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STATEMENT OF INTEREST

Center for Food Safety and Public Justice, through undersigned counsel, respectfully submit this Brief as *Amici Curiae* in support of Plaintiffs. Plaintiffs have consented to this filing. Defendants have stated they will not object to the filing.

Amicus Center for Food Safety (“CFS”) is a national nonprofit organization dedicated to addressing the environmental, economic, ethical, human health, and social impacts associated with the development and commercialization of agricultural and food processing technologies, with a specific focus on animal factories. CFS seeks to protect animal welfare and public health by promoting sustainable agricultural practices. CFS also advocates for consumers by protecting their right to know how their food is produced.

Amicus Public Justice, P.C. (“Public Justice”) is a national public interest law firm dedicated to holding corporations accountable for the manufacture, distribution, and marketing of food and other products that endanger public safety, health, and nutrition. Public Justice’s Food Safety & Health Project seeks to promote sustainable animal agriculture by attacking the systemic inequities that prop-up the industrial animal agriculture system and forcing such factory farms to internalize their true costs to the environment, community, workers and public health. Thus, among other efforts, it works to help consumers redress the harms caused by industrial animal agriculture that can place their safety, and even their lives, at risk.

Together, as public interest advocacy organizations dedicated to protecting individuals’ rights and health, *Amici* have a strong interest in ensuring transparency so that consumers can have access to information about how their food is produced and there can be a robust national debate about food and agriculture policy.

CORPORATE DISCLOSURE STATEMENT

Amicus CFS is a nonprofit corporation. *Amicus* Public Justice is a professional corporation. Both have no parent corporations, and do not issue stock.

Dated: June 9, 2016

Respectfully submitted,

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INTRODUCTION

Amici submit this Brief to demonstrate the “substantial” nature of the communications restricted by Utah’s “Ag Gag” law, Utah Code Ann. § 76-6-112—which criminalizes undercover investigations of agriculture production facilities that are necessary to keep consumers safe, enable an important national conversation regarding our food system and policies, and advocate for change. This is a central component of the test for “overbreadth” and whether the law can survive “intermediate scrutiny,” should the Court determine the law does not mandate strict scrutiny. “According to [the Supreme Court’s] First Amendment overbreadth doctrine, a statute is facially invalid *if it prohibits a substantial amount of protected speech.*” *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis added); *see also* Defs.’ Mem. in Support of Mot. for Summ. J., ECF. No. 112 (Defs.’ Br.) xl; Pls.’ Mem. in Support of Mot. for Summ. J., ECF. No. 106 (Pls.’ Br.) ix. “Under intermediate scrutiny, the Government may employ the means of its choosing so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, *and does not burden substantially more speech than is necessary to further that interest.*” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) (quotation marks and ellipse omitted; emphasis added); *see also* Defs.’ Br. 12; Pls.’ Br. xi.

Whether a law unconstitutionally restricts a “substantial” amount of protected speech as compared to its legitimate applications is not simply based on tallying both sides, but whether the law “significantly compromises recognized First Amendment protections.” *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Supreme Court has repeatedly explained that there is a hierarchy of First Amendment speech, with certain types of speech deserving “special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983). Thus, this Court’s inquiry into whether the Ag Gag law “substantially” interferes with First Amendment protections has “a qualitative as well as quantitative dimension.” Richard H. Fallon,

Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 895 (1991). Of particular relevance to this case, the Supreme Court has held that speech on ““a matter of legitimate public concern”” is the basis of the ““free and open debate [that] is vital to informed decision-making by the electorate.”” *Connick*, 461 U.S. at 145 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968)). Thus, it occupies “the ‘highest rung of the hierarchy of First Amendment values.’” *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

This Brief documents that the speech Utah’s Ag Gag law targets—and particularly the speech of Plaintiffs and groups like them, which the law has and will continue to suppress—is on the “highest rung” of the First Amendment “hierarchy,” as it addresses matters of “public concern,” is necessary to “inform” the public, and furthers vital debates about food quality and safety, the current regulation of the food industry, and the policies and practices that could result in the industry’s reform. Therefore, the quality of the suppressed speech renders the speech “substantial.”

(I) The Brief first substantiates that food safety is an important matter of public concern, having grave impacts on citizens’ health and the national economy, and that the safety of animal products is of particular concern, as foodborne illnesses caused by industrial animal agriculture have resulted in more deaths than any other foods.

(II) It then demonstrates that the risks presented by industrial animal agriculture products stem from the ways in which the animals are raised and slaughtered.

(III) While federal regulations exist to limit these risks, the Brief continues, those restrictions are routinely violated by companies and ignored by regulators, not only increasing the danger to consumers, but enhancing the need for other channels to provide information to the public.

(IV) With this background, the Brief provides examples of how the undercover investigations of industrial agriculture facilities targeted by Utah’s Ag Gag law, particularly the

investigations of animal agriculture facilities by Plaintiffs, are the highest form of First Amendment speech. Those investigations provide the public otherwise unavailable information; demonstrate key regulatory lapses; and facilitate discussion of how to change our current food system—including among Plaintiffs, representatives of industrial animal agriculture companies, farmers, and the government.

(V) The Brief concludes by demonstrating that Defendants' effort to diminish the value of Plaintiffs' speech fails. Rather than substantiating true, legitimate applications for the Ag Gag law to counterbalance the value of Plaintiffs' suppressed speech, Defendants attempt to diminish the import of the speech by suggesting it poses potential risks—ironically the same risks that Plaintiffs are seeking to highlight and mitigate through their investigations. This not only misapplies the overbreadth and intermediate scrutiny balancing tests, but flies in the face of the key underlying First Amendment principle: the courts should work to facilitate free debate so that the *public* can judge the merit of the speech, rather than enable the government to decide what sorts of information is released.

Therefore, in conducting its overbreadth analysis and applying intermediate scrutiny (should the Court determine that is appropriate), the nature of the speech suppressed by the Ag Gag law should tilt the balance heavily towards finding the law unconstitutional.

ARGUMENT

I. FOODBORNE ILLNESSES FROM INDUSTRIAL ANIMAL AGRICULTURE PRESENT AN IMPORTANT MATTER OF PUBLIC CONCERN

Each year approximately 48 million American consumers are sickened, 128,000 are hospitalized, and 3,000 are killed by foodborne illnesses.¹ The resulting annual economic loss from just the immediate medical care and harm to productivity is over \$51 billion.² Foodborne

¹ Ctrs. for Disease Control & Prevention (CDC), *Estimates of Foodborne Illness in the United States*, <http://www.cdc.gov/foodborneburden/> (last visited June 2, 2016).

² Helena Bottemiller, *Annual Foodborne Illnesses Cost \$77 Billion, Study Finds*, Food Safety News (Jan. 3, 2012), <http://www.foodsafetynews.com/2012/01/foodborne-illness-costs-77->

illnesses can also cause serious long-term effects, such as chronic arthritis and brain and nerve damage,³ which annually produce an additional \$26.7 billion in costs.⁴

Contaminated animal products are particularly to blame for these harms. Over the past two decades, poultry and beef have caused more deaths from foodborne illness than any other source. *Listeria* in poultry was responsible for the most deaths from foodborne illnesses between 1998 and 2008.⁵ *E. coli* in beef was the pathogen-food combination responsible for the most deaths from foodborne illnesses in 2009 and 2010.⁶ In 2009 and 2010, beef and poultry were, respectively, the first and fourth food products most often implicated in disease outbreaks.⁷ *Salmonella* associated with eggs led to the most food-related outbreaks between 2009 and 2010.⁸ Moreover, *E. coli* infections associated with contaminated beef have been linked to some of the most significant side effects from foodborne illnesses. Five to 10% of individuals struck by *E. coli* develop hemolytic uremic syndrome, a type of kidney failure that can result in serious long-term damage or death.⁹

It cannot be disputed that information concerning the causes of foodborne illnesses, particularly foodborne illnesses in meat products, is of public interest and import.

billion-annually-study-finds/#.UDU4Isx5XIN.

³ FoodSafety.gov, *Food Poisoning*, <http://www.foodsafety.gov/poisoning/index.html> (last visited June 6, 2016).

⁴ Bottemiller, *supra* note 2.

⁵ Gretchen Goetz, *11 Years of Data Show Poultry, Fish, Beef Have Remained Leading Sources of Food-Related Outbreaks*, Food Safety News (June 28, 2013), <http://www.foodsafetynews.com/2013/06/20-years-of-foodborne-illness-data-show-poultry-fish-beef-continue-to-be-leading-sources-of-outbreaks/#.UpUjJOKkGil>.

⁶ CDC, *Tracking and Reporting Foodborne Disease Outbreaks*, <http://www.cdc.gov/features/dsfoodborneoutbreaks/> (last visited June 3, 2016).

⁷ *Id.*.

⁸ *Id.*

⁹ CDC, *E. coli (Escherichia coli)*, <http://www.cdc.gov/ecoli/general/> (last visited June 6, 2016).

II. **FOODBORNE ILLNESSES FROM INDUSTRIAL ANIMAL PRODUCTS RESULT FROM THE INDUSTRIAL ANIMAL AGRICULTURE SYSTEM**

The connections between foodborne illnesses and the conditions at industrial factory farms are well-documented.¹⁰ As much as 99.9% of the chicken and 78% of the beef consumed in the United States comes from such factories.¹¹ As a result, transparency regarding how farm animals are raised is vital.

For instance, *Salmonella* contamination in poultry occurs most often during slaughter and processing, because the live birds carry pathogens on their feathers and in their intestines into the slaughterhouse that are transferred to their own or other animals' carcasses.¹² Thus, the risk of *Salmonella* contamination is directly related to the ways in which the animals are raised. Studies have consistently found that hens raised in cages present a higher risk of *Salmonella*.¹³ A 2010 study found that housing laying hens in battery cages—small pens stacked on top of one another—is a significant risk factor for generating *Salmonella* Enteritidis and/or *Salmonella* Typhimurium, and that *Salmonella* shedding—the release of *Salmonella* in feces—was twenty times more likely in caged hens than in non-caged flocks.¹⁴

These increased threats to health and safety are unsurprising given the conditions at

¹⁰ Michael Greger, *The Human/Animal Interface: Emergence and Resurgence of Zoonotic Infections Diseases*, 33 *Critical Reviews in Microbiology* 243 (2007); Danielle Nierenberg & Leah Garcés, *Industrial Animal Agriculture: The Next Global Health Crisis?* (World Soc'y for the Protection of Animals 2005), http://www.worldanimalprotection.ca/sites/default/files/ca_-_en_files/industrialanimalagriculture_globalhealth_summary_tcm22-8298.pdf; Leo Horrigan, et al., *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110 *Env'tl. Health Persps.* 445 (2002).

¹¹ Nil Zacharias, *It's Time to End Factory Farming*, *Huffington Post* (Oct. 19, 2011), http://www.huffingtonpost.com/nil-zacharias/its-time-to-end-factory-f_b_1018840.html.

¹² Sarah Klein and Caroline Smith DeWaal, *Risky Meat: A CSPI Field Guide to Meat and Poultry Safety* 8 (2013), http://cspinet.org/foodsafety/PDFs/RiskyMeat_CSPI_2013.pdf.

¹³ HSUS, *Cage Confinement of Laying Hens Increases Salmonella Risk*, http://www.humanesociety.org/issues/confinement_farm/facts/salmonella.html#.UpzFLOkkGik (last visited June 6, 2016).

¹⁴ S. Van Hoorebeke et al., *Determination of the within and between flock prevalence and identification of risk factors for Salmonella infections in laying hen flocks housed in conventional and alternative systems*, 94 *J. Preventive Vet. Med.* 94, 94-100 (2010).

factory farms, which are documented thanks in large part to the undercover investigations targeted by Utah's Ag Gag law. Hens at factory farms are regularly covered in liquid manure from shallow manure scraping pits, and forced to walk amidst manure overflows as they are moved from barn to barn.¹⁵ Battery-caged hens are also often confined with rotting corpses or birds with exposed wounds, and can be covered in feces from birds in overhead cages.¹⁶ Decaying dead hens are customarily left on factory floors or cage ledges or tops, often in direct contact with live hens and eggs.¹⁷

The circumstances in cattle and beef production are no different. The sale of spent dairy cows for beef production is an integral part of industrial animal agriculture operations, which are focused on maximizing the monetary gain from each animal. Multiple outbreaks of a multi-drug resistant strain of *Salmonella* have been tied to ground beef made from dairy cows.¹⁸ Again, the treatment of these cows during their lives directly explains why they are more likely to carry and cause disease. The more time animals spend lying down—which is at its pinnacle in factory farming, where (as discussed more below) investigations have documented that animals too sick to stand or walk remain in the production chain in order to protect the producer's bottom line—increases the chance the animals will become contaminated with fecal matter.¹⁹ Likewise, feeding beef and dairy cattle high-grain diets rather than allowing them to forage—again a practice that is typical for factory-farmed cattle, as high-grain diets increase weight at the least

¹⁵ Humane Soc'y of the U.S. (HSUS), *Undercover at the Largest U.S. Egg Producer* (2010), http://www.humanesociety.org/assets/pdfs/farm/cal-maine_investigation_report.pdf; Letter from John W. Thorsky, FDA District Director, to Austin Decoster, Owner, Quality Egg LLC (Oct. 15, 2010), <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2010/ucm229805.htm>.

¹⁶ HSUS, *supra* note 15.

¹⁷ *Id.*

¹⁸ A. Gupta et al., *Emergence of multidrug-resistant Salmonella enterica serotype Newport infections resistant to expanded-spectrum cephalosporins in the United States*, 188 *J. of Infectious Diseases* 1707, 1707-16 (2003).

¹⁹ T. Grandin, *A.M.I. Sponsors Stunning and Handling Conference*, *Meat & Poultry* 48-49 (Mar. 1999).

cost—increases the amount of the bacteria cattle shed in their manure.²⁰ Stress also increases the likelihood the animals will shed pathogens.²¹

Put simply, there is not just a public interest in information regarding food processing, but in understanding and monitoring food production systems, and particularly animal agriculture production methods. The safety of our food supply is intertwined with how the animals we eat are treated throughout their lives, through slaughter. Thus, the need for discourse and debate on food safety mandates discourse and debate on farm practices.

III. GOVERNMENT REGULATORS HAVE TURNED A BLIND EYE TO THE RISKS PRESENTED BY INDUSTRIAL ANIMAL AGRICULTURE

Yet further enhancing the need for public information concerning factory-farmed animal products is the government's inability and unwillingness to enforce existing regulations that govern factory farm production methods and are meant to reduce the risks to consumers.

This is dramatically illustrated by a 2007 undercover investigation—like those prohibited by Utah's Ag-Gag law—conducted by the Humane Society of the United States (HSUS) at a California slaughter plant operated by Hallmark/Westland (Hallmark), which primarily processed spent dairy cows. *See* Report of Expert Sean Thomas at 20, ECF No. 85. At the time, Hallmark was the second-largest supplier of beef to the U.S. Department of Agriculture (USDA)'s Agricultural Marketing Service, which purchases beef for distribution to needy families, the elderly, and schools through the National School Lunch Program. Among other things, the HSUS investigator “filmed workers ramming cows with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks often in sensitive areas, dragging them with chains pulled by heavy machinery, and torturing them with a high-pressure water hose

²⁰ Todd Callaway, et al., *Diet, Escherichia coli O157:H7, and Cattle: A Review After 10 Years*, 11 *Current Issues in Molecular Biology* 67, 70-71 (2009).

²¹ J. S. Spika et al., *Chloramphenicol-resistant Salmonella newport traced through hamburger to dairy farms: a major persisting source of human salmonellosis in California*, 316 *New Eng. J. Med.* 565, 565-70 (1987).

to simulate drowning, all in attempts to force crippled animals to walk to slaughter.”²² In one case, the investigator videotaped a cow “who collapsed on her way into [a] stunning box. After she was electrically shocked and still could not stand, [an employee of Hallmark] shot [the cow] in the head with a captive bolt gun to stun her and then dragged on her knees into slaughter.”²³

These practices took place while a USDA inspector was onsite. Rather than inspect animals individually, the USDA inspector looked at groups of thirty to thirty-five animals as they passed by and “merely noted those animals who could not stand [at that time] and then approved the remainder for slaughter.”²⁴ In addition, even though USDA inspectors are required to monitor and verify humane handling during offloading and while the plant holds animals, the inspector was “rarely present during offloading” and was only observed in pens or chutes at two predictable times each day.²⁵

Forcing “downer” animals into the food supply is another way that industrial animal agriculture production methods increase the risk of foodborne illness. Every year an estimated 195,000 to 1.8 million cattle collapse for a variety of metabolic, infectious, toxic, and/or musculoskeletal reasons.²⁶ Further, as the United States Food and Drug Administration (FDA)

²² See Hearing to Discuss the Recent Hallmark/Westland Meat Recall Before the U.S. Senate Comm. on Appropriations, Subcomm. on Agric., Rural Dev., FDA, and Related Agencies, 110th Cong., at 1 (Feb. 28, 2008) (statement of Wayne Pacelle, President & CEO, Humane Society of the United States), <http://www.humanesociety.org/assets/pdfs/farm/hsus-testimony-senate-ag-approps-hearing-2-28-08.pdf>.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ *Id.* at 4.

²⁶ U.S. Dep’t of Agric. (USDA) Office of the Inspector Gen. (OIG), *Audit Report: Animal and Plant Health Inspection Service and Food Safety and Inspection Service: bovine spongiform encephalopathy (BSE) surveillance program – Phase I*, at 2 (Aug. 18, 2004), www.oig.usda.gov/webdocs/50601-9-final.pdf; Sparks Cos., Inc., *Livestock mortalities: methods of disposal and their potential cost*, at 29 (Mar. 2002), http://assets.nationalrenderers.org/mortalities_final.pdf; C.L. Stull et al., *A review of the causes, prevention, and welfare of nonambulatory cattle*, 231 J. of the Am. Vet. Med. Assoc. 227, 227-34 (2007), https://www.researchgate.net/publication/6207158_A_review_of_the_causes_prevention_and_w

has recognized, “nonambulatory disabled cattle . . . are the population at greatest risk for harboring” bovine spongiform encephalopathy (BSE or “mad cow disease”).²⁷ People who eat meat from BSE-infected animals can contract the disease, resulting in dementia and death. Slaughtering animals with BSE not only places consumers of that animal at risk, but potentially contaminates all of the meat being processed because BSE can be aerosolized during carcass splitting or transferred to the hands, clothes or tools workers.²⁸

Accordingly, once the HSUS investigation became public, USDA could not deny its failure to keep consumers safe.²⁹ In the resulting Office of the Inspector General (OIG) audit of Hallmark, USDA veterinarians admitted that “they took shortcuts in ante-mortem inspection activities.”³⁰ OIG further found that “there were deliberate actions by Hallmark personnel to bypass required inspections, as well as noncompliance with required inspection procedures by

elfare_of_nonambulatory_cattle.

²⁷ Use of Materials Derived From Cattle in Human Food and Cosmetics, 69 Fed. Reg. 42,256, 42,259 (proposed July 14, 2004).

²⁸ J. Cohen et al., *Evaluation of the potential for bovine spongiform encephalopathy in the United States*, at 58 (Nov. 26, 2001), Harvard Ctr. for Risk Analysis & Harvard School of Pub. Health, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.319.6152&rep=rep1&type=pdf>; C.R. Helps et al., *Transfer of spinal cord material to subsequent bovine carcasses at splitting*, 67 J. of Food Prot. 1921, 1921-26 (2004), <http://www.ncbi.nlm.nih.gov/pubmed/15453582>; USDA Food Safety and Inspection Serv. (FSIS), *Current thinking on measures that could be implemented to minimize human exposure to materials that could potentially contain the bovine spongiform encephalopathy agent* (Jan. 15, 2002), http://www.fsis.usda.gov/Oa/topics/BSE_Thinking.pdf; 69 Fed. Reg. at 42,257; D. M. Prendergast et al., *Dissemination of central nervous system tissue during the slaughter of cattle in three Irish abattoirs*, 154 Veterinary Record 21, 21-24 (2004); R. R. Coore et al., *Dissemination of brain emboli following captive bolt stunning of sheep: capacity for entry into the systemic arterial circulation*, 67 J. of Food Prot. 1050, 1050-52 (2004); T. Garland, *Brain emboli in the lungs of cattle after stunning*, 348 Lancet 610 (1996); D. J. Daly et al., *Use of a marker organism to model the spread of central nervous system tissue in cattle and the abattoir environment during commercial stunning and carcass dressing*, 68 Applied & Env'tl. Microbiology 791, 791-98 (2002).

²⁹ USDA, OIG, *Audit Report: Evaluation of FSIS Management Controls Over Pre-Slaughter Activities*, at ii (Nov. 2008), <http://www.usda.gov/oig/webdocs/24601-07-KC.pdf> (hereinafter “Audit Report”).

³⁰ *Id.* at iv.

[USDA] in-plant staff. Supervisory and other management controls did not detect and/or prevent these incidents.”³¹ OIG concluded that “there is an inherent vulnerability that humane handling violations can occur and not be detected by [USDA] inspectors.”³²

Yet, the attention and findings following the HSUS investigation have not obviated the need for the important role that undercover investigations play in keeping our food supply safe.³³ For example, a hidden camera installed in a veal slaughtering plant in 2009—another type of investigation that would be outlawed under Utah’s law—revealed a different USDA inspector failing to act when confronted with clear evidence of serious regulatory violations. “In one scene, a worker attempted to skin a calf who was still alive, directly in front of this inspector. The government official told the worker that if another USDA inspector . . . saw this, the plant would be shut down, but he allowed the abuse to continue.”³⁴ The official then told the investigator “not to tell him if a live calf was in the pile of dead animals because, ‘I’m not supposed to know. I could shut them down for that.’”³⁵

Government regulation is no substitute for an informed public. However, “informed public opinion is the most potent of all restraints upon misgovernment.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). Indeed, one of the reasons the Supreme Court has stated that

³¹ *Id.* at iii.

³² *Id.*

³³ There are numerous chronic and systemic deficiencies in the federal food safety system including: fragmented oversight responsibility among multiple agencies and statutes, Nathan Trexler, *Market Regulation: Confronting Industrial Agriculture’s Food Safety Failures*, 17 *Widener L. Rev.* 311, 318 (2011); weaknesses in regulators’ ability to recall unsafe food, Government Accountability Office, *Food Safety: USDA & FDA Need to Better Ensure Prompt & Complete Recalls of Potentially Unsafe Food* (2004), <http://www.gao.gov/new.items/d0551.pdf>; and oversight regimes based on obsolete technologies and practices, R.A. Robinson, General Accounting Office, *Food Safety & Security: Fundamental Changes Needed to Ensure Safe Food* (2001), <http://www.gao.gov/assets/110/109016.pdf>.

³⁴ Hearing Before the House Comm. on Oversight and Gov’t Reform, Subcomm. on Domestic Policy, 111th Cong., at 2 (Mar. 4, 2010) (statement of Wayne Paccelle), http://www.humanesociety.org/assets/pdfs/farm/paccelle_slaughter_030410.pdf.

³⁵ *Id.*

speech on matters of public concern deserves “special protection” is that it will produce an informed electorate, enabling them to hold officials accountable for failed policies and lobby their representatives to enact needed reforms. *See Connick*, 461 U.S. at 145. Thus, that the government has repeatedly flouted its commitment to protect the food supply by refusing to enforce existing regulations underscores the import of speech that will alert the public to the current methods of factory farming, enabling accountability and providing the evidence necessary for change.

IV. UNDERCOVER INVESTIGATIONS OF INDUSTRIAL AGRICULTURE OPERATIONS HAVE BEEN CRITICAL FOR FURTHERING PUBLIC AWARENESS ABOUT FOOD SAFETY, GENERATING DEBATE ABOUT OUR FOOD SYSTEM, AND CHANGING THE REGULATORY REGIME

Undercover investigations like those targeted by Utah’s Ag Gag law have fulfilled the highest function of First Amendment speech, providing consumers information they need to protect their health and safety, identifying regulatory failures, and furthering discussions among the public, producers, the government, and activists about food practices.

The HSUS investigation of the Hallmark plant discussed above resulted in a recall of more than two years’ worth of ground beef that had already entered the market—143 million pounds—as unfit for human consumption,³⁶ and enabled taxpayers to recover \$156 million for the tainted meat products Hallmark sold to the United States government.³⁷ As a direct response to the investigation, USDA issued for public comment, and eventually promulgated, regulations

³⁶ *See* Statement by Sec’y of Agric. Ed Schafer Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall (Feb. 17, 2008), <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2008/02/0046.xml&printable=true&contentidonly=true>.

³⁷ Jonathan Stempel, *U.S., Suppliers Settle Over School Lunch Beef Linked to Recall*, Reuters (Nov. 27, 2013), <http://www.reuters.com/article/2013/11/27/us-usa-schoollunch-settlement-idUSBRE9AQ18M20131127>; HSUS, *Owners of Infamous Calif. Slaughterhouse Pay Millions to Settle Government Fraud Case* (Nov. 27, 2013), http://www.humanesociety.org/news/press_releases/2013/11/Hallmark_settlement_112713.html#.Uq9-ISdu6M8.

requiring downer cows and calves to be separated from ambulatory animals, prohibiting “[t]he dragging of disabled animals and other animals unable to move, while conscious,” and requiring USDA inspectors to be notified when downer cows are present. 9 C.F.R. §§ 309.3(e), 309.13(b), 313.2(d). More broadly, in the wake of the investigation, a former FDA official disclosed a funding crisis for all United States food inspectors, explaining to the *New York Times* that “[b]ecause F.D.A. food-related funding has not kept pace with inflation, more than 800 scientists, inspectors and other critical staff have been lost in the past four years.”³⁸ Further, having been forced to acknowledge Hallmark’s misconduct and being aware that the public was conscious of the risks posed by Hallmark’s practices, when yet another HSUS investigation uncovered similar actions at a different slaughterhouse, USDA quickly responded, suspending the plant and its inspector and requiring corrective measures.³⁹

As another example, an investigator for Plaintiff PETA videotaped the operation of a North Carolina dairy, whose cows most likely made their way into the meat supply. The investigator documented the dairy cows having to trudge through ankle deep pools of their own liquid manure in order to reach their feed bins.⁴⁰ Unsurprisingly, this resulted in caked on manure, even covering the cows’ udders immediately before they were milked.⁴¹ Because PETA was able to gather and release this footage, the North Carolina Department of Environment and Natural Resources began its own investigation into the dairy, which confirmed that the animals were required to stand, eat, walk, and try to rest in up to three feet of manure, causing the state to

³⁸ Andrew Martin, *Humane Society Criticized in Meat Quality Scandal*, N.Y. Times (Feb. 27, 2008), <http://www.nytimes.com/2008/02/27/business/27food.html>.

³⁹ Wayne Pacelle, *Extreme Abuse of Calves Leads to Immediate Shuttering of N.J. Slaughterhouse*, LiveScience Op-ed (Feb. 19, 2014), <http://www.livescience.com/43516-extreme-abuse-shutters-slaughterhouse.html>.

⁴⁰ PETA, *Cows Force to Live in Their Own Waste at Dairy Farm*, <http://investigations.peta.org/north-carolina-dairy-farm/> (last visited June 7, 2016).

⁴¹ *Id.*

issue six citations against the dairy for violations of state law.⁴² At least one buyer stopped shipments from the dairy, and the public outcry caused the owner to cease his operations.⁴³ The images PETA collected also provided a visceral means for promoting its view that people should eat vegan. The story and images convinced more than 7000 people to sign PETA's pledge to change their consumption habits.⁴⁴

Most recently, an investigator for Plaintiff ALDF who secured employment at a pig operation that supplies Hormel was able to document the facility's practice of keeping ill and injured animals trapped alongside pigs destined for the food supply. The investigator recorded that for days or even weeks pigs with "grossly prolapsed rectums, intestinal ruptures, large open wounds, and bloody baseball-sized ruptured cysts" were forced to remain in the regular pens with the other animals.⁴⁵ The resulting risk to public health and safety was made worse because the operators would leave the pigs without food for days at a time, causing them to turn on one another, increasing the potential for cross contamination.⁴⁶ Once this information was revealed, Hormel suspended the supplier from its chain and immediately began a discourse with its consumers via Facebook. ALDF was also able to use the footage to generate a petition for Hormel to alter its protocols and take more proactive steps to ensure animal welfare, in hopes that the company would become an industry leader on these issues.⁴⁷

These are but a few examples of the information and discussions that have flowed from

⁴² *Id.*

⁴³ PETA, *Filthy N.C. Dairy Farm Shuts Down Following PETA Investigation*, <http://investigations.peta.org/north-carolina-dairy-farm/farm-shuts-down/> (last visited June 7, 2016).

⁴⁴ *Id.*

⁴⁵ ALDF, *Investigation Reveals Cruelty and Neglect at Hormel Foods' Pig Supplier* (May 25, 2016), <http://aldf.org/press-room/press-releases/investigation-reveals-cruelty-and-neglect-at-hormel-foods-pig-supplier/>.

⁴⁶ *Id.*

⁴⁷ ALDF, *Stop Cruelty and Neglect at Hormel Foods' Pig Supplier*, http://org2.salsalabs.com/o/5154/p/dia/action3/common/public/?action_KEY=22986 (last visited June 7, 2016).

undercover investigations of animal agriculture facilities. The expert report of Travis Powell, for example, details numerous similar accomplishments from other investigations, including creating the basis for a major ABC news special highlighting animal rights, sparking additional federal investigations, and changing Walmart's sourcing practices. *See* Expert Report of Travis Powell at 9-10, ECF. No. 86.

The constitutionally protected speech generated by each of these investigations would have been rendered criminal by Utah's Ag-Gag law. In each case, a person entered an "agricultural operation," as defined in the law, and "without consent from the owner . . . record[ed] an image" of the operation. Utah Code Ann. § 76-6-112(2)(a). Moreover, in each case, the investigator may have also "obtain[ed] access to [the] agricultural operation under false pretenses" and obtained employment to record information knowing that such recordings were prohibited, creating separate and independent bases for liability. *Id.* § 76-6-112(2)(b)-(c). Thus, Utah's Ag-Gag law could have thrice rendered criminal the investigators' protected efforts to shine a light on the conduct effecting public health and safety. *Id.* § 76-6-112(3)-(4).

Accordingly, it cannot be disputed that the law will chill equivalent protected speech in Utah. It would have allowed the conditions and contamination that each investigation revealed to go unchecked, increasing the risk of consumer disease and death. Perhaps more importantly, it would have stymied or squelched the conversations and policy decisions that the investigations motivated, denied evidence and images that caused all of the participants in our food system to engage with one another, and suppressed key facts that switched prior positions. The effect of the Ag Gag law will be to decrease transparency, favoring corporate secrecy over discussions that the public, food producers, industry, and the government has already indicated are desirable and necessary.

V. DEFENDANTS' EFFORTS TO DIMINISH THE VALUE OF UNDERCOVER INVESTIGATIONS FAIL AS A MATTER OF LAW AND FACT

Defendants spend a great deal of their Brief trying to undercut the value of undercover investigations of animal agriculture facilities by hypothesizing a series of harms that could result from this important speech. They suggest Utah's Ag Gag law cannot be unconstitutional because undercover investigators performing the *same* functions as other employees somehow present a *greater* threat of spreading disease and harming employees—ironically, as demonstrated above, the exact harms that undercover investigations have demonstrated are endemic to industrial animal agriculture and that the investigations have helped mitigate. This, Defendants claim, minimizes the value of the investigators' speech. *See, e.g.*, Defs.' Br. 24 (stating the law is not overbroad because it regulates "individuals who may pose a danger to themselves, others, animals, or food safety"). Yet, Defendants' approach seeks to double count the hypothetical governmental interests at stake, underscoring that they cannot, in fact, counterbalance the substantial nature of the First Amendment speech the law would suppress.

Defendants are asking the Court to conclude that there is less of a societal interest in protecting speech connected with undercover investigations because suppressing that speech could have certain benefits. In doing so, they are intermixing the two sides of overbreadth and intermediate scrutiny balancing tests when, instead, the Court must "take[] seriously" the need to disaggregate the protected speech that the law could impinge from the established legitimate rationales for the law, and then balance the two. *Bartnicki v. Vopper*, 200 F.3d 109, 125 (3d Cir. 1999) (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 52 (1987)), *aff'd* 532 U.S. 514 (2001). Both overbreadth and intermediate scrutiny emphasize that to sustain a law that interferes with speech, the law must be "directed at an important or substantial governmental interest *unrelated to the suppression of free expression.*" *Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010) (emphasis added), *aff'd*, 132 S. Ct. 873 (2012) (discussing intermediate scrutiny); *see also Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus*,

Inc., 482 U.S. 569, 576 (1987) (indicating the same for overbreadth). A law cannot be sustained because suppressing speech can have other tangential benefits; rather the government must establish that, taking into account the full extent and import of the speech the law could suppress, the law's *other*, separate functions outweigh the harm from suppression.

If one were to proceed as Defendants suggest, First Amendment jurisprudence would be turned on its head: suppression of speech would become the rationale for upholding laws. If the potential side-effects from speech diminished its value, courts in England could have shut down Speakers' Corner simply because they determined that the risk of the speech convening a crowd undercut the value of the resulting debate. Where the speech itself produces the ills the government wishes to regulate, the Constitution mandates strict—not intermediate—scrutiny. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This is because “the First Amendment protects the dissemination of [] information so that the people, not the courts, may evaluate its usefulness.” *Connick*, 461 U.S. at 165.

There is a good reason that Defendants attempt to skew the analysis. Properly performed overbreadth and intermediate scrutiny analysis “requires the government” not merely to attack the speech Plaintiffs wish to protect, but to demonstrate that the benefits from that speech are outweighed by the “evidence that a challenged regulation ‘materially advances an important or substantial interest [(unconnected with suppression)] by redressing past harms or preventing future ones.’ *These harms must be real, not merely conjectural*[.]” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (emphasis added) (quoting *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir.2001)); *see also Golan*, 609 F.3d at 1084-85 (10th Cir. 2010) (stating substantially the same).

Defendants have not and cannot carry this burden here. Defendants' only evidence purporting to show any harm from undercover investigations is what their “experts” deem to be “likely” to occur because undercover investigators are on site. Expert Report of David Pyle at 7,

ECF No. 89-1; *see also* Expert Report of William James at 12, ECF No. 88-1 (“A focus on any other activity, such as recording animal handling, is dangerous to human health.”). These hypothetical risks are the *same* harms that have gone unchecked and unnoticed except when brought to light by undercover investigations. Given the evidence *Amici* detail above, such fears cannot possibly justify the legislature and the Court shutting down a necessary public debate about animal agriculture that, in fact, counteracts such risks.

Moreover, Defendants’ conjecture stands in sharp contrast to the facts submitted by Plaintiffs that establish there is no increased risk to health or safety from undercover investigations. For instance, Plaintiffs’ expert Sean Thomas details that while working as an investigator he “completed the various” trainings required of all employees and that he performed all of his functions in “a manner that matched the expectations of my animal industry employers.” Thomas Report at 9, ECF No. 85. Plaintiffs’ expert Travis Powell further explains that undercover investigators of animal agriculture facilities obtain their employment through submitting standard job applications, simply omitting their employment with the investigating organization and past work investigating animal agriculture facilities. Powell Report at 7, 8, 9, ECF No. 86. Investigators leave themselves to the mercy of their employers to determine how they should be instructed and carry out their duties. Thomas Report at 11, ECF No. 85 (“The farm manager told me that the sow was unable to deliver the piglets unassisted and that they needed someone with long arms to try and reach inside the sow and retrieve piglets who had not passed through the birth canal. I had no veterinary training and my position at the farm was awarded to me with the full disclosure that I had no previous experience working with animals.”). The only risks that they present are the risks of animal agriculture that their undercover operations have helped document.

Defendants have failed to make the necessary showings to tip the balance of overbreadth or intermediate scrutiny to their favor. Rather than substantiate non-speech related reasons for

the law, they attack the speech at issue, effectively admitting that the purpose of the law is to target speech the state does not believe is meritorious. Yet, as with all First Amendment doctrines, both overbreadth and intermediate scrutiny start from the premise that it is more important to ensure “protected speech” is not “muted” than to allow the government to regulate its feared negatives from speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Defendants have neither called into question the value of undercover investigations nor carried their burden to show their regulation is necessary to further a sufficiently important governmental objective.

CONCLUSION

“The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). The investigations by Plaintiffs that facilitate their informational campaigns, which Utah’s Ag Gag law seeks to prevent, are indisputably part of this core First Amendment interest; thus the protections afforded this speech must reflect its vaunted position. The investigations reveal real and present dangers to the public’s wellbeing due to how food animals are raised and slaughtered. In doing so, they force discussions in all sectors about how to mitigate these risks and reform the industry. They also reveal failures in “public agenc[ies] discharging [their] governmental responsibilities,” which, in and of itself, renders the speech on a matter of “public concern,” warranting special protection. *Lincoln v. Maketa*, No. 15-00423, 2016 WL 1258988, at *5 (D. Colo. Mar. 31, 2016) (quotation marks omitted). Defendants’ unsubstantiated concern that the speech could produce certain harms is irrelevant to the analysis. Defendants also fail to establish that the law has any “benefits” beyond the suppression of speech. Therefore, in considering whether the Ag Gag law is overbroad or survives intermediate scrutiny, the Court should recognize that the First Amendment interests it violates are “substantial,” and the balance of the purported competing interests justifies holding the law unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2016, I electronically filed the foregoing *Amicus Curiae* Brief with this Court using the CM/ECF system, which sent electronic notification to all counsel of record.

/s/ Cristina R. Stella
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