 2017), <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm130321.htm> [<https://perma.cc/C93Q-QGCM>]. The FDA still relies upon its 1993 audit of all studies used in determining the human food safety of rbST. See *id.* In 1993, the FDA denied the results of Health Canada’s rat study that concluded Posilac caused adverse human health effects, succinctly stating that “Canadian reviewers did not interpret the results correctly.” *Id.* Additionally, the FDA claims that “there are no new scientific concerns regarding the safety of milk from cows treated with rbGH,” and that “bGH [natural bovine growth hormone] and rbGH are biologically indistinguishable.” *Id.*

96. Anahad O’Connor, *Got Almond Milk? Dairy Farms Protest Milk Label on Nondairy Drinks*, N.Y. TIMES (Feb. 13, 2017), <https://nyti.ms/2l8g99d> [<https://perma.cc/M8F9-4UT3>].

97. Teaganne Finn, *FDA Wants to Address Udder Confusion on Milk Labeling Rules*, BLOOMBERG GOV’T (July 18, 2018), <https://about.bgov.com/blog/fda-wants-udder-confusion-on-milk-labeling/> [<https://perma.cc/XU9B-53ZE>].

98. Indeed, if the FDA started enforcing strict definitions of dairy-related terms, other nondairy products with dairy names would be affected. “Will milk of magnesia, cocoa butter, cream of wheat and peanut butter have to change their names as well?” *Id.* The Plant Based Foods Association, along with leading advocates and organizations representing manufacturers of plant-based foods—including Blue Diamond and Campbell Soup Company—led the coalition in November 2017 opposing this possibility and the Dairy

Dairy companies claim their interest lies in minimizing confusion: ensuring that customers actually get milk.<sup>99</sup> This may have been a valid argument a decade ago, but consumers have consciously been purchasing rice, nut, coconut, soy, and hemp milks for too long now. At this point, changing labeling standards under the guise of arbitrary principle insults consumers, because a “reasonable consumer . . . would not assume that two distinct products have the same nutritional content; if the consumer cared about the nutritional content, she would consult the label.”<sup>100</sup> Furthermore, when two indistinct products—say hormone-treated and untreated cow’s milk—are not plainly or even equally labeled, a *reasonable* consumer *would* assume the products have the same nutritional content.<sup>101</sup> Milk from treated and untreated cows plainly *does not* have the same nutritional content, and the harm by concealing this information from consumers is

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Pride Act. MICHELE SIMON, PLANT BASED FOODS ASS’N, PLANT BASED COALITION LOBBIES CONGRESS TO OPPOSE DAIRY PRIDE ACT 1 (2017), <http://www.prweb.com/pdfdownload/14866415.pdf> [<https://perma.cc/X3SE-VFHZ>].

99. O’Connor, *supra* note 96.

100. *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-VC, 2015 WL 9121232, at \*1 (N.D. Cal. Dec. 1, 2015). Federal District Court Judge Vince Chhabria struck down the DAIRY PRIDE bill in California. Editorial Board, *Sour Milk from the Dairy Industry*, CHI. TRIB. (Apr. 7, 2017, 12:10 PM), <https://www.chicagotribune.com/news/opinion/editorials/ct-milk-almond-soy-dairy-fda-edit-0410-md-20170407-story.html> [<https://perma.cc/MU6Y-69CK?type=image>].

101. A University of Wisconsin survey found that “less than 12 percent [of consumers] believed food-related application of rbGH is a good or excellent idea, and 74 percent were moderately or very concerned about rbGH-related health risks that may be found in the future.” Deana Grobe, *New National Survey Finds Consumer Concern over Milk Hormones*, OR. ST. U. (Aug. 28, 2009), <http://today.oregonstate.edu/archives/1996/jan/new-national-survey-finds-consumer-concern-over-milk-hormones> [<https://perma.cc/E7ZK-BSUK>]. Yet, “64 percent . . . knew something about [rbGH] [and approximately] 94 percent . . . said they approved of labels to differentiate milk from treated and untreated sources.” *Id.* Despite these numbers, in 2016, organic food, which includes hormone-free milk, accounted for a mere 5.3 percent of total food sales in the U.S. Maggie McNeal, *Robust Organic Sector Stays on Upward Climb, Posts New Records in U.S. Sales*, ORGANIC TRADE ASS’N (May 27, 2017), <https://www.ota.com/news/press-releases/19681> [<https://perma.cc/CE39-9F3G>]. If only 12% of consumers think rbGH in their milk is a good idea, this number should be much higher, even if not everyone drinks milk and even if milk accounts for a small percentage of food sales, because if 64% of people know something about rbGH, then logically, the same percentage of people know about hormones in general. *See* Grobe, *supra*. Furthermore, if 94% of people approve of labels that differentiate milk from treated and untreated sources, they likewise likely approve of labels that differentiate hormones in other animal products. *See id.* Moreover, the fact that consumers only buy 5% organic points to the strong possibility that they think there is no difference. *See* McNeal, *supra*. Further, they may think there is no difference because they rely on inadequate labels.

not only that they must rely upon the government’s standard of health but also the strong chance of misinformation.<sup>102</sup> Offering additional data to complement existing understanding is key.

Milk from cows treated with rbST is but one example of how the exclusion of information can have a range of effects on consumer health. In addition to health-related matters, research indicates that consumers also care about animal and employee welfare when properly exposed.<sup>103</sup> The same deficiencies present in health-related disclosure laws exist in the legislation governing disclosure of animal and employee conditions: they are inconsistent, incomplete, and generic. Part IV will discuss existing food safety regulations and how they fall short.

#### IV. EXISTING FOOD SAFETY REGULATIONS

##### A. Existing Regulations: The Adequacy Argument

Proponents of less agricultural regulation maintain that current standards are adequate.<sup>104</sup> Two main laws govern food labeling: the FD&C Act<sup>105</sup> and the Fair Packaging and Labeling Act (FPLA).<sup>106</sup> The FD&C Act regulates national uniform nutrition labeling, misbranded food, and disclosure.<sup>107</sup> The relevant sections prescribe very basic standards. For example, one must label the fruit known as cantaloupe, as *cantaloupe*.<sup>108</sup> Under the FPLA, “[p]ackages and their labels should enable consumers to obtain accurate

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102. See *infra* Section IV.B.1.

103. See Anna Starostinetskaya, *Consumers’ Animal Welfare Concerns Hit “Critical Mass,”* VEGNEWS (Apr. 29, 2017), <https://vegnews.com/2017/4/consumers-animal-welfare-concerns-hit-critical-mass> [<https://perma.cc/D9JX-BLEX>] (“[D]ue in large part to undercover investigations at factory farms, consumers continue to be increasingly concerned with animal welfare within the food industry. . . .”). In the absence of worker strikes and nonprofit movements, awareness of worker conditions is less commonplace. See Stephen Lurie, *You Care About Where Your Food Comes from. Shouldn’t You Care About Who Grew and Picked It?*, VOX (Apr. 2, 2015, 8:30 AM), <https://www.vox.com/2015/4/2/8203301/food-movement-labor>. Although many labels attest to the nutrition and ethics of products, a standalone certification verifying good labor practices currently does not exist. *Id.* Presumably, this information should be more readily available to consumers, or alternatively, employees should be more empowered within the workplace. See discussion *infra* Part VI.

104. Generally, proponents consist of state agricultural departments and farmers with traditional products. See, e.g., *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 648–49 (6th Cir. 2010).

105. See generally 21 U.S.C. §§ 301–399 (2018).

106. See generally 15 U.S.C. §§ 1451–1461 (2018).

107. See generally 21 U.S.C. §§ 301–399.

108. See *id.* at § 343 (“A food shall be deemed to be misbranded—(a) . . . If (1) its labeling is false or misleading in any particular, or (2) . . . its advertising is false or misleading in a material respect [or (b) if] it is offered for sale under the name of another food.”).

information” because “[i]nformed consumers are essential to the fair and efficient functioning of a free market economy.”<sup>109</sup> In furtherance of those goals, the FPLA requires commodity labels include the commodity name; “the name and place of business of the manufacturer, packer, or distributor”; and the “net quantity of contents.”<sup>110</sup> The FPLA further regulates label styling, “serving” disclosures, and the use of supplemental statements.<sup>111</sup> Nonetheless, the labeling requirements still afford state agencies generous room to enact their own labeling regulations.<sup>112</sup>

Although federal regulations on food labeling are minimal, new forms of regulations have emerged in response to the growing agricultural industry. Ecolabels, for example, are one such form of functional safety regulation.<sup>113</sup> Ecolabels visually communicate “environmentally preferable products, services or companies that are based on [third-party] standards.”<sup>114</sup> The United States Environmental Protection Agency (EPA) makes recommendations of ecolabels for federal purchasing,<sup>115</sup> serving as “information-based government intervention.”<sup>116</sup> One such ecolabel is the “USDA Organic” label.<sup>117</sup>

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109. 15 U.S.C. § 1451 (“It is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.”).

110. *Id.* § 1453.

111. *Id.*

112. *See id.* § 1458.

113. *See* Megan S. Houston, Note, *Ecolabel Programs and Green Consumerism: Preserving a Hybrid Approach to Environmental Regulation*, 7 BROOK J. CORP. FIN. & COM. L. 225, 226 (2012).

114. *Id.* (citation omitted). For example, the “Fair Trade Certified” ecolabel certifies that “products are sourced from producers that engage in sustainable practices, have safe working conditions, and earn fair and stable prices.” Anne Field, *Certifications: A Closer Look at 12 Ecolabels and Certifications*, B CHANGE (Oct. 31, 2016), <https://bthechange.com/certifications-a-closer-look-at-12-ecolabels-and-certifications-87f63eadb958> [<https://perma.cc/EV5M-XDLU>]. The nonprofit organization Fair Trade USA certifies compliant organizations. *Id.* In contrast, the United States Environmental Protection Agency, which provides the Energy Star certification and ecolabel, utilizes independent third-party certifiers who determine compliance. *Id.*

115. *Recommendations of Specifications, Standards, and Ecolabels for Federal Purchasing*, EPA (Nov. 5, 2018), <https://www.epa.gov/greenerproducts/recommendations-specifications-standards-and-ecolabels-federal-purchasing> [<https://perma.cc/Q4SN-HW3Q>].

116. Houston, *supra* note 113.

117. *Id.* at 238–39.

The National Organic Program (NOP), a federal regulatory agency overseen by the USDA, regulates the use of the term “organic” on food labels.<sup>118</sup> The NOP allows states to enact their own organic certification if they conform with the NOP’s standards.<sup>119</sup> These standards include a National List of substances that may not be certified organic.<sup>120</sup> Many consumers now rely upon the organic label in making healthy choices.<sup>121</sup> Evidently, when given more information, consumers take pause before checking out.

## B. Shortcomings of Existing Regulations

### 1. Potential for Appointment of Inadequate Leaders

Nevertheless, advocates of the *less is more* mantra argue that more information can also be misleading.<sup>122</sup> Proponents against special labeling for the use of rbST, for example, claim that because no significant difference exists between milk from rbST-treated and untreated cows, both are equally safe and healthy for human consumption.<sup>123</sup> Notwithstanding the fact that

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118. 7 U.S.C. § 6503 (2018). The Secretary of Agriculture consults with the “National Organic Standards Board,” which is comprised of fifteen members—appointed by nomination—knowledgeable in organic farming and handling, environmental protection, science, and public interest. *Id.* § 6518.

119. *Id.* § 6503(b).

120. *Id.* § 6517.

121. See generally Kristen Leigh Painter, *Americans Are Eating More Organic Food Than Ever, Survey Finds*, STAR TRIB. (May 24, 2017, 11:27 PM), <http://www.startribune.com/americans-are-eating-more-organic-food-than-ever-survey-finds/424061513/> [https://perma.cc/9EJL-24GB].

122. See, e.g., Josh Dhyani, *Science-Based Food Labels: Improving Regulations & Preventing Consumer Deception Through Limited Disclosure*, 26 ALB. L.J. SCI. & TECH. 1, 34 (2016) (citation omitted); Beth Hoffman, ‘Organic’ One of The Most Confusing Labels, *Report Says*, FORBES (Jul 17, 2013, 11:33 AM), <https://www.forbes.com/sites/bethhoffman/2013/07/17/organic-causes-confusion/#667e6c013159> [https://perma.cc/D2NR-5NA4].

123. See *Eli Lilly & Co. v. Arla Foods Inc.*, 893 F.3d 375, 382–83 (7th Cir. 2018). After the FDA approved rbST in 1993, it came out with interim guidance regarding rbST labeling. See Interim Guidance, *supra* note 74. Because the FDA concluded that there was “[n]o significant difference . . . between milk derived from rbST-treated and non-rbST-treated cows,” the FDA did not require special labeling for milk from treated cows. *Id.* Seemingly, the FDA offered guidance because prior to February 3, 1994, there existed a congressional moratorium on the commercial sale of rbST. See *id.* The worry was—and the guidance sought to prevent—that false or misleading claims regarding rbST would be made. *Id.* Eli Lilly, who purchased Monsanto’s rbST hormone, Posilac, filed suit against Arla Foods in 2017 for making false or misleading claims about rbST. See *Eli Lilly*, 893 F.3d at 379; *Eli Lilly Buys Troubled Monsanto Dairy Product*, FOOD & WATER WATCH (Aug. 20, 2008), <https://www.foodandwaterwatch.org/news/eli-lilly-buys-troubled-monsanto-dairy-product> [https://perma.cc/Z5LC-N3PJ]. The trial court granted Eli Lilly’s request to enjoin Arla from running its “Live Unprocessed” advertisements, ruling that the ads

some consumers may still choose to purchase rbST-ridden milk, it is troubling that a court may essentially enable a producer to censor a product because it has determined an ingredient has no effect.<sup>124</sup> Indeed, the fact that Europe and Canada have prohibited rbST since 1994 because of concerns of food safety, cow health, and impact on small farms—and have maintained the moratorium in response to evidence that rbST causes cancer—implies there *is* a significant difference between milk from treated and untreated cows.<sup>125</sup> By regulating rbST labeling, the government aims to maintain neutral consumer reception of rbST so as not to mislead consumers.<sup>126</sup> This regulation protects big companies but leaves consumers vulnerable.

Ideally, federal agencies such as the NOP and FDA would consist of objective, well-intentioned individuals. Yet, the President of the United States holds wide discretion in making federal agency appointments, many of which do not require Senate approval.<sup>127</sup> Often, the president may appoint based on *political favors* rather than qualification.<sup>128</sup> The NOP must consist

were “likely to mislead consumers about the wholesomeness of products made from milk supplied by rbST-treated cows.” *Eli Lilly*, 893 F.3d at 383.

124. See generally *Eli Lilly*, 893 F.3d 375; Interim Guidance, *supra* note 74.

125. See Anna Hunt, *American Milk Banned in Europe Because It Does No Body Good*, WAKING TIMES (Jan. 18, 2013), <http://www.wakingtimes.com/2013/01/18/american-milk-banned-in-europe-because-it-does-no-body-good/> [<https://perma.cc/8PBU-SXQL>]. “[T]he Codex Alimentarius Commission, the U.N. Food Safety Agency representing 101 nations worldwide, has banned rbST” in the 101 nations it represents. *Id.* The moratorium has been in place since 1990. Collier, *supra* note 76, at 158–59.

126. The FDA has maintained that because “the claim ‘rbST free’ ‘may imply a compositional difference’ between the two types of milk,” such a claim is misleading without a disclaimer indicating there is no actual difference. *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 638 (6th Cir. 2010) (quoting Interim Guidance, *supra* note 74). Although the court in *Boggs* ultimately upheld the FDA’s interim guidance requiring the disclaimer, the court did so while acknowledging that the claim “rbST free” is not misleading in every context and pointing out that “the FDA cited no evidence or studies in the Guidance to support its concerns regarding consumer confusion.” *Id.*

127. See U.S. CONST. art. II, § 2, cl. 2.

128. “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.* Presidential appointments outside of Cabinet secretaries and supreme court justices do not require Senate approval. *Id.* Thus, the president has complete discretion in appointing Heads of Departments. *Id.*; see also Robert Longley, *Presidential Appointments: No Senate Required*, THOUGHTCO. (Apr. 8, 2018), <https://www.thoughtco.com/presidential-appointments-no-senate-required-3322124> [<https://perma.cc/2EX8-H34M>]; Zack Piaker, *Help Wanted: 4,000 Presidential Appointees*, CTR. FOR PRESIDENTIAL TRANSITION (Mar. 16, 2016), [http://presidentialtransition.org/blog/posts/160316\\_help-wanted-4000-appointees.php](http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php) [<https://perma.cc/5S7Q-GZXX>]. However, in part due to the sole reference to “Heads of Departments” existing in the Appointment Clause, scholars continue to debate over whether the framers

of a number of organic farmers, environmental conservationists, and other individuals representing public or consumer interest groups.<sup>129</sup> Despite the requirement that appointees to the NOP must meet a higher appointment standard than most presidential appointments without Senate confirmation (PAs), the bar is still relatively low.<sup>130</sup> Indeed, one of the few rules outlined in agency appointment restricts employment of relatives, but even then there are loopholes.<sup>131</sup> Presidents *may* appoint relatives if they serve without pay, temporarily, or are “preference eligible.”<sup>132</sup> Therefore, existing measures may only feign accountability, leaving an abundance of discretion available in appointing the most crucial positions in agricultural federal agencies.

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intended a distinction between this phrase and “principal officers”—the otherwise consistently-used phrase throughout the Constitution. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 35 (1994). That is, given the express language of the Opinions Clause of “executive” departments, some scholars argue the “Heads of Departments” reference within the Appointments Clause ought to have likewise specified *executive* “Heads of Departments.” See *id.* Failure to do so, the argument goes, implies a distinction. *Id.* Scholars Steven Calabresi and Saikrishna Prakash retort that the framers intended no distinction between department heads and principal officers and that the distinct language of the Appointments Clause was used to emphasize “a means of relieving Congress and the President of the duty of nominating and confirming every officer of the federal government.” Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 630 (1994). The president’s power to appoint officers without Senate approval is nonetheless hotly contested and raises speculation as to whether the Senate should approve certain appointments that are not intrinsically executive. See, e.g., Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1093–94 (2015). This is an especially relevant issue considering the drastic transformation of the appointment procedure in the last few decades. That is, 163 of the total 321 presidentially appointed positions governmentwide that do not require Senate confirmation were created through President Obama’s Presidential Appointment Efficiency and Streamlining Act in 2012. Longley, *supra*.

129. The NOP

Board shall be composed of 15 members, of which—(1) four shall . . . operate an organic farming operation; (2) two shall . . . own or operate an organic handling operation; (3) one shall . . . own[] or operate[] a retail establishment with significant trade in organic products; (4) three shall . . . [have] expertise in areas of environmental protection and resource conservation; (5) three shall . . . represent public interest or consumer interest groups; (6) one shall . . . [have] expertise in the fields of toxicology, ecology, or biochemistry; (7) and one shall be . . . a certifying agent as identified under . . . this title.

7 U.S.C. § 6518(b) (2018).

130. See Longley, *supra* note 128.

131. See 5 U.S.C. § 3110(b), (d) (2018).

132. *Id.* at § 3110(e).



## 2. Agricultural Boards May Not Serve Consumers' Best Interests

Although many agencies under the USDA prescribe a balance of qualified individuals, no rule exists excluding individuals from serving who have conflicts of interest. For example, Monsanto developed rbST under the name Posilac in the early nineties, finding that when injected into cows, the hormone increased milk production by up to sixteen percent.<sup>133</sup> Posilac gained FDA approval in 1993<sup>134</sup> and in 1994, the United States lifted its moratorium on the previously banned product.<sup>135</sup> In 2008, Monsanto sold Posilac to Eli Lilly,<sup>136</sup> who has fought the *rbST-free* label ever since.<sup>137</sup> Eli Lilly has argued that absence labels can be misleading and imply that milk from cows treated with rbST is inferior.<sup>138</sup> Incidentally, courts have reasoned similarly, maintaining that “rbST-free” producers may not make claims that there is any difference between the two types of milk.<sup>139</sup>

Interestingly, Monsanto introduced a product to the United States that was banned in many countries worldwide and Eli Lilly has since successfully kept it on the market.<sup>140</sup> More interesting is Monsanto's connection to Washington.<sup>141</sup> Notably, former Monsanto attorney and current Supreme Court Justice Clarence Thomas has not recused himself in cases directly involving Monsanto and its interests.<sup>142</sup> Even United Nations representatives

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133. I.R. Dohoo et al., *A Meta-Analysis Review of the Effects of Recombinant Bovine Somatotropin*, 67 CAN. J. VET. RES. 252, 253, 257 (2003). The increase is closer to 25% today. Grobe, *supra* note 101.

134. Dohoo et al., *supra* note 133, at 253.

135. Interim Guidance, *supra* note 74, at 1280.

136. *Eli Lilly Buys Troubled Monsanto Dairy Product*, *supra* note 123.

137. See, e.g., *Eli Lilly & Co. v. Arla Foods Inc.*, 393 F.3d 375, 379 (7th Cir. 2018).

138. *Id.*

139. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 638 (6th Cir. 2010).

140. RbST has been banned by the European Union, Canada, Australia, Japan, New Zealand, and Israel. Edward Group, 8 *Shocking Facts About Bovine Growth Hormone*, GLOBAL HEALING CTR., <https://www.globalhealingcenter.com/natural-health/8-shocking-facts-bovine-growth-hormone/> [<https://perma.cc/M9LY-LKWF>].

141. See Janie Boschma, *Monsanto: Big Guy on the Block When It Comes to Friends in Washington*, OPENSECRETS (Feb. 19, 2013), <https://www.opensecrets.org/news/2013/02/monsanto/> [<https://perma.cc/XE55-CN49>].

142. See *id.* In 2013, Justice Thomas did not recuse himself from hearing *Bowman v. Monsanto Co.*, which addressed Monsanto's herbicide-resistant seed patents. *Id.*; see also *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013). Similarly, in 2001, he authored the opinion in a case not involving Monsanto but holding that new, developed plant breeds are patentable. See generally *J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001). Both instances posed clear conflicts of interest. Boschma, *supra* note 141.

have Monsanto ties.<sup>143</sup> Additionally, Monsanto engages in frequent lobbying, contributes generously to political action committees, and monetarily fights legislation much to its success.<sup>144</sup>

Reliance on government agencies to protect consumers is inadequate. Ideally, companies seeking to disclose more in the name of consumer trust should receive a helping hand to combat behemoths of the industry that are well connected to Washington and able to throw millions of dollars at any given obstacle.<sup>145</sup> Congruently, reliance on the USDA and Department of Human Health Services (HHS) to develop dietary guidelines may be misplaced. The agencies base the final guidelines, at least in part, on a report from the Dietary Guidelines Advisory Committee, which is made up of “experts in the fields of health and nutrition.”<sup>146</sup> “The Advisory Committee bases its recommendations on thousands of pages of published research, and the report is open to public comment.”<sup>147</sup> Yet, the current guidelines deviate substantially from the committee’s recommendations.<sup>148</sup> The USDA contends deviations “reflect the latest research and science, as well as [their] current understanding of the connections between diet and health.”<sup>149</sup> Unfortunately, because of the “regulatory revolving door” present at the USDA, executing objective standards is difficult.<sup>150</sup> Until the USDA

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143. See Charles Platiau, *Conflict of Interest? Members of UN Panel on Glyphosate Have Monsanto Ties*, RT (May 18, 2016, 8:09 PM), <https://www.rt.com/usa/343485-un-who-glyphosate-cancer-risks/> [https://perma.cc/HS25-DXMR].

144. See Boschma, *supra* note 141; *Monsanto Company Citizenship Fund AKA Monsanto Citizenship Fund*, FED. ELECTION COMM’N, <https://www.fec.gov/data/committee/C00042069/?cycle=2016> [https://perma.cc/9H5C-S39L].

145. In 2012, for example, Monsanto spent millions of dollars successfully opposing California’s Proposition 37, which would have mandated the disclosure of genetically modified crops on food labels. See Amy Westervelt, *Monsanto, DuPont Spending Millions to Oppose California’s GMO Labeling Law*, FORBES (Aug. 22, 2012, 10:00 PM), <https://www.forbes.com/sites/amywestervelt/2012/08/22/monsanto-dupont-spending-millions-to-oppose-californias-gmo-labeling-law/#4f9a2222605b> [https://perma.cc/48SC-PTMZ].

146. Markham Heid, *Experts Say Lobbying Skewed the U.S. Dietary Guidelines*, TIME (Jan. 8, 2016), <http://time.com/4130043/lobbying-politics-dietary-guidelines/> [https://perma.cc/4GB3-CNNC]. See generally U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF AGRIC., *DIETARY GUIDELINES FOR AMERICANS 2015–2020* (8th ed. 2015), [https://health.gov/dietaryguidelines/2015/resources/2015-2020\\_Dietary\\_Guidelines.pdf](https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf) [https://perma.cc/B3UU-NKXD].

147. Heid, *supra* note 146; see also U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF AGRIC., *supra* note 146, at vii.

148. Heid, *supra* note 146 (“[L]eading nutrition experts . . . say the guidelines are influenced too much by food manufacturers, food producers, and special interest groups.”).

149. *Id.*

150. Josh Sager, *Monsanto Controls Both the White House and the US Congress*, GLOBAL RES. (Mar. 6, 2018), <https://www.globalresearch.ca/monsanto-controls-both-the-white-house-and-the-us-congress/5336422> [https://perma.cc/A3WY-LLS4]. Monsanto exemplifies a corporation that has infiltrated regulatory agencies through its corporate actors moving in and out of each position to gain corporate advantages. See *id.* The deputy

alleviates one of its functions, managing food production or crafting nutrition policy,<sup>151</sup> consumers risk receiving mixed messages about the facts concerning their food.

### 3. Other Shortcomings

Apart from the skeptical relationships between policymakers and corporations, existing standards often lack specificity otherwise helpful to consumers. For example, one might argue that the *organic* label is more misleading than the *rbST-free* label, because *organic* automatically signifies a readily understood attribute, which many consumers might believe negates any other dubious attributes of the product.<sup>152</sup> Ideally, any label would be “well understood by consumers and reflect their preferences.”<sup>153</sup> To pass as adequate—avoiding consumer deception and mistrust—disclosure should be verified and substantiated.<sup>154</sup>

Until lawmakers redefine the relationship between what is misleading and what counts as *little difference*, corporations seeking to empower consumers will be prohibited from sharing the whole story with them. Likewise, corporations seeking to *conceal* information will be enabled to do so, forcing consumers to rely upon their own diligence for information.

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director of the FDA under Bush Sr., the director of the USDA under Obama, and the deputy commissioner of the FDA under Obama are only a few examples of Monsanto executives who have also worked for the federal government. *See id.*; Jared Diamond,

<https://www.iatp.org/news/agency-guarding-us-food-supply-has-close-ties-to-beef-industry> [<https://perma.cc/5VXD-8DEQ>] (noting that USDA deputy undersecretary Charles Lambert formerly worked for the National Cattlemen’s Beef Association).

151. Heid, *supra* note 146 (“Placing the guidelines solely in the hands of the Department of Health and Human Services would be a step in the right direction . . .”).

152. For example, the “organic label does not guarantee that a product is free from pesticides or chemicals, nor does it certify the overall agricultural land use process.” Houston, *supra* note 113, at 226, 239–41 (footnotes omitted) (first citing Michelle T. Friedland, *You Call That Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 384–85 (2005); then citing OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM 2–3 (2010); and then citing Jason J. Czarnecki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L.J. 3, 15 (2011)).

153. *Id.* at 226 (quoting David Conner & Ralph Christy, *The Organic Label: How to Reconcile Its Meaning with Consumer Preferences*, 35 J. FOOD DISTRIBUTION RES. 40, 40 (2004)).

154. *Id.* (citing Roger D. Wynne, *The Emperor’s New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Program*, 14 VA. ENVTL. L.J. 51, 54 (1994)).

To trigger consumer enlightenment and gain consumer trust, the USDA should offer tailored benefit corporation status to corporations willing to go the extra mile to disclose contents and practice transparency.

## V. UNDERSTANDING BENEFIT CORPORATIONS

### A. What is a Benefit Corporation?

A benefit corporation has the *benefit* of pursuing “socially-minded purposes” as one of its core objectives without the threat of legal backlash.<sup>155</sup> Ordinarily, a for-profit corporation has a fiduciary duty to maximize shareholder profits, and shareholders may sue if the corporation fails to pursue that objective.<sup>156</sup> In benefit corporations, shareholders generally *may* “hold directors accountable for failure to create material positive

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155. *Benefit Corporations: What Are the Advantages, Disadvantages, and Impact on Not-for-Profit Organizations?*, COHNREZNICK (Oct. 31, 2014), <https://www.cohnreznick.com/insights-and-events/insights/benefit-corporations-what-are-advantages-disadvantages-and-impact-not-profit-organizations> [<https://perma.cc/6WYN-S9KN>].

156. *Id.*; see LA. STAT. ANN. § 12:1-831 (2018); see also FED. R. CIV. P. 23.1 (“This rule applies when one or more shareholders . . . bring a derivative action to enforce a right that the corporation . . . may properly assert but has failed to enforce.”). *But see* DEL. CODE ANN. tit. 8, § 102 (2017) (“[T]he certificate of incorporation may also contain [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as director, provided that such provision shall not eliminate or limit the liability of a director (i) [f]or any breach of the directors duty of loyalty to the corporation or its stockholder [or] (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . .”); Jacob E. Hasler, Note, *Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279, 1292 (2014) (“Though the ‘best interests of the corporation’ could be synonymous with maximizing shareholder value, it is by no means the only interpretation of the statutes.” (quoting Ian B. Lee, *Corporate Law, Profit Maximization, and the “Responsible” Shareholder*, 10 Stan. J.L., Bus. & Fin. 31, 33–34 (2005))). The court in *Dodge v. Ford Motor Co.* held that a “a business corporation is organized and carried on primarily for the profit of the stockholders. [As such,] [t]he powers of the directors are to be employed for that end.” *Id.* (quoting *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919)). Despite this holding, “*Dodge* has been dismissed by commentators as ‘a mistake,’ applicable only in the context of minority shareholder oppression, and largely irrelevant since it is nearly one hundred years old.” *Id.* (footnotes omitted) (first quoting Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166, 176 (2008); and then citing D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278, 323 (1998)).

impact on society.”<sup>157</sup> Presently, benefit corporations do not receive preferred tax treatment and are authorized by state statutes.<sup>158</sup>

Benefit corporations came to fruition in 2010,<sup>159</sup> shortly after the founding of the nonprofit organization, B Lab, created in 2006.<sup>160</sup> B Lab sought to utilize business to solve social problems, aiming to address “the existence of shareholder primacy which makes it difficult for corporations to take employee, community, and environmental interests into consideration when making decisions.”<sup>161</sup> Ultimately, B Lab began certifying companies like Etsy and Patagonia as “Certified B Corporations” by evaluating their societal impact.<sup>162</sup> B Lab’s lobbying efforts directly led to the emergence of benefit corporation legislation in several states.<sup>163</sup>

For example, California passed benefit corporation legislation in 2012.<sup>164</sup> The board of directors of a benefit corporation in California must consider the impact of its actions upon its shareholders *and* employees, the interests of its customers as beneficiaries of the public benefit purpose, and “[t]he local and global environment.”<sup>165</sup> Directors may escape liability if the

157. See, e.g., B Lab, *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010, 10:57 AM), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation) [https://perma.cc/UE4V-5FJ7]. Although the Maryland statute enables directors to pursue goals outside of making profits, the statute’s language does not require that directors *must* do so. See MD. CODE ANN., Corporations and Associations § 5-6C-07 (West 2018). In fact, if a benefit corporation director acts in good faith, he is immune from liability for not fulfilling benefit corporation goals. *Id.* § 2-405.1.

158. Mystica M. Alexander, *Benefit Corporations—The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy?*, 38 SETON HALL LEGIS. J. 219, 222 (2014).

159. *Id.*

160. Amaan A. Shaikh, Comment, *The Post-Conception Contract Landscape: The Role Socially Conscious Business Can Play*, 57 SANTA CLARA L. REV. 223, 242–43 (2017).

161. *Id.* at 243 (quoting Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1011 (2013)).

162. *Id.* at 243, 255–56 (quoting J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 488–89 (2012)); see also James Surowiecki, *Companies with Benefits*, NEW YORKER, Aug. 4, 2014, at 23, 23.

163. Shaikh, *supra* note 160, at 243 (citing Murray, *supra* note 162, at 489). With every benefit corporation statute passed, more states, and thus more benefit corporations, would likely require a third-party assessment, which is B Lab’s specialty. See Alcorn, *supra* note 23.

164. See CAL. CORP. CODE § 14620 (2018).

165. *Id.* § 14620(b)(1)–(5).

benefit corporation incorporates as such, although any “provision may not eliminate or limit the liability of directors . . . for acts or omissions that involve intentional misconduct or a knowing and culpable violation of law,” including several stipulations.<sup>166</sup> California corporate law affords directors similar flexibility.<sup>167</sup> The main distinction between benefit corporations and ordinary for-profits is that the former have the *apparent* luxury of multiplying their goals.<sup>168</sup>

For example, Kickstarter, the self-proclaimed “world’s largest funding platform for creative projects,”<sup>169</sup> reincorporated as a benefit corporation in 2015 through a unanimous vote by its shareholders.<sup>170</sup> Kickstarter’s charter outlines its “commitment to arts and culture,” its plan to make decisions “swayed by profit motives,” and its vow “to donate 5% of annual post-tax profits to arts education and organizations fighting inequality.”<sup>171</sup> Such a mission complies with the intention of the benefit corporation framework: providing social good.<sup>172</sup> Additionally, Kickstarter releases an annual assessment reflecting on its success in advancing its mission.<sup>173</sup> Kickstarter’s provision of creative project resources exemplifies social good worthy of special corporate treatment.<sup>174</sup> Therefore, because Kickstarter provides a benefit to society, the law does not require it answer to the same corporate standard of maximizing shareholder profits to which regular for-profit corporations must adhere.<sup>175</sup>

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166. *Id.* § 204(a)(10).

167. *See id.* § 304. The board of a corporation must answer to its shareholders for all prescribed shareholder actions or else be subject to suit. *Id.* Outside shareholder concerns, a board has full discretion of all business affairs. *See id.* § 300(a).

168. *Benefit Corporations*, *supra* note 155.

169. Jason Furie, *Become an Active Member of the Kickstarter Community*, BACKERKIT (May 3, 2018), <https://www.backerkit.com/blog/kickstarter-community> [<https://perma.cc/QH22-BFZT>].

170. Yancey Strickler et al., *Kickstarter Is Now a Benefit Corporation*, KICKSTARTER BLOG (Sept. 21, 2015), <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation> [<https://perma.cc/DFH8-H2AH>].

171. *Id.*

172. *See id.*

173. *Id.*

174. In Kickstarter’s case, reincorporating as a benefit corporation was an effortless means for gaining recognition without changing business values. *See* GEORGE SERAFEIM ET AL., KKS ADVISORS, B CORPS & BENEFIT CORPORATIONS: UNDERSTANDING THE IMPLICATIONS FOR COMPANIES AND INVESTORS 6 (2017), <https://www.kksadvisors.com/s/B-Corps-Benefit-Corporations.pdf> [<https://perma.cc/5A3E-FFUJ>].

175. *See Benefit Corporations*, *supra* note 155.

*B. Criticisms of Benefit Corporations*

Benefit corporation legislation supports the discretion of corporations with goals outside of making profits. Without such legislation, any corporation could limit liability as desired with the appropriate contract.<sup>176</sup> The rationale behind benefit corporation legislation, then, was to establish a class of corporations predetermined as lawful, so there would be less uproar when those corporations were not complying with traditional fiduciary duties.<sup>177</sup> Consequently, with such a superfluous rationale, some deemed the legislation unnecessary.

The main criticism of benefit corporations is that their alleged benefit—the ability to pursue objectives outside of making profits—is one similarly shared by ordinary for-profit corporations.<sup>178</sup> Professor Lynn Stout of Cornell Law School concluded that “maximizing shareholder value is not a managerial obligation, it is a managerial choice.”<sup>179</sup> Critics argue corporations share the alleged leniency afforded to benefit corporations with regard to meeting business goals.<sup>180</sup> Furthermore, despite the presumptive distinction of benefit corporations being twofold—(1) directors cannot be sued for abandoning profit maximization goals, and (2) directors *can* be sued for abandoning altruistic policies—the actual language of many statutes is not so finite, leaving critics wondering if there is actually any difference.<sup>181</sup> Indeed the language of California’s benefit corporation legislation clearly states that “[a] director shall *not* be liable for monetary damages . . . for any failure of the benefit corporation to create a general or specific public benefit.”<sup>182</sup> Moreover, the traditional notion that regular

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176. See Dana Brackman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 595 (2011).

177. *Id.* at 596 (“Those purchasing shares in the benefit corporation . . . are thus placed on notice of the special nature of the corporation . . .”).

178. See Noam Noked, *Benefit Corporations vs. “Regular” Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), <https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> [https://perma.cc/RT7E-ZUU6].

179. *Id.* (quoting LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 32 (2012)).

180. See *id.*

181. Surowiecki, *supra* note 162, at 23; see Noked, *supra* note 178.

182. CAL. CORP. CODE § 14620(f) (2018) (emphasis added).

corporate directors must pursue profit maximization at all costs is not so stringent.<sup>183</sup>

Others argue that benefit corporations inadequately prove social mission compliance.<sup>184</sup> Initially glorified for the “proposition to build positive social impact into corporate purpose,” benefit corporations enabled businesses to inherently value social goods.<sup>185</sup> Yet, when they aim to profit monetarily overall, for-profit businesses experience intrinsic limitations in their abilities to promote social goods.<sup>186</sup> Thus, if benefit corporations truly desired the promotion of social good, they would instead incorporate as nonprofit organizations.<sup>187</sup> Instead, some argue that the ease of becoming a benefit corporation enables inadequate social missions.<sup>188</sup> One must consider these criticisms when developing future legislation related to the benefit corporation framework.

### C. Treating Agricultural Benefit Corporations as NPOs

On the other end of the spectrum, some critics worry legislation governing benefit corporations does not go far enough to reward these corporations for their social contributions.<sup>189</sup> Benefit corporations pledge to forego

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183. California benefit corporations and regular for-profit corporations abide by the same statute that limits liability of a director for monetary damages. *See id.* §§ 204(a)(10), 14620(i).

184. *See* David R. Sands, *Benefit Corporations Raise Legal, Regulatory Questions*, WASH. TIMES (Dec. 7, 2014), [www.washingtontimes.com/news/2014/dec/7/benefit-corporations-raise-legal-regulatory-questi/](http://www.washingtontimes.com/news/2014/dec/7/benefit-corporations-raise-legal-regulatory-questi/) [<https://perma.cc/JLK2-3DDQ>].

185. Joanne Bauer & Elizabeth Umlas, *Do Benefit Corporations Respect Human Rights?*, STAN. SOC. INNOVATION REV. 27, 28 (Fall 2017), [http://ssir.org/articles/entry/do\\_benefit\\_corporations\\_respect\\_human\\_rights](http://ssir.org/articles/entry/do_benefit_corporations_respect_human_rights).

186. *Id.*

187. *See generally* Brackman Reiser, *supra* note 176 (noting that benefit corporations rely on consumer diligence to ascertain their missions).

188. *See* Bauer & Umlas, *supra* note 185, at 29. Critics contend that benefit corporation incorporation enables any company to become a benefit corporation so long as it strategically commits to a social goal. *Id.* For example, in 2017, Nevada’s number of benefit corporations divided in half to include pest control and pool services companies. *Id.* at 30. Laureate Education, the first benefit corporation to go public—as well as the largest for-profit college company worldwide—cites its social mission in part as “boosting ‘employment and social mobility.’” Lauren Gensler, *The World’s Biggest For-Profit College Company, Laureate Education, Raises \$490 Million in Public Debt*, FORBES (Feb. 1, 2017, 11:29 AM), <https://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/#1212a18a2b3d> [<https://perma.cc/6QLK-PMV4>]. However, some question Laureate’s ability to provide a quality education considering its abysmal graduation rate in some countries and its poor student-to-teacher ratio. *Id.*

189. *See* Kent Greenfield, *A Skeptic’s View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 19 (2014). Kent Greenfield posits that leveling the playing field to mandate attentiveness by all corporations would ensure attentiveness



profit maximization in pursuit of goals that benefit society. Indeed, they forewarn their shareholders of this reality and in return face less legal backlash.<sup>190</sup> Yet, what are benefit corporations *actually* getting other than that warm fuzzy feeling?

Benefit corporation status does not adequately protect companies from market pressure, critics contend, for two reasons. First, raising social capital takes more time and effort than raising commercial capital, given the demand of social investors.<sup>191</sup> Second, “[b]ecause not all companies choose to become benefit corporations, those that *do* will suffer competitive disadvantages in the capital market, at least in the short term.”<sup>192</sup> As a result, benefit corporations—in addition to, and because of, the extra work they put in—risk acquiring fewer shareholders.<sup>193</sup> Current legislation rewards these sacrifices with lessened liability, but the advantage is unclear because for-profits may take advantage of loopholes to evade liability.<sup>194</sup> Meanwhile, the debate continues over whether benefit corporations should qualify for special tax treatment, an advantage currently unavailable to benefit corporations.

Some further hypothesize that because benefit corporations voluntarily incur increased market pressure to advance social good they should qualify for some degree of tax deduction in line with nonprofit treatment.<sup>195</sup> However, affording benefit corporations special tax treatment might then detract from nonprofit status.<sup>196</sup> Specific concerns include the diversion

to social needs benefits a company. *Id.* As the legislation sits, benefit corporations receive little benefit given market pressure and other obstacles. *See id.*

190. *See* Brackman Reiser, *supra* note 176, at 596.

191. Joan MacLeod Heminway, *To Be or Not to Be (a Security): Funding For-Profit Social Enterprises*, 25 REGENT U.L. REV. 299, 310 (2013) (quoting Timothy Ogden, *The True Cost of Social Capital*, STAN. SOC. INNOVATION REV. (Mar. 7, 2012), [http://www.ssireview.org/blog/entry/the\\_true\\_cost\\_of\\_social\\_capital](http://www.ssireview.org/blog/entry/the_true_cost_of_social_capital) [<https://perma.cc/2HSN-3EPV>]).

192. Greenfield, *supra* note 189, at 19 (emphasis added). It follows that past the short-term, successful benefit corporations have proven themselves, and thus, social investors will be less hesitant to invest.

193. *Id.* (noting that most investors are interested in gaining a profit and henceforth are more likely to invest in commercial capital).

194. In theory, the *benefit* of benefit corporations is an avoidance of fiduciary duty; however, for-profits can also avoid their fiduciary duty to a large extent by incorporating carefully. *See supra* Section V.B.

195. *See* Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 422–23 (2014).

196. *See id.* at 391–92; *see also* Brian Kimball, Comment, *Hybrid Business Organizations: Reconciling Fiduciary Duty, Profit, and Social Purpose*, 54 SANTA CLARA L. REV. 931, 960 (2014) (explaining that a significant challenge to awarding special tax treatment to

of needed funds from existing charities and the appearance of government approval or oversight of the specific goal of any given corporation.<sup>197</sup>

Nonprofit organizations must comply with federal statute to gain tax exemption.<sup>198</sup> The main distinction between nonprofit organizations and for-profit organizations is that the former are subject to a “nondistribution constraint,” prohibiting them from dispersing surplus funds to owners or shareholders.<sup>199</sup> Instead, nonprofits must use surplus funds for stated charitable or otherwise statute-acceptable purposes.<sup>200</sup> Nonprofits that operate exclusively for charitable purposes also afford the benefit of tax exemption to their donors.<sup>201</sup>

Yet, some believe that benefit corporations, like nonprofits, “merit special [tax] treatment due to their historical background, as a response to market and government failures, as forces for pluralism, and as a mechanism by which an individualistic society can express solidarity through joint action.”<sup>202</sup> Although benefit corporations do not have a nondistribution constraint, some contend this is consistent with nonprofit policy.<sup>203</sup> That is, the combination of just compensation for nonprofit workers along with nonprofit organization tax exemption is a relatively equal benefit to allowing private inurement for benefit corporations.<sup>204</sup> Both types of organizations

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social enterprises such as benefit corporations is that they fail to meet the nonprofit prohibition for individual inurement of benefit).

197. Because nonprofits receive tax exemption or subsidy with the stipulation that they provide a charitable service, nonprofits attain government approval, acting as a natural endorsement to the public. Hitoshi Mayer & Ganahl, *supra* note 195, at 397–400. Skeptics fear any subsidy to other corporations who do not meet the charitable standard of nonprofits will confuse the public into thinking that these corporations—benefit corporations—are equally endorsed as nonprofits. *Id.* at 399–400. Because nonprofits have a private inurement restriction, such confusion could harm nonprofit businesses two-fold: first, the emergence of corporations other than nonprofits receiving special government tax treatment will divert funds from nonprofits, and second; the public patrons will ignore the distinction between nonprofits and other corporations, perceiving that the government approves equally of benefit corporations and nonprofits. *Id.* at 397, 400.

198. See 26 U.S.C. § 501 (2018).

199. Hitoshi Mayer & Ganahl, *supra* note 195, at 404 (quoting Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 34, 56–57 (1981)).

200. *Id.* (quoting Hansmann, *supra* note 199).

201. *Id.* at 405.

202. Kimball, *supra* note 196, at 960 (citing JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS, CASES AND MATERIALS* 30 (4th ed. 2010)). Just as the principle of volunteerism serves as the historical precedent for special treatment for nonprofits, so too should the principle of service to causes beyond self-interest form the basis of special tax treatment for benefit corporations.

203. See *id.* at 961.

204. See *id.* Brackman Reiser points out benefit corporations’ vulnerability in the present state of affairs: they lack “robust mechanisms to enforce dual mission[s], which will ultimately undermine [their] ability to expand funding streams and create a strong

pursue socially beneficial goals beyond the typical goals of for-profit organizations.<sup>205</sup> The difference: one receives a tax exemption while the other may privately inure.<sup>206</sup>

Critics of affording benefit corporations special tax treatment conclude that the halo bestowed upon nonprofits is not transferable.<sup>207</sup> In addition to the premise that nonprofits operate *exclusively* towards their charitable purpose, leading tax scholar Lloyd Hitoshi Mayer explains that for-profits that engage in charitable activity already have recourse for partial benefits.<sup>208</sup> For-profits need only distinguish between “contributions or gifts” and “ordinary and necessary business expenses” to receive a tax refund.<sup>209</sup> Furthermore, critics contend that offering a tax incentive opens the door to corporations left and right claiming social pursuits simply to collect.<sup>210</sup>

Despite apparent majority insistence that the binary tax distinction should remain, Professor Malani and Professor Posner have argued that the tax code should be amended to provide tax incentives to businesses engaged in social promotion, regardless of their status as nonprofit organizations.<sup>211</sup> They reason “that the government should provide favorable tax treatment for activities that eliminate the need for government action by providing

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brand for social enterprise as sustainable organizations.” Brackman Reiser, *supra* note 176, at 593. Thus, special tax treatment would be a worthy solution given the comparison of social good amongst nonprofits and benefit corporations. See Kimball, *supra* note 196, at 961.

205. See Kimball, *supra* note 196, at 960–61.

206. See *id.*

207. “[T]he propensity of people to see nonprofits as more trustworthy than for-profits” is known as the “halo effect.” Terry L. Corbett, *Healthcare Corporate Structure and the ACA: A Need for Mission Primacy Through a New Organizational Paradigm?*, 12 IND. HEALTH L. REV. 103, 130 (2015).

208. See Hitoshi Mayer & Ganahl, *supra* note 195, at 408.

209. *Id.* at 408, 408 n.97 (quoting Rev. Rul. 72-314, 1972-1 C.B. 44); see also 26 U.S.C. § 162 (2018) (“There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business [but no] deduction shall be allowed . . . for any contribution or gift which would be allowable as a deduction under section 170 . . . .”); *id.* § 170 (“There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.”).

210. See Sands, *supra* note 184.

211. See Joseph M. Binder, Note, *A Tax Analysis of the Emerging Class of Hybrid Entities*, 78 BROOK. L. REV. 625, 640 (2013) (citing Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2064–65 (2007)).

publicly beneficial goods or services” and that logically such treatment cannot be restricted to nonprofit organizations.<sup>212</sup> Additionally, they argue that because principal business costs can be doctored, nonprofits have flexibility with private inurement.<sup>213</sup> That is, nonprofits can work less efficiently and go on lavish conferences while still complying with the nondistribution constraint.<sup>214</sup> Thus, corporations that engage in activities that benefit the public good should be rewarded for using their for-profit structure to do so efficiently.<sup>215</sup>

Most modern scholars respond negatively to the pre-benefit corporation rationale of Malani and Posner. First, critics claim that taxing benefit corporations aligns with the goals of the tax system.<sup>216</sup> Because benefit corporations expect to earn a profit, they are able to pay taxes.<sup>217</sup> Second, that benefit corporations balance government failure is not concrete.<sup>218</sup> Government failure occurs when a desired government program fails “to attract a majority of votes.”<sup>219</sup> The government will not provide the desired good or service if only a minority of the population desires it.<sup>220</sup> In this case,

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212. *Id.* (citing Malani & Posner, *supra* note 211, at 2030–31).

213. *Id.* at 640–41 (citing Malani & Posner, *supra* note 211, at 2031).

214. *See id.* (citing Malani & Posner, *supra* note 211, at 2035); *see, e.g.*, Dave Philipps, *Wounded Warrior Project Spends Lavishly on Itself, Insiders Say*, N.Y. TIMES (Jan. 27, 2016), <https://www.nytimes.com/2016/01/28/us/wounded-warrior-project-spends-lavishly-on-itself-ex-employees-say.html> [<https://perma.cc/AZH7-GXTN>] (noting that in 2014 the charity flew out its 500 employees to a Colorado Springs five-star hotel in celebration of a profitable year).

215. *See* Binder, *supra* note 211, at 641.

216. *Id.* at 656 (noting that taxing statutory benefit corporations is not fundamentally at odds with the goals of the tax system because benefit corporations “contemplate earning some profit”). Three accepted goals of the tax system include raising revenue to finance public goods, redistributing income, and providing a means of government regulation. Limor Riza, *In Retrospect of 40 Years, Another Look at Andrews’ Personal Deductions Argument: A Comparison of Charitable Contributions and Child-Care Expenses*, 15 DEPAUL BUS. & COM. L.J. 55, 57 (2016). The government provides distinct tax treatment for nonprofit and for-profit businesses under the rationales that income tax should apply to earnings and be measured in part by a taxpayer’s ability to pay the tax. *See* Binder, *supra* note 211, at 638. Benefit corporations have earnings and can pay taxes—given that they have no limitations on private inurement. Rick Bell & Devin Scott, *Non-Profit Corporation vs Public Benefit Corporation*, DELAWAREINC.COM (July 2, 2018), <https://www.delawareinc.com/blog/non-profit-corporation-vs-public-benefit-corporation/> [<https://perma.cc/ST83-YBKQ>].

217. Binder, *supra* note 211, at 656–57.

218. *Id.* at 657 (noting the skepticism regarding to what extent statutory benefit corporations provide goods and services that the government would otherwise need to provide).

219. Kevin M. Yamamoto, *Taxing Income from Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 243 (2001) (citing John D. Colombo, *Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 875 (1993)).

220. *Id.* (citing Colombo, *supra* note 219, at 874–75).

nonprofit tax exemption acts as a subsidy to complement the government's failure to otherwise provide the desired good or service.<sup>221</sup> Additionally, the IRS provides benefit corporations with a broad scope of permissible purposes, while nonprofits experience a restricted scope.<sup>222</sup> Accordingly, the government does not offer favorable tax treatment to benefit corporations because it does not impose as narrow of requirements as it does upon nonprofits.<sup>223</sup>

As illustrated above, the debate over preferential tax treatment for benefit corporations remains inconclusive. However, if benefit corporations balance government failure adequately, a certain subset might be due *more* of a benefit. Thus, Part VI advocates for Congress to create a new class of benefit corporation to reward agricultural companies that advance social good.

## VI. A NEW CLASS OF BENEFIT CORPORATION

A new class of benefit corporation will simultaneously boost agricultural standards and consumer trust. Although benefit corporations are currently legislated by states, federal hybrid corporation legislation is attainable.<sup>224</sup> A federal benefit corporation tailored to the needs of the agricultural industry is thus no huge divergence from current law.<sup>225</sup> Accordingly, this Comment proposes that Congress pass legislation that includes two main components outside of the original benefit corporation framework. First, in line with current benefit corporation structures of pursuing socially-minded business goals, agricultural corporations that comply with industrial practice transparency regulations will qualify for a tax incentive. Second, to instill the prescribed mission of transparent, ethical standards, the new class will require that employee representatives be board members.

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221. *Id.* (citing Colombo, *supra* note 219, at 875).

222. *See id.* at 228 (citing I.R.C. § 501(a) (2000)).

223. *See* Emily Cohen, Note, *Benefit Expenses: How the Benefit Corporation's Social Purpose Changes the Ordinary and Necessary*, 4 WM. & MARY BUS. L. REV. 269, 274 (2013) (citing Malani & Posner, *supra* note 211, 2026).

224. Congress may regulate commerce among the several States. U.S. CONST. art. I, § 8, cl. 3. Given the existence of state hybrid corporations and the reality that nonprofit corporations operate at the federal level, legislation of federal hybrid corporations is constitutional. *See* Kimball, *supra* note 196, at 934.

225. Nonprofits are federally regulated under tax law; thus, a type of federal benefit corporation would not be unprecedented. *See* 26 U.S.C. § 501 (2012); *see also* Kimball, *supra* note 196, at 960.

## A. A Feasible Tax Incentive

### 1. Congressional Authority and ABCs as Worthy Tax Incentive Recipients

Congress receives its authority to lay and collect taxes from Article I of the Constitution.<sup>226</sup> Congress imposes uniform taxes to “pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>227</sup> Historically, the government has utilized tax incentives to reduce taxes for individuals while encouraging targeted programs or behaviors.<sup>228</sup> In the nonprofit sector, individuals who donate to charities receive tax exemption on their donation.<sup>229</sup> Thus, tax exemption incentivizes the behavior of donating to a good cause. For example, subsidies, deductions, and exclusions for homeownership represent a mainstay social program worthy of its billion-dollar cost to the federal budget—presumably because

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226. See U.S. CONST. art. I, § 8, cl. 1.

227. *Id.* Courts have historically debated the meaning of “general Welfare.” See *id.* James Madison held the view that “the power to tax was confined to the enumerated legislative fields committed to Congress,” while Alexander Hamilton maintained that the clause conferred “separate and distinct power,” substantively granting Congress the power “to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.” Jamess, *America’s Misunderstood Mission: Promoting the General Welfare*, DAILY KOS (Nov. 2, 2014, 8:15 AM), <https://www.dailykos.com/stories/2014/11/2/1340978/-America-s-Misunderstood-Mission-Promoting-the-general-Welfare> [<https://perma.cc/9A4F-88W4>] (emphasis omitted). The Court in *United States v. Butler* held the Agricultural Adjustment Act of 1933 (AAA) unconstitutional, siding with Hamilton’s notion of general welfare. See *id.* The Court declared that the AAA’s intention on setting limits on the production of certain crops and imposing taxes on the excessive production of such limits was unconstitutional because the tax was proposed for extraneous reasons beyond the common, national welfare. *United States v. Butler*, 297 U.S. 1, 68 (1936). The Court further noted that because Congress is not granted the power to regulate agricultural production, the power to tax on that basis is prohibited and the Tenth Amendment controls. *Id.* But see 7 U.S.C. § 612(a) (2018) (“There is appropriated [by the Treasury], the sum of \$100,000,000 to be available to the Secretary of Agriculture for administrative expenses . . . and for payments authorized to be made under section 608 of this title.”); *id.* § 612(b) (“[A] sum equal to the proceeds derived from all taxes imposed under this chapter is appropriated to the Secretary of Agriculture for (1) the acquisition of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to cooperate with a program of production adjustment or marketing adjustment adopted under the authority of this chapter, and (2) . . . [a]dministrative expenses, payments authorized to be made under section 608 of this title, and refunds on taxes.”). Thus, §§ 608 and 612 effectively allow for the Secretary of Agriculture to subsidize agricultural commodities that are below the fair exchange value. See *id.* §§ 608, 612.

228. See, e.g., BENJAMIN H. HARRIS ET AL., NEW PERSPECTIVES ON HOMEOWNERSHIP TAX INCENTIVES 1315–17 (2013), <https://www.urban.org/sites/default/files/publication/43086/1001710-new-perspectives-on-homeownership-tax-incentives.pdf> [<https://perma.cc/D6RW-78RD>].

229. See 26 U.S.C. § 170(a)(1).

owning a home encourages saving, which boosts the economy and strengthens the development of American communities.<sup>230</sup> Therefore, to maintain consistent tax policy, individuals or entities receiving tax deductions must do something that directly or indirectly benefits society.

Benefit corporations, by definition, must provide a positive impact on society.<sup>231</sup> Yet, because they remain for-profit entities, state legislatures do not limit their scope of societal goals.<sup>232</sup> If the government starts subsidizing traditional benefit corporations, however, some argue that the public may perceive the government as endorsing corporations' social goals.<sup>233</sup> Such endorsement could diminish the halo effect of nonprofits. Furthermore, despite all benefit corporations theoretically prescribing to do something *good* for society, nonprofits arguably impact taxpayer welfare more directly.

Yet, in the case of agricultural corporations, the social goal of instilling consumer trust and improving food production standards is objectively worthy of endorsement, like that of a nonprofit.<sup>234</sup> Regardless of a particular corporation's industry or product, consumer trust is a common area of focus.<sup>235</sup> In the agricultural industry, it is often a marketing strategy.<sup>236</sup> Yet, frequent use of "shared values" language risks ambiguity depending

230. HARRIS ET AL., *supra* note 228, at 1317.

231. *See supra* Part V.

232. *See supra* Part V.

233. *See* THE REGISTRY, FOR PROFIT VERSUS NON-PROFIT 1–2 (2002), <https://www.the-registry.org/Portals/0/Documents/Credentials/Administrator/Documents/For%20Profit%20versus%20Non.pdf> [<https://perma.cc/VT7T-3ZUW>]. Because the government offers special tax treatment to nonprofits, there is a real or perceived view that the organization operates in the public interest. *See id.* As such, "[t]he public is more willing to offer money or time to do business with a nonprofit." *Id.* If the government started treating benefit corporations similarly to nonprofits, the public would likely associate a comparable endorsement. *See id.* But *see* MARK KRAMER & JOHN KANIA, A NEW ROLE FOR NONPROFITS (2006), [https://ssir.org/pdf/2006SP\\_sidebar\\_Kramer\\_Kania\\_new%20role%20for%20nonprofits.pdf](https://ssir.org/pdf/2006SP_sidebar_Kramer_Kania_new%20role%20for%20nonprofits.pdf) [<https://perma.cc/83CP-JHPS>] (positing that nonprofits control retaining their halos, at least in the case of aligning with business partners).

234. Transparency enables consumers to make informed decisions about the food they consume. *See supra* Part III.

235. *See, e.g.,* Alyssa Conway, *Consumer Trust and the Agriculture Industry: Bridging the Gap*, WATTAGNET (Jan. 27, 2016), <https://www.wattagnet.com/articles/25743-consumer-trust-and-the-agriculture-industry-bridging-the-gap> [<https://perma.cc/2G8G-3X8Z>]; Hembree Brandon, *Agriculture's Challenge: How to Counter Lack of Trust in Today's Food System*, DELTA FARM PRESS (July 30, 2015), [www.deltafarmpress.com/miscellaneous/agriculture-s-challenge-how-counter-lack-trust-today-s-food-system](http://www.deltafarmpress.com/miscellaneous/agriculture-s-challenge-how-counter-lack-trust-today-s-food-system) [<https://perma.cc/6DG4-DTQ8>].

236. *See* Conway, *supra* note 235 (noting how Tyson executive Christine Daughtery advised women in the agribusiness industry to reach out to consumers regarding shared values).

on the speaker.<sup>237</sup> Although corporations themselves pursue improving consumer trust, organizations such as the Center for Food Integrity aim to collect consumer trust research with similar objectives.<sup>238</sup> Therefore, the desire for improved consumer trust warrants government endorsement. Additionally, agricultural subsidies are already commonplace,<sup>239</sup> making the creation of a tax incentive for agricultural industries reasonable. In some cases, existing subsidies are no longer necessary.<sup>240</sup> Furthermore, the rationale is to tip the scale in favor of compliant corporations, thus incentivizing transparent, ethical standards.

One key area in which to tip the scale is animal agriculture. As discussed in this Comment, animal agricultural standards are not only increasingly deplorable but also increasingly censored.<sup>241</sup> Despite deplorable conditions—and although these industries actually produce less sustenance than would equal subsidies to plant industries—the government continues to subsidize meat and dairy industries.<sup>242</sup> Giving subsidy preference to more transparent

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237. *Id.*

238. See Brandon, *supra* note 235.

239. See generally JAYSON L. LUSK, THE EVOLVING ROLE OF THE USDA IN THE FOOD AND AGRICULTURAL ECONOMY (2016), <https://www.mercatus.org/system/files/Lusk-USDA-v1.pdf> [<https://perma.cc/AZ9W-TG8S>]. The United States subsidized nearly nine billion dollars to agricultural farms in 2016. See *Subtotal, Farming Subsidies in the U.S., 2016*, EWG, [https://farm.ewg.org/top\\_recips.php?fips=00000&progcode=totalfarm&yr=2016&regionname=theUnitedStates](https://farm.ewg.org/top_recips.php?fips=00000&progcode=totalfarm&yr=2016&regionname=theUnitedStates) [<https://perma.cc/2TNF-4TP3>]. Deline Farms, a partnership whose main commodities include cotton, rice, soybeans, corn, and wheat, received four million dollars in 2016. *USDA Subsidy Information for Deline Farms Partnership*, EWG, <https://farm.ewg.org/persondetail.php?custnumber=B05492376> [<https://perma.cc/FK9R-8JFU>]. Napi, which grew corn, wheat, and barley, received 2.3 million dollars. *USDA Subsidy Information for Napi*, EWG, <https://farm.ewg.org/persondetail.php?custnumber=A09396739> [<https://perma.cc/P9SF-FCCU>]. And Frische Farms, which grew corn, cotton, sorghum, and wheat, received 2.2 million dollars. *USDA Subsidy Information for Frische Farms*, EWG, <https://farm.ewg.org/persondetail.php?custnumber=A09342293> [<https://perma.cc/7SMW-GLQH>].

240. During the Great Depression, the USDA mandated price floors and bought surplus crops to simultaneously subsidize farmers' income and consumers' ability to afford products. LUSK, *supra* note 239, at 14. Some subsidies, such as the raisin subsidy implemented in the 1940s—and only recently struck down in 2015—are simply unnecessary today. *Id.* at 5.

241. See *supra* Part I.

242. See *U.S. Could Feed 800 Million People with Grain that Livestock Eat*, *Cornell Ecologist Advises Animal Scientists*, CORNELL CHRON. (Aug. 7, 1997), <http://news.cornell.edu/stories/1997/08/us-could-feed-800-million-people-grain-livestock-eat> [<https://perma.cc/TU6M-ZD64>]. Since 1995, the U.S. government has paid out 10.3 billion dollars in livestock subsidies alone, including over 136 million to the Cattle Feed Program and over 122 million to the Small Hog Operation. *Livestock Subsidies in the U.S. Totaled \$10.3 Billion from 1995-2016*, EWG, <https://farm.ewg.org/progdetail.php?fips=00000&progcode=livestock> [<https://perma.cc/RP5X-Y83Y>]. Comprehensive studies estimate the total annual figure of meat and dairy subsidies is thirty-eight billion dollars. David Robinson Simon, *10 Things We Wish Everyone Knew about the Meat and Dairy Industries*, PETA, <https://www.peta.org/living/food/10-things-wish-everyone-knew-meat-dairy-industries/> [<https://perma.cc/TZ4W-LQRN>].



and ethical animal agricultural corporations and minimal or no subsidies to those outside of a statutorily defined standard would enable the government to monetarily incentivize Agriculture Benefit Corporations (ABCs). Furthermore, as consumers pay the cost of these subsidies, reason warrants that their tax money go toward lowering the price of food, so they can make more informed decisions about purchasing.<sup>243</sup> Depression-era policies served the general public because nearly everyone was affected by the Depression.<sup>244</sup> Therefore, subsidies paid out through tax dollars to lower the cost of food was a reasonable policy.<sup>245</sup> With the economy in an improved state of affairs today, this is no longer a reasonable practice.<sup>246</sup> Instead, the U.S. government should subsidize agriculture that improves transparency because nontransparent agricultural corporations currently disserve the general public.

Lowering or eliminating subsidies for other areas of agriculture could also enable a tax provision for compliant corporations. For example, studies suggest corn promotes obesity, suggesting subsidies may not only be unnecessary but may also promote unhealthy food choices.<sup>247</sup> Thus, if the government eliminated or lowered its corn subsidy, it could increase its ability to subsidize agricultural corporations practicing transparency.

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One study analyzing U.S. farm subsidy programs—including crops, livestock, and dairy—since 1986 reported that the value of USDA programs to the U.S. agriculture industry was \$180.8 billion in 2009, with the dairy industry receiving \$19.3 billion. Grey, Clark, Shih & Assocs., Ltd., *Farming the Mailbox: U.S. Federal and State Subsidies to Agriculture*, CISION, <http://www.newswire.ca/news-releases/farming-the-mailbox-us-federal-and-state-subsidies-to-agriculture-546401352.html> [<https://perma.cc/RGV2-6TNK>]. The report stated this amount included programs for “irrigation infrastructure support and unreported below market price-cost water and power for irrigation systems,” summarizing that subsidies to U.S. dairy producers acted as revenue from the marketplace, enabling “producers to sell below their fully absorbed cost of production by insulating them from the need to earn a profit from the market [and permitting] insulation from international price pressures.” *Id.*

243. See Christopher Hyner, *A Leading Cause of Everything: One Industry That Is Destroying Our Planet and Our Ability to Thrive on It*, GEORGETOWN ENVTL. L. REV. (Oct. 23, 2015), <https://gelr.org/2015/10/23/a-leading-cause-of-everything-one-industry-that-is-destroying-our-planet-and-our-ability-to-thrive-on-it-georgetown-environmental-law-review/> [<https://perma.cc/K4XH-DEAG>].

244. See LUSK, *supra* note 239, at 14.

245. See *id.*

246. See *id.* at 6–8.

247. See generally MANUELA MONTERO, WHY THOSE PRO-HIGH FRUCTOSE CORN SYRUP COMMERCIALS ARE [BS] (2012), <https://matadornetwork.com/change/why-those-pro-high-fructose-corn-syrup-commercials-are-bullshit-infographic/> [<https://perma.cc/PQY9-4DYY>].

In fact, a shift in policy could enable corn producers to retain part of their subsidies if they simply disclosed more information on their content and practices, thereby shifting power back to consumers to make informed food choices. Therefore, considering rampant discussion regarding subsidy inadequacies, transforming current subsidy allocations is one feasible way to enable a tax incentive for transparent agricultural corporations.

## 2. *Dangers of Agricultural Subsidy Reform*

Despite the proposal's aim to incentivize and propel industry changes via special tax treatment to ABCs, current leaders of the industry—particularly those currently receiving subsidies—may not change their ways. By diminishing existing subsidies for some corporations, entities could begin taking shortcuts to save money, effectively harming consumers. For example, if dairy companies must fully disclose hormone use or cow living conditions to keep their subsidies but refused to comply, would their standards get worse upon losing their subsidies? Would dairy companies using untreated cows suddenly enlist the use of the dangerous hormone rbST to increase milk production<sup>248</sup> without incurring extra costs?

Although this is a possibility, reason points to the alternative outcome. First, even if stubborn companies fail to see the benefit of engaging in better practices and pledging transparency, the benefit of a tax incentive would encourage many corporations to sign up. Naturally, consumers will favor products serving their best interest.<sup>249</sup> As such, to remain competitive with compliant organizations, reluctant organizations that previously refused to comply would have increased incentive to change to appeal to more consumers and achieve maximum profits.<sup>250</sup> In the case of milk, producers

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248. Collier, *supra* note 76.

249. See Starostinetskaya, *supra* note 103.

250. An incentive program differs from the AAA, which sought to tax corporations that engaged in over-production. See *United States v. Butler*, 297 U.S. 1, 67–68 (1936). Despite the AAA's utilization of economic pressure to coerce compliance by corporations, the incentive of ABCs is simply a reward for engaging in best practices that help the consumer. *Id.* at 59, 75; Jamess, *supra* note 227. Furthermore, ABCs would not violate Antitrust law, for there is no restraint of trade or price-fixing involved. See 15 U.S.C. § 1 (2018). Even a liberal prediction of the ABC program's success would not succumb to an antitrust violation. See *id.* That is, if the main goal of the ABC structure was to restrain competition from certain corporations and enhance or maintain prices for certain agricultural commodities, it would first have to exclude a subset of all agricultural corporations. See 15 *id.* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nation, is declared to be illegal."). Second, in the case of a section two violation, such a scenario would need to tend to produce a monopoly. See *id.* § 2. The only way in which a monopoly could arise out of the ABC structure would be if only the largest corporations took advantage of it, which is very unlikely. See *id.* ("Every person who shall monopolize, or attempt to

still using hormones would suffer. No longer able to take advantage of consumer ignorance and facing the market shift toward plant-based products, these producers would have added incentive to comply with the statute.<sup>251</sup> Second, corporations already practicing due diligence would likely embrace the opportunity to maintain a subsidy in the name of consumer trust.

### B. Utilizing Employee Board Members to Account for Social Compliance

Next, utilizing lower-level employee members on agricultural corporation boards offers an additional level of review to account for proper standard implementation.<sup>252</sup> As an added benefit, employee board members strengthen advocacy for employee interests.<sup>253</sup>

Central to the agricultural discussion, employee board members provide an additional level of accountability to the assessment of the corporation's mission. As of 2015, a majority of the twenty-eight states of the European Union plus Norway included employee board-level representatives.<sup>254</sup> In Germany, for instance, as many as half of the members of a given board are employee representatives.<sup>255</sup> Including employees on boards provides additional managerial oversight, increases employees' enthusiasm to work, and enables longer-term perspectives on performance.<sup>256</sup> Managerial oversight by

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monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”).

251. Studies show that the exposure of detrimental effects of dairy in recent years has caused a dramatic decline in dairy consumption. See Michael Pellman Rowland, *Got Milk? A Tale of Two Cities*, FORBES (Apr. 11, 2017, 12:17 PM), <https://www.forbes.com/sites/michaelpellmanrowland/2017/04/11/milk-industry-controversy/#755ce41757e5> [https://perma.cc/R5V2-S4SZ].

252. See generally Eric Engle & Tetiana Danyliuk, *Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm*, 45 GOLDEN GATE U.L. REV. 69 (2015).

253. See generally *id.*

254. *Board Level Representation*, WORKER-PARTICIPATION, <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2> [https://perma.cc/4AGJ-VVS4].

255. *Id.* German corporations are constructed on a two-tier board model separating oversight and supervisory functions. Engle & Danyliuk, *supra* note 252, at 104–05. Board members on one tier cannot serve on the other. *Id.* at 104. Worker representation on the supervisory board of larger companies is guaranteed by law. *Id.*

256. Engle & Danyliuk, *supra* note 252, at 85.

employees is especially useful in monitoring adherence to societal impact missions, as employees earning less tend to have a more benign outlook when working for societally-beneficial organizations.<sup>257</sup>

Employees benefit from the election of employee board level representatives. First, having employee members on the board automatically gives employees access to the court system, as current corporate law enables board members to bring derivative suits against a corporation.<sup>258</sup> Additionally, a greater ratio of employees on the board enables more direct assessment of employee concerns.<sup>259</sup> For example, with a level playing field for shareholders and employees, a fair dialogue regarding arbitration options could take place.<sup>260</sup> Furthermore, employee representation will lessen labor–management conflicts and create more effective work ethic “due to greater commitment and improved communication.”<sup>261</sup>

Yet, some may resist the inclusion of employees on boards. Perhaps the employee representative model works in Europe because European boards operate on a two-tier system, separating strategic, supervisory roles from operational ones.<sup>262</sup> “Oversight is exercised by a supervisory board of directors, while management of operations is implemented by a managerial board of directors.”<sup>263</sup> Many directors value this structure, called corporatism, based on the theory that labor and management operate best cooperatively.<sup>264</sup> Typically, employee board members only preside on the operational tier. This makes sense given the clear conflict of interest likely to arise over discussions of budgetary matters and the like. Additionally, employee members likely lack qualifications regarding supervisory, strategic, and long-term

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257. Theoretically, employees are more concerned with earning a wage than with its employer making profits. Moreover, benefit corporation employees likely choose to work with a corporation with a certain mission because they also take pride in it. *See, e.g.,* Mike Isaac & David Gelles, *Kickstarter Focuses Its Mission on Altruism Over Profit*, N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html> [<https://perma.cc/QU72-R9D6>].

258. *See* FED. R. CIV. P. 23.1; *see also* Shaikh, *supra* note 160, at 253 (citing CAL. CORP. CODE § 14601(b)(1)–(2) (2017)).

259. *See* Shaikh, *supra* note 160, at 253 (citing CORP. §§ 14601(c), 14620(b)(2)–(3)).

260. *See id.* at 252.

261. *See* Engle & Danyliuk, *supra* note 252, at 112 (citing DAVID B. REYNOLDS, *TAKING THE HIGH ROAD: COMMUNITIES ORGANIZE FOR ECONOMIC CHANGE* 45 (2002)).

262. *Id.* at 104 (citing Aktiengesetz [AktG] [German Stock Corporation Act], Sept. 6, 1995, BUNDESGESETZBLATT, Teil I [BGBL I], § 30 (Ger.)).

263. *Id.* (citing AktG § 30) (emphasis omitted).

264. *Id.* at 86. Corporatism, which originated in Europe, assumes that within a mixed economy involving “government industry and intervention in areas of public goods, . . . large concentrations of corporate power are inevitable because of natural monopoly.” *Id.* (citing Peter Muchlinski, *The Development of German Corporate Law Until 1990: An Historical Reappraisal*, 14 GERMAN L.J. 339, 370 (2013)). To regulate the potential abuses of concentrated economic power, a system where labor and management interact cooperatively is ideal.

planning issues. Further, such matters could combat the intended purpose of including employees on boards—to strengthen communication and work ethic—by exposing them to functional aspects of the business, which the employee is unlikely to understand nor appreciate.

Although the United States operates on a single-tier corporate governance structure<sup>265</sup>—all board members address operational and supervisory issues—committees are commonplace.<sup>266</sup> Thus, an executive committee or session could naturally exclude employees from worker-sensitive discussions of issues posing conflicts of interest. Such separation—often imposed in nonprofit corporations where workers must voluntarily recuse themselves from conflicting situations—provides a mechanism whereby the awkward recusal and rejection process can be eliminated altogether.<sup>267</sup> Therefore, extending the attributes of the two-tier corporate structure would be plausible in a single-tier framework with the existence of committees. Such a structure allows employees to serve as an extra check to board members.

### *C. Proposed ABC Statute Elements*

In addition to the traditional benefit corporation elements, the proposed legislation should include a tax provision and employee board member requirement to effectively incentivize agricultural corporations to improve their practices.

#### *1. Traditional Benefit Corporation Elements*

Common elements of state benefit corporation statutes include having a worthy social objective, acknowledging leniency regarding profit maximization, complying with annual reports surveyed by a third party, and agreeing by a defined percentage of board members prior to becoming

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265. *Id.* at 87.

266. Kevin D. Chen & Andy Wu, *The Structure of Board Committees* 1 (Harvard Bus. Sch., Working Paper No. 17-032, 2016).

267. See Jeremy Barlow, *The Executive Board's Roles and Responsibilities*, BOARD EFFECT (June 15, 2016), [www.boardeffect.com/blog/executive-boards-roles-and-responsibilities](http://www.boardeffect.com/blog/executive-boards-roles-and-responsibilities) [https://perma.cc/SX27-LNEF]; see, e.g., Jailyn Anderson, *Teachers Protest Proposed Budget Cuts as School Board Votes Down Possible Charter School*, OAKLAND NORTH (Nov. 9, 2017 5:33 PM), <https://oaklandnorth.net/2017/11/09/teachers-protest-proposed-budget-cuts-as-school-board-votes-down-possible-charter-school/> [https://perma.cc/ZCW4-CTQA] (showcasing an instance where a nonprofit school board may want to exclude teachers from voting on budgetary matters that would directly affect their salaries, as teachers would be biased).

a benefit corporation.<sup>268</sup> The ABC statute proposed in this Comment uses California’s benefit corporation statute as a model, modified to represent the interests of agricultural corporations.<sup>269</sup>

First, although the existing statute speaks of compliance with a “general public benefit” that controls the corporation’s purpose plus any specific purpose it sets forth in its articles of incorporation, the ABC statute shall impose a “consumer public benefit,” defined as a material positive impact on society and the environment, as assessed against a third-party standard prescribing full disclosure of content and conditions of production.<sup>270</sup> The terms within this definition shall be further defined within the ABC statute. The definition of “third-party standard” shall remain as defined in the California model,<sup>271</sup> except that it shall assess overall *consumer* public benefit performance. “Content” shall be defined as including all ingredients and additives, including antibiotics, hormones, and genetically modified organisms. “Conditions of production” shall include detailed descriptions of production practice, such as spatial and sustenance allocations per crop or animal, USDA audit frequency, and worker duties. “Full disclosure” is defined as annual reports made available to the public. Although this section cannot alter existing labeling requirements,<sup>272</sup> it will encourage disclosures made on annual reports to appear on food labels as well.

Next, the ABC statute’s fiduciary duty language should be stricter than the California statute’s language to promote consumer trust in the mission of transparency.<sup>273</sup> In describing the “[p]erformance of duties by director,”

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268. See Alexander, *supra* note 158, at 243.

269. See CAL. CORP. CODE § 14602 (2018) (“[T]he articles shall . . . state that the corporation is a benefit corporation and shall identify any specific public benefit adopted pursuant to Section 14610.”).

270. *Id.* § 14610 (“A benefit corporation shall have the purpose of creating general public benefit. This purpose is in addition to, and may be a limitation on, the corporation’s purpose . . . and any specific purpose set forth in its articles . . .”). Further defining the term *consumer public benefit* is necessary because such a benefit is not present in existing statutes. The benefit extends beyond a general public benefit, a term which is well known, at least in the corporate law sector. See *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Nov. 12, 2018) (noting that thirty-four states have passed benefit corporation statutes to date, with six states working on it, which implies a general understanding of the public benefit concept).

271. CORP. § 14601(g) (“‘Third-party standard’ means a standard for defining, reporting, and assessing overall corporate social and environmental performance . . .”).

272. See generally 21 U.S.C. § 343 (2018).

273. Whether one is in the camp that believes benefit corporations are no different than regular for-profits or in the camp that believes benefit corporations should do more to deserve their *benefit*, the California statute’s language seems to completely contradict the concept of benefit corporations: that, embedded within the fiduciary duty, there should be a penalty for the benefit corporation’s failure to fulfill its general or specific public benefit. See CORP. § 14620(f). Whether one believes that corporate law in general affords too many loopholes for directors to evade liability and that this reality might as well extend

a director *shall* “be liable for monetary damages under this part for any failure of the benefit corporation to accomplish its consumer public benefit.”<sup>274</sup> Additionally, there will be no clause providing for elimination of director liability for breach of the director’s duties to the corporation and its shareholders, nor to a person that is a beneficiary of the consumer public benefit.<sup>275</sup> Lastly, an existing corporation may amend its articles in line with the California statute to become an ABC with adoption by a minimum status vote of at least two-thirds of the shareholders.<sup>276</sup>

By employing stricter fiduciary duty language than California’s statute, the ABC statute will promote consumer trust in the mission of transparency, disabling loopholes that allow directors to avoid benefit corporation compliance.

## 2. Additional ABC Elements

In addition to the traditional benefit corporation elements, the ABC statute will include a tax provision and employee board member requirement. First, the tax code will include a provision like the nonprofit subsection.<sup>277</sup> The provision will offer a tax deduction similar in amount to current subsidy allocations. Referencing the ABC statute, a corporation described in subsection x shall receive special tax treatment as follows. From here a subsidy outline would project any given corporation’s deduction. Theoretically, the existing subsidy slate would be wiped clean to reformulate available subsidies to compliant corporations on an equal distribution basis, considering product cost. The idea is not to create reliance, but to offer a

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to benefit corporations or any corporation organizing under the for-profit framework, at the very least, a federal statute offering benefits should strictly conform to the classic attributes of both fiduciary duty—liability—and benefit corporations—achieving social missions. For the classic attribute of fiduciary duty, see 3 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 837.50 (2010). For the attribute of the benevolent corporations, see 1A *id.* § 79.

274. CORP. § 14620(g).

275. *See id.* §§ 204(a)(10), 309(c), 14620(g)–(i).

276. *See id.* §§ 14603(a), 14601(d).

277. *See* 26 I.R.C. § 501(a), (c)(7) (2018) (“An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle . . .”).

benefit.<sup>278</sup> As such, through the use of a reformed, shared subsidy system, total agricultural subsidies would decrease.<sup>279</sup>

Additionally, the ABC statute should include language requiring lower-level employee board members. Although utilizing committees to insulate employee board members from conflicts of interest is encouraged, that choice should ultimately be left up to the company. As such, the ABC statute will not dictate such a requirement. Given that the aforementioned amendment to the California statute enables beneficiaries of the consumer public benefit to sue directors, the employee board member requirement should be flexible, depending on the corporation size. Thirty to 50% of the supervisory portion of the board should be made up of employees. Thus, the language of the ABC statute should include in its “Formation” description that “[a] benefit corporation shall be formed in accordance [with state corporation law] except that the articles shall also state that the corporation is a benefit corporation and shall” adhere to employee board member requirements.<sup>280</sup> Employee board member requirements would subsequently be defined. In line with the German model, the largest corporations should contain 50% employee representation.<sup>281</sup>

The ABC statute sets a high bar to gain the worthy reward of special tax treatment. By simultaneously incentivizing compliance of transparent agricultural standards and boosting accountability through employee board representatives, the ABC statute provides a balanced approach to improving consumer information.

## VII. CONCLUSION

In the last decade, activists, exposés, and simple consumer diligence have played active roles in transforming the climate of both consumer awareness and standards in the agricultural industry. Ten years ago, most people still bought into the notion that milk “does a body good.”<sup>282</sup> In

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278. “The largest 15 percent of farm operations and the richest farmers and landowners . . . receive over 85 percent of all farm subsidies. . . . [O]nly 4 percent of U.S. farms produce two-thirds of all agricultural sales.” Alison Acosta Winters, *How Agriculture Subsidies Are Hurting Farmers, Taxpayers*, HILL (Dec. 9, 2016, 12:55 PM), <https://thehill.com/blogs/congress-blog/economy-budget/309575-how-agriculture-subsidies-are-hurting-farmers-taxpayers> [<https://perma.cc/LY4V-UP6Y>]. Thus, the notion that existing subsidies protect vulnerable corporations is inaccurate and worthy of reform. *See id.*

279. *See id.*

280. CORP. § 14602.

281. *See Board Level Representation*, *supra* note 254. The German model prescribes for corporations containing over 2,000 employees to have 50% employee representation and corporations of 500 or less to exclude employee representatives. *Id.*

282. Pellman Rowland, *supra* note 251.



response to this progression, however, some corporations have pushed back even more vehemently.<sup>283</sup>

Although existing standards regarding disclosures on food labels aim to inform consumers, ultimately, they oversimplify or omit critical information.<sup>284</sup> Until Congress believes that the “consumer learning curve” is up to speed<sup>285</sup> or that science is definitive enough,<sup>286</sup> the current landscape projects the notion that too much information poses a threat of *misleading* consumers.<sup>287</sup> Amidst such a veil, even the diligent consumer cannot escape the reality that some producers may legally hide practices that would otherwise violate the average consumer’s expectations and, possibly, the health code.<sup>288</sup>

As distrust of federal agencies rises amidst notions that suspicious corporations’ interests are propelled via their ties to Washington,<sup>289</sup> the need for increased consumer trust is paramount. As tempting as making agricultural subsidies contingent upon abolishing unnatural products and harmful practices is, a federal regulation forcing agricultural corporations to change is simply unreasonable. Labeling standards and precedent will not change overnight. Additionally, despite its flaws, the current USDA framework affords states great flexibility in legislating for themselves—a right they would resist giving up in our federalist society.<sup>290</sup> In an effort to regain consumer trust, improve consumer knowledge, and incentivize transparent agricultural standards, this Comment advocates the development of a federal benefit corporation class. Such an offering would give compliant agricultural companies alone the benefit of special tax treatment—if they choose—so long as they pledged to practice transparency and adhere to

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283. Some corporations attempt to censor conduct and conditions, manipulate and change existing laws, and ignore accountability threatening the health and informed decision-making of the average consumer. *See supra* Part II; *see also* Meyers, *supra* note 46 (highlighting proposed legislation in Arkansas that would criminalize the documentation of malfeasance on private property); O’Connor, *supra* note 96 (noting the dairy industry’s attempt to prevent plant-based companies from labeling their products as milk, cheese, and yogurt).

284. *See* Houston, *supra* note 113 (“[S]hortand endorsement of attributes [on labels] precludes the consumer from making informed choices.”).

285. *Id.* Critics claim that progressive labeling standards serve as insufficient disclosure when they are implemented ahead of the “consumer learning curve.” *Id.*

286. The USDA and critics assert that regulations lacking a scientific basis create “consumer deception.” Dhyani, *supra* note 122, at 43; *see also* Heid, *supra* note 146.

287. *See* Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 633–34 (6th Cir. 2010).

288. *See supra* Part II.

289. *See* Boschma, *supra* note 141.

290. *See supra* Section IV.A.

the requirements of the class. By rewarding honesty in the agricultural industry, everyone wins: complacent corporations remain inactive, transparent corporations gain a benefit, and consumers gain the power of informed decision-making and improved health.