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Standing as a Barrier for Constitutional Challenges to Civil Ag-Gag Statutes

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— Note —

STANDING AS A BARRIER FOR CONSTITUTIONAL CHALLENGES TO CIVIL AG-GAG STATUTES

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INTRODUCTION

In 1906, Upton Sinclair's infamous exposé of the reality behind the industrial animal agricultural industry shocked the nation. *The Jungle* chronicled horrific animal cruelty, labor abuses, and health and safety hazards present in America's slaughterhouses at the turn of the century.[1] Over 100 years later, animal activists, environmental

1. *Upton Sinclair's* The Jungle*: Muckraking the Meat-Packing Industry*, 24 BILL OF RTS. IN ACTION (Constitutional Rights Found., Los Angeles, CA), no. 1, 2008, at 6–9, http://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html [https://perma.cc/LE7E-AQWV].

protection groups, and other watchdog organizations continue Sinclair's work by going undercover in agricultural facilities to shed light on abusive practices.

The investigation that spearheaded this type of modern covert operation showed workers playing games—games with perverse rules. Farm workers played by slamming chickens against the factory farm's wall—114 chickens in seven minutes to be exact. Other workers jumped up and down on the chickens and ripped their beaks off. Some workers twisted the chickens' heads like a twist-off beer bottle cap and wrote graffiti in chicken blood on the factory walls. Others spat tobacco into the chickens' eyes and mouths and plucked their feathers to "make it snow." Perhaps most disturbingly of all, some workers squeezed the chickens' bodies so hard that feces sprayed over the other birds below, helplessly waiting their turn to play the workers' sadistic game.[2]

People for the Ethical Treatment of Animals (PETA) recorded this footage from an undercover investigator who worked from October 2003 to May 2004 at a Pilgrim's Pride plant, one of KFC's many suppliers and winner of the "Supplier of the Year" award in 1997.[3] Although animal rights groups have long complained about horrific conditions at factory farms—besides the expected slaughter—PETA's video was the first time that graphic proof was made available for the public eye.[4]

Sadly, exposés of workers torturing livestock has proven to be an all-too-common occurrence. Since 2004, thousands of equally disturbing videos have been released from animal rights groups documenting abuse.[5] Investigations have revealed workers sticking clothespins in pigs' eyes, spraying industrial dye in pigs' faces, and killing underweight piglets by smashing their skulls against concrete floors to the

2. Donald G. McNeil Jr., *KFC Supplier Accused of Animal Cruelty*, N.Y. TIMES (July 20, 2004), http://www.nytimes.com/2004/07/20/business/kfc-supplier-accused-of-animal-cruelty.html [https://perma.cc/ZD53-49ZL].

3. *Id.*

4. *Id.*; *see also* Rachel Hosie, *Animal Abuse in Factory Farms*, INDEP. (Jan. 4, 2017, 2:42 PM), www.independent.co.uk/life-style/animal-abuse-factory-farms [https://perma.cc/QJ8Q-LBVR] (explaining how abuse and cruelty are inherent to the agricultural industry's standard practice).

5. The most well-known animal rights groups conducting undercover investigations are Mercy for Animals (MFA), PETA, Direct Action Everywhere, and the Humane Society of the United States. *Undercover Investigations*, ANIMAL CHARITY EVALUATORS, https://animalcharityevaluators.org/advocacy-interventions/interventions/undercover-investigations/ [https://perma.cc/B2NJ-8V9L] (last updated Feb. 2016). These organizations conduct undercover investigations on different industries, which makes exact comparison difficult. MFA, however, appears to conduct the most U.S. investigations, recording 7,069 media pieces from January to August 2015. *Id.* at n.17.

amusement of their fellow workers.[6] Another covert video shows farm hands burning Tennessee walking horses with chemicals.[7] Other videos show workers kicking, punching, and stabbing cows with screwdrivers as well as workers electrically shocking the animals' genitalia to force them to move.[8] This abuse is so extreme that few would believe it without documented proof. After all, who would believe that people would brag about sticking cattle prods in cows' eyes just for fun?[9]

It is indisputable that such conduct is horrific—even by slaughterhouse standards. But other conduct that many would deem "abuse" is standard industry practice and not illegal when committed against livestock—a fact which most people are unaware of.[10]

6. Ted Genoways, *"Hurt That Bitch": What Undercover Investigators Saw Inside a Factory Farm*, MOTHER JONES (Oct. 16, 2014, 10:10 AM), https://www.motherjones.com/environment/2014/10/hog-hell-inside-story-peta-investigation-mowmar-farms/ [https://perma.cc/N3X6-ZEQ6].

7. Richard A. Oppel Jr., *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES (Apr. 6, 2013), http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html [https://perma.cc/B7SU-PQ2V].

8. John M. Glionna, *New Mexico Dairy Shuts Down After Undercover Activist Videotape*, L.A. TIMES (Dec. 20, 2014, 3:50 PM), http://www.latimes.com/nation/la-na-dairy-farm-video-20141219-story.html [https://perma.cc/D3Y8-ENK2].

9. *See* Paul Solotaroff, *In the Belly of the Beast*, ROLLING STONE (Dec. 10, 2013), https://www.rollingstone.com/feature/belly-beast-meat-factory-farms-animal-activists [https://perma.cc/ZG75-WHGL].

10. For example, the Humane Methods of Slaughter Act, which requires livestock to be rendered unconscious before slaughter, excludes birds and fish. 7 U.S.C. § 1902 (2012). Birds, for example, enter scalding feather-removal tanks while still alive and conscious. The United States Department of Agriculture (USDA) estimates that this common industry practice kills millions of birds every year. *Chicken Transport and Slaughter*, PETA, https://www.peta.org/issues/animals-used-for-food/factory-farming/chickens/chicken-transport-slaughter/ [https://perma.cc/C3RK-MGQ9] (last visited Sept. 2, 2018). The United States raises and slaughters nearly ten times more birds than any other type of animal. All birds are excluded from all federal animal protection laws. *Farm Animal Welfare: A Closer Look at Animals on Factory Farms*, ASPCA, https://www.aspca.org/animal-cruelty/farm-animal-welfare/animals-factory-farms [https://perma.cc/U3PU-9WXU] (last visited Sept. 2, 2018). Piglets are taken from their mothers at around two weeks old and placed in windowless sheds without fresh air, sunlight, or outdoor access. Pigs live on concrete or slatted floors. Naturally intelligent and curious, their barren surroundings cause many pigs to act out in frustration against the other pigs. As a result, farms cut off pigs' tails and remove their teeth without painkillers. Female pigs, sows, spend their entire lives in gestation crates, which are so small they prevent her from even turning around. Cows are branded and castrated, and some have their horns removed all

Undercover investigations have shed light on such practices and led to food safety recalls and public outrage across the globe in response to the horrific animal abuse witnessed on farms across America.[11]

In response to these exposés, which have bankrupted and closed several large farming companies,[12] legislators backed by powerful agricultural lobbyists have made their disdain clear by passing "ag-gag" laws. As the name suggests, ag-gag laws "gag" whistleblowers from documenting and disseminating abuse witnessed at agricultural facilities by criminalizing undercover investigations.[13] While these laws aim to keep horrific animal abuse out of sight and out of mind from the American public, even more concerning is that these laws attack our nation's fundamental constitutional right to free speech. Ag-gag laws used to be confined to the relatively narrow sphere of animal factory farms; therefore, the laws flew under the radar for Americans without any ties to the agricultural industry or animal activism. Recently, however, these ag-gag laws have expanded beyond the realm of the agricultural realm. With this new expansion, the American public needs to take notice now more than ever.

North Carolina led the agricultural lobbyists' charge to hide factory farm conditions from public awareness and subsequent condemnation by creating a new civil cause of action in 2015.[14] This newest ag-gag model removes criminal penalties and authorizes private employers to sue for draconian monetary damages—up to $5,000 per day plus attorney's fees and court costs[15]—against any employee who "captures

without any anesthetic. Beef cattle often spend their lives without shelter outside, standing in mud, ice, and bodily waste. *Id.*

11. Sarah Von Alt, *14 Times MFA's Undercover Investigations Changed the World for Animals*, MERCY FOR ANIMALS (Aug. 26, 2014), http://www.mercyforanimals.org/7-mfa-investigations-that-shook-us-to-our-core [https://perma.cc/MB6A-P4UH].

12. *See* Glionna, *supra* note 8; Genoways, *supra* note 6.

13. *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/ [https://perma.cc/MZC9-JWVX] (last visited Sept. 2, 2018).

14. Property Protection Act, ch. 99A, 2015 N.C. Sess. Laws 50 (2015) (codified at N.C. GEN. STAT. § 99A (2017)).

15. *Id.* § 99A–2(d). Although Kansas, Montana, and Idaho also impose civil liability, in addition to criminal penalties, other states' ag-gag laws do not provide for separate punitive damages. Courts may award punitive damages by doubling or tripling the amount of actual damages sustained. Without actual damages, however, the ag-gag statutes do not allow any civil recovery. *See* KAN. STAT. ANN. § 47–1828(a) (2000 & Supp. 21 2017) (granting damages "equal to three times all actual and consequential damages" plus attorney's fees and court costs); MONT. CODE ANN. § 81-30-104(1) (2017) (originally enacted as Farm Animal and Research Facilities Protection Act, ch. 205, 1991 Mont. Laws (1991)) (allowing for the same recovery as Kansas); IDAHO CODE § 18-7042(4)

or removes" documents from the workplace or records images or sounds of the workplace and then uses this illicit material to violate the employee's "duty of loyalty" to her employer.[16] Arkansas lawmakers followed North Carolina's lead and passed a nearly identical ag-gag statute in March 2017.[17] This type of ag-gag legislation strikes at the very heart of animal activism by harshly penalizing employment-based undercover investigations.[18] While the constitutional merits of such statutes appear dubious in light of recent case law,[19] plaintiffs challenging an ag-gag statute's constitutional validity may be kept out of court entirely for lack of standing. This is exactly what happened in North Carolina's district court in May 2017.[20] Although the Fourth

(2016) (declaring restitution to be double the value of the violation's damage), *held unconstitutional in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018). For further discussion, see Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. MARSHALL L. REV. 649, 666–69 (2017).

16. N.C. GEN. STAT. § 99A-2(b)(2) (2017) (effective Jan. 1, 2016); Dan Flynn, *Mixed District Court 'Ag-Gag' Rulings are Getting Appellate Review*, FOOD SAFETY NEWS (May 16, 2017), http://www.foodsafetynews.com/2017/05/mixed-district-court-ag-gag-rulings-are-getting-appellate-review/#.WmIT9KinFPY [https://perma.cc/5MFT-CTU3].

17. ARK. CODE. ANN. § 16-118-113 (2017); *see also* Dan Flynn, *Arkansas Lawmakers Take 'Civil' Approach with New Ag-Gag Law*, FOOD SAFETY NEWS (Mar. 24, 2017), http://www.foodsafetynews.com/2017/03/arkansas-lawmakers-take-civil-approach-with-new-ag-gag-law/#.WmIlF6inFPY [https://perma.cc/NZZ7-Q8YY] (explaining that Arkansas lawmakers created a civil cause of action for employers who are harmed by individuals who record videos or remove documents that "damage" the employer).

18. Animal rights groups use undercover investigations to document animal abuse to press charges, but even more importantly as a way to raise public awareness of various forms of suffering and injustice animals experience that is legal, standard industry practice. The vast majority of animal activist groups who conduct undercover investigations use an employment-based method. Activists gain access to the facility to record and document in secret by seeking employment there, often by lying on their applications and in interviews. *Undercover Investigations*, ANIMAL CHARITY EVALUATORS, https://animalcharityevaluators.org/advocacy-interventions/interventions/undercover-investigations/#rf16-9909 [http://perma.cc/B2NJ-8V9L] (last updated Feb. 2016).

19. *See, e.g.*, *Wasden*, 878 F.3d at 1205 (affirming Idaho's district court's decision that Idaho's ag-gag statute's misrepresentation provision was too broad and unneeded to protect property rights); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017) (holding Utah's ag-gag statute violates First Amendment rights and is unconstitutional).

20. PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 370 (M.D. N.C. 2017), *rev'd*, 737 F. App'x 122, 122 (4th Cir. 2018).

Circuit reversed the lower court's dismissal in June 2018,[21] this litigious battle shows why standing remains a difficult fight for plaintiffs with the threat of draconian penalties halting undercover investigations.

This Note explores the tension between preemptively challenging an ag-gag statute that only imposes civil liability and satisfying the standing requirements necessary to ensure justiciability. This Note investigates how an ag-gag statute imposing only civil liability—but with tremendous monetary penalties—may prevent these statutes from being challenged in court on their merits. Because plaintiffs will find satisfying the standing requirements difficult without exposing themselves to tremendous civil liability, agricultural lobbyists may have found an effective loophole to keep potential whistleblowers out of their facilities. Allowing these ag-gag statutes to go unchecked means hidden abuse, compromised food safety, and undermined constitutional rights.

Part I explains ag-gag development from its "domestic terrorism" origin to the restrictive whistleblower statutes of today as well as providing a background into animal activists' undercover investigations. Part II reviews general standing requirements as well as the standing standard for First Amendment challenges, which are the main focus of constitutional challenges to ag-gag statutes. Part III examines standing in the recent federal cases challenging the constitutionality of ag-gag statutes from the Ninth, Fourth, Eighth, and Tenth Circuits. Part IV argues that federal courts should adopt the Tenth Circuit's standing test for plaintiffs alleging injury based on a statute's chilling effect on speech. Part V argues that money is the key motivating factor behind the threat of prosecution under the civil ag-gag statutes.

I. OVERVIEW OF AG-GAG LEGISLATION

A. History of Ag-Gag Legislation

Former *New York Times* columnist Mark Bittman coined the term "ag-gag" in 2011 to describe lawmakers' efforts to criminalize and impede undercover investigations of agricultural facilities.[22] Ag-gag laws, however, are not a new tool for legislators to use as a way to shield animal industries from the public's watchful eye. The 1980s and 1990s saw "politicians, law enforcement, and big business [promoting] a narrative of an industry under siege by 'eco-terrorists' and 'animal rights extremism.'"[23] This intense scrutiny of animal activist groups has

21. *PETA*, 737 F. App'x at 132.

22. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES: OPINIONATOR (Apr. 26, 2011, 9:29 PM), https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ [https://perma.cc/BA83-NS4Q].

23. CHIP GIBBONS, CTR. FOR CONSTITUTIONAL RIGHTS & DEFENDING RIGHTS DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON

been called the "Green Scare," referencing the "anti-communist hysteria of the 'Red' Scares" of the Cold War era.[24] In 1988, the FBI first labeled an act by an animal rights activist as "domestic terrorism" and added the Animal Liberation Front, an animal activist group with a track record of zero human injuries or deaths, to its "'Terrorism in the United States' report."[25]

During the 1980s and 1990s, animal rights groups began conducting undercover investigations to expose and draw awareness to the widespread animal cruelty present in agriculture, laboratories, fur industries, and entertainment.[26] PETA spearheaded this movement when PETA co-founder Alex Pacheco accepted a position at a research lab and photographed the conditions of the test monkeys.[27] Pacheco's photos showed horrific conditions: starving monkeys picking through feces for food; fingers ripped from the monkeys' hands from being snagged on the rusted cage bars; cages caked in feces and filth; and experimental methods that could inspire a Stephen King horror movie.[28] Pacheco's work led to the nation's first lawsuit originating from undercover footage that documented animal abuse. Similar undercover investigations on horse slaughterhouses, factory farms, and furriers followed throughout the 1980s and 1990s.[29]

ACTIVISTS AND WHISTLEBLOWERS 7 (2017), https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf [https://perma.cc/4G45-GV8P] (asserting a rise of "terrorist" rhetoric by the government and business leaders when describing the growing traction of animal rights and environmental movements since the 1970s).

24. *Id.*

25. *Id.*

26. *Id.* at 8.

27. *The Silver Spring Monkeys: The Case That Launched PETA*, PETA, https://www.peta.org/issues/animals-used-for-experimentation/silver-spring-monkeys/ [https://perma.cc/454M-MSL3] (last visited Sept. 2, 2018) [hereinafter *Silver Springs*].

28. Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991) (explaining that researchers surgically severed the monkeys' spinal columns and then subjected them to electric shock and food deprivation to force them to use their disabled limbs while immobilized in a dark chamber); *see Silver Springs*, *supra* note 27; *see also* Peter Carlson, *The Great Silver Spring Monkey Debate*, WASH. POST (Feb. 24, 1991) (narrating the investigation and the then-upcoming U.S. Supreme Court case).

29. GIBBONS, *supra* note 23, at 9.

B. Ag-Gag's Distinct Trends

1. Ag-Gag's First Wave

States began to take notice of these undercover investigations and responded by drafting the nation's first wave of ag-gag legislation. This first wave of ag-gag legislation focused on intentional property damage and non-consensual entry into a facility; in other words, the statutes recriminalized vandalism and trespass.[30] Kansas enacted the country's first ag-gag law in 1990,[31] and Montana and North Dakota followed suit the next year.[32] Although this legislation received little media attention at the time, these laws "legitimized the idea that animal industries should receive special protection, that animal rights activists should be singled out for special punishment, and that documentation of animal agriculture should be criminalized."[33] As of 2015, no convictions have been reported under any of these laws.[34]

2. Ag-Gag's Second Wave

After a nearly two-decade hiatus, state legislators returned to ag-gag legislation.[35] The 2008 undercover investigation at MowMow Farms in Iowa renewed legislators' interest in ag-gag legislation and spawned the second wave of ag-gag legislation.[36] The PETA footage of MowMow

30. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1332–39 (2015).

31. Codified as Kansas Farm Animal and Field Crop and Research Facilities Protection Act, KAN. STAT. ANN. § 47-1825 (2012); *see also* GIBBONS, *supra* note 23, at 10.

32. Montana Farm Animal and Research Facilities Protection Act, HR 120, 1991 Leg., Reg. Sess. (Mont. 1991) (codified at MONT. CODE ANN. § 81-30-101) (2017)); North Dakota Animal Research Facility Damage Act, H.B. 1338, 52d Leg. Assemb., Reg. Sess. (N.D. 1991) (codified at N.D. CENT. CODE § 12.1-21.1-.01 (2012)); *see also* GIBBONS, *supra* note 23, at 10–11.

33. GIBBONS, *supra* note 23, at 11.

34. *See* Marceau, *supra* note 30, at 1333–34 (explaining that Kansas, Montana, and North Dakota ag-gag laws remain unused because they merely repackage existing crimes).

35. From 1992 to 2011, Alabama was the only state to enact ag-gag legislation, the Alabama Farm Animal, Crop, and Research Facilities Protection Act in 2002. This statute mirrored the first wave of ag-gag laws. *See* ALA. CODE § 13A-11-153 (2018) (criminalizing "[k]nowingly obtain[ing] control by theft or deception that is unauthorized, or to exert control that is unauthorized over any records, data, materials, equipment, animals, or crops of any animal").

36. GIBBONS, *supra* note 23, at 13; *see Graphic Abuse of Pigs Caught on Tape*, CBS NEWS (Sept. 17, 2008, 9:20 AM), https://www.cbsnews.com/news/graphic-abuse-of-pigs-caught-on-tape/ [https://perma.cc/7GEQ-TDRZ] (describing pig farm workers "hitting sows with metal rods, slamming piglets

Farms shocked the public, and the documented violence became international news.[37] The secretly filmed video showed workers striking pigs with metal rods, smashing piglets onto the concrete floor, and "bragging" about sodomizing pigs with rods.[38] The surveilled farm's chief operating officer later called the event the "'9-11' event of animal care in [the animal agricultural] industry."[39]

In response, industry groups began drafting ag-gag legislation to criminalize undercover investigations of animal factories to silence whistleblowers rather than improving the treatment of America's farm animals. This wave of ag-gag legislation is probably the best known and includes one or more of three important elements: (1) prohibiting documentation, such as taking photographs, making videos, or collecting documents; (2) prohibiting lying about or misrepresenting one's underlying motives to gain access to an animal agricultural industry; and/or (3) demanding mandatory reporting of illegal animal cruelty to authorities within a very short timeframe.[40] In 2012, Iowa, Missouri, Utah, and Idaho all passed ag-gag statutes falling under this second-wave umbrella.[41]

Iowa led the ag-gag bandwagon when it created the crime of "agricultural production facility fraud," which criminalized lying on a job application to gain access to an agricultural production facility.[42] To bolster support, legislators claimed that animal rights advocates "want to hurt an important part of [the U.S.] economy" and the bill "protect[s] agriculture" from "subversive acts to bring down an industry."[43]

Utah passed its Agricultural Interference Act in 2012, which criminalized lying to gain access to an agricultural operation and filming

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on a concrete floor and bragging about jamming rods up into sows' hindquarters" from undercover video shot at MowMow pig farm in Iowa).

37. Joe Vansickle, *It Can Happen to You*, NAT'L HOG FARMER (July 16, 2012), http://www.nationalhogfarmer.com/animal-well-being/it-can-happen-you [https://perma.cc/Q9H7-6MQF].

38. *Graphic Abuse of Pigs Caught on Tape*, *supra* note 36.

39. Vansickle, *supra* note 37.

40. GIBBONS, *supra* note 23, at 6.

41. *Id.* at 14–16.

42. H.R. 589, 84th Gen. Assemb., 2d Reg. Sess. (Iowa 2012) (codified at IOWA CODE § 717A.3A (2013)) (criminalizing using "false pretenses" to gain access to an agriculture production facility) *held unconstitutional by* Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa Jan. 9, 2019); *see also* GIBBONS, *supra* note 23, at 15.

43. Complaint at ¶¶ 52, 54, *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901 (S.D. Iowa 2018) (No. 4:17-cv-00362-JEG).

once inside.[44] Legislators displayed clear animosity towards animal rights groups when enacting this statute. Senate sponsor David Hinkins stated that the statute would target "the vegetarian people" who "are trying to kill the animal industry" and that animal rights groups are "terrorists."[45]

Idaho passed its ag-gag law in 2014 following a damning undercover investigation of a dairy farm by Mercy for Animals (MFA).[46] The statute created the "new crime, 'interference with agricultural production.'"[47] The law criminalized lying to obtain employment and making audio or video recordings of the conduct of an agricultural facility, among others.[48] The Idaho Dairymen's Association, an agricultural trade association, was a "driving force" behind the ag-gag statute.[49]

Missouri tweaked the legislative trend by passing its ag-gag law with a "mandatory 24-hour reporting requirement" of illegal animal abuse by employees.[50] The Missouri statute requires "any farm animal professional" to give law enforcement any recorded footage showing farm animal abuse within twenty-four hours of witnessing the crime.[51]

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44. H.R. 187, 59th Leg., Gen. Sess. (Utah 2012) (codified at UTAH CODE ANN. § 76-6-112 (West 2015) (effective May 8, 2012)), *held unconstitutional by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

45. Plaintiff's Opposition to Defendant's Motion to Dismiss at vi, Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017) (No. 2:13-cv-00679-RJS) (quoting Civil Rights Complaint at ¶ 48, *Animal Legal Def. Fund*, 268 F. Supp. 3d 1193 (No. 2:13-cv-00679-RJS)); *see also* Will Potter, *Exposing Animal Cruelty Is Not a Crime*, CNN (June 26, 2014), http://www.cnn.com/2014/06/26/opinion/potter-ag-gag-laws-animals/index.html [perma.cc/TND7-X4LE].

46. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015); *see* Von Alt, *supra* note 11 (stating that undercover investigation revealed workers whipping cows' faces and bodies with chains as well as denying access to veterinary care for open wounds, infections, and injuries).

47. *Otter*, 118 F. Supp. 3d at 1200.

48. *Id.* (citing Act of Feb. 28, 2014, ch. 30, § 1, 2014 Idaho Sess. Laws 44 (codified at IDAHO CODE § 18-7042 (2016)), *held unconstitutional in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018)).

49. Animal Legal Def. Fund v. Otter, 300 F.R.D. 461, 464 (D. Idaho 2014), *dismissed in part*, 44 F. Supp. 3d 1009 (D. Idaho 2014), *summary judgment granted*, 118 F. Supp. 3d 1195 (D. Idaho 2015), *aff'd in part and rev'd in part sub. nom.*, *Wasden*, 878 F.3d.

50. S. 631, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012) (codified at MO. ANN. STAT. § 578.013 (West 2012)); *see also* GIBBONS, *supra* note 23, at 15.

51. Mo. S. 631.

While this provision supposedly helps animals, the quick-reporting requirement actually forces undercover investigators to halt their work. This makes it impossible to establish systemic abuse at a facility, undermining potential cruelty cases.[52]

3. Ag-Gag's Third Wave

Since then, lobbyists have improved their drafting skills to disguise ag-gag laws by using broad language, creating a private cause of action, and providing for civil rather than criminal liability. The third wave of ag-gag legislation is now upon us.[53] Crafty lobbyists and legislators have creatively found a way to make ag-gag statutes hard to challenge in court while maintaining their deterrent effect on potential whistleblowers. The result is a new breed of ag-gag legislation even more dangerous than the former ag-gag statutes that had only criminal consequences.

North Carolina exemplifies this new ag-gag model. Animal agriculture has an extremely strong presence in North Carolina politics, with "an influential, aggressive lobbying presence."[54] After a failed 2013 attempt to pass a traditional ag-gag bill reminiscent of the second

52. Marceau, *supra* note 30, at 1340–41; *see* Hosie, *supra* note 4 (explaining that undercover investigations typically take between one and three months).

53. *See* Lindsay Abrams, *North Carolina's Chilling New Twist on "Ag-Gag,"* SALON (June 4, 2015), https://www.salon.com/2015/06/04/north_carolinas_chilling_new_twist_on_ag_gag/ [https://perma.cc/WY59-9TPY] (quoting the vice president of farm animal protection at the Humane Society of the United States calling the North Carolina's ag-gag statute "a new type of ag-gag").

54. *Id.* North Carolina is home to 50,000 farms, 800,000 cows, 8.6 million pigs, and nearly 800 million broiler chickens. *Id.* North Carolina's protection of the agricultural industry at the expense of their citizens continues. In May 2017, the state legislature overrode Governor Cooper's veto of House Bill 467, which caps the amount of money that neighboring property owners can collect against agricultural facilities in nuisance lawsuits. The bill's House sponsor received more than $115,000 in campaign contributions from "Big Pork." The legislation came on the heels of twenty-six federal lawsuits filed against the hog company Murphy-Brown LLC for fecal matter from the company's hog operations entering the plaintiffs' homes and food. Although legislators claim the law protects farmers from "greedy out-of-state" attorneys, the twenty-six federal lawsuits that instigated the legislation were filed by a North Carolina-based law firm representing mostly low-income African-Americans against a $14 billion multinational corporation. Erica Hellerstein, *The N.C. Senate Overrides Cooper's HB 467 Veto, Hog-Farm-Protection Bill is Law*, INDY WEEK (May 11, 2017, 6:38 PM), https://www.indyweek.com/news/archives/2017/05/11/the-nc-senate-overrides-coopers-hb-467-veto-hog-farm-protection-bill-is-law [https://perma.cc/3H94-H5TK].

wave,[55] North Carolina legislators successfully passed the Property Protection Act in the spring of 2015.[56] Touted as perhaps the nation's "worst" ag-gag statute,[57] several factors distinguish North Carolina's ag-gag law from the previous waves of ag-gag legislation.

First, the statute does not limit itself merely to the animal agricultural industry. Rather, any employee who takes photographs of a "nonpublic" area without the employer's permission is subject to severe civil liability.[58] Although legislators tout the law as private property protection,[59] animal rights organizations maintain that agricultural industry protection was the motivation behind the law in the state, which is home to the nation's second-largest hog industry and third-largest poultry production.[60]

The law also was opposed by non-animal rights groups, such as the American Association of Retired Person, Wounded Warrior Project, and Domestic Violence Council, because the law's broad language puts other vulnerable populations even more at risk.[61] North Carolina legislators wanted to keep the language broad, however, to disguise the

55. S. 648, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013). Although North Carolina legislators claimed the bill was not an "ag-gag" bill, the bill was nothing more than a thinly disguised, traditional ag-gag law touted as business protection. Dan Flynn, *'Ag-Gag' Battle Moves on to North Carolina*, FOOD SAFETY NEWS (May 29, 2013), http://www.foodsafetynews.com/2013/05/ag-gag-battle-moves-on-to-north-carolina/#.WrBr76jwZPY [https://perma.cc/GT2C-3F8Y].

56. Property Protection Act, ch. 99A, 2015 N.C. Sess. Laws 50 (2015) (codified at N.C. GEN. STAT. § 99A-2 (2017)). North Carolina's Chamber of Commerce, which was the bill's most prominent backer, represents "industry giants like Tyson, Smithfield Foods, Pilgrim's and Cargill" among others. Abrams, *supra* note 53.

57. Rob Verger, *North Carolina's Ag-Gag Law Might Be the Worst in the Nation*, VICE NEWS (June 9, 2015, 3:50 PM), https://news.vice.com/article/north-carolinas-ag-gag-law-might-be-the-worst-in-the-nation [https://perma.cc/QU7X-YLDP]; Eric Frazier, *N.C.'s Boneheaded 'Ag-Gag' Law Protects Corporate Wrongdoing from Exposure*, CHARLOTTE OBSERVER (Jan. 5, 2016, 3:49 PM), http://www.charlotteobserver.com/opinion/opn-columns-blogs/o-pinion/article53141640.html [https://perma.cc/2GCU-S9D6].

58. GIBBONS, *supra* note 23, at 19.

59. Mark Binker & Laura Leslie, *Lawmakers Override McCrory Veto on Controversial 'Ag-Gag' Bill*, WRAL (June 3, 2015), http://www.wral.com/lawmakers-override-mccrory-veto-on-controversial-private-property-bill/14687952/ [https://perma.cc/GMG2-YRDS].

60. GIBBONS, *supra* note 23, at 19–20.

61. *Id.* at 20.

real purpose behind the law.[62] But with its pork production worth an estimated $2.9 billion,[63] legislators have every reason to protect North Carolina's animal farming industry from exposure. The true motivation of the law is clear: chill whistleblowers who want to expose animal abuse in agricultural facilities.

Second, the North Carolina's ag-gag law "hands the power directly to the [agricultural] industry" to prosecute secret activists instead of relying on the government to bring charges against an undercover agent.[64]

Third, this new kind of ag-gag statute authorizes draconian monetary penalties (up to $5,000 per day plus attorney's fees and court costs) for the surveilled company rather than the relatively minor criminal penalties characteristic of the second-wave ag-gag legislation.[65] Most recently, in March 2017, Arkansas enacted its own ag-gag law following the blueprint of North Carolina.[66] Wyoming's "Data Trespass" laws bridge the gap between the traditional ag-gag model and the new civil version found in North Carolina and Arkansas. Wyoming enacted a pair of broad "civil trespass" statutes in 2015 that are a hybrid of traditional and new ag-gag laws.[67] The statutes impose

62. *See* Verger, *supra* note 57 (describing the opinion held by the law's opponents).

63. *Id.* (referencing 2012 U.S. Department of Agriculture statistics).

64. Abrams, *supra* note 53.

65. N.C. GEN. STAT. § 99A-2(d) (2017) (effective Jan. 1, 2016); *see, e.g.*, UTAH CODE ANN. § 76-6-112(3)–(4) (West 2015) (effective May 8, 2012) (stating that violators of Utah's agricultural operation interference statute commit a class A or class B misdemeanor), *held unconstitutional by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); IDAHO CODE § 18-7042(3) (2016) (stating that violators commit a misdemeanor punishable by up to one year of imprisonment and/or by a maximum $5,000 fine), *held unconstitutional in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

66. *See also* GIBBONS, *supra* note 23, at 20. *Compare* ARK. CODE ANN. § 16-118-113 (Supp. 16 2017) (authorizing employers to sue anyone who "knowingly bans access to any nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area"), *with* N.C. GEN. STAT. § 99A-2(d).

67. Act of Mar. 5, 2015, ch. 146, § 1, 2015 Wyo. Sess. Laws (codified as amended at Wyo. Stat. Ann. § 6-3-414 (2017)), *held unconstitutional in part by* W. Watersheds Project v. Michael, No. 15-CV-169-SWS, 2018 WL 5318261, at *10 (D. Wyo. Oct. 29, 2018); Act of Mar. 12, 2015, ch. 183, § 3, 2015 Wyo. Sess. Laws (codified as amended at Wyo. Stat Ann. § 40-27-101 (2017)), *held unconstitutional in part by W. Watersheds Project*, 2018 WL 5318261, at *10. While Wyoming's statutes do encompass many of the characteristics of the new wave of ag-gag statutes with broad language and harsh civil penalties, one statute has criminal penalties for criminal trespass rather than imposing solely civil liability onto violators. Wyoming's data trespass statutes could aptly be described as a hybrid between this new wave of ag-gag legislation

both civil and criminal liability for data collection on private land or when an unauthorized individual crosses private land to reach public land.[68] The statutes came in response to a conflict between an environmental group and Wyoming landowners.[69] In 2014, fifteen Wyoming ranchers sued the nonprofit environmental conservation group Western Watersheds Project (WWP) for trespassing on their private property to reach public land to test the water quality of public streams.[70] WWP claimed that its unintentional trespassing and sampling led to the discovery of E. coli in the water as a result of cattle ranching.[71] Ranchers felt specifically targeted by the environmental group and pressured the state legislature to protect their agriculture industry.[72]

The Wyoming statutes enacted in 2015 permitted landowners to hold trespassers civilly liable when the person trespasses to "unlawfully

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and the second wave version of ag-gag statutes. *Compare* § 6-3-414(d) ("Crimes committed under subsection (a), (b), or (c) of this section are punishable as follows: (i) By imprisonment for not more than one (1) year, a fine of not more than one thousand dollars ($1,000.00), or both; (ii) By imprisonment for not less than ten (10) days nor more than one (1) year, a fine of not more than five thousand dollars ($5,000.00), or both, if the person has previously been convicted of trespassing to unlawfully collect resource data or unlawfully collecting resource data."), *with* § 40-27-101(d) ("A person . . . shall be liable in a civil action by the owner or lessee of the land for all consequential and economic damages proximately caused by the trespass. In a civil action brought under this section, in addition to damages, a successful claimant shall be awarded litigation costs . . . [which] include . . . court costs, expert witness fees, other witness fees, costs associated with depositions and discovery, reasonable attorney fees and the reasonably necessary costs of identifying the trespasser, of obtaining effective service of process on the trespasser and of successfully effecting the collection of any judgment against the trespasser.").

68. Wyo. Stat. Ann. §§ 6-3-414 and 40-27-101, *held unconstitutional in part by W. Watersheds Project*, 2018 WL 5318261, at *10.

69. Steven L. Hoch, *"Trespass is Fine with Us" Sayeth the 10th Circuit*, CLARK HILL (Sept. 29, 2017), http://www.clarkhill.com/alerts/trespass-is-fine-with-us-sayeth-the-10th-circuit.pdf [https://perma.cc/84LQ-6SAR].

70. Ralph Maughan, *Western Watersheds Project Not Backing Down in Wyoming Lawsuit*, THE WILDLIFE NEWS (Aug. 4, 2014), http://www.thewildlifenews.com/2014/08/04/western-watersheds-project-not-backing-down-in-wyoming-lawsuit/ [https://perma.cc/S78L-RZH7]; *see also* Frank Ranches, Inc. v. Jonathan Ratner, No. 40007 (9th Dist. Wyo. 2014).

71. Hoch, *supra* note 69, at 2.

72. Josh Mogerman, *Federal Court Strikes Down Wyoming "Data Trespass" Laws as Unconstitutional*, NRDC (Oct. 30, 2018), https://www.nrdc.org/media/2018/181030 [https://perma.cc/X8D9-7FEG].

collect resource data." [73] The civil statute allowed damages for proximate damages and "litigation costs," which included attorneys' fees.[74] The statute broadly defined resource data as "data relating to land or land use . . . regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species."[75] Successful claimants could recover all "consequential and economic damages proximately caused by the trespass" as well as litigation costs.[76] Wyoming amended the statutes in 2016 but maintained both civil and criminal penalties.[77]

Wyoming's law mirrors the draconian civil penalties found in the North Carolina and Arkansas ag-gag statutes while also giving private individuals the power to decide whether to prosecute a wrong-doer.[78] And just like North Carolina and Arkansas, Wyoming's ag-gag statutes do not make any specific references to agricultural facilities or animals as do traditional ag-gag statutes. This notable absence of an agricultural reference shows how legislators are attempting to repackage traditional ag-gag statutes into a modern format that avoids the legislative animus targeted at animal protection groups.[79]

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73. § 40-27-101(d).

74. Act of Mar. 12, 2015, ch. 183, § 3, 2015 Wyo. Sess. Laws.

75. § 40-27-101(h)(iii).

76. § 40-27-101(d) (allowing a successful claimant litigation costs including "court costs, expert witness fees, other witness fees, costs associated with depositions and discovery, reasonable attorney fees and the reasonably necessary costs of identifying the trespasser, of obtaining effective service of process on the trespasser and of successfully effecting the collection of any judgment against the trespasser").

77. The Wyoming legislature amended the 2015 statutes after constitutional challenge. The amended statutes clarify that they apply only to entry onto private lands and no longer require that data be submitted or intended to be submitted by the trespassers to the governmental agency. The revised statutes also redefined the term "collect" and eliminated the reference to "open lands." Wyo. Stat. Ann. §§ 6-3-414(a)-(c), (e)(i) and 40-27-101(a)-(c), (h)(i) (2017).

78. *See* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017) (holding that the data collection statutes regulate protected speech under the First Amendment and remanding the case to the district court to determine what level of scrutiny to apply to these statutes and whether the statutes survive the appropriate review), *summary judgment for Plaintiffs granted and summary judgment for Defendants denied*, No. 15-CV-169-SWS, 2018 WL 5318261 (D. Wyo. Oct. 29, 2018) (applying strict scrutiny to these statutes because they are content-based and determining the laws fail strict scrutiny).

79. WYO. STAT. ANN. §§ 6-3-414(e)(i), 40-27-101(h)(i) (2017); *see* W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231, 1237 (D. Wyo. 2016), *rev'd* 869 F. 3d 1189 (10th Cir. 2017), *summary judgment for*

C. Why Ag-Gag Legislation Matters

Ag-gag legislation has undergone a metamorphosis since its initial conception nearly thirty years ago. The early ag-gag laws of Utah, Idaho, Missouri, Iowa, and Kansas focused their "protection" exclusively on animal agricultural facilities. These early ag-gag laws pose three practical concerns: (1) they hide animal abuse from the public eye; (2) they pose a safety threat to the nation's food supply; and (3) they raise safety concerns for the workers on factory farms. First, horrific animal abuse, such as castration without anesthesia, extreme confinement, and tail docking,[80] is the norm rather than the exception on factory farms.[81] Prohibiting videos documenting such abuse keeps the public—whose sensitivity to the negative effects of a meat-based diet has grown substantially in the last few years[82]—in the dark.

Another method to stymie undercover investigations is mandating the immediate reporting of illegal animal abuse. Immediate reporting requires undercover investigators to out themselves, which leaves them unable to continue to document further abuse.[83] Investigators cannot document larger patterns of violence, including legal violence, if they are forced to report immediately. Industry spokespeople also have an easy scapegoat in the workers, often undocumented and minority individuals, and can pass the abuse off as "aberrations" that are not representative of standard operations.[84] Mandatory reporting times effectively curtail animal welfare organizations' ability to present the public with evidence that widespread policy changes need to occur within the agricultural animal industry.

Second, failure to expose the conditions on factory farms endangers the public at large because these cover operations have directly

Plaintiffs granted and summary judgment for Defendants denied, No. 15-CV-169-SWS, 2018 WL 5318261 (D. Wyo. Oct. 29, 2018).

80. *Inhumane Practices on Factory Farms*, ANIMAL WELFARE INST., https://awionline.org/content/inhumane-practices-factory-farms [https://perma.cc/3HXD-4TE6] (last visited Sept. 3, 2017) [hereinafter AWI].

81. Steve Chapman, *Exposing Abuse of Farm Animals*, CHI. TRIB. (Aug. 7, 2015), http://www.chicagotribune.com/news/opinion/chapman/ct-pigs-chickens-abuse-farm-animals-humane-society-ag-gag-perspec-0710-20150807-column.html [perma.cc/J8ET-TJ9V] (noting that the general public must "rely on activists who covertly record inside and put videos online").

82. *Veganism Has Grown 500% since 2014 in the US*, RISE OF THE VEGAN (June 25, 2017), https://www.riseofthevegan.com/blog/veganism-has-increased-500-since-2014-in-the-us [https://perma.cc/HNQ8-MZHM] (noting that going vegan or meat-free is the number one trend among consumers as well as identifying a key trend for "ethical eating").

83. Chapman, *supra* note 81.

84. GIBBONS, *supra* note 23, at 6.

commanded "America's largest meat recalls."[85] In 2008, for example, the United States Department of Agriculture (USDA) recalled 143 million pounds of beef by Westland Meat because the company allowed sick animals to enter the U.S. food supply.[86] The recall came on the heels of an undercover investigation video by the Humane Society of the United States that showed "workers . . . delivering repeated electric shocks to cows too sick or weak to stand on their own; drivers using forklifts to roll the 'downer' cows on the ground . . . and even a veterinary version of waterboarding in which high-intensity water sprays are shot up animals' noses."[87] The "sheer number of animals raised within confinement operations," such as gestation crates for sows, increases the spread of disease between the animals and to human workers.[88] The use of antibiotics in farm animals contributes to drug-resistance in humans.[89] Animal waste, which animals often lie in for their entire lives, can contaminate meat with dangerous bacteria, such as E. coli and salmonella.[90]

Third, factory farms that slaughter animals at high rates of speed not only cause the animals to suffer needlessly, but they also present safety concerns to the workers.[91] The Animal Legal Defense Fund (ALDF) filed a 2015 complaint with the Occupational Safety and Health Administration against Tyson Foods for "unsafe working conditions for employees."[92] The complaint cites repetitive motion

85. Cody Carlson, *The Ag-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/B39L-DFAE].

86. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html [https://perma.cc/S3PT-MH8P].

87. Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST (Jan. 30, 2008), http://www.washingtonpost.com/wp-dyn/content/story/2008/01/30/ST2008013001224.html [https://perma.cc/C85U-SKH6].

88. Sameera Dhanani, *Animal Welfare on Factory Farms*, SAMEERA (June 9, 2014), http://materiallyf.blogspot.com [https://perma.cc/88H2-D522].

89. AWI, *supra* note 80.

90. *Id.*

91. *See, e.g.*, Peggy Lowe, *Working 'The Chain,' Slaughterhouse Workers Face Lifelong Injuries*, NPR (Aug. 11, 2016), https://www.npr.org/sections/thesalt/2016/08/11/489468205/working-the-chain-slaughterhouse-workers-face-lifelong-injuries [https://perma.cc/BQ98-8ZQU] (explaining that Occupational Safety and Health Administration data shows slaughterhouse workers suffering repetitive motion injuries at a rate seven times that of other private industries).

92. Cathy Siegner, *Undercover Investigation Alleges Abuse of Chickens, Workers at Tyson Slaughter Plant in Texas*, FOOD SAFETY NEWS (Sept. 16, 2015),

injuries and risk of maiming by the high-velocity conveyor belts.[93] But slaughterhouse workers face emotional and psychological injuries as well. Studies link slaughterhouse work to post-traumatic stress disorder, perpetration-induced traumatic stress, higher rates of domestic violence, and substance abuse.[94] Research even reveals a "strong correlation" between high crime rates in U.S. cities and the presence of slaughterhouses in those cities.[95] Preventing workers, or the public, from documenting factory farm conditions benefits no one but the agricultural companies—animals, workers, and the public at large suffer the consequences.

Even more troubling, however, is how recent ag-gag legislation has effectively broadened its purview beyond the agricultural industry: North Carolina, Wyoming, and Arkansas's "new breed of ag-gag has dropped the 'ag,' criminalizing whistleblowing across industries . . . "[96] Arkansas has already adopted North Carolina's statute almost verbatim; more states could follow suit. These broad laws threaten the fundamental constitutional right to free speech while simultaneously threatening the public's welfare.

II. STANDING REQUIREMENTS

Despite the important constitutional concerns that these ag-gag statutes pose, plaintiffs must be able to demonstrate standing to have the merits of their ag-gag challenge heard in court. Other states could see North Carolina's statute as a blueprint to model in their states to

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http://www.foodsafetynews.com/2015/09/undercover-investigation-alleges-abuse-at-tyson-chicken-plant-in-texas/#.WhB9R0qnFPY [https://perma.cc/J92B-5XCY].

93. *Id.*

94. Chas Newkey-Burden, *There's a Christmas Crisis Going On: No One Wants to Kill Your Dinner*, THE GUARDIAN (Nov. 19, 2018), https://www.theguardian.com/commentisfree/2018/nov/19/christmas-crisis-kill-dinner-work-abattoir-industry-psychological-physical-damage [https://perma.cc/U58M-QKKB] (explaining why British workers no longer want to work in slaughterhouses due to the emotional, psychological, and physical dangers); Ashitha Nagesh, *The harrowing psychological toll of slaughterhouse work*, METRO.CO.UK (Dec. 31, 2017), https://metro.co.uk/2017/12/31/how-killing-animals-everyday-leaves-slaughterhouse-workers-traumatised-7175087/ [https://perma.cc/6ZW7-X6KP] (narrating former slaughterhouse workers' stories about the trauma they experienced working in a slaughterhouse).

95. James McWilliams, *PTSD in the Slaughterhouse*, TEXAS OBSERVER (Feb. 7, 2012), https://www.texasobserver.org/ptsd-in-the-slaughterhouse/ [https://perma.cc/LD34-VWMR] (explaining how the presence of a slaughterhouse was "the factor most likely to spike crime statistics" due to slaughterhouse workers becoming desensitized to violence in the research study).

96. GIBBONS, *supra* note 23, at 3.

keep plaintiffs out of court given the United States District Court of North Carolina's dismissal for lack of standing.[97] Although the Fourth Circuit Court of Appeals reversed the dismissal in June 2018,[98] the standing battle is not over. North Carolina's standing litigation likely foreshadows similar lawsuits in other circuits as other states model their statutes off of North Carolina's ag-gag law.[99] Standing remains a difficult fight for plaintiffs with the threat of draconian penalties halting undercover investigations, and similar standing battles are likely coming down the pipeline.

This section first discusses general standing requirements. Next, this section examines standing requirements for First Amendment challenges, which is the constitutional challenge plaintiffs have brought against ag-gag statutes in the past.

A. General Standing Requirements

All federal courts will refuse to hear a party's case without establishing that the plaintiff has standing to sue.[100] The standing requirement originates from Article III of the Constitution, which confers the "judicial Power" on federal courts to resolve "[c]ases" or "[c]ontroversies"—conditional upon meeting the standing requirements.[101] The standing requirement "imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III."[102] Therefore, plaintiffs must establish that they have standing to sue before the merits of the case may be addressed.

At minimum, litigants must prove three "constitutional" elements in order to establish their "standing to sue."[103] First, the plaintiffs must establish that they suffered an "injury in fact," which is "an invasion

97. PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 125 (4th Cir. 2018).

98. *PETA*, 737 F. App'x at 132.

99. Arkansas enacted its own ag-gag law following the blueprint of North Carolina in March 2017. ARK. CODE ANN. § 16-118-113 (Supp. 16 2017).

100. Warth v. Seldin, 422 U.S. 490, 498 (1975) (noting that standing is "the threshold question in every federal case, determining the power of the court to entertain the suit"). For a detailed discussion of standing within the animal protection context, see Kristen Stuber Snyder, Note, *No Cracks in the Wall: The Standing Barrier and the Need for Restructuring Animal Protection Laws*, 57 CLEV. ST. L. REV. 137 (2009).

101. U.S. CONST. art. III, § 2, cl. 1; *see* Lujan v. Defs of Wildlife, 504 U.S. 555, 560 (1992) (noting that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

102. *Warth*, 422 U.S. at 498.

103. *Lujan*, 504 U.S. at 560–62.

of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[104] Next, the injury must be caused by the defendant's conduct.[105] Third, the injury must be "likely" redressable by granting the plaintiff's requested relief.[106] The standing dispute in the ag-gag context primarily concerns the first element of the standing doctrine—the injury-in-fact requirement.

The standing requirement cuts two ways. On one hand, it can be a barrier to the courtroom for parties who are unable to prove the three constitutional elements. As a consequence, parties may be blocked from any redress or solution to their complaint. On the other hand, the "standing requirement alleviates a court's duty to hear frivolous and speculative lawsuits."[107] Weeding out cases who fail to satisfy the standing requirements lightens the burden on courts. The standing doctrine also ensures that "courts do not render advisory opinions rather than resolve genuine controversies between adverse parties."[108]

B. Standing for First Amendment Challenges

Standing is a threshold issue even when the claim challenges the cornerstone constitutional right to free speech. To determine whether a litigant has standing, the court does not consider "whether the alleged injury rises to the level of a constitutional violation."[109] Rather, the court considers whether the three requirements of standing—injury in fact, causation, and redressability—have been satisfied.[110] These rules of adjudication "reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[111]

That said, however, courts may relax standing requirements for litigants bringing a First Amendment claim. Statutes that constrict First Amendment rights "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression

104. *Id.* at 560 (internal quotations and citations omitted).

105. *Id.*

106. *Id.*

107. Snyder, *supra* note 100, at 143.

108. *Lujan*, 504 U.S. at 598 n.4.

109. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006).

110. *Id.*; *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014).

111. Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973) ("These principles rest on more than the fussiness of judges."); *see also* Younger v. Harris, 401 U.S. 37, 52 (1971).

has to give way to other compelling needs of society."[112] The Supreme Court has deviated from the formulaic standing rules to allow plaintiffs to challenge a statute when that statute could prevent others from engaging in constitutionally protected speech or expression.[113] This is because the First Amendment not only protects against the government prosecuting constitutionally protected activities, but also against the government adopting laws that cause individuals to self-censor due to the risk of state action.[114] Self-censorship is an injury to the would-be speaker even if the allegedly unconstitutional law has not yet been applied to the plaintiff.[115]

When challenging the constitutionality of a criminal statute, a plaintiff does not need to "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."[116] If a "credible threat" of prosecution exists under the statute, then the Supreme Court has held that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[117] But plaintiffs who merely face "imaginary or speculative" state prosecution do not satisfy the standing requirements.[118] If a plaintiff cannot credibly claim

112. *Broadrick*, 413 U.S. at 611–12 (citing Herndon v. Lowry, 301 U.S. 242, 258 (1937)); *see also id.* at 611 ("In the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.' One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. Another exception has been carved out in the area of the First Amendment.") (internal citations omitted).

113. *See id.* at 612 (noting that "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

114. Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988).

115. *See* Sec'y of Md. v. Joseph H. Murison Co., 467 U.S. 947, 956 (1984) ("Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser."); *see also* Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 47 (1st Cir. 2011) (finding that a plaintiff could have suffered a "cognizable, Article III injury" even without a "tangible injury").

116. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)); *see also* Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006).

117. *Babbitt*, 442 U.S. at 298 (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)).

118. *Id.* at 298–99 (quoting Younger v. Harris, 401 U.S. 37, 42 (1971)).

that prosecution would occur, then she has not alleged a case or controversy for purposes of Article III standing.[119] "Allegations of *possible* future injury are not sufficient" to satisfy standing requirements.[120] But alleging future injury could suffice if the possible injury is "certainly impending" or a "substantial risk" of the harm occurring exists.[121]

The precise point in time when a case matures past a hypothetical future injury to a true injury in fact is not clear. When the plaintiff asserts a "chilling effect on the freedom of speech" as the injury, however, the standing analysis becomes even more complicated because the plaintiff claims she was injured for something that has not yet occurred and may never occur;[122] these claims essentially repackage the chicken-and-the-egg riddle into a legal conundrum. The "inchoate" injury arises because the speech is chilled, but no "formal enforcement action" has occurred.[123] While these claims should not be ignored merely because "there has been no need for the iron fist to slip its velvet glove," courts may not issue advisory opinions or intervene without a "concrete and particularized" injury.[124] Federal courts have recognized that a "chilling effect" on the plaintiff's First Amendment rights can amount to a "judicially cognizable injury" if the plaintiff suffers an "objectively justified fear" of actual punishment.[125]

119. *Id.* ("When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court.") (quoting *Younger*, 401 U.S. at 42).

120. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal citations and quotations omitted).

121. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5) (internal quotations and citations omitted).

122. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006).

123. *Id.*

124. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

125. *Id.* (citing D.L.S. v. Utah, 374 F.3d 971, 975 (10th Cir. 2004)); Bell v. Keating, 697 F.3d 445, 454 (7th Cir. 2012) (citing *Walker*, 450 F.3d at 1089); *see also* Molinari v. Bloomberg, 564 F.3d 587, 600–01 (2d Cir. 2009) (applying the Tenth Circuit's test in *Walker* and finding "no First Amendment right is implicated in this case").

While ag-gag laws have historically provided for criminal consequences,[126] the new wave of ag-gag statutes[127] forego criminal penalties for only civil liability on violators. What then happens to those litigants who attempt to challenge statutes that arguably chill First Amendment speech while imposing only civil liability?

III. EXAMINATION OF STANDING IN FEDERAL CASES CHALLENGING THE CONSTITUTIONALITY OF AG-GAG STATUTES

Standing remains one of the biggest hurdles for animal activists to gain access to the courtroom.[128] Because animals are not legal persons,[129] the plaintiff cannot merely allege injury to the animal; rather, the plaintiff must show that he or she suffered an injury.[130] A mere desire to prevent animal cruelty does not satisfy standing's injury requirement. [131] Satisfying this injury requirement is the most problematic of the standing requirements for plaintiffs bringing constitutional challenges to ag-gag statutes. Despite ag-gag statutes existing for decades, case law challenging their constitutionality has only begun to emerge in the last few years.[132] To date, constitutional

126. *See, e.g.*, IDAHO CODE § 18-7042 (2016); UTAH CODE ANN. § 76-6-112 (West 2015) (effective May 8, 2012); IOWA CODE §§ 717A.1–717A.4 (2013); MO. REV. STAT. § 578.013 (2012).

127. *See* N.C. GEN. STAT. § 99A-2 (2017); ARK. CODE. ANN. § 16-118-113 (2017).

128. *See* Emily A. Beverage, Note, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After* ASPCA v. Ringling Brothers, 13 VAND. J. ENT. & TECH. L. 155, 161 (2010) ("[A] person seeking to employ the judicial process to protect animals routinely runs into the barrier of lacking standing."); 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, 248 (2014) ("Overall, standing presents one of the biggest challenges for activists seeking legal action on behalf of animals."); Snyder, *supra* note 100, at 143.

129. For further discussion on animals as legal persons, see Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, The Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247 (2008); Alexis Dyschkant, Note, *Legal Personhood: How We Are Getting it Wrong*, 2015 U. ILL. L. REV. 2075.

130. Snyder, *supra* note 100, at 144; Morgan, *supra* note 128, at 247–50.

131. Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 936–37 (Fed. Cir. 1991).

132. *See* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017); PETA v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

challenges to ag-gag statutes have arisen in five states: Idaho, Utah, Iowa, Wyoming, and North Carolina. This section will discuss each challenge to the state's ag-gag statute in turn to examine how the standing requirements were ultimately satisfied.[133]

A. Idaho

For the first time ever in 2014, a federal court heard a constitutional challenge to ag-gag legislation in *Animal Legal Defense Fund v. Otter*.[134] Together with individuals and other non-profits, ALDF sued the Governor of Idaho Butch Otter and Idaho's Attorney General Lawrence Wasden to challenge the constitutionality of Idaho's ag-gag law.[135] ALDF alleged violations of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment due to lawmakers' animus towards animal activists when drafting the statute.[136]

The state moved to dismiss the case, arguing that the plaintiffs lacked Article III standing under two subsections of Idaho's ag-gag

133. *See supra* notes 20, 55–65 and accompanying text.

134. 300 F.R.D. 461 (D. Idaho 2014), *aff'd in part* 44 F. Supp. 3d 1009 (D. Idaho 2014).

135. Seventeen plaintiffs sued in Idaho. In addition to the ALDF, the other non-profit plaintiffs were: PETA, American Civil Liberties Union of Idaho, Center for Food Safety, Farm Sanctuary, River's Wish Animal Sanctuary, Western Watersheds Project, Sandpoint Vegetarians, Idaho Concerned Area Residents for the Environment, Idaho Hispanic Caucus Institute for Research & Education, and Farm Forward. The other organization plaintiff was news journal CounterPunch. The individual plaintiffs were: author and journalist Will Potter, animal agriculture scholar and historian James McWilliams, investigator Monte Hickman, freelance journalist Blair Koch, and agricultural investigations expert Daniel Hauff. *Otter*, 300 F.R.D. at 463 n.1. The plaintiffs argued that the law was unconstitutional because it criminalized employment-based undercover investigations, videography, and whistleblowing. Complaint ¶ 14, *Otter*, 300 F.R.D. at 463 (No. 1:14-cv-00104-BLW); *see also supra* notes 46–49 and accompanying text. Idaho's ag-gag statute is part of the second wave of ag-gag legislation. *Id.*; *see also* IDAHO CODE § 18-7042 (2016) (criminalizing undercover investigations and videography at agricultural production facilities).

136. Legislative history revealed that Idaho lawmakers discussed their concerns that the undercover investigations prohibited by the statute would harm the agricultural industry in Idaho. Lawmakers compared animal rights groups to "terroris[ts]," "marauding invaders," "extreme activists," and people who want to take the dairy industry "hostage." *Otter*, 118 F. Supp. 3d at 1200–01 (internal quotations omitted); *see also* Mich. State Univ. Coll. of Law, *Animal Legal Defense Fund v. Otter*, LEGAL & HIST. ANIMAL CTR., https://www.animallaw.info/case/animal-legal-defense-fund-v-otter [https://perma.cc/Y7JA-PVLQ] (last visited Sept. 8, 2018) [hereinafter LEGAL].

statute.[137] The United States District Court of Idaho noted that First Amendment cases require special standing considerations to avoid the "chilling effect of sweeping restrictions."[138] To remain consistent with this approach, the court explained that the plaintiffs "need only show they engage in a 'course of conduct arguably affected with a constitutional interest and that there is a credible threat that the provision will be invoked'" against them.[139]

The first disputed subsection prohibited obtaining employment at an agricultural production facility by misrepresenting oneself in order to cause economic injury to the facility. The plaintiffs' complaint, however, stated that the plaintiffs planned to conduct undercover investigations to expose illegal animal abuse but for the threat of criminal prosecution under the statute.[140] They also pled that they hoped the exposure of illegal and abusive conduct by animal agricultural workers would result in "food safety recalls, citations for environmental and labor violations, evidence of health code violations, plant closures, criminal convictions, and civil litigation."[141] Because these actions could economically harm a business, the court determined that the plaintiffs alleged intent to violate this subsection and, therefore, had standing.

The second disputed ag-gag subsection required the violator to "cause[] physical damage or injury to [an] agricultural facility's operations."[142] The court determined that the plaintiffs did not allege intent to physically damage the facility; therefore, the court dismissed the constitutional challenge to this subsection for lack of standing.[143] The court did not discuss standing in the case's subsequent history.[144]

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137. *Otter*, 44 F. Supp. 3d at 1017.

138. *Id.* (noting that the Supreme Court "has endorsed what might be called a 'hold your tongue and challenge now approach' rather than requiring litigants to speak first and take their chances with the consequences") (quoting Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003)).

139. *Id.* (quoting Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1015 (9th Cir. 2013)).

140. Complaint ¶¶ 26, 33, 86, 106, *Otter*, 44 F. Supp. 3d 1009 (No. 1:14-cv-00104-BLW); *see also* LEGAL, *supra* note 136.

141. Complaint, *supra* note 140, at ¶ 4.

142. IDAHO CODE § 18-7042(1)(e) (2016).

143. *Otter*, 44 F. Supp. 3d at 1017–18.

144. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (affirming the district court's holding that Idaho's ag-gag statute regarding the misrepresentation and recording provisions violated the First Amendment because it was overly broad but reversing the district court's ruling that the other provisions violated the First Amendment).

B. Utah

In July 2017, animal rights activists filed suit against Utah's Governor Gary Herbert and Attorney General John Swallow in the United States District Court of Utah to challenge the constitutionality of Utah's ag-gag statute.[145] Some of the plaintiffs were familiar faces, including ALDF and PETA.[146] New faces also joined the plaintiffs in this litigation, including Amy Meyer.[147]

Amy Meyer has the dubious honor of being the first and only person to date to be charged under an ag-gag statute.[148] Meyer filmed activity at a slaughterhouse from public property adjacent to the facility. Despite never entering the slaughterhouse's private property, the police charged Meyer with violating the ag-gag law. Approximately two months later, the state dropped the charges against her.[149]

Whether the plaintiffs had standing to sue became a disputed issue when the defendants moved to dismiss the entire complaint for lack of standing.[150] The United States District Court for Utah held that the plaintiffs did have standing[151] because the plaintiffs satisfied the Tenth Circuit's three-part test established in *Initiative and Referendum Institute v. Walker*.[152] Under *Walker*'s standing test for a plaintiff

145. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); *see also* UTAH CODE ANN. § 76-6-112 (West 2015) (effective May 8, 2012).

146. Repeat plaintiffs included the ALDF, PETA, CounterPunch, and Will Potter. *Compare Herbert*, 263 F. Supp. 3d 1193, *with Otter*, 44 F. Supp. 3d 1009.

147. New plaintiffs also included Jesse Fruhwirth, James McWilliams, and Daniel Hauff. *Compare Herbert*, 263 F. Supp. 3d 1193, *with Otter*, 44 F. Supp. 3d 1009. Fruhwirth is a journalist who covers animal rights issues. The ALDF hired Hauff to coordinate investigations into Utah's factory farms, but he lost that employment opportunity because ALDF halted its undercover investigations in the state due to the ag-gag statute. Plaintiffs' Opposition to Motion to Dismiss at viii, *Herbert*, 263 F. Supp. 3d 1193 (No. 2:13-cv-00679-RJS). McWilliams is a professor at Texas State University who writes, publishes, and lectures nationally on food production and factory farming. *James McWilliams*, PAC. STANDARD, https://psmag.com/author/james-mcwilliams [https://perma.cc/54TJ-7CQQ] (last visited Sept. 8, 2018).

148. Plaintiffs' Opposition to Motion to Dismiss, *supra* note 147, at viii–ix.

149. *Id.*

150. Defendants' Motion to Dismiss, *Herbert*, 263 F. Supp. 3d 1193 (No. 2:13-cv-00679-RJS).

151. *Herbert*, 263 F. Supp. 3d at 1200

152. 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) (quoting D.L.S. v. Utah, 374 F.3d 971, 975 (10th Cir. 2004)) (recognizing that a "chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it 'arise[s] from an

alleging injury based upon a statute's chilling effect on speech, a plaintiff must prove:

> (1) that in the past, the plaintiff engaged in the kind of speech implicated by the statute;
>
> (2) that the plaintiff has a desire, but no specific plans, to engage in the speech; and
>
> (3) that the plaintiff presently has no intention of engaging in the speech because of a credible threat that the statute will be enforced.[153]

The test balances the competing interests of meeting the constitutional requirement that an alleged injury be "sufficiently concrete" with the "notion that a plaintiff need not . . . break[] the law before suing."[154]

The court held that all the plaintiffs satisfied all three requirements. The plaintiffs met the first requirement because ALDF and PETA had previously engaged in speech prohibited by the statute, and Meyer was actually arrested for doing so. The plaintiffs satisfied the third element because the plaintiffs wished to conduct future undercover investigations in Utah but had not out of fear of prosecution.[155]

The court explicitly rejected the defendants' argument regarding the second requirement. The defendants argued that the plaintiffs needed "actual plans to violate the challenged statute" to satisfy the injury-in-fact requirement.[156] The court reiterated that the Tenth Circuit "explicitly disclaimed" the need for "actual plans."[157] Rather, plaintiffs only needed to show a "present desire, though no specific plans, to engage in such speech" to satisfy the standing requirements to sue when the complaint pleads a "chilling effect on speech."[158] Ultimately, the United States District Court of Utah held the ag-gag law unconstitutional for violating the First Amendment.[159]

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objectively justified fear of real consequences' . . . [and] 'a credible threat of prosecution or other consequences flowing from the statute's enforcement'").

153. *Walker*, 450 F.3d at 1089 (applying this test to a coalition of animal advocates and organizations challenging a law that required wildlife initiatives to attain a supermajority to pass).

154. *Herbert*, 263 F. Supp. 3d at 1200.

155. *Id.*

156. *Id.*; *see also supra* note 99 and accompanying text.

157. *Herbert*, 263 F. Supp. 3d at 1200.

158. *Id.* (emphasis omitted).

159. *Id.* at 1213.

C. Iowa

In October 2017, five non-profit organizations filed suit against Iowa's Governor, Attorney General, and Montgomery County Attorney challenging the constitutionality of Iowa's Agricultural Production Facility Fraud statute.[160] One month later, the defendants moved to dismiss for lack of standing, claiming a failure to establish an injury in fact.[161]

The United States District Court for the Southern District of Iowa distinguished Iowa's standing dispute from North Carolina's battle because North Carolina's ag-gag law only imposed civil liability while violators of Iowa's statute faced criminal consequences.[162] Noting that "concerns over the chilling effects of speech are significantly more acute when a criminal sanction is involved rather than a civil cause of action," the court held that the advocacy groups had "plausibly alleged" a true prosecutorial threat in Iowa.[163]

In addition, the court explained that the threat of prosecution increases when a statute is relatively new.[164] Because the Iowa legislature had enacted section 717A.3A only a few years earlier, the prosecutorial threat was therefore greater, and more credible.[165] United States District Court for the Southern District of Iowa held that Iowa code section 717A.3A failed to survive judicial scrutiny.[166]

160. Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901 (S.D. Iowa 2018); Iowa Code § 717A.3A (2013), *held unconstitutional by* Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa Jan. 9, 2019). The plaintiffs included ALDF, Iowa Citizens for Community Improvement, Bailing out Benji, Center for Food Safety, and PETA.

161. *Reynolds*, 297 F. Supp. 3d at 911–12. The other standing requirements were not disputed.

162. *Id.* at 916; *compare* N.C. Gen. Stat. § 99A-2 *with* Iowa Code § 717A.3A.

163. *Reynolds*, 297 F. Supp. 3d at 916.

164. *Id.*

165. *Id.* While four plaintiffs alleged injury from refraining to conduct undercover investigations, the Center for Food Safety alleged injury from a "reduced, or possibly eliminated" source of information gained from undercover investigations in Iowa. While this injury was "more contingent" than the stopping of the undercover investigations themselves, the court held that the Center for Food Safety "plausibly alleged" an injury because the First Amendment gives standing to 'persons who are "willing listeners" to a willing speaker, but for the restriction, would convey information.' *Id.* (quoting Am. Civil Liberties Union v. Holder, 673 F.3d 245, 255 (4th Cir. 2011)).

166. Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069, at *9 (S.D. Iowa Jan. 9, 2019).

D. Wyoming

Multiple non-profit organizations filed suit against Wyoming's Attorney General and the director of the Wyoming Department of Environmental Quality challenging the constitutionality of Wyoming's "Trespass to Collect Resource Data" statutes.[167] The defendants moved to dismiss for lack of standing,[168] arguing that the plaintiffs' alleged civil trespass injury was too speculative to meet the injury-in-fact standing requirement.

To decide the standing question, the United States District Court for the District of Wyoming used the same *Walker* test as in Utah.[169] The court held that the plaintiffs satisfied the first prong because they collected resource data from open lands in Wyoming and reported such data to government agencies in the past.[170] This conduct exposed the plaintiffs to civil liability under the statute.[171] The plaintiffs pled that they had a general, present desire to collect data in the future, which satisfied the second requirement.

The court's analysis of the third prong was more in-depth. The court found that the plaintiffs refrained from the conduct because of a

167. W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016), *rev'd and remanded by* 869 F.3d 1189, 1198 (10th Cir. 2017), *held unconstitutional in part by* No. 15-CV-169-SWS, 2018 WL 5318261, at *10 (D. Wyo. Oct. 29, 2018) ("The First Amendment's guarantee of free speech in this case leads the Court to find Wyoming statutes §§ 6-3-414(c) and 40-27-101(c) are facially unconstitutional."). The plaintiffs included the Western Watersheds Project, National Press Photographers Association, National Resource Defense Council, PETA, and the Center for Food Safety. *Id.* Wyo. Stat. Ann. §§ 6-3-414, 40-27-101 (2017) (prohibiting individuals from entering "open land," collecting or recording information relating to the land and land use, and then intending to submit or submitting that information to a governmental agency), *held unconstitutional in part by* W. Watersheds Project v. Michael, 2018 WL 5318261, at *10.; *see supra* note 78 and accompanying text.

168. *Michael*, 196 F. Supp. 3d at 1236.

169. The *Walker* test's three prongs are:

> (1) evidence that in the past [the plaintiffs] have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of a.* [sic] credible threat that the statute will be enforced.

W. Watersheds Project v. Michael, No. 15-CV-0169-SWS, 2015 WL 12852338, at *4–5 (D. Wyo. Dec. 28, 2015); *see also supra* note 153 and accompanying text.

170. *Michael*, 2015 WL 12852338, at *5.

171. *See* § 40-27-101(a).

credible threat that the statute will be enforced against them, exposing them to real consequences. The court noted "[i]t is not 'guesswork' to conclude that if Plaintiffs engage in complained-of activities, the complaining landowners will likely use the avenue of relief provided to them by the legislature."[172] The defendants admitted that the statutes were adopted in response to Wyoming landowners complaining about the plaintiffs entering their lands.[173] Furthermore, the court noted that the state was a potential plaintiff under the civil statute because the state owns the "open lands."[174]

The court determined that the plaintiffs' fear of civil prosecution by the state was credible because the "Wyoming legislature could not possibly have intended the civil statute to be invoked only by private citizens" due to the "open land" provision.[175] Finally, the court harkened back to the Supreme Court's decision in *Steffel v. Thompson*,[176] that a plaintiff does not need to expose himself to criminal prosecution under a statute to challenge its constitutionality.[177] Because the statute's wording contained identical language for both the civil and criminal portions, the court could not find a scenario where an individual could violate *only* the civil trespass statute. Therefore, any violation of the statute invariably opened the individual up to criminal prosecution.[178] Finding that the plaintiffs satisfied the *Walker* criterion, the court issued a written order holding that plaintiffs had standing to challenge the civil statute.[179]

172. *Michael*, 2015 WL 12852338, at *6.

173. *Id.*; *see also* Ralph Maughan, *Western Watersheds Project Not Backing Down in Wyoming Lawsuit*, WILDLIFE NEWS (Aug. 4, 2014), http://www.thewildlifenews.com/2014/08/04/western-watersheds-project-not-backing-down-in-wyoming-lawsuit/ [https://perma.cc/N8HZ-7AA2].

174. *Michael*, 2015 WL 12852338, at *6; *see* WYO. STAT. ANN. § 40-27-101(a) (2017).

175. *Michael*, 2015 WL 12852338, at *6.

176. 415 U.S. 452 (1974) (holding that standing does not require a plaintiff to expose himself to actual arrest or prosecution to challenge the statute's constitutionality).

177. *Id.* at 459.

178. *Michael*, 2015 WL 12852338, at *6 ("The prescriptive portions of the criminal and civil trespass statutes contain identical language. The Court cannot imagine, and the State Defendants have not provided, any scenario wherein an individual could violate the civil trespass statute without violating the criminal trespass statute. To violate one is to violate the other.") (citations omitted).

179. W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231, 1236 (D. Wyo. 2016), *rev'd and remanded by* 869 F.3d 1189, 1198 (10th Cir. 2017).

The Tenth Circuit reversed the district court's conclusion that sections of the statutes were not entitled to First Amendment protection. The Tenth Circuit held that the statutes regulated protected speech under the First Amendment because the statutes at issue "target[ed] the 'creation' of speech by imposing heightened penalties on those who collect resource data."[180] The Tenth Circuit remanded the case to the district court to decide the level of scrutiny to apply to the statutes and whether the statutes survive such review.[181]

Upon remand, the parties filed cross-motions for summary judgment.[182] The United States District Court for the District of Wyoming held that the statutes sections 6-3-414(c) and 40-27-101 are facially unconstitutional and in violation of the First Amendment of the U.S. Constitution.[183]

E. North Carolina

In January 2016, eight animal rights groups and government watchdog organizations challenged the constitutionality of North Carolina's Property Protection Act.[184] In contrast to other ag-gag statutes, North Carolina's law creates a purely civil cause of action for any North Carolina employer to bring suit against an employee who "'captures or removes' documents from the employer's premises or records images or sound on the employer's premises and uses the documents or recordings to breach the employee's duty of loyalty to the employer."[185] All of the plaintiffs were organizations that conduct undercover investigations and attempt to expose "illegal and unethical conduct in private and public industries."[186] The plaintiffs filed suit against North Carolina's Attorney General, Josh Stein, and Chancellor of the University of North Carolina-Chapel Hill, Carol Folt.[187] The plaintiffs sued Folt, who exercises "executive authority over UNC/Chapel Hill," because plaintiff PETA had investigated this

180. *Michael*, 869 F.3d at 1192 (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).

181. *Id.* at 1198.

182. *Michael*, 2018 WL 5318261, at *10 (granting the Plaintiff's motion for summary judgment and denying the defendants' motion for summary judgment).

183. *Id.*

184. PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 122 (4th Cir. 2018).

185. *PETA*, 259 F. Supp. 3d at 371 (quoting Property Protection Act, ch. 99A, 2015 N.C. Sess. Laws 50 (2015) (codified at N.C. GEN. STAT. § 99A-2 (2017))).

186. *Id.* at 373.

187. *Id.* at 372.

facility in the past and wished to investigate it again.[188] The Attorney General would act as counsel to UNC/Chapel Hill so plaintiffs also named him in the lawsuit.[189]

The plaintiffs claimed that the Property Protection Act hindered their ability to conduct undercover investigations in violation of the First and Fourteenth Amendments. The defendants moved to dismiss the complaint for lack of standing.[190] The United States District Court of North Carolina agreed with the defendants, dismissing the case because the plaintiffs failed to allege an Article III injury in fact.[191] While the court noted the "serious First Amendment issues at stake," it could not "put the merits cart before the standing horse."[192]

The linchpin of the district court's dismissal hinged on the perceived distinction between a pre-enforcement challenge to a civil versus a criminal statute.[193] Relying primarily upon the Supreme Court's decision in *Clapper v. Amnesty International USA*,[194] the court noted that it is well-established law that a plaintiff satisfies the injury-in-fact requirement by alleging an "intention to engage in a course of conduct arguably affected with a constitutional interest" when challenging a *criminal* law before it is enforced if the challenged statute presents a "credible threat" of prosecution.[195] Here, however, the statute only imposed *civil* liability. The district court reasoned that because the Property Protection Act did not authorize a state criminal prosecution, it is less reasonable for the plaintiffs to expect that private actors would use the statute.[196] The district court believed it was "purely speculative" whether a surveilled North Carolina business

188. *Id.* at 373–74.

189. If UNC-Chapel Hill sued the plaintiffs under the statute, the Attorney General would act as counsel. The district court noted that a state agency "may retain private counsel if granted permission by the Attorney General to do so." *Id.* at 380 n.10 (citing N.C. GEN. STAT. §§ 114–2.3(a), 147–17(a) (2017)).

190. *PETA*, 259 F. Supp. 3d at 374.

191. *Id.* at 372.

192. *Id.* at 376 (quoting Cooksey v. Futrell, 721 F.3d 226, 239 (4th Cir. 2013)).

193. *Id.* at 375–84.

194. 568 U.S. 398, 409 (2013) (holding that various organizations lacked standing to challenge a provision of the Foreign Intelligence Surveillance Act because "'[a]llegations of *possible* future injury' are not sufficient" to satisfy standing's injury in fact requirement).

195. *PETA*, 259 F. Supp. 3d. at 375–76.

196. *Id.* at 383 (noting that "it would be unreasonable to assume the legislature enacted [a criminal] law without intending that it be enforced by the State," but the same level of threat is not present here because it is a civil cause of action).

would choose to file a private cause of action against any of the plaintiffs.[197]

The court also reasoned that the plaintiffs' undercover investigations in North Carolina were too contingent upon external factors to fear imminent liability.[198] First, the plaintiffs would need to wait for the right job position to become available at a location they believe is engaging in abusive animal conduct. Then, the plaintiffs would need to find a qualified candidate willing to go undercover on the organization's behalf and lie about her employment history to this location during the interview. Next, the location would need to hire the plaintiffs' undercover agent. Finally, the undercover agent would need to actually witness abusive conduct occurring and then document it. The court determined that these multiple contingencies did not constitute an "immediate threat of harm."[199]

The United States Court of Appeals for the Fourth Circuit reversed the lower court's dismissal.[200] Performing a similar analysis to the *Walker* test,[201] the court noted that the plaintiffs had engaged in the exact kind of speech implicated by the statute.[202] The plaintiffs had a desire to engage in the prohibited speech and were "fully prepared to go forward but for their fear of liability" under the statute.[203]

The court also noted that the statute empowered the defendants to file suits against the plaintiffs and the defendants had not "disavowed enforcement" if the plaintiffs conducted their undercover investigations.[204] Therefore, the plaintiffs had no reason to assume that the defendants would not file suit against them if the plaintiffs violated the statute.[205]

Finally, the court explained the plaintiffs' alleged injury went beyond the mere threat of a lawsuit. Rather, the plaintiffs refraining

197. *Id.* at 378.

198. *Id.* at 379.

199. *Id.* at 382.

200. PETA, Inc. v. Stein, 737 F. App'x 122, 132 (4th Cir. 2018) (remanding the case to the district court to be heard on the merits).

201. *See supra* notes 153, 169.

202. *PETA*, 737 F. App'x at 130 ("[T]he Act appears by its terms to prohibit [p]laintiffs' planned activities and to subject them to civil liability, including severe exemplary damages . . . [The activities prohibited by N.C. STAT. ANN. § 99A-2(b)(1)–(3)] are precisely the types of activities that [p]laintiffs engaged in before and intend to engage in again during their future investigations.").

203. *Id.* at 130.

204. *Id.* at 131 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014)).

205. *Id.*

from the planned investigations due to their "reasonable and well-founded fear that they will be subjected to significant exemplary damages under the [statute] if they move forward at all" constitutes the injury in fact for standing purposes.[206] Notably, the appellate court declined to address the civil liability issue.[207]

IV. UNIFORM TEST FOR STANDING WHEN PLAINTIFFS ALLEGE INJURY BASED ON CHILLING EFFECT OF STATUTE

Standing's first requirement—imminent injury in fact—remains the most disputed element and the biggest hurdle for plaintiffs to surmount when challenging ag-gag statutes.[208] In this section, I argue that all federal courts should adopt the Tenth Circuit's *Walker* test to determine whether a plaintiff alleging injury based upon a statute's chilling effect on speech has suffered a sufficiently concrete injury regardless of whether the statute imposes criminal or civil liability.[209]

Ag-gag statutes continue to expand into new states.[210] As animal activists and other watchdog organizations fight these ag-gag statutes in court, defendants have pushed back on standing in every constitutional challenge to date.[211] Therefore, a uniform standing test would promote judicial economy.

If all federal courts applied the *Walker* test, these cases would move much more quickly through the courts. A bright-line test would make standing requirements clearer for plaintiffs when filing their complaints. Plaintiffs would be chosen carefully to ensure that they meet the established criteria. Similarly, defendants would know when a standing challenge would be appropriate. As courts struggle to determine how much civil liability impacts the standing analysis, a bright-line test would provide much-needed guidance to parties and the court.

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206. *Id.* at 131.

207. *Id.* at 128 ("Because [p]laintiffs have sufficiently alleged an actual injury, we need not visit the district court's determination of whether *Clapper* would strip [p]laintiffs of their standing to assert a claim of a threatened or imminent injury in the form of a civil lawsuit.").

208. *See, e.g.*, *supra* notes 148, 190–192 and accompanying text.

209. A plaintiff must prove three elements to satisfy the *Walker* test: (1) that in the past, the plaintiff engaged in the kind of speech implicated by the statute; (2) that the plaintiff has a desire, but no specific plans, to engage in the speech; and (3) that the plaintiff presently has no intention of engaging in the speech because of a credible threat the statute will be enforced. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006); *see also supra* notes 153, 169 and accompanying text.

210. In March 2017, Arkansas became the most recent state to enact an ag-gag statute. *See supra* note 66 and accompanying text.

211. *See, e.g.*, *supra* notes 137, 150, 168, 190 and accompanying text.

A uniform test would allow judges to hear these constitutional challenge cases on the merits rather than spending time and money on justiciability issues. Resources would be devoted to the real heart of the matter—whether these statutes infringe constitutional rights—rather than spending them on fights just to get into the courtroom.

While the *Walker* test would promote uniformity amongst the circuits and judicial economy in future standing disputes, potential plaintiffs may face obstacles. The first requirement of the test is that the plaintiff had previously engaged in the kind of speech implicated by the statute.[212] Therefore, potential plaintiffs may need to expand their undercover operations into states without current ag-gag statutes to have standing if those states later enact ag-gag laws. This could require potential plaintiffs to expend significant resources, time, and effort all to ensure standing at some unknown, hypothetical point in the future. But states with significant agriculture are the most likely to pass ag-gag statutes. So, if undercover investigations are targeted at those states, then the cost to expand investigations will be more manageable.

The *Walker* test may also reduce the number of potential plaintiffs able to demonstrate standing. This puts a greater pressure on those able to survive standing to file suit. The average citizen does not engage in undercover investigations of any kind. Without past history of such speech, potential plaintiffs would be barred from the courtroom under the *Walker* test. Therefore, the public will have to rely on organizations with a known track record of covert operations to bring constitutional challenges lawsuits to satisfy *Walker*'s first element.[213] But often times the plaintiffs challenging ag-gag statutes are already familiar faces, such as PETA and ALDF.[214] Therefore, this possible consequence will likely have little to no impact on the potential plaintiffs.

Despite these potential issues under the *Walker* test, this test provides the best blueprint for courts to follow when deciding whether a plaintiff has standing when alleging injury based upon a statute's chilling effect on speech. The test is concise with clear guidelines for plaintiffs. The bright-line rules create an enforceable standard that federal courts will be able to replicate. Although the Fourth Circuit did not state it used the *Walker* test when hearing the appeal from North Carolina, the court's analysis touched upon all of the *Walker* factors.[215]

212. *See supra* note 153 and accompanying text.

213. *See supra* note 153.

214. *See supra* note 146.

215. The court noted that the plaintiffs conducted undercover investigations in the past and engaged in "precisely the types of activities" prohibited by the statute, which satisfies the first element. PETA, Inc. v. Stein, 737 F. App'x 122, 130 (4th Cir. 2018). Next, the court stated that the plaintiffs "plausibly alleged" that they wanted to engage in future investigations, which satisfies the second element. *Id.* And the plaintiffs

This shows that the Fourth Circuit used similar criteria to evaluate injury for purposes of standing as the Tenth Circuit. Affirmatively adopting the *Walker* test would be the next logical step.

V. MONEY AS A MOTIVATING FACTOR

In the ag-gag standing litigation to date, none of the courts have focused on a practical reality—money is a huge motivator when a party decides to sue.[216] Because current civil ag-gag statutes authorize fines of up to $5,000 per day as well as attorneys' fees and court costs,[217] a government agency or a private corporation stands to gain an enormous financial boon if successful. Undercover investigations often last months to establish systemic abuse in the agricultural industry.[218] In money terms, a defendant faces approximately $100,000 in civil liability for *each* month of undercover filming under the civil ag-gag statutes of North Carolina and Arkansas.[219] Therefore, a successful plaintiff would likely be entitled to hundreds of thousands of dollars.

Undercover investigations by animal welfare groups try to catch egregious behavior on video to show the public. As previous exposés have shown, the storyline becomes public outrage followed by lost

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are able to move forward with the investigations "but for their fear of liability" under the statute given their allegations of a "reasonable and well-founded fear" that the statute will be enforced against them and given their allegations that the statute was enacted to target public-interest organizations. This satisfies *Walker*'s third element. *Id.*

216. PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 380 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 122 (4th Cir. 2018) ("It is also far from likely that the Act would be enforced by UNC/Chapel Hill upon whose threat of enforcement [p]laintiffs' claims depend. Because the purpose of [p]laintiffs' organizations is to expose wrongdoing, it is entirely possible that UNC/Chapel Hill—as opposed to a private enterprise—is uniquely motivated not to seek to punish those involved.").

217. N.C. GEN. STAT. § 99A-2(d) (2017); ARK. CODE ANN. § 16-118-113(e) (Supp. 16 2017).

218. Oppel, *supra* note 7; *see also* Marceau, *supra* note 30, at 1340–41 ("[T]here is no evidence that there is a problem with people failing to report animal abuse to authorities, and thus these laws provide no concrete benefits to animals . . . On the other hand, these laws do effectively accomplish the agriculture industry's purpose of making it impossible to expose what is actually going on inside factory farms. For one thing, if every act of cruelty requires an immediate outing of the undercover investigator, then showing patterns of abuse or complicity on the part of management is impossible.").

219. N.C. GEN. STAT. § 99A-2(d); ARK. CODE ANN. § 16-118-113 (calculating liability at $5,000 per day, or $25,000 per "work" week).

profits to the facility when consumers stop buying its products.[220] It therefore makes financial sense for both public and private entities to choose to sue under these civil ag-gag statutes, if possible, to recoup some of their lost earnings following an exposé. The enormous financial incentive makes the imminent threat of state-sanctioned harm under a civil ag-gag statute at least as likely, if not more so, than under a criminal ag-gag statute.

CONCLUSION

The agricultural industry paints animal welfare organizations as extremists trying to force everyone to eat only lettuce and treat animals better than people. But when did being kind—or even just humane—to animals become an "extreme" position? Instead of being horrified at the abusive reality that billions of animals face every day on America's farms, the agricultural industry became angry at those who exposed that reality. Rather than responding with a call to arms for industry change to improve conditions for animals and give the public higher quality food, the agricultural industry lobbied to punish the undercover investigators rather than the animal abusers. The agribusiness lobbyists spent more than $131 billion in 2017 to get the ear of legislators and keep the American public in the dark.[221]

Ag-gag supporters claim that these laws are vital to protect their livelihoods from attack against extremist vegans hell bent on destroying the nation's food supply. But these ag-gag statutes attack the core values of our constitutional protections. Dismissing challenges to ag-gag statutes for lack of standing is dangerous. While it is indisputable that standing requirements cannot be disregarded, this new wave of ag-gag statutes should make courts balance the need to hear the merits of the case against the ability of the plaintiffs to allege the required specificity without exposing themselves to extreme liability.

Courts hearing these constitutional challenges to civil ag-gag statutes need to account for the enormous monetary penalty these statutes impose when evaluating standing. Individuals and groups who seek to challenge the constitutional validity of a statute should not be forced to subject themselves to extreme civil liability first. Constitutional scrutiny should not be avoided merely because the potential plaintiff is a nonprofit unable to withstand hundreds of thousands of dollars in potential liability. It is counterintuitive to forbid

220. *See, e.g.*, Glionna, *supra* note 8 (documenting how a dairy closed down following an undercover video exposé).

221. *See* Ctr. for Responsive Politics, *Agribusiness: Lobbying, 2018*, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/indus.php?id=A (stating that the agricultural sector spent over $132 million total in lobbying for its various industries) [https://perma.cc/4JR3-J8J6] (last visited Sept. 5, 2018).

a plaintiff from preemptively challenging a private, civil cause of action merely because it is unknown if or when a third party might seek to enforce the law. Relying on the wrongdoer to take action first is illogical.

Given the steady evolution of ag-gag statutes and the powerful influence of big agriculture in politics, it seems likely that these laws will remain a part of our history for the foreseeable future. Time will tell if North Carolina's newest ag-gag law will survive constitutional scrutiny. But at least the court will now hear the case on its merits. As states continue to enact ag-gag statutes and public-interest groups continue to challenge them, future litigation over standing seems inevitable. Hopefully federal courts outside of the Tenth Circuit will adopt the *Walker* test in their jurisdictions to address the standing issue and dispose of it quickly. Only then the true controversy over the constitutionality of these statutes may be addressed.

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