

WHAT EVER HAPPENED TO VEGGIE LIBEL?: WHY PLAINTIFFS ARE NOT USING AGRICULTURAL PRODUCT DISPARAGEMENT STATUTES

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I. INTRODUCTION

Eating corn might kill you, at least according to bestselling author Michael Pollan.¹ Pollan is not alone in criticizing the food industry: for example, many publicly question whether eggs are safe to eat following the recent salmonella outbreak.² Such comments might also be dangerous: people who make them may be liable under agricultural product disparagement statutes (“APD statutes,” commonly known as “veggie libel laws”), which impose civil liability for falsely stating that a perishable agricultural food product is unsafe or unhealthy to eat.³

From the time APD statutes were introduced in the 1990s until the beginning of the twenty-first century, legal scholars and the press criticized them as unconstitutional⁴ and predicted that producers would use the statutes to silence

1. See MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 108 (2006) (alleging that corn products are the least healthy products in supermarkets); see also *The Daily Show with Jon Stewart* (Comedy Central television broadcast Jan. 4, 2010) [hereinafter *The Daily Show*], available at <http://www.thedailyshow.com/watch/mon-january-4-2010/michael-pollan> (interview in which Pollan stated: “[t]he food industry creates patients for the health care industry. . . . We subsidize the least healthy calories in the supermarkets . . . [including] high fructose corn syrup.”).

2. See, e.g., Marc Siegel, Op-Ed., *The Silver Lining in the Egg Recall*, FOXNEWS.COM (Aug. 25, 2010), <http://www.foxnews.com/opinion/2010/08/25/dr-marc-siegel-eggs-recall-fda-usda-salmonella-wright-county-egg-safety/> (stating that egg farms “are unsafe, unclean, with poor working conditions and hens clumped together in tiny cages. Not only that but after a rodent or worker introduces salmonella into the hens’ feed, it spreads like wildfire from hen to hen and onto the forming eggs before they have been hatched.”); *Un Oeuf is Enough*, THE ECONOMIST, Sept. 2, 2010, http://www.economist.com/node/16943964?story_id=16943964 (quoting Robert Reich, a former Clinton administration official, as saying that the “government doesn’t have nearly enough inspectors or lawyers to bring every rotten egg to trial.”).

3. See ALA. CODE §§ 6-5-622 to 625 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113 (2002); FLA. STAT. ANN. § 865.065 (West 2000); GA. CODE ANN. §§ 2-16-3 to 4 (West 2003); IDAHO CODE ANN. § 6-2003 (2010); LA. REV. STAT. ANN. §§ 3:4503–4504 (2003); MISS. CODE ANN. §§ 69-1-255 to 257 (West 2009); N.D. CENT. CODE §§ 32-44-02 to 04 (2010); OHIO REV. CODE ANN. § 2307.81 (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102 (West 2003); S.D. CODIFIED LAWS §§ 20-10A-2 to 4 (2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.002–.004 (West 2011). By deeming a statement to be false unless the defendant proves that it was based on reasonable and reliable scientific data, however, some of these statutes are structured so that even potentially true statements might subject their makers to liability. See ALA. CODE ANN. § 6-5-621(1); GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 4502(1); MISS. CODE ANN. § 69-1-253(a). But see COLO. REV. STAT. §§ 35-31-101, 104 (2011) (imposing criminal liability only).

4. For a discussion of the constitutional concerns raised by APD statutes, see, for example, Bruce E.H. Johnson & Eric M. Stahl, *Food Disparagement Laws: An Overview of the Constitutional Issues*, LIBEL DEF. RESOURCE CENTER BULL.: AGRICULTURAL DISPARAGEMENT LAWS 31, 31 (1998) [hereinafter LDRC BULL.] (“[T]here is no way for the industry to accomplish its goals

people who publicly raised concerns about food safety.⁵ These predictions seemed well founded after beef producers sued Oprah Winfrey for negative statements made about beef on her program.⁶ Somewhat surprisingly, however, APD statutes have resulted in only two reported lawsuits.⁷

This Article examines why plaintiffs have avoided using APD statutes. Part II discusses pre-existing common law causes of action, the push for states to enact APD statutes, and reported APD cases, and briefly surveys the constitutional criticisms. Next, Part III examines three possible reasons why there have been so few APD-related cases. The first possible explanation is plaintiffs have no occasion to sue under APD statutes because the statutes have completely chilled speech critical of agricultural products. The second explanation is some states have discouraged spurious APD suits by enacting anti-strategic lawsuits against public participation (“SLAPP”) statutes, which punish plaintiffs who

constitutionally, precisely because the goal is to deter speech that enjoys First Amendment protection.”); David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 201–02 (1998) (arguing an ADP statute violates the U.S. Constitution if it “heavily regulates the marketplace of ideas”); Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 839 (2000–2001); Jennifer J. Mattson, Note, *North Dakota Jumps on the Agricultural Disparagement Law Bandwagon by Enacting Legislation to Meet a Concern Already Actionable Under State Defamation Law and Failing to Heed Constitutionality Concerns*, 74 N.D. L. REV. 89, 115 (1998); Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Law*, 15 VA. ENVTL. L.J. 403, 411 (1996); Julie J. Srochi, Note, *Must Peaches be Preserved at all Costs? Questioning the Constitutional Validity of Georgia’s Perishable Product Disparagement Law*, 12 GA. ST. U. L. REV. 1223, 1223 (1996); Harold M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 334 (2000); *infra* Section III(C).

5. See, e.g., Debora K. Kristensen, *What Can You Say About an Idaho Potato?*, 41 ADVOC. 18, 21 (1998); Wasserman, *supra* note 4, at 334 (referring to “the valid concern that [APD statutes] can and will be used to silence the weak, economically poor voices of individuals and not-for-profit advocacy groups”); Melody Petersen, *Farmers’ Right to Sue Grows, Raising Debate on Food Safety*, N.Y. TIMES, June 1, 1999, at C11, available at <http://query.nytimes.com/gst/fullpage.html?res=9B01E2DC1330F932A35755C0A96F958260&sec=health&spon=&scp=1&sq=Farmers%27+right+to+sue+grows&st=cse&pagewanted=print>; Sam Howe Verhovek, *Talk of the Town: Burgers v. Oprah*, N.Y. TIMES, Jan. 21, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9A01E4DD1E38F932A15752C0A96E958260&scp=1&sq=&pagewanted=1> (“[John] Stauber, executive director of a public interest group, said he had talked to many journalists who were worried that food safety investigations could bring ruinous lawsuits.” Stauber also opined that the lawsuit involving Oprah Winfrey had already had a chilling effect on speech about Mad Cow Disease); see generally, LDRC BULL., *supra* note 4.

6. See *Texas Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 860 (N.D. Tex. 1998), *aff’d*, 201 F.3d 680 (5th Cir. 2000); see also Verhovek, *supra* note 5 (describing the potential chilling effect of *Texas Beef*).

7. See generally *Texas Beef Grp.*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t v. Georgia*, 457 S.E.2d 273 (Ga. Ct. App. 1995).

bring frivolous lawsuits in order to silence discussion of issues of public concern.⁸ The third possibility is APD statutes are almost certainly unconstitutional.⁹ Perhaps producers shun APD claims in favor of common law causes of action in order to avoid the probable (and likely successful) constitutional challenges that would accompany an APD suit. Finally, Part IV assesses these factors' relative strength. Although all three probably have decreased the number of lawsuits brought under APD statutes, plaintiffs' desire to avoid the constitutional problems involved in an APD claim likely has had the greatest impact.

II. BACKGROUND

A. *Pre-existing Remedies*

APD statutes stem from the distinct, but related, torts of defamation and product disparagement. Both arise from the defendant publishing a false negative statement.¹⁰ The difference is defamation involves a statement that damages the plaintiff's reputation, whereas disparagement relates to a statement about the plaintiff's products or services.¹¹

The modern cause of action for defamation is strictly constrained by First Amendment limitations.¹² The elements of defamation vary from case to case, both because the constitutional requirements differ depending on the circumstances and because different states have imposed further restrictions.¹³ However, it generally involves:

- (1) a statement of fact;
- (2) that is false;
- (3) and defamatory;

8. Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENVTL L. & POL'Y F. 17, 17 (1993) (explaining that SLAPP lawsuits are effective because "the average citizen dislikes going to court, cannot afford large attorney's fees, will be inconvenienced by court appearances and discovery, and will be less likely to speak out either during or after the suit"). See, e.g., ARIZ. REV. STAT. ANN. § 12-752 (Supp. 2010); GA. CODE ANN. § 9-11-11.1 (West 2003); LA. CODE CIV. PROC. ANN. art. 971 (2005).

9. See *infra* Section III(C).

10. See *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 932-33 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995).

11. *Id.* at 932.

12. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). See generally *Gitlow v. New York*, 268 U.S. 652 (1925) (the First Amendment's protection of speech applies to the states through the Fourteenth Amendment).

13. For further discussion of the constitutional limitations on defamation claims, see *infra* Section II(C).

(4) of and concerning the plaintiff;
(5) that is published to a third party. . . ;
(6) not absolutely or conditionally privileged;
(7) that causes actual injury. . . ;
(8) that is the result of fault by the defendant. . . ;
(9) that causes [actual pecuniary] harm in addition to generalized reputational injury.¹⁴

Unlike defamation, which compensates the plaintiff for damage to his or her reputation,¹⁵ APD statutes more closely resemble the common law cause of action for product disparagement.¹⁶ Product disparagement claims usually involve statements that a plaintiff's products or services are of poor quality.¹⁷ Most states have adopted the Restatement (Second) of Torts approach,¹⁸ which makes the defendant liable for the plaintiff's pecuniary loss¹⁹ if the plaintiff proves that the defendant: (1) intentionally (2) caused pecuniary loss to the plaintiff by (3) falsely stating a fact (4) to a third person, (5) knowing that the statement was false or recklessly disregarding its truth or falsity.²⁰

The Supreme Court has not decided the extent to which First Amendment protections apply to product disparagement.²¹ The Court has accepted, without deciding on, a district court's application of the First Amendment's actual malice requirement for defamation claims by public figures to claims for dis-

14. RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:34 (2d ed. 2010) (citations omitted).

15. *Id.*

16. Product disparagement is also known as "trade libel" and is one form of injurious falsehood, which also includes disparagement of land, personal property, and intangible things. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. a.

17. *See* 2 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 13:1:3 (3d ed. 2009) (citations omitted).

18. *See* 5 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 27:99 (4th ed. 1996) (discussing product disparagement cases in which the court applies the Restatement (Second) standard).

19. *See* RESTATEMENT (SECOND) OF TORTS § 633(1) (2011) ("The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.").

20. *Id.* at § 623A.

21. *See id.* at § 623A cmt. c ("In the absence of any indications from the Supreme Court on the extent, if any, to which the elements of the tort of injurious falsehood will be affected by the free-speech and free-press provisions of the First Amendment, it is not presently feasible to make predictions with assurance.").

paragement.²² Lower federal courts and state supreme courts have applied the First Amendment limitations on liability for defamation to disparagement.²³ These limitations, if they apply, make it more difficult for plaintiffs to prove their cases.²⁴

B. *The Rise of Agricultural Product Disparagement Statutes*

States enacted APD statutes in response to the Alar scandal in the 1980s.²⁵ Alar, a pesticide, caused widespread alarm after the Natural Resources Defense Council reported using it on apples causes cancer in humans.²⁶ Media outlets across the country—including, most famously, CBS's *60 Minutes*—picked up the story.²⁷ Following the *60 Minutes* story, apple sales decreased sub-

22. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984); *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1270–71 (D. Mass. 1981). Actual malice means the defendant either knew the statement was false or acted in reckless disregard of its truth or falsity. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). All other plaintiffs need only prove the defendant was negligent—or worse—whether the statement was true. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

23. See, e.g., *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1133 (9th Cir. 2003) (stating the actual malice standard applies to disparagement claims); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (subjecting disparagement claims to the same First Amendment limitations as defamation claims); *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1295 (Ohio 1995) (requiring plaintiffs to show actual malice in disparagement cases based on statements that are qualifiedly privileged under defamation law). The courts have been divided on whether to apply the “of and concerning” requirement from defamation claims. Compare *Gintert v. Howard Publ'ns, Inc.*, 565 F. Supp. 829, 833 (N.D. Ind. 1983) (forbidding a group of 165 lakefront homeowners to sue for slander of title based on a negative statement about the lake's environmental condition because they could not prove the statements were spoken of them specifically), and *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (applying First Amendment protections, including the “of and concerning” requirement), with *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 935 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995) (holding that statements questioning the safety of pesticide-treated apples satisfy the “of and concerning” element because the statements could be construed to be about each individual apple grower), and *Auvil v. CBS “60 Minutes,”* 67 F.3d 816, 823 (9th Cir. 1995) (affirming because the plaintiffs had not proven that the statements were false).

24. See *infra* Section II(C)(1)(b)(i) (further discussing First Amendment limitations on defamation claims and the probable application of these limitations to disparagement).

25. Jones, *supra* note 4, at 826; Wasserman, *supra* note 4, at 325.

26. Jones, *supra* note 4, at 827–28; Wasserman, *supra* note 4, at 325. Though the EPA has concluded Alar probably causes cancer in humans, the amount of risk it poses remains controversial. Compare ENVTL. PROT. AGENCY, DOCKET NO. EPA-HQ-OPP-2009-0242, DAMINOZIDE (ALAR) SUMMARY DOCUMENT REGISTRATION REVIEW: INITIAL DOCKET 12 (2009), with Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 699 (1999) (“the risk [posed by Alar] was vastly exaggerated”).

27. Jones, *supra* note 4, at 827; Wasserman, *supra* note 4, at 325.

stantially.²⁸ Subsequently, Washington apple growers sued CBS for common law product disparagement, but lost because they could not prove the statements were false.²⁹

After *Auvil v. CBS “60 Minutes,”* agricultural interests lobbied state legislatures to make it easier to recover damages for negative statements about agricultural products.³⁰ As a result, thirteen states passed APD statutes between 1991 and 1997.³¹ In general, these statutes impose civil liability for stating that any perishable agricultural product is unsafe or unhealthy, unless the statement is based on reasonable and reliable scientific data.³² North Dakota and South Dakota’s APD statutes also apply to statements about agricultural practices.³³

The elements of an APD statutory claim differ from common law product disparagement in several key respects, which make it easier for plaintiffs to win. First, a plaintiff in a defamation action can only recover for a statement that is “of and concerning”—meaning it clearly identifies—the plaintiff.³⁴ Although some courts also apply this requirement to claims for common law product

28. *Auvil v. CBS “60 Minutes,”* 67 F.3d 816, 819 (9th Cir. 1995).

29. *See id.* at 823.

30. Jones, *supra* note 4, at 822–23.

31. Louisiana was the first state to pass its APD statute, in 1991. *See* LA. REV. STAT. ANN. §§ 3:4501–4504 (2003). It was joined by Idaho in 1992 and Alabama and Georgia in 1993. *See* IDAHO CODE ANN. §§ 6-2001 to 03 (2010); ALA. CODE §§ 6-5-620 to 625 (LexisNexis 2005); GA. CODE ANN. §§ 2-16-1 to 4 (WEST 20). Four states—Colorado, Florida, Mississippi, and South Dakota—passed APD statutes in 1994. *See* COLO. REV. STAT. §§ 35-31-101, 104 (2011); FLA. STAT. ANN. § 865.065 (West 2000); MISS. CODE ANN. §§ 69-1-251 to 257 (West 2009); S.D. CODIFIED LAWS §§ 20-10A-1 to 4 (2004). Arizona, Oklahoma, and Texas followed in 1995. *See* ARIZ. REV. STAT. ANN. § 3-113 (2002); OKLA. STAT. ANN. tit. 2, §§ 5-100 to 102 (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–004 (West 2011). Ohio enacted its APD statute in 1996. *See* OHIO REV. CODE ANN. § 2307.81 (LexisNexis 2010). North Dakota was the last state to pass an APD statute; it did so in 1997. *See* N.D. CENT. CODE §§ 32-44-01 to 04 (2010).

32. *See* ALA. CODE §§ 6-5-620 to 625 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113 (2002); FLA. STAT. ANN. § 865.065 (West 2000); GA. CODE ANN. §§ 2-16-1 to 4 (West 2003); IDAHO CODE ANN. §§ 6-2001 to 03 (2010); LA. REV. STAT. ANN. §§ 3:4501–4504 (2003); MISS. CODE ANN. §§ 69-1-251 to 257 (West 2009); N.D. CENT. CODE §§ 32-44-01 to 04 (2010); OHIO REV. CODE ANN. § 2307.81 (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, §§ 5-100–5 to 102 (West 2003); S.D. CODIFIED LAWS §§ 20-10A-1 to 4 (2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–004 (West 2011). *But see* Colo. REV. STAT. §§ 35-31-101, 104 (2010) (imposing criminal liability only).

33. N.D. CENT. CODE § 32-44-01(2) (2010) (referring to “agricultural production practices”); S.D. CODIFIED LAWS § 20-10A-1(2004) (“generally accepted agricultural and management practices”).

34. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 288–89 (1964). A statement is “of and concerning” a plaintiff if it clearly identifies the individual plaintiff. *Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002); *see also* RESTATEMENT (SECOND) OF TORTS § 564A, cmt. b (1977) (a statement about a group is only “of and concerning” a particular group member if it clearly implicates the plaintiff, either because of the group’s small size or because of other circumstances). *See infra* Section III(C)(1)(b)(iii) (further discussing the “of and concerning” requirement).

disparagement,³⁵ some APD statutes allow plaintiffs to recover for statements that are not “of and concerning” them.³⁶ In addition, a plaintiff who is a public official or public figure must prove the defendant acted with actual malice—meaning the defendant knew the statement was false or acted in reckless disregard of its truth or falsity—to recover for defamation.³⁷ In contrast, the standard of care under APD statutes ranges from actually knowing that a statement is false,³⁸ to recklessness,³⁹ negligence,⁴⁰ and strict liability.⁴¹ Also, unlike in product disparagement and defamation actions,⁴² some APD statutes burden the de-

35. Compare *Gintert v. Howard Publ'ns, Inc.*, 565 F. Supp. 829 (N.D. Ind. 1983) (holding that a group of 165 lakefront homeowners could not sue for slander of title based on a negative statement about the lake's environmental condition because of the statement did not specifically identify them), and *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (First Amendment protections apply, including the “of and concerning” requirement), with *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 935 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995) (holding that statements questioning the safety of pesticide-treated apples generally may satisfy the “of and concerning” element because the statements could be construed to be about each individual apple grower), and *Auvil v. CBS “60 Minutes,”* 67 F.3d 816, 823 (9th Cir. 1995) (affirming because the plaintiffs had not proven that the statements were false).

36. The North Dakota statute allows every member of a group or class to recover for a false, defamatory statement about the group or class, regardless of the number of members. See N.D. CENT. CODE § 33-44-03 (2010). Other statutes allow for associations of producers to sue on behalf of their members, apparently regardless of how many, if any, of the members' products were mentioned with specificity. See ARIZ. REV. STAT. ANN. § 3-113(A) (2002); FLA. STAT. ANN. § 865.065(3) (West 2000); OHIO REV. CODE ANN. § 2307.81(D) (LexisNexis 2005) (referring to actions by associations of producers). Only Idaho's statute requires the statement be of and concerning the plaintiff's specific product, though a federal court read such a requirement into the Texas statute. See IDAHO CODE ANN. § 6-2002(1)(a) (2010); *Texas Beef Grp. v. Winfrey*, 201 F.3d 680, 685 (5th Cir. 2000).

37. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Many potential plaintiffs under APD statutes arguably are public figures. See *infra* notes 164–65 and accompanying text. Further, no plaintiff can recover without showing the defendant was negligent, or worse. *Gertz*, 418 U.S. at 350.

38. COLO. REV. STAT. § 35-31-101 (2011); MISS. CODE ANN. § 69-1-253(a) (West 2009); S.D. CODIFIED LAWS § 20-10A-1(2) (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(2) (West 2011).

39. IDAHO CODE ANN. § 6-2002(a)(1)(d); N.D. CENT. CODE § 32-44-01(6) (2010).

40. ARIZ. REV. STAT. ANN. § 3-113(E)(1) (2002); FLA. STAT. ANN. § 865.065(2)(a); LA. REV. STAT. ANN. § 3:4502(1) (2003); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003).

41. ALA. CODE § 6-5-623 (LexisNexis 2005).

42. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (noting plaintiffs are burdened with proving falsity in defamation cases concerning matters of public concern); SACK, *supra* note 17, at § 3:3.2 (citations omitted) (“The Supreme Court has not decided whether the Constitution permits liability for truthful speech that fails the ‘public concern’ test, for truthful speech that is not disseminated by the traditional media, or for both. Open or not, the latter question is largely academic. Only in the rarest cases have courts permitted liability in a defamation

defendant with proving a statement is true.⁴³ In addition, though a plaintiff may recover punitive damages for defamatory speech about a matter of public concern only if the defendant acted with actual malice,⁴⁴ most APD statutes arguably allow for punitive damages for such speech without regard to the defendant's state of mind.⁴⁵

C. Constitutional Criticisms

Many scholars believe that APD statutes violate the First Amendment's Free Speech Clause—as applied to the states through the Fourteenth Amendment—in several different ways.⁴⁶ First, APD statutes impermissibly discriminate based on the speaker's viewpoint.⁴⁷ Second, APD statutes that allow public figure plaintiffs to recover without showing the defendant acted with actual malice may violate the First Amendment because they do not require the plaintiff to prove the level of fault required for defamation claims.⁴⁸ Third, some APD statutes lack the requirement that the statement be “of and concerning” the plaintiff, which the First Amendment requires to recover under a defamation theory.⁴⁹ Fourth, some APD statutes unconstitutionally burden the defendant with proving the statement's truth.⁵⁰ Fifth, APD statutes violate the First Amendment by providing for punitive damages for speech about a matter of public concern with-

action based on a true and defamatory statement.”). The burden of proof requirements also likely apply to disparagement claims. *See infra* section II.C.1.b.i.

43. *See* ALA. CODE § 6-5-621(1) (a statement is “deemed to be false if it is not based on reasonable and reliable scientific inquiry, facts, or data.”); GA. CODE ANN. § 2-16-2(1) (West 2003) (giving a similar test); LA. REV. STAT. ANN. § 4502(1) (giving a similar test). This is problematic because it deters even arguably true statements because defendants “doubt whether it can be proved in court or fear . . . the expense of having to do so.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

44. Where the speech is about a matter of public concern or involves a public-figure plaintiff, the plaintiff must show actual malice in order to recover punitive damages. *See Phila. Newspapers, Inc.*, 475 U.S. at 775. The Constitution does not limit awards of punitive damages, however, where there is both a private plaintiff and the issue is one of private concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

45. ALA. CODE § 6-5-622; ARIZ. REV. STAT. ANN. § 3-113(A) (2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3; LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 69-1-255 (West 2009); N.D. CENT. CODE § 32-44-02 (2010); OHIO REV. CODE ANN. tit. 2, § 2307.81(4)(C) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2011). The health and safety of food is an issue of public concern. *See infra* note 158 and accompanying text.

46. *See* sources cited *supra* note 4.

47. *See infra* Section III(C)(1)(a)(i).

48. *See infra* Section III(C)(1)(b)(ii).

49. *See infra* Section III(C)(1)(b)(iii).

50. *See infra* Section III(C)(1)(b)(iv).

out requiring the plaintiff to prove actual malice.⁵¹ Sixth, they impose liability for political speech and are therefore subject to strict scrutiny, which they cannot withstand.⁵² Finally, some APD statutes could be interpreted as allowing plaintiffs to enjoin speech in advance—in violation of the First Amendment’s near-total prohibition of prior restraints.⁵³ These concerns are addressed further in Section III. C. 1.

D. Case Law

Despite the extensive discussion of APD statutes in law review articles and the media, they have only given rise to two reported cases, neither of which addressed their constitutionality.⁵⁴ The best-known of these, *Texas Beef Group v. Winfrey*, arose from statements on the Oprah Winfrey Show about Mad Cow Disease—a cattle disease linked to a fatal illness in humans, likely through consuming beef from cows who had been fed contaminated ruminant-derived protein supplements.⁵⁵ A guest on the show, Howard Lyman, warned that the United States risked a serious outbreak of the disease unless the FDA banned the practice of feeding cattle protein derived from other ruminant animals.⁵⁶ Winfrey later remarked that Lyman’s warnings “stopped [her] cold from eating another burger.”⁵⁷ A group of cattlemen sued Lyman, Winfrey, and the production company under Texas’s APD statute,⁵⁸ claiming the program caused the market price of beef to drop, thereby injuring their economic interest, even though none of the defendants mentioned Texas or any of the plaintiffs by name.⁵⁹ The trial court found that the plaintiffs had not met the statute’s requirements because live cattle

51. See *infra* Section III(C)(1)(b)(v).

52. See *infra* Section III(C)(1)(a)(ii).

53. See *infra* Section III(C)(1)(a)(iii).

54. As of January 2011, there have been two reported cases. See *Texas Beef Grp. v. Winfrey*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t v. Georgia*, 457 S.E.2d 273 (Ga. Ct. App. 1995).

55. *Texas Beef Grp.*, 11 F. Supp. 2d 858, 860–61 (N.D. Tex. 1998), *aff’d*, 201 F.3d 680 (5th Cir. 2000).

56. *Id.* at 861. A FDA ban on the practice became effective in August of 1997, sixteen months after the segment aired. 21 C.F.R. § 589.2000 (2010).

57. *Texas Beef Grp.*, 201 F.3d at 688.

58. TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–004 (West 2011); *Texas Beef Grp.*, 11 F. Supp. 2d at 858.

59. *Texas Beef Grp.*, 11 F. Supp. 2d at 860, 862. The plaintiffs also sued for common law defamation, statutory libel, negligence, and negligence per se. *Id.* at 860. The District Court dismissed the claims for common law defamation, statutory libel, negligence, and negligence per se. *Id.* at 863–84. The jury found for the defendants on a claim for business disparagement. *Texas Beef Grp.*, 201 F.3d at 682. The Fifth Circuit rejected the plaintiffs’ allegations of error on appeal. *Id.* at 689–90.

are not a perishable food product (to which the statute is limited) and the plaintiffs had not shown the defendants knew their statements were false.⁶⁰ The Fifth Circuit affirmed and—without reaching the issue of whether live cows are a perishable food product to which the statute applies—held that the defendants did not knowingly disseminate false information about beef.⁶¹ The *Texas Beef Group* litigation is noteworthy because it involved the type of speech (not specifically about individual plaintiffs) that would not have given rise to a common law claim for product disparagement because of the “of and concerning” requirement for such claims.⁶²

In the other reported case, *Clean Environment v. Georgia*, the Georgia Court of Appeals affirmed the dismissal of a constitutional challenge to Georgia’s APD statute brought by environmental watchdog groups against the state.⁶³ The court found there was no justiciable controversy because the state did not have any interest adverse to the plaintiffs and had not denied them any right.⁶⁴

III. DISCUSSION

The question of why so few plaintiffs have brought APD suits remains unanswered. Three factors appear to have acted in concert to bring about this result. First, as predicted, threats of lawsuits have chilled at least some speech. Secondly, the enactment of statutes that penalize plaintiffs who bring frivolous lawsuits designed to silence criticism anti-strategic litigation against public participation statutes (“anti-SLAPP” statutes), has likely prevented some non-meritorious APD suits. Finally, an APD claim would likely generate a successful First Amendment challenge.⁶⁵ Therefore, reasonable plaintiffs avoid such claims and instead sue under the constitutionally sound common law causes of

60. *Texas Beef Grp.*, 11 F. Supp. 2d at 863.

61. *Texas Beef Grp.*, 201 F.3d at 687–89. The court held Lyman’s statements did not contain any “provably false factual connotation” and “were based on factually accurate premises.” *Id.* at 688. In addition, the program included (and did not misrepresent) the views of the guests who spoke in defense of the cattle industry. *Id.* at 689.

62. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 81–82 (1966) (noting that a statement must be “of and concerning” the plaintiff to give rise to a claim for defamation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288–89 (1964) (reaching a similar decision). *See also Wasserman, supra* note 4, at 337 (noting that such speech “would not have been actionable under common law principles but became actionable under [some] APD statutes.”).

63. *Action for a Clean Env’t*, 457 S.E.2d 273, 273–74 (Ga. Ct. App. 1995); *see GA. CODE ANN. §§ 2-16-1 to 4* (West 2003).

64. *Action for a Clean Env’t*, 457 S.E.2d at 274; *GA. CODE ANN. §§ 2-16-1 to 4*.

65. *See sources cited supra* note 4. *See also infra* Section III(C)(1) (discussing why a court would likely find an APD statute unconstitutional).

action of product disparagement and defamation.⁶⁶ These factors have combined to prevent the extensive litigation that many predicted APD statutes would create.⁶⁷

A. *APD Statutes May Have Prevented Litigation by Chilling Criticism that Would Give Rise to a Claim*

Many scholars and journalists predicted APD statutes would silence people who might otherwise express concerns about food safety.⁶⁸ Though there is anecdotal evidence that this has happened,⁶⁹ one only has to watch television, read the news, or pick up a best-selling book to find allegations that agricultural products or processes are unsafe or unhealthy.⁷⁰ This discrepancy raises the question of how much APD statutes really chill such speech.

1. *Theoretical Arguments About Why APD Statutes Chill Speech*

APD statutes chill speech for several reasons.⁷¹ First, a statement must be false in order to be actionable under an APD statute, but these statutes define falsity according to a vague standard: whether the statement is based on reasonable and reliable science.⁷² This is vague because “[m]any environmental science disputes are reducible to differences of opinion on the appropriate methodology, degree of uncertainty or likelihood of uncertain outcomes or causation, or

66. See *Auvil v. CBS* “60 Minutes,” 800 F. Supp. 928, 932–33 (E.D. Wash. 1992), *aff’d*, 67 F.3d 816 (9th Cir 1995).

67. As of January 2011, there have been two reported cases. See generally *Texas Beef Grp. v. Winfrey*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t*, 457 S.E.2d 275 (Ga. Ct. App. 1995).

68. See sources cited in *supra* note 5.

69. See *infra* Section III(C)(2).

70. See POLLAN, *supra* note 1, at 108 (alleging corn products are a main contributor to the country’s obesity epidemic); Siegel, *supra* note 2; *The Daily Show*, *supra* note 1.

71. The chilling effect may be exacerbated by the use of the Internet because agricultural producers can find a record of negative comments through a simple search. See Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES, May 31, 2010, http://www.nytimes.com/2010/06/01/us/01slapp.html?_r=2&scp=1&sq=anti-SLAPP&st=cse.

72. See ALA. CODE § 6-5-621(1) (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113(E)(1) (2002); FLA. STAT. ANN. § 865.065(2)(a) (West 2000); GA. CODE ANN. § 2-16-2(1) (West 2003); LA. REV. STAT. ANN. § 3:4502(1) (2003); MISS. CODE ANN. § 69-1-253(a) (West 2009); N.D. CENT. CODE § 32-44-01(5) (2010); OHIO REV. CODE ANN. § 2307.81(B)(2) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West 2011). However, Colorado, Idaho, and South Dakota do not define falsity. See COLO. REV. STAT. §§ 35-31-101 (2010), 35-31-104; IDAHO CODE §§ 6-2001 to -2003 (Michie 2004); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (2004).

involve scientific hypotheses or allegations of risk that cannot be proved or disproved.⁷³ As a result, a jury could award damages based on “some perfectly valid scientific ideas and conclusions,”⁷⁴ and speakers remain silent rather than risk liability.⁷⁵ This chilling effect is increased when the defendant bears the burden of proving a statement’s truth, as is the case under some APD statutes.⁷⁶ Finally, some statutes have an even stronger chilling effect because they could be interpreted as allowing injunctive relief—a prior restraint on speech.⁷⁷ Prior restraints have “an immediate and irreversible sanction,”⁷⁸ preventing the public from receiving the information it needs to engage in informed discussions about public issues. In addition, a well-heeled plaintiff might bring a non-meritorious suit in order to intimidate future speakers through the threat of expensive litigation. Proving that a statement is scientifically supported requires expert testimony, which can cost a great deal of money.⁷⁹ Many people stay silent because they cannot afford to risk such a lawsuit, even if they believe their concerns about food safety are legitimate. Finally, the time and stress involved in litigation is, in itself, a deterrent.⁸⁰

73. Robert R. Kuehn, *Suppression of Environmental Science*, 30 AM. J.L. & MED. 333, 347 (2004). One such example is the disagreement about the causes of climate change: “although the weight of scientific evidence suggests that large-scale emissions of greenhouse gases are likely to change [the] climate, there are so many uncertainties about the roles of clouds, carbon sinks, and various possible feedbacks that both greenhouse ‘hawks’ and ‘doves’ can reasonably enlist science as an ally while accusing their opponents of misusing science.” Dale Jamieson, *Scientific Uncertainty and the Political Process*, 545 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 36 (1996).

74. Wasserman, *supra* note 4, at 389.

75. See Jones, *supra* note 4, at 859.

76. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (burdening the defendant with proving a statement’s truth deters truthful speech “because of doubt whether it can be proved in court or fear of the expense of having to do so.”).

77. See ALA. CODE § 6-5-622 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113(A) (2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3 (West 2003); LA. REV. STAT. ANN. § 3:4503 (2003); MISS. CODE ANN. § 69-1-255 (West 2009); N.D. CENT. CODE § 32-44-02 (2010); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2011); Amy B. Gimensky & Kathy E. Ochroch, *Damages*, LIBEL DEF. RESOURCE CENTER BULL.: AGRICULTURAL DISPARAGEMENT LAWS 61, 64 (1998). Prior restraints on speech are presumptively unconstitutional. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 149 (1967). See also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (noting the main purpose of the First Amendment’s protection of speech is to prohibit prior restraints).

78. *Neb. Press*, 427 U.S. at 559.

79. See Jones, *supra* note 4, at 840.

80. See Merriam & Benson, *supra* note 8, at 17 (“While [a plaintiff] may realize that her SLAPP [(strategic lawsuit against public participation)] suit has no chance of winning on the merits, she knows that the average citizen dislikes going to court, cannot afford large attorney’s fees,

2. Examples of APD Statutes' Chilling Effect

The prospect of defending an APD lawsuit has deterred some people who would otherwise speak out about food safety. Floyd Abrams, a First Amendment lawyer whose clients include media companies, confirmed this chilling effect, remarking that many smaller publishers are concerned about being sued and “do not want to be part of some test case.”⁸¹ For example, in 1998, one publisher cancelled a book—even though the manuscript had already gone to the printer—after receiving a letter from Monsanto’s attorney saying “he believed the manuscript, which he had not seen, included false statements that would disparage” Monsanto’s herbicide, Roundup.⁸² The book’s co-author said that the publisher’s lawyer already had approved the book, but later changed his or her mind because of concerns about being sued under various states’ APD statutes.⁸³ The publisher confirmed this suspicion stating, “I was scared. . . . As soon as I told my insurance agent about the letter, he would not return any of my calls. I had no choice. I had to let go of the book.”⁸⁴ Similarly, Alec Baldwin claims that in the late-1990s, the Discovery Channel denied his proposal for a documentary about “pesticides, herbicides, and some disputed practices used to raise beef” because it feared an APD lawsuit.⁸⁵

This chilling effect is not limited to the media, however. For instance, one Sierra Club volunteer worried, “[w]hen I give speeches [about genetically modified foods (“GMOs”)] . . . I’m even afraid to say, ‘This might be unsafe,’ because I’m fearful I could get sued [under Ohio’s APD statute].”⁸⁶ She also noted other volunteers repeatedly asked her whether they could get sued for helping her hand out a brochure about GMOs.⁸⁷ Another instance occurred in 1997 when the United Fresh Fruit and Vegetable Association demanded that an environmental group “stop distributing reports questioning the safety of irradiating fruits and vegetables” or else risk an APD lawsuit.⁸⁸ These are just some of the reported instances of chilled speech stemming from APD statutes.⁸⁹

will be inconvenienced by court appearances and discovery, and will be less likely to speak out either during or after the suit.”).

81. Petersen, *supra* note 5, at C11.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The Discovery Channel denies this allegation. *Id.*

86. *Id.*

87. *Id.* These events occurred in Ohio in 1999, three years after Ohio passed its APD statute. *See id.*; OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2010).

88. *Id.*

89. *See Jones, supra* note 4, at 857–58 (reporting other instances of APD statutes’ chilling effect).

The following example illustrates how the threat of a lawsuit chills speech. Although it does not involve speech actionable under an APD statute,⁹⁰ it shows the type of litigation experience that deters some would-be speakers. In the late 1990s, Jane Akre and Steve Wilson were investigative reporters employed by a Fox affiliate.⁹¹ They created a segment in which they concluded that drinking milk from cows treated with the bovine growth hormone, which is produced by Monsanto, might cause cancer in humans.⁹² After Monsanto threatened to sue, the station pulled the story for an eight-month-long “re-review,” during which Fox’s lawyers “remov[ed] a reference to cancer and insert[ed] statements that [Akre and Wilson] had demonstrated to be false.”⁹³ Fox then fired Akre and Wilson after they threatened to report Fox to the Federal Communications Commission (“FCC”) for violating the FCC’s policy against news distortion.⁹⁴

They sued the station, claiming they were fired in retaliation for threatening to report the alleged news distortion.⁹⁵ Though Akre won at trial, an appellate court reversed because the state whistleblower statute only punished retaliation in response to an employee’s threat to disclose a violation of “law, rule, or regulation,” and the FCC’s policy (developed in administrative proceedings) was not a “law, rule, or regulation” because the FCC had not published it “as a regulation with definitive elements and defenses.”⁹⁶

The chilling effect of APD statutes is likely even more severe than in cases like Akre and Wilson’s because APD statutes often burden the defendant with proving the statement’s truth and may impose a prior restraint on speech by allowing injunctive relief. However, Akre and Wilson’s example illustrates how a chilling effect works. First, Monsanto successfully prevented the station from broadcasting negative information about its products: the threat of costly litigation outweighed the benefit to the station of informing the public about food safe-

90. Akre and Wilson, who worked at a Fox affiliate in Florida, questioned the safety of the bovine growth hormone, which is not actionable under Florida’s APD statute because it is not a perishable food product. *New World Commc’ns of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1232 (Fla. Dist. Ct. App. 2003); Jane Akre & Steve Wilson, *Modern Media’s Environmental Coverage: What We Don’t Know Can Hurt Us*, 33 B.C. ENVTL. AFF. L. REV. 551, 551–52 (2006). See also FLA. STAT. ANN. § 865.065(2)(b)–(c) (West 2000).

91. *New World Commc’ns*, 866 So. 2d at 1232; Akre & Wilson, *supra* note 90, at 551–52.

92. *New World Commc’ns*, 866 So. 2d at 1232; Akre & Wilson, *supra* note 90, at 551–53.

93. Akre & Wilson, *supra* note 90, at 553–54.

94. *New World Commc’ns*, 866 So. 2d at 1233; Akre & Wilson, *supra* note 90, at 554.

95. *New World Commc’ns*, 866 So. 2d at 1233; Akre & Wilson, *supra* note 90, at 554–55.

96. *New World Commc’ns*, 866 So. 2d at 1233.

ty.⁹⁷ Second, when Akre and Wilson attempted to “stand[] up for the truthfulness of [their] story” by suing for retaliatory dismissal, they incurred extensive legal fees⁹⁸ and ultimately lost on a technicality.⁹⁹

3. How Much Do APD Statutes Really Chill Speech?

In addition to the known examples of threatened APD suits silencing critics, many incidents likely go unreported,¹⁰⁰ perhaps because the would-be speakers are too intimidated or have too little access to the media to make their mistreatment known. Although celebrities like Oprah Winfrey and Michael Polan appear undeterred by the threat of litigation, they are different from most potential defendants because they likely have enough money to defend an APD lawsuit and because the publicity that such a lawsuit would generate would probably increase their revenue—either through increased book sales or improved ratings.¹⁰¹ Thus, APD statutes appear to chill some, though not all, criticism of agricultural interests—regardless of a statement’s objective truth or falsity.

B. Anti-SLAPP Statutes May Have Prevented Some Frivolous APD Suits

Chilled speech cannot alone explain the dearth of case law involving APD statutes. Another possible explanation is that three states with APD statutes also have enacted anti-SLAPP statutes.¹⁰² Anti-SLAPP statutes allow a court to dismiss a frivolous lawsuit that is based on the defendant exercising his or her right of free speech or right to petition the government.¹⁰³ States enacted anti-

97. See Akre & Wilson, *supra* note 90, at 554.

98. *Id.* They had already spent \$50,000 on attorney fees after just eight weeks of depositions, which “Fox knew . . . would cost [them] large sums of money” and ultimately, generated “many hundreds of thousands of dollars” in such fees. *Id.* at 555.

99. See *New World Commc’ns*, 866 So. 2d at 1233.

100. *Cf.* Peterson, *supra* note 5, at C11 (quoting Rodney A. Smolla, “It is very hard to document people who don’t speak. You’re documenting silence.”).

101. *Cf.* Sam Howe Verhovek, *Gain for Winfrey in Suit by Beef Producers in Texas*, N.Y. TIMES, Feb. 18, 1998, <http://www.nytimes.com/1998/02/18/us/gain-for-winfrey-in-suit-by-beef-producers-in-texas.html> (describing the *Texas Beef* trial as a “high-profile spectacle during which Ms. Winfrey has cast herself as martyr and taped her national program before packed audiences at Amarillo’s Little Theater”).

102. See ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (Supp. 2010); GA. CODE ANN. § 9-11-11.1 (West 2003); LA. CODE CIV. PROC. ANN. art. 971 (2005). Florida also has an anti-SLAPP statute, but it only applies to governmental plaintiffs, and so it is not relevant here. See FLA. STAT. ANN. § 768.295 (West 2005). Congress also considered, but did not pass, a federal anti-SLAPP law. See Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).

103. See ARIZ. REV. STAT. ANN. §§ 12-751 to 752; GA. CODE ANN. § 9-11-11.1; LA. CODE CIV. PROC. ANN. art. 971.

SLAPP statutes to prevent plaintiffs from bringing frivolous—but costly to defend—lawsuits aimed at preventing discussions about public issues by intimidating potential speakers with the prospect of incurring extensive legal fees.¹⁰⁴ This is the very sort of lawsuit people feared would result from APD statutes.

Anti-SLAPP statutes may have prevented some APD suits, but their effect is probably quite limited.¹⁰⁵ To the extent an anti-SLAPP statute applies, it potentially is very effective in preventing an APD SLAPP lawsuit because the anti-SLAPP statutes not only require dismissal if the statute's requirements are met, but also allow the defendant to recover attorney's fees.¹⁰⁶ However, anti-SLAPP statutes' effectiveness is limited by their scope and by the fact that they exist in only three states that have APD statutes.¹⁰⁷ The Louisiana statute has the broadest scope: it covers almost all speech that would be actionable under its APD statute.¹⁰⁸ The Louisiana anti-SLAPP statute applies to any statement or writing about an issue of public interest that was "made in a place open to the public or a public forum."¹⁰⁹ Consequently, it is a very effective tool in fighting frivolous APD lawsuits. By contrast, Arizona's anti-SLAPP statute is the most limited.¹¹⁰ It applies only to statements made in petitions to a governmental body or as "part of an initiative, referendum, or recall effort."¹¹¹ It therefore does not protect most speech that could give rise to liability under Arizona's APD statute.¹¹² Finally, Georgia's anti-SLAPP statute strikes a middle ground: it applies to statements made to governmental entities or in connection with an issue a gov-

104. See, e.g., GA. CODE ANN. § 9-11-11.1(a) (West 2003).

105. Of course, it is impossible to state their effect with any certainty because would-be SLAPP plaintiffs are unlikely to admit their motivations.

106. See ARIZ. REV. STAT. ANN. § 12-752(D) (2003); GA. CODE ANN. § 9-11-11.1(b); LA. CODE CIV. PROC. ANN. art. 971(B).

107. The year in which each state passed its anti-SLAPP statute is also relevant in explaining its effect on the number of APD lawsuits brought. Georgia and Louisiana's anti-SLAPP statutes have likely had a more extensive effect than Arizona's because they enacted their anti-SLAPP shortly after their APD statutes, unlike Arizona, which did not enact its anti-SLAPP statute until 2006, eleven years after enacting its APD statute. See ARIZ. REV. STAT. ANN. § 3-113; ARIZ. REV. STAT. ANN. §§ 12-751 to 752 (Supp. 2010). Georgia enacted its APD statute in 1993, just two years after its anti-SLAPP. See GA. CODE ANN. §§ 2-16-1 to 2-16-4, 9-11-11.1 (West 2003 & Supp. 2010). Louisiana enacted its APD statute in 1991 and its anti-SLAPP statute in 1999. See LA. REV. STAT. ANN. §§ 3:450–3:4504 (2003); LA. CODE CIV. PROC. ANN. art. 971 (2005).

108. LA. CODE CIV. PROC. ANN. art. 971(A)(1), E(1)(c); LA. REV. STAT. ANN. 6 §§ 3:450–3:4504.

109. LA. CODE CIV. PROC. ANN. art. 971(A)(1), (E)(1)(c).

110. Compare ARIZ. REV. STAT. ANN. § 12-751(1), 12-752(A) (Supp. 2010), with LA. CODE CIV. PROC. ANN. art. 971 (2005), and GA. CODE ANN. §§ 9-11-11.1(b), (c) (West Supp. 2010).

111. ARIZ. REV. STAT. ANN. §§ 12-751(1), 12-752(A).

112. See *id.*

ernmental entity is considering.¹¹³ Therefore, it applies to many statements actionable under the state's APD statute—statements about government-regulated agricultural practices, such as the use of certain pesticides, could be considered statements about government regulation of them¹¹⁴—but excludes others, such as those about agricultural practices that the government is not currently regulating.¹¹⁵

In theory, anti-SLAPP statutes could substantially reduce the number of APD suits brought—at least in Louisiana and Georgia because their statutes cover more speech.¹¹⁶ However, their impact seems quite limited because (1) there have only been two reported cases involving APD statutes,¹¹⁷ and (2) only three out of the twelve states that provide a private cause of action under an APD statute have anti-SLAPP statutes.¹¹⁸ Therefore, some other factor must be limiting the number of APD lawsuits.

C. *Plaintiffs May Avoid APD Suits in Favor of Constitutionally Valid Common Law Causes of Action*

Plaintiffs want to achieve their litigation goals without incurring any more legal fees than they must. They do not want to waste time and money on claims that will likely fail, especially when there are other, effective remedies. A court that considers an APD statute's constitutionality would likely hold that it violates the First Amendment's free speech clause.¹¹⁹ Therefore, a reasonable plaintiff will not pursue such a claim if there are alternative, constitutionally valid causes of action.¹²⁰ In fact, common law disparagement and defamation sufficiently protect a plaintiff's legitimate interest in recovering for pecuniary harm caused by a false, disparaging statement about the plaintiff's agricultural product.¹²¹ This may explain why there have been so few cases involving APD statutes.

113. GA. CODE ANN. § 9-11-11.1(b), (c).

114. Wasserman, *supra* note 4, at 381.

115. See GA. CODE ANN. §§ 9-11-11.1(b), (c).

116. See LA CODE CIV. PROC. ANN. art. 971(A)(1), (E)(1)(c) (2005); GA. CODE ANN. §§ 9-11-11.1(b), (c).

117. See sources cited in *supra* note 7.

118. See sources cited in *supra* note 102.

119. See *infra* Section III(C)(1).

120. In 2000, Eileen Gay Jones hypothesized that perhaps this explained why there had been so little APD litigation, but did not elaborate on this point. Jones, *supra* note 4, at 833–34. Ten years later, there have been no additional reported cases, and this hypothesis merits further exploration.

121. See sources cited in *supra* note 66.

1. A Court Would Likely Find an APD Statute to be Unconstitutional

The First Amendment, which applies to state action through the Fourteenth Amendment,¹²² provides “Congress shall make no law . . . abridging the freedom of speech.”¹²³ This protection of speech extends to private causes of action because they can restrict speech just as much as direct government action.¹²⁴ Despite the Amendment’s absolutist language, the government may—subject to judicially-imposed limitations—prohibit certain types of expression.¹²⁵ For example, individuals do not have free reign to engage in defamation.¹²⁶

APD statutes probably violate the First Amendment free speech clause in several ways.¹²⁷ These constitutional violations fall into two categories. The first includes violations that exist regardless of whether APD claims are subject to the same First Amendment limitations as claims for defamation. The second category of violations contains those that arise if the constitutional limitations on defamation claims also apply to APD claims.¹²⁸

122. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

123. U.S. CONST. amend. I.

124. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

125. The government may restrict incitements to violence, fighting words, obscenity and child pornography. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Miller v. California*, 413 U.S. 15, 23–24 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words).

126. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

127. Some state legislatures rejected bills that would have created an APD cause of action because they believed the bill to violate the First Amendment. *See* COMM. ON THE JUDICIARY & FAMILY LAW, H.R. REP. ON H.B. 1105, at 1 (N.H. 1998) (finding “this bill . . . constitute[s] an attack on the 1st Amendment rights basic to our democracy.”); *Agricultural Food Products Trade Libel: Hearing on S.B. 492 Before the S. Judiciary Comm.*, 1995 Leg., 1995–1996 Reg. Sess. 8–9 (Cal. 1998) (noting concerns that the bill’s omission of an “of and concerning” requirement or burdening the defendant with proving the statement’s truth might violate the First Amendment).

128. The First Amendment limitations on defamation claims probably also apply to APD claims. *See infra* Section III(C)(1)(b)(i). One cannot state this with certainty, however, because the Supreme Court has only considered one common law product disparagement claim, and neither of the reported cases on APD statutes addressed their constitutionality. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 487 (1984); *see generally* *Texas Beef Grp. v. Winfrey*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t v. Georgia*, 457 S.E.2d 273 (Ga. Ct. App. 1995).

a. *APD Statutes Violate the First Amendment, Regardless of Whether a Court Applies the Constitutional Limitations on Defamation Claims to Them*

Even if a court does not apply the First Amendment limitations on defamation to APD claims, APD claims still violate the First Amendment in three ways. First, they discriminate based on the speaker's viewpoint.¹²⁹ Second, because APD statutes impose liability for political speech, they are subject to strict scrutiny, which they cannot withstand.¹³⁰ Finally, they impose an unconstitutional prior restraint on speech by allowing for injunctive relief.¹³¹

i. *APD Statutes Involve Unconstitutional Viewpoint Discrimination*

APD statutes unconstitutionally discriminate based on the speaker's viewpoint. Laws that restrict speech based on its content are subject to strict scrutiny because they "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."¹³² Viewpoint discrimination—restricting only some views on a given subject—is the worst form of content-based discrimination, and laws that discriminate based on viewpoint "might be virtually *per se* unconstitutional."¹³³

APD statutes discriminate based on viewpoint because they "provide a cause of action against . . . statements that cast doubt on the safety of agricultural products and are not based on reasonable and reliable scientific inquiry, facts, and data" but not against statements that such products are safe and healthy, regardless of whether those statements are based on any science at all.¹³⁴ Surely, this is the epitome of viewpoint discrimination.

Even if viewpoint discriminatory laws are not *per se* unconstitutional, APD statutes fail strict scrutiny. A statute can only withstand strict scrutiny if it

129. See *infra* Section III(C)(1)(a)(i).

130. See *infra* Section III(C)(1)(a)(ii).

131. See *infra* Section III(C)(1)(a)(iii).

132. *Turner Broad. Sys., Inc. v. Fed. Comm'n Comm'n*, 512 U.S. 622, 641–42 (1994).

133. *Wasserman, supra* note 4, at 366; see *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). See also Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 475 (1986) ("[A]lthough the Court has never expressly held that such restrictions are *per se* unconstitutional, one might fairly read that lesson into the actual record of the Court's decisions.").

134. *Wasserman, supra* note 4, at 367–68.

is narrowly tailored to serve a compelling government interest.¹³⁵ A law is not narrowly tailored if it is under-inclusive, meaning that it does not affect other speech that damages the same interest.¹³⁶ This is because under-inclusive laws may represent a governmental “attempt to give one side of a debatable public question an advantage in expressing its views to the people.”¹³⁷ APD statutes are under-inclusive because they apply only to disparaging statements about perishable agricultural products, but not to statements about non-perishable food items, much less to statements about the products of other industries.¹³⁸ Concern about protecting the public from false information is not limited to information about perishable food products, and damage to other industries may negatively impact the state economy just as much as damage to the agriculture industry.¹³⁹ Thus, APD statutes fail strict scrutiny, and therefore violate the First Amendment.

ii. *APD Statutes Impose Liability Based on Political Speech and, Therefore, are Subject to Strict Scrutiny, Which They Fail*

Political speech is the most protected form of expression because it is essential for democratic governance.¹⁴⁰ Restrictions on political speech are subject to strict scrutiny, meaning that they must be narrowly tailored to serve a compelling state interest.¹⁴¹ Political speech includes—but is not limited to—attempts to influence “issue-based elections.”¹⁴² Much of the speech actionable under APD statutes is political speech: people often voice concerns about food safety in order to change—and, indeed, often succeed in changing—government policy.¹⁴³ For example, the FDA banned Alar following the *60 Minutes* report on its cancer

135. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334, 347 (1995).

136. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). The reason for this is that doing so may represent a governmental “attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978).

137. *Bellotti*, 435 U.S. at 785–86.

138. See Wasserman, *supra* note 4, at 376–77.

139. *Id.* at 378.

140. *McIntyre*, 514 U.S. at 346; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”)).

141. *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 898 (2010); *McIntyre*, 514 U.S. at 347.

142. *McIntyre*, 514 U.S. at 347; see also *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988) (regarding circulating a petition for a ballot initiative).

143. See Wasserman, *supra* note 4, at 382.

risk;¹⁴⁴ the ban on feeding ruminant-derived protein to cows followed the Oprah broadcast;¹⁴⁵ and Upton Sinclair's *The Jungle*, a book about disgusting practices in the meatpacking industry, "is widely credited with providing the decisive push for passage of the Pure Food and Drug Act of 1906, only six months after publication."¹⁴⁶ In addition, the South Dakota APD statute applies to statements against "generally accepted agricultural and management practices,"¹⁴⁷ which the government often regulates. As a result, criticizing those practices is the same thing as criticizing "government policies that regulate, condone, and require" them.¹⁴⁸ Because APD statutes make political speech actionable, they are subject to strict scrutiny.¹⁴⁹ As discussed above, APD statutes fail strict scrutiny because they are underinclusive.¹⁵⁰

iii. APD Statutes Violate the First Amendment by Potentially Imposing a Prior Restraint on Speech

The government imposes a prior restraint on speech when it limits or prohibits speech in advance,¹⁵¹ such as through temporary restraining orders and permanent injunctions. It is generally accepted that the most important—though not sole—purpose of the First Amendment's protection of freedom of speech and the press is to prevent prior restraints upon publication.¹⁵² Prior restraints are particularly dangerous in a democracy because "[o]pen debate and discussion of public issues are vital for our national health."¹⁵³ Prior restraints prevent the public from receiving the information they need to engage in such discussions.¹⁵⁴

Some APD statutes could be interpreted as allowing injunctive relief, thereby imposing prior restraints.¹⁵⁵ Prior restraints are strongly presumed to be

144. *Id.*; *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 930 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995).

145. *Texas Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 865-66 app. A (1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000); Wasserman, *supra* note 4, at 382.

146. Wasserman, *supra* note 4, at 382; *see generally*, Pure Food and Drug Act of 1906, 21 U.S.C. § 301 (1906).

147. S.D. CODIFIED LAWS § 20-10a-1(2) (2004).

148. Wasserman, *supra* note 4, at 380-81; *see* S.D. CODIFIED LAWS § 20-10a-1(2) (2004).

149. *See McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 347 (1995).

150. *See supra* Section III(C)(1)(ii).

151. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 541 (1976).

152. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

153. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

154. *Id.*

155. Gimensky & Ochroch, *supra* note 77, at 64. *See* ALA. CODE § 6-5-622 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113(A) (2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3 (West 2003); LA. REV. STAT. ANN. § 3:4503 (2003); MISS. CODE ANN. § 69-1-

unconstitutional, even if it would be permissible to punish the speech after the fact.¹⁵⁶ Prior restraints are only permitted in certain exceptional circumstances, “where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.”¹⁵⁷ An example of such an exceptional circumstance is where speech creates a clear and present danger to national security, such as publishing “the sailing dates of transports or the number and location of troops.”¹⁵⁸ The only potential justification for allowing a court to enjoin statements (even if false) that an agricultural product is unsafe or unhealthy is to prevent economic harm to either the producer or the state economy. The risk of economic harm cannot justify imposing a prior restraint.¹⁵⁹ Even if it could, the risk of such harm cannot be merely speculative.¹⁶⁰ An injunction under an APD statute would be similar to the situation in *CBS, Inc. v. Davis*.¹⁶¹ In that case, the Supreme Court stayed an injunction aimed at preventing CBS from airing videotape of unsanitary practices at a meatpacking plant.¹⁶² The lower court had issued the injunction because it concluded that airing the footage would cause people to stop purchasing meat products from that plant.¹⁶³ The Supreme Court held that even if economic harm could justify a prior restraint, this alleged harm was impermissibly speculative because it was based on “factors unknown and unknowable.”¹⁶⁴ Similarly, any economic harm caused by negative statements about an agricultural product is based on unknown factors, such as the public’s reaction. For these reasons, APD statutes are unconstitutional to the extent that they allow injunctive relief.

255 (West 2009); N.D. CENT. CODE § 32-44-02 (2010); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2011).

156. *Near*, 283 U.S. at 713; *see also Neb. Press Ass’n*, 427 U.S. 539; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

157. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

158. *Near*, 283 U.S. at 716; *see* 16b C.J.S. CONSTITUTIONAL LAW § 809 [hereinafter C.J.S. § 809] (describing other exceptional circumstances in which prior restraints are permitted).

159. *People v. Bryant*, 94 P.3d 624, 629 (Colo. 2004); C.J.S. § 809, *supra* note 158.

160. *CBS, Inc.*, 510 U.S. at 1318.

161. *See id.*

162. *Id.* at 1315, 1318.

163. *Id.* at 1316.

164. *Id.*; *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 563 (1976).

b. *APD Statutes Involve Additional First Amendment Violations if They are Subject to the Constitutional Restrictions on Claims for Defamation*

APD statutes violate the First Amendment in several additional ways if they are subject to the same constitutional restrictions as defamation claims. First, APD statutes that allow public figure plaintiffs to recover without showing the defendant acted with actual malice imposes liability upon the plaintiff showing a lesser degree of fault than is required for defamation claims.¹⁶⁵ Secondly, some APD statutes do not require the statement be “of and concerning” the plaintiff, which the First Amendment requires to recover for defamation.¹⁶⁶ Thirdly, some APD statutes unconstitutionally burden the defendant with proving the statement’s truth.¹⁶⁷ Finally, APD statutes violate the First Amendment by allowing punitive damages for speech about a matter of public concern without requiring the plaintiff to prove actual malice.¹⁶⁸

i. *The First Amendment Requirements for Defamation Claims Should Apply to Claims Under APD Statutes*

The First Amendment strictly limits liability for defamation.¹⁶⁹ The Supreme Court has not decided the extent to which these limits apply to common law disparagement and APD claims.¹⁷⁰ Lower federal courts and state courts have directly applied the constitutional limitations on defamation to common law disparagement.¹⁷¹ Doing so makes sense: both involve alleged damage caused by publishing a false, negative statement. The difference is defamation involves personal reputation and disparagement involves a product. Therefore, “[a]ny argument that disparagement is not subject to the same constitutional limits as defamation ultimately must rest on the notion that speech about things is less

165. See *infra* Section III(C)(1)(b)(i).

166. See *infra* Section III(C)(1)(b)(ii).

167. See *infra* Section III(C)(1)(b)(iii).

168. See *infra* Section III(C)(1)(b)(iv).

169. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

170. See RESTATEMENT (SECOND) OF TORTS § 623A, cmt. c (1977).

171. See, e.g., *Auvil v. CBS “60 Minutes,”* 800 F.Supp. 928, 935 (E.D. Wash. 1992), *aff’d*, 67 F.3d 816 (9th Cir. 1995) (the “of and concerning” requirement applies to disparagement claims); *Auvil v. CBS “60 Minutes,”* 67 F.3d 816, 820 (9th Cir. 1995) (applying *Sullivan*’s falsity and actual malice requirements to disparagement claims); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182–83 (Cal. 1986) (First Amendment protections apply, including the “of and concerning” requirement); *Teilhaber Mfg. Co. v. Unarco Materials Storage*, 791 P.2d 1164 (Colo. App. 1989) (similar); *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1295 (Ohio 1995) (the plaintiff must show actual malice).

important, and thus less worthy of protection, than speech about individuals.”¹⁷² However, the opposite is true. After all, what could be of greater concern to the public than the health and safety of the food it eats?¹⁷³

These limitations should also apply to APD statutes. If the First Amendment only constrains common law claims, then those seeking to infringe on individual liberties could do so simply by creating statutory claims. Furthermore, limiting liability in this way is consistent with the principle that the First Amendment requires “giv[ing] the benefit of [the] doubt to protecting rather than stifling speech,”¹⁷⁴ and with the Court’s application of First Amendment protections when the alleged harm is damage done by speech, regardless of the particular claim asserted.¹⁷⁵

ii. *APD Statutes Violate the First Amendment by Allowing Plaintiffs to Recover Without Showing the Degree of Fault Required for Defamation Claims*

APD statutes that allow plaintiffs to recover without showing the degree of fault the First Amendment requires for defamation claims are unconstitutional.¹⁷⁶ Plaintiffs who are public officials or public figures cannot recover for defamation without proving the defendant acted with actual malice, meaning the defendant either knew the statement was false or acted in reckless disregard of its truth or falsity.¹⁷⁷ Other plaintiffs must only prove the defendant was negligent

172. Johnson & Stahl, *supra* note 4, at 33.

173. See *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 516 A.2d 220, 230 (N.J. 1986) (“[M]atters of public interest include such essentials of life as food and water.”); *Nat’l Nutritional Foods Ass’n v. Whelan*, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) (holding “the qualities and marketing of health foods” is a matter of public concern). *But cf.* *Twenty-Five E. 40th St. Rest. Corp. v. Forbes*, 282 N.E.2d 118, 118 (N.Y. Ct. App. 1972) (holding that a negative restaurant review is of public interest).

174. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007); see also *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (“Believing in the power of reason as applied through public discussion, [the Founders] eschewed silence coerced by law”); Wasserman, *supra* note 4, at 345 (asserting the Supreme Court would likely apply First Amendment requirements to APD statutes because APD suits chill expression in exactly the same way as defamation suits).

175. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (invasion of privacy).

176. See *Base Corp. v. Consumers Union of the U.S.*, 466 U.S. 485, 487 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

177. *Gertz*, 418 U.S. at 342. Many potential plaintiffs under APD statutes arguably are public figures. See *infra* notes 140–49 and accompanying text. The Court imposes a heavier burden on public figures because they “invite attention and comment,” and because they can more

about whether the statement was true.¹⁷⁸ Plaintiffs can be public figures by either “occupy[ing] positions of . . . persuasive power and influence,” or “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹⁷⁹

Many APD statutes allow a plaintiff to recover without showing the defendant possessed the necessary degree of fault. Alabama and Georgia’s statutes violate the First Amendment regardless of who the plaintiff is because they impose liability even if the defendant could not have known the statement was false.¹⁸⁰ Even statutes that require the plaintiff to prove the defendant was negligent about the statement’s falsity violate the First Amendment when the plaintiff is a public figure because they impose liability without requiring actual malice.¹⁸¹ Most or all APD plaintiffs should be required to show actual malice because they are public figures: they are either large, well-known corporations; local public figures, with regard to statements made locally; or trade associations formed in

easily communicate with large audiences—and thus refute false statements—than private individuals. *Gertz*, 418 U.S. at 344–45.

178. *See id.* at 347 (holding the states cannot impose liability for defamation without fault). Although the Court did not expand on the meaning of “fault,” “it is generally agreed, expressly or tacitly, that no standard less than negligence will suffice.” SACK, *supra* note 17, at § 6:1 (citations omitted). *Gertz* concerned a defendant who was a member of the media. *See Gertz*, 418 U.S. at 325. The Supreme Court has not held whether a non-media defendant can be liable for defamation without a showing of fault. Though state courts are split on the issue, courts in five states with APD statutes have applied *Gertz* to non-media defendants. *See Mead Corp. v. Hicks*, 448 So. 2d 308, 313 (Ala. 1983); *Bryan v. Brown*, 339 So. 2d 577, 583–84 (Ala. 1976); *Antwerp Diamond Exch., Inc. v. Better Bus. Bureau*, 637 P.2d 733, 738 (Ariz. 1981); *Nodar v. Galbreath*, 462 So. 2d 803, 888 (Fla. 1984); *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 678 (La. 2006) (“We find that a private individual’s right to free speech is no less valuable than that of a publisher, broadcaster or other member of the communications media and therefore should be protected by similar standards of proof.”); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 426 (Tex. Ct. App. 1997); *see also* SACK, *supra* note 17, at § 6:5:1 (citations omitted) (“The position of the various jurisdictions on the question is often more a matter of the reader’s interpretation than of the courts’ explicit determination.”). Of the states with APD statutes, only Colorado has expressly held *Gertz* inapplicable to nonmedia defendants. *See Rowe v. Metz*, 579 P.2d 83, 83 (Colo. 1978); SACK, *supra* note 17, at § 6:5:2 (citations omitted). In any event, many statements actionable under APD statutes are made using some form of broadcast or print media. *See, e.g., Texas Beef Grp. v. Winfrey*, 201 F.3d 680, 682–84 (5th Cir. 2000) (concerning statements made on a television talk show).

179. *Gertz*, 418 U.S. at 345.

180. *See* ALA. CODE ANN. §§ 6-5-621(1), 6-5-623 (LexisNexis 2005); GA. CODE ANN. § 2-16-2(1) (West 2003).

181. *See* ARIZ. REV. STAT. ANN. § 3-113(E)(1) (West 2002); FLA. STAT. ANN. § 865.065(2)(a) (West 2000); LA. REV. STAT. ANN. § 3:4502(1) (West 2003); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003).

order to inform the public of the industry's point of view.¹⁸² Howard Wasserman advocates treating all plaintiffs in class action APD as public figures because a class usually includes both public and private figures, and Supreme Court jurisprudence weighs in favor of protecting speech.¹⁸³ Wasserman's argument is persuasive because not doing so would allow public figure plaintiffs to avoid the normal limits on their claims simply by joining a private plaintiff.

iii. *APD Statutes Lacking an "Of and Concerning" Requirement are Unconstitutional*

In order to establish liability for defamation, the First Amendment requires that the statement at issue be "of and concerning" the plaintiff.¹⁸⁴ This means that the statement must clearly identify a particular plaintiff.¹⁸⁵ This determination is more difficult when the allegedly defamatory statement is about a group. Two main factors in determining whether a group member may recover for a defamatory statement about the group are: (1) whether the statement is about some or all group members and (2) the group's size.¹⁸⁶ It is not sufficient to show a statement implicated only some group members.¹⁸⁷ However, a statement that impugns *every* member may satisfy the "of and concerning" requirement.¹⁸⁸ Nonetheless, if the subject group is sufficiently large, the statement is

182. Wasserman, *supra* note 4, at 351–53. An example of a local public figure is a meat-packing plant that employs a large percentage of people in a small community "with reference to statements made in a local speech or local newspaper." *Id.* at 352.

183. *Id.* at 353; see Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (noting that the First Amendment requires "giv[ing] the benefit of [the] doubt to protecting rather than stifling speech").

184. See *Rosenblatt v. Baer*, 383 U.S. 75, 81–82 (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288–89 (1964).

185. *Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002); see also *Rosenblatt*, 383 U.S. at 81–82.

186. See *Algarin v. Town of Wallkill*, 421 F.3d 137, 139–40 (2d Cir. 2005); *cf.* RESTATEMENT (SECOND) OF TORTS § 564A, cmt. b (1977) (noting that a statement about a group is only of and concerning a particular group member if the group is sufficiently small or the circumstances indicate that it is about a particular plaintiff.).

187. See *Rosenblatt*, 383 U.S. at 81–82; *Owens v. Clark*, 6 P.2d 755, 759 (Okla. 1931) (holding that a defamatory statement about some members of the Oklahoma Supreme Court was not defamatory of all members).

188. See *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (statement that an entire football team used a performance-enhancing drug was "of and concerning" every member of the team); *Rosenblatt*, 383 U.S. at 81 ("Were the statement . . . an explicit charge that . . . the entire Area management were corrupt, we assume without deciding that any member of the identified group might recover.").

not considered to be “of and concerning” any particular group member.¹⁸⁹ Although “[i]t is not possible to set definite limits as to the size of the group or class,” courts usually only allow recovery when there are twenty-five or fewer members.¹⁹⁰

Some courts also, correctly, only allow plaintiffs to recover for common law disparagement for statements that are “of and concerning” that particular plaintiff.¹⁹¹ Applying the “of and concerning” requirement to disparagement claims is proper because the harm caused to members of a large group whose product has been disparaged is outweighed by the “public’s interest in free expression.”¹⁹² Allowing such large groups to sue for a derogatory comment would unduly burden this interest in free expression: defendants would censor themselves in order to avoid the enormous potential liability and legal costs that would result.¹⁹³ Without an “of and concerning” requirement, the media might be unwilling to alert the public about potential dangers to public welfare because of fears of such extensive liability.¹⁹⁴ For example, without such a requirement, “[i]f Oprah Winfrey had been liable for disparaging beef, she would be liable not just

189. See *Algarin*, 421 F.3d at 139–40; see also SACK, *supra* note 17, at § 2:9:4 (citations omitted) (“The general rule is that if the group is so large that ‘there is no likelihood that a reader would understand the article to refer to any particular member of the group,’ is it not libelous of any individual.”).

190. RESTATEMENT (SECOND) OF TORTS § 564A, cmt. b (1977). For example, a statement about the quality of food at Kentucky Fried Chicken is not “of and concerning” each of the 5,000 KFC restaurants. *Ky. Fried Chicken, Inc. v. Sanders*, 563 S.W.2d 8, 9 (Ky. 1978). Similarly, a defamatory statement about African-Americans generally cannot be said to refer to any particular African-American plaintiff, and allegations that fishing with nets causes environmental harm was not “of and concerning” 436 commercial net fishers. *Robertson v Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 902 (Tex. App. 2006) (involving statements about African-Americans); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 802 (Fla. Dist. Ct. App. 1997) (involving statements about net fishing).

191. *Gintert v. Howard Publ’ns, Inc.*, 565 F. Supp. 829, 833 (N.D. Ind. 1983) (holding that a group of 165 homeowners in a lakefront community could not sue for slander of title based on a negative statement about the lake’s environmental condition), *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182–83 (Cal. 1986) (applying the “of and concerning” requirement to defamation claims); see *Teilhaver Mfg. Co. v. Unarco Materials Storage*, 791 P.2d 1164, 1166 (Colo. App. 1989) (same). *But see Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 935 (E.D. Wash. 1992), *aff’d*, 67 F.3d 816 (9th Cir. 1995) (holding that statements questioning the safety of pesticide-treated apples satisfy the “of and concerning” element because they could be construed to be about each individual apple grower).

192. SACK, *supra* note 17, at §13:1:4 (citations omitted). See also *Fed. Election Com’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (noting the First Amendment requires “‘giv[ing] the benefit of [the] doubt to protecting rather than stifling speech’”).

193. *Id.*

194. *Srochi*, *supra* note 4, at 1236.

to the plaintiffs, but to every cattle grower in Texas and in every other state with a similar statute.”¹⁹⁵

A court would likely apply the “of and concerning” requirement to APD statutes. After all, the rationale of avoiding limitless liability applies to APD claims to an even greater degree than to claims for disparagement of non-food products because of the public’s substantial interest in knowing about potentially dangerous foods. Some APD statutes create liability for statements that are not “of and concerning” the plaintiff,¹⁹⁶ however, and therefore would likely be held to be unconstitutional.

iv. *Requiring the Defendant to Prove a Statement’s Truth Violates the First Amendment*

Some APD statutes violate the First Amendment by requiring the defendant to prove the allegedly disparaging statement was true. The First Amendment requires that plaintiffs suing for defamation and common law product disparagement based on a statement about a matter of public concern prove the statement is false.¹⁹⁷ The Court imposed this requirement in order to avoid the self-censorship that would otherwise result: people might stay silent because they fear being unable to prove their statements are true (even if they are actually true).¹⁹⁸ This self-censorship would, in turn, prevent the public from receiving

195. Johnson & Stahl, *supra* note 4, at 35.

196. See ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); N.D. CENT. CODE ANN. § 33-44-03 (2010); OHIO REV. CODE ANN. § 2307.81(D)(3) (2010). Only Idaho’s statute requires that the statement be of and concerning the plaintiff’s specific product, though a federal court read such a requirement into the Texas statute. See IDAHO CODE ANN. § 6-2002(1)(a) (2010); Texas Beef Grp. v. Winfrey, 201 F.3d 680, 687 (5th Cir. 2000); see also Jones, *supra* note 4, at 836 (stating that even if the statute doesn’t specifically say so, many statutes’ language suggests that “a wide range of persons” have standing.).

197. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (“[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (noting plaintiffs are burdened with proving falsity in defamation cases concerning matters of public concern); see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (noting that burdening the defendant with proving the statement’s truth deters truthful speech). The burden of proof requirements for defamation also likely apply to disparagement claims. See *infra* Section II(C)(1)(b)(i). Although “[t]he Supreme Court has not decided whether the Constitution permits liability for truthful speech that fails the ‘public concern’ test, for truthful speech that is not disseminated by the traditional media, or for both. Open or not, the latter question is largely academic. Only in the rarest cases have courts permitted liability in a defamation action based on a true and defamatory statement.” SACK, *supra* note 17, at § 3:3.2 (citations omitted).

198. See Sullivan, 376 U.S. at 279 (noting that burdening the defendant with proving the statement’s truth deters truthful speech); see also Johnson & Stahl, *supra* note 4, at 36.

information that may be important to it. APD statutes impose liability for statements about food safety, which is an issue of public concern.¹⁹⁹ Because it is a matter of public concern, the plaintiff should have the burden of proving falsity, but some APD statutes unconstitutionally burden defendants with providing studies to prove the truth of their statements and proving those studies are reasonable and reliable.²⁰⁰

v. *Some APD Statutes Violate the First Amendment by Providing for Punitive Damages for Speech About a Matter of Public Concern Without Requiring the Plaintiff to Prove Actual Malice*

Some APD statutes unconstitutionally allow the plaintiff to recover punitive damages for speech about an issue of public concern without proving actual malice.²⁰¹ In the context of a defamation claim, the First Amendment only allows a plaintiff to recover punitive damages for speech about a matter of public concern if the plaintiff first proves that the defendant acted with actual malice.²⁰² The Court imposed this limitation both because the jury can award punitive damages in a way that punishes unpopular views, and because allowing punitive

199. See *supra* note 157 and accompanying text.

200. See ALA. CODE ANN. § 6-5-621(1) (LexisNexis 2005); GA. CODE ANN. § 2-16-2(1) (West 2003); LA. REV. STAT. ANN. § 4502(1) (West 2003); MISS. CODE ANN. § 69-1-253(a) (West 2009). The defendant's ability to meet this burden is further undermined by the fact that it is unclear what is "reasonable and reliable" science. Scientists often disagree about data, methodology, how to interpret results, or who even counts as an expert. Jones, *supra* note 4, at 839. However, 40; see also Wasserman, *supra* note 4, at 334 (citing *Auvil v. CBS "60 Minutes,"* 67 F.3d 816, 821 (9th Cir. 1995)) ("None of the [APD] statutes requires the plaintiff to provide affirmative scientific evidence to show the absence of a health risk; it apparently is sufficiently to poke holes in the scientific evidence underlying the defendant's initial speech. The Ninth Circuit in *Auvil*, however, explicitly rejected this idea, holding instead that the growers could not prevail when they had not provided evidence that Alar did not pose a risk to children."). See *Auvil*, 67 F.3d 816, 821 (9th Cir. 1995). Requiring the defendant in an APD suit to prove the statement's truth is not only unconstitutional, but is also unusual, given the plaintiff almost always carries the burden of proving the elements of most claims. See Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 3:3 (3d ed. 2010).

201. See ALA. CODE ANN. § 6-5-622 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3; LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 69-1-255; N.D. CENT. CODE ANN. §§ 32-44-02 (2010); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2011).

202. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (allowing punitive damages absent a showing of actual malice in cases not involving matters of public concern).

damages would unnecessarily increase self-censorship.²⁰³ If this requirement applies to APD statutes, several are unconstitutional because they potentially allow a plaintiff to recover punitive damages, absent actual malice, for statements about food safety, a matter of public concern.²⁰⁴

2. *Other Causes of Action Provide Sufficient Remedies Without the Constitutional Infirmities of an APD Claim, so Plaintiffs do not Sue Under APD Statutes in Order to Avoid Wasting Time and Money on a Claim that They Will Likely Lose on Constitutional Grounds*

Causes of action for defamation and common law product disparagement sufficiently protect the interests of plaintiffs who would otherwise sue under APD statutes. Common law product disparagement is the most obvious alternative to an APD claim because it allows a plaintiff to recover damages caused by false, disparaging statements about the plaintiff's product.²⁰⁵ In addition, agricultural producers often can sue under defamation laws instead.²⁰⁶ For example, North Dakota passed its APD statute because ranchers were upset about false claims that the ranchers mistreated their horses—as opposed to claims that their product was unsafe.²⁰⁷ Instead of seeking a new cause of action, the ranchers could have sued for defamation because they were seeking to remedy damage to their reputations.²⁰⁸ Although a plaintiff is less likely to win a claim for defamation or common law disparagement than using an APD statute, the ways in which APD statutes make it easier for a plaintiff to recover—switching the burden of proof to the defendant, lowering the level of intent the plaintiff must show, dispensing with the “of and concerning” requirement, and potentially allowing injunctive relief—likely are unconstitutional. Plaintiffs do not want to waste attorney's fees on APD claims they likely would lose on constitutional grounds.

203. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

204. ALA. CODE ANN. § 6-5-622; ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3; LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 69-1-255; N.D. CENT. CODE ANN. §§ 32-44-02 (2010); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2011). *But see* IDAHO CODE §§ 6-2003(1), (3) (2010) (allowing only actual, compensatory damages). *See supra* note 157 and accompanying text (for a discussion of why food safety is an issue of public concern).

205. *See supra* Section II(A) (further discussing the product disparagement cause of action).

206. Mattson, *supra* note 4, at 116.

207. *Id.* at 115–16; *see also* Hearing on H.B. 1176 Before the S. Agric. Comm., 55th Leg. (N.D. 1997).

208. Mattson, *supra* note 4 at 115–16; *see also* Hearing on H.B. 1176 Before the S. Agric. Comm., 55th Leg. (N.D. 1997).

Therefore, a reasonable plaintiff who has suffered a legitimate harm would instead pursue a defamation or common law disparagement action.

IV. CONCLUSION

All three factors likely have discouraged plaintiffs from suing under APD statutes. The most influential factor probably is plaintiffs' desire to avoid the (likely successful) constitutional challenges that would accompany an APD claim in favor of other causes of action. This is because rational plaintiffs, when given the choice between constitutionally valid causes of action and a cause of action that is likely to fail because it violates the Constitution, will avoid unnecessary legal fees by pursuing only the constitutionally valid claims. In addition, though APD statutes probably do silence some people who would otherwise raise alarms about food safety, people continue to express publicly their concerns about food safety—perhaps even with greater frequency than when APD statutes were enacted. Therefore, APD statutes' chilling effect cannot be the only reason there have been so few reported cases based on APD statutory claims. Finally, though anti-SLAPP statutes may help deter some frivolous APD litigation in the states where they exist, they are limited in scope and do not affect litigation in the other nine states with APD statutes. For these reasons, plaintiffs' desire to avoid wasting resources on a constitutionally invalid claim appears to be the strongest deterrent of APD suits. Whatever the reason, plaintiffs' avoidance of APD claims is a positive trend with regard to protecting individuals' freedom to express concerns about food safety.