What Happened to Veggie Libel: Why Plaintiffs are not Using Agricultural Product Disparagement Statutes

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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.

2. Other causes of action provide sufficient remedies, 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.

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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 questioned the safety of eggs following the recent salmonella outbreak in them.2 People who make such comments 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

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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), available at http://www.thedailyshow.com/watch/mon-january-4-2010/michael-pollan (interview in which Pollan stated, “The food industry creates patients for the health care industry... We subsidize the least healthy calories in our supermarkets[, including] high fructose corn syrup.”) (hereinafter “The Daily Show”).

2 See, e.g., Marc Siegel, The Silver Lining in the Egg Recall, FOXNEWS.COM (Aug. 26, 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 32 (Sep. 2, 2010), available at http://www.economist.com/node/16943964?story_id=16943964 (quoting Rob 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 ANN. §§ 6-5-620 to -625 (LexisNexis Supp. 2004); ARIZ. REV. STAT. ANN. § 3-113 (West 2002); FLA. STAT. ANN. § 865.065 (West 2000); GA. CODE ANN. §§ 2-16-1 to -4 (2000); IDAHO CODE §§ 6-2001 to -2003 (Michie 2004); LA. REV. STAT. ANN. §§ 3:4501–:4504 (West 2003); MISS. CODE ANN. §§ 69-1-251 to -257 (West 2009); N.D. CENT. CODE ANN. §§ 32-44-01 to -04 (Supp. 2005); OHIO REV. CODE ANN. § 2307.81 (LexisNexis 2005); OKLA. STAT. ANN. §§ 5-100 to -102 (West 2003); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–.004 (West 2005). But see COLO. REV. STAT. §§ 35-31-101, -104 (2010) (imposing criminal liability only). Some of these statutes are structured so that even potentially true statements might subject their makers to liability. This is done by deeming a statement to be false unless the defendant proves that it was based on reasonable and reliable scientific data. See ALA. CODE ANN. § 6-5-21(1) (LexisNexis Supp. 2004); GA. CODE ANN. § 2-16-2(1) (2000); LA. REV. STAT. ANN. § 4502(1) (West 2003); MISS. CODE ANN. § 69-1-253(a) (West 2009).

and predicted that producers would use them to silence people who publicly raised
concerns about food safety. These predictions seemed well founded after beef producers
sued Oprah Winfrey for negative statements made about beef on her program.

Somewhat surprisingly, however, APD statutes have resulted in only two reported
lawsuits.

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, the reported APD cases, and briefly surveys the constitutional criticisms. Part III
examines three possible reasons why there have been so few APD-related cases. The
first possible explanation is that plaintiffs have no occasion to sue under APD statutes

AGRICULTURAL DISPARAGEMENT LAWS 31, 31 (1998) (“[T]here is no way for the industry to accomplish
its goals constitutionally, precisely because the goal is to deter speech that enjoys First Amendment
protection.”); Eileen Gay Jones, Forbidden Fruit: Talking About Pesticides And Food Safety in the Era of
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 NORTH DAKOTA L. REV. 89, 116 (1998); Megan W. Semple, Veggie Libel
ENVTL. L. J. 403 (1995–1996); Julie J. Srochi, Note & Comment, 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 (1996); Howard 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). For further
discussion of the constitutional problems created by APD statutes, see section III.C, infra.

5 See, e.g., Debora K. Kristensen, What Can You Say About an Idaho Potato?, 41 ADVOCATE 19, 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, Jun. 1, 1999,
&spon=&scp=1&sq=Farmers%27+right+to+sue+grows&st=cse&pagewanted=print; Sam Howe Verhovek,
=&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 had already had a chilling effect on speech about Mad Cow Disease); see
generally, LDRC BULL., supra note 4.

Cir. 2000); see also Verhovek, supra note 5 (describing the potential chilling effect of Texas Beef).

7 See Tex. Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000); Action for a Clean Env’t v. Georgia, 457
because the statutes have completely chilled speech critical of agricultural products. The second possibility is that some states have discouraged spurious APD suits by enacting anti-SLAPP (strategic lawsuits against public participation) statutes, which punish plaintiffs who bring frivolous lawsuits in order to silence discussion of issues of public concern. Thirdly, APD statutes are almost certainly unconstitutional. 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, the 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. However, defamation involves a statement that damages the plaintiff’s reputation, whereas disparagement relates to a statement about the plaintiff’s products or services.

The modern cause of action for defamation is strictly constrained by First Amendment limitations. The elements of defamation vary from case to case, both because the constitutional requirements differ depending on the circumstances and

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8 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.” Dwight H. Merriam & Jeffrey A. Benson, Identifying and Beating a Strategic Lawsuit Against Public Participation, 3 Duke Envt’l. & Pol’y F. 17, 17 (1993).
10 Id.
because different states have imposed further restrictions. However, it generally involves:

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

Unlike defamation, which compensates the plaintiff for damage to his or her reputation, APD statutes resemble more closely the common law cause of action for product disparagement. Common law product disparagement claims usually involve detrimental statements about the quality of a plaintiff’s product or services. Most states have adopted the Restatement (Second) of Torts Section 623A approach, which makes the defendant liable for the plaintiff’s pecuniary loss 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.

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12 For further discussion of the constitutional limitations on defamation claims, see infra section II.C.
13 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:34 (2d ed. 2010).
14 Product disparagement is also known as “trade libel” and is a variety of the claim for injurious falsehood, which also includes disparagement of land, personal property, and intangible things. See RESTATEMENT (SECOND) OF TORTS § 623A, cmt. a (1977) (hereinafter “RESTATEMENT”).
17 See RESTATEMENT, supra note 14, at § 633(1) (“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.”).
18 Id. at § 623A.
The Supreme Court has not directly decided the extent to which First Amendment protections apply to product disparagement. However, it 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 disparagement. In addition, lower federal courts and state supreme courts have applied the First Amendment limitations on liability for defamation to disparagement. These limitations, if they apply, make it more difficult for plaintiffs to prove their cases.

B. The Rise of Agricultural Product Disparagement Statutes

States enacted APD statutes in response to the Alar scandal in the 1980s. Alar, a pesticide, caused widespread alarm after the Natural Resources Defense Council

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19 See id. at § 623A, cmt. (“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.”).
20 See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249, 1270–71 (D. Mass. 1981). Actual malice means that the defendant either knew that the statement was false or acted in reckless disregard of its truth or falsity. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974). All other plaintiffs must show only that the defendant was negligent—or worse—about whether or not the statement was true. Id. at 347.
21 See, e.g., Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110 (9th Cir. 2003) (stating that the actual malice standard applies to disparagement claims); Auvil v. CBS “60 Minutes”, 836 F. Supp. 740 (E.D. Wash. 1993), aff’d 67 F.3d 816 (9th Cir. 1995), cert. denied, 517 U.S. 1167 (1996) (“Auvil II”) (stating that Sullivan’s requirements that the plaintiff prove falsity and actual malice apply to disparagement claims); Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990) (holding that claims for disparagement are subject to the same First Amendment limitations as claims for defamation); Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. App. 1989) (same); A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council, 651 N.E.2d 1283 (Ohio 1995) (holding that the plaintiff must show actual malice). 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 (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), and Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182–83 (Cal. 1986) (First Amendment protections apply, including the “of and concerning” requirement) with Auvil v. CBS “60 Minutes”, 800 F. Supp. 928 (E.D. Wash. 1992), dismissed because the plaintiffs had not proven that statements were false, 836 F. Supp. 740 (E.D. Wash. 1993), aff’d on other grounds, 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).
22 See infra section II.C.1.b.i. for more information on the First Amendment limitations on defamation claims and the probable application of these limitations to disparagement.
23 Jones, supra note 4, at 826; Wasserman, supra note 4, at 325.
reported that using it on apples causes cancer in humans.24 Media outlets across the country—including, most famously, CBS’s *60 Minutes*—picked up the story.25 Following the *60 Minutes* story, apple sales decreased substantially.26 Subsequently, Washington apple growers sued CBS for common law product disparagement, but lost because they could not prove that the statements were false.27

Following *Auvil*, agricultural interests lobbied state legislatures to create a new cause of action that would make it easier to recover damages for negative statements about agricultural products.28 As a result,29 thirteen states passed APD statutes between 1991 and 1997.30 In general, the statutes impose civil liability for stating that any perishable agricultural product is unsafe or unhealthy, unless the statement is based on

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26 Jones, *supra* note 4, at 828.


28 Jones, *supra* note 4, at 833.

29 Several statutes state outright that the purpose is to protect agriculture because it is important to the state’s economy. ALA. CODE ANN. § 6-5-620 (LexisNexis Supp. 2004); FLA. STAT. ANN. § 865.065 (West 2000); GA. CODE ANN. §§ 2-16-1 (2000); IDAHO CODE § 6-2001 (Michie 2004); LA. REV. STAT. ANN. § 3:4501 (West 2003); MISS. CODE ANN. § 69-1-251 (LexisNexis 2005); OHIO REV. CODE ANN. § 2307.81(A) (LexisNexis 2005); OKLA. STAT. ANN. §§ 5-100 (West 2003).

reasonable and reliable scientific data.\textsuperscript{31} North Dakota and South Dakota’s statutes also apply to statements about agricultural practices.\textsuperscript{32}

The elements of an APD statutory claim differ from common law product disparagement in several key respects that 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 that it clearly identifies—the plaintiff.\textsuperscript{33} Although some courts also apply this requirement to claims for common law product disparagement,\textsuperscript{34} some APD statutes allow plaintiffs to recover for statements that are not “of and concerning” them.\textsuperscript{35} In addition, a plaintiff who is a public official or public figure cannot recover for


\textsuperscript{33} See N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). A statement is “of and concerning” a plaintiff if it clearly identifies the individual plaintiff. See Algarin v. Town of Wallkill, 421 F.3d 137, 139 (2d Cir. 2005), quoting Abramson v. Pataki, 278 F.3d 92, 93, 102 (2d Cir. 2002). See also RESTATEMENT, supra note 14, at § 564A cmt. b. (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.) For further discussion of the “of and concerning” requirement, see infra subsection III.C.1.b.iii.

\textsuperscript{34} Compare Gintert v. Howard Publ’ns, Inc., 565 F. Supp. 829 (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), and Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182–83 (Cal. 1986) (First Amendment protections apply, including the “of and concerning” requirement) with Auvil v. CBS “60 Minutes”, 800 F. Supp. 928 (E.D. Wash. 1992), dismissed because the plaintiffs had not proven that statements were false, 836 F. Supp. 740 (E.D. Wash. 1993), aff’d on other grounds, 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).

\textsuperscript{35} 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 ANN. § 33-44-03 (Supp. 2005). Other statutes allow for associations of producers to sue on behalf of their members, apparently regardless of how many, if any, of the member’s products were mentioned with specificity. See ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); OHIO REV. CODE ANN. § 2307.81(D)(3) (LexisNexis 2005) (referring to actions by associations of producers, without explicitly providing for such actions). 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
defamation without proving that the defendant acted with actual malice, meaning that the
defendant knew that the statement was false or acted in reckless disregard of its truth or
falsity. In contrast, the standard of care under APD statutes ranges from actually
knowing that a statement is false, to recklessness, to negligence, to strict liability. Also, unlike in product disparagement and defamation actions, some APD statutes
burden the defendant with proving that a statement is true. 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, most APD statutes arguably
allow for punitive damages for such speech without regard to the defendant’s state of
mind.

IDAHO CODE § 6-2002(1)(a) (Michie 2004); Texas Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000) (discussing TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–.004).
36 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Many potential plaintiffs under APD statutes arguably are public figures. See infra notes 152–54 and accompanying text. Further, no plaintiff can recover without showing that the defendant was negligent, or worse. Gertz, 418 U.S. at 347.
39 ARIZ. REV. STAT. ANN. § 3-113(E)(1) (West 2002); FLA. STAT. ANN. § 65.065(2)(a) (West 2003); LA. REV. STAT. ANN. § 3:4502(1) (West 2003); OKLA. STAT. ANN. § 5-102(A) (West 2003).
41 See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (noting that a plaintiffs are burdened with proving falsity in defamation cases concerning matters of public concern); SACK, supra note 15, at § 3:3.2 (“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 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.
42 See ALA. CODE. ANN. § 6-5-621(1) (LexisNexis Supp. 2004) (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) (2000) (same); La. Rev. Stat. Ann. § 4502(1) (West 2003) (similar). 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).
43 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. However, the constitution does not limit awards of punitive damages where there is both private plaintiff and the issue is one of private concern. See id. at 775 citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985).
44 ALA. CODE ANN. § 6-5-622 (LexisNexis Supp. 2004); ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 65.065(3) (West 2003); GA. CODE ANN. § 2-16-3 (2000); LA. REV. STAT. ANN. § 3:4503 (West 2003); MISS. CODE ANN. § 69-1-255 (West 2009); N.D. CENT. CODE ANN. §§ 32-44-02 (Supp.
C. Constitutional Criticisms

Many scholars believe that APD statutes violate the First Amendment free speech clause—as applied to the states through the Fourteenth Amendment—in several different ways. First, APD statutes impermissibly discriminate based on the speaker’s viewpoint. Second, APD statutes that allow public figure plaintiffs to recover without showing that 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. 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. Fourth, some APD statutes unconstitutionally burden the defendant with proving the statement’s truth. Fifth, 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. Sixth, they impose liability for political speech and are therefore subject to strict scrutiny, which they cannot withstand. Finally, APD statutes impose an impermissible prior restraint on speech by allowing for injunctive relief. These concerns are addressed further in section III.C.1.

2005); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2005); OKLA. STAT. ANN. § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2005). The health and safety of food is an issue of public concern. See infra note 143 and accompanying text.

45 See authorities cited in supra note 4.
46 See infra subsection III.C.1.a.i.
47 See infra subsection III.C.1.b.ii.
48 See infra subsection III.C.1.b.iii.
49 See infra subsection III.C.1.b.iv.
50 See infra subsection III.C.1.b.v.
51 See infra subsection III.C.a.ii.
52 See infra subsection III.C.1.a.iii.
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,\(^{53}\) neither of which addressed their constitutionality. 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 of cows who had been fed contaminated ruminant-derived protein supplements.\(^{54}\) A guest on the show, Howard Lyman, warned that the U.S. risked a serious outbreak of the disease unless the FDA banned ruminant–to–ruminant feeding.\(^{55}\) Winfrey later remarked that Lyman’s warnings “stopped [her] cold from eating another burger.”\(^{56}\) A group of cattlemen sued Lyman, Winfrey, and the production company under Texas’s APD statute,\(^{57}\) claiming that the program caused 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.\(^{58}\)

The trial court found that the plaintiffs had not met the statute’s requirements because live cattle were not a perishable food product and that the plaintiffs had not shown that the defendants knew that their statements were false.\(^{59}\) The Fifth Circuit affirmed, holding that the defendants did not knowingly disseminate false information about beef,

\(^{53}\) As of January 2011.


\(^{55}\) *Id.* at 861. A FDA ban on the practice became effective in August of 1997, 16 months after the segment aired.

\(^{56}\) *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000).


\(^{58}\) *Texas Beef*, 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. The jury found for the defendants on a claim for business disparagement. *Texas Beef Group v. Winfrey*, 201 F.3d 680, 685 (5th Cir. 2000). The Fifth Circuit rejected the plaintiffs’ allegations of error on appeal. *Id.*

\(^{59}\) *Texas Beef*, 11 F. Supp. 2d at 863.
without reaching the issue of whether live cows are a perishable food product to which the statute applies. The Texas Beef 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.

In the other reported case, Action for a 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. The court did not reach the merits, finding that there was no justiciable controversy because the state did not have any interest adverse to the plaintiffs and had not denied them any right.

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 or “anti-SLAPP”

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60 Texas Beef, 201 F.3d at 687–89. The court held that Lyman’s statements did not contain any “provably false factual connotation” and “were based on factually accurate premises.” Id. at 688. In addition, the editing did not misrepresent the views of the guests who spoke in defense of the cattle industry and broadcast some of those guests’ statements. Id. at 689.
61 See, e.g., Rosenblatt v. Baer, 383 U.S. 75, 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, 288–92 (1964) (same); Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182–83 (Cal. 1986) (regarding disparagement); Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. App. 1989) (same). 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].”)
64 Id.
A. APD Statutes May Have Prevented Litigation by Chilling Criticism that Would Give Rise to a Claim.

Many people predicted that APD statutes would silence people who might otherwise express concerns about food safety. Though there is anecdotal evidence that this has happened, 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. 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. First, APD statutes define falsity, a prerequisite for liability, according to a vague standard: whether the statement is based on reasonable and reliable science.
science disputes are reducible to differences of opinion on the appropriate methodology, degree of uncertainty or likelihood of uncertain outcomes or causation, or involve scientific hypotheses or allegations of risk that cannot be proved or disproved.”  

As a result, a jury could award damages based on “some perfectly valid scientific ideas and conclusions,” and speakers remain silent rather than risk liability. 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. Finally, some statutes have an even stronger chilling effect because they could be interpreted as allowing injunctive relief, a prior restraint on speech. Prior restraints have “an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it.” In addition, a well-heeled plaintiff might bring a non-meritorious suit in

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71 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. Theories about the causes of climate change are based on complex models that are, in turn, based on assumptions about the likely effects of a variety of factors. Dale Jamieson, Scientific Uncertainty and the Political Process 35, 36 (1996) (“[A]lthough 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.”).

72 Wasserman, supra note 4, at 389.

73 Jones, supra note 4, at 859.

74 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.”)


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. Many people stay silent because they cannot afford to risk such a lawsuit, even if they believe that their concerns about food safety are legitimate. Finally, the time and stress involved in litigation is, in itself, a deterrent.

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.” For example, in 1998, one publisher cancelled a book, even though the manuscript already had gone to the printer, after receiving a letter from Monsanto’s attorney, saying that “he believed the manuscript, which he had not seen, included false statements that would disparage” Monsanto’s herbicide, Roundup. 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. 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.” Similarly, Alec Baldwin claims that in the late-

77 Jones, supra note 4, at 840.
78 See Merriam & Benson, supra note 8, at 17 (“While [a plaintiff] may realize that her SLAPP [(strategic lawsuit against public participation)] lawsuit has no chance of winning on the merits, she knows that 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.”).
79 Petersen, supra note 5, at C11.
80 Id.
81 Id.
82 Id.
1990s the Discovery Channel denied his proposal for a documentary that discussed “pesticides, herbicides, and some disputed practices used to raise beef” because of concern about an APD lawsuit. This chilling effect is not limited to the media. For instance, a Sierra Club volunteer worried, “When 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].” She also noted that other volunteers repeatedly asked her whether they could get sued for helping her hand out a brochure about GMOs. 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. These are just some of the reported instances of chilled speech stemming from APD statutes.

The example of Jane Akre and Steve Wilson illustrates how the threat of a lawsuit chills speech. Although their story does not involve speech actionable under an APD statute, it shows the type of litigation experience that deters some would-be speakers. In the late 1990s, Akre and Wilson were investigative reporters employed by a Fox affiliate. They concluded that drinking milk from cows treated with the bovine growth

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83 Id. The Discovery Channel denies this allegation.
84 Id.
85 Id. These events occurred in Ohio in 1999, three years after Ohio passed its APD statute. Id.
86 Id.
87 See Jones, supra note 4, at 857–58 (reporting other instances of APD statutes’ chilling effect).
89 New World Commc’ns, 866 So.2d at 1231; Akre & Wilson, supra note 88, at 551–52.
hormone, which is produced by Monsanto, might cause cancer in humans.\(^{90}\) 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.”\(^{91}\) 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.\(^{92}\)

They sued the station, claiming that they were fired in retaliation for threatening
to report the alleged news distortion.\(^{93}\) Though Akre won at trial, an appellate court

reversed because the state whistleblower statute requires that the retaliation be in
response to an employee’s threat to disclose a violation of “law, rule, or regulation,” and

that the FCC’s policy (developed in its administrative proceedings) was not a “law, rule,
or regulation” because the FCC had not published it “as a regulation with definitive

elements and defenses.”\(^{94}\)

The chilling effect under 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 impose a prior impose 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 safety. Second, when Akre and Wilson attempted to

\(^{90}\) New World Commc’ns, 866 So.2d at 1231; Akre & Wilson, supra note 88, at 551–53.

\(^{91}\) Akre & Wilson, supra note 88, at 553–54.

\(^{92}\) New World Commc’ns, 866 So.2d at 1233; Akre & Wilson, supra note 88, at 554.

\(^{93}\) New World Commc’ns, 866 So.2d at 1233; Akre & Wilson, supra note 88, at 554–55.

\(^{94}\) New World Commc’ns, 866 So.2d at 1233, quoting FLA. STAT. § 448.102 (1997).
“stand up for the truthfulness of [their] story” by suing for retaliatory dismissal, they incurred extensive legal fees\textsuperscript{95} and ultimately lost on a technicality.

### 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,\textsuperscript{96} 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 Pollan 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.\textsuperscript{97} 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 the enactment of anti-SLAPP (strategic lawsuit against public participation) statutes in three states with APD statutes.\textsuperscript{98} Anti-SLAPP

\textsuperscript{95} 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. Akre & Wilson, supra note 88, at 555

\textsuperscript{96} 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.”).


\textsuperscript{98} See ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (West Supp. 2009); GA. CODE ANN. § 9-11-11.1 (Supp. 2005); LA. CODE CIV. PROC. ANN. Art. 971 (West 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). The other states with APD statutes do not have anti-SLAPP statutes. Congress is also considering a federal anti-SLAPP law. See Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (as referred to H. Subcomm. on Courts and Competition Pol’y, Apr. 26, 2010).
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.\textsuperscript{99} States enacted anti-SLAPP statutes to prevent lawsuits aimed at preventing discussions about matters of public concern by intimidating potential speakers with the prospect of incurring extensive legal fees.\textsuperscript{100} This is the very sort of lawsuit that people feared would result from APD statutes.

Anti-SLAPP statutes may have prevented some APD suits, but their effect is probably quite limited.\textsuperscript{101} To the extent that 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.\textsuperscript{102} 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.\textsuperscript{103} The Louisiana statute has the broadest scope: it covers almost all speech that would be actionable under its APD statute. It 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

\textsuperscript{99} See ARIZ. REV. STAT. ANN. §§ 12-751 to -752; GA. CODE ANN. § 9-11-11.1; LA. CODE CIV. PROC. Art. 971.
\textsuperscript{100} ARIZ. LAWS 2006, Ch. 234, § 2(B); GA. CODE ANN. § 9-11-11.1(a) (Supp. 2005); LA. LAWS 2009, § 2, No. 734.
\textsuperscript{101} Of course, it is impossible to state their effect with any certainty because would-be SLAPP plaintiffs are unlikely to admit their motivations.
\textsuperscript{102} See ARIZ. REV. STAT. ANN. § 12-752(D) (West Supp. 2009); GA. CODE ANN. § 9-11-11.1(b) (Supp. 2005); LA. CODE CIV. PROC. Art. 971(B) (West 2005).
\textsuperscript{103} The year in which each state passed its anti-SLAPP statute is also relevant to 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, 12-751 to -752 (West 2002 & Supp. 2009). Georgia enacted its APD statute in 1993, just two years after its anti-SLAPP. See GA. CODE ANN. §§ 2-16-1–2-16-4; 9-11-11.1 (2000 & Supp. 2005). Louisiana enacted its APD statute in 1991 and its anti-SLAPP statute in 1999. See LA. REV. STAT. ANN. §§ 3:450–3:4504 (West 2003); LA. CODE CIV. PROC. Art. 971 (West 2005).
Consequently, it is a very effective tool in fighting frivolous APD lawsuits. Arizona’s anti-SLAPP statute is the most limited. It applies only to statements made in petitions to a governmental body or as “part of an initiative, referendum, or recall effort.” It, therefore, does not protect most speech that could give rise to liability under Arizona’s APD statute. Finally, Georgia’s anti-SLAPP statute strikes a middle ground: it applies to statements made to governmental entities or in connection with an issue that a governmental entity is considering. Therefore, it applies to many statements actionable under the state’s APD statement—because the government regulates many agricultural practices, including the use of certain pesticides, such that statements about these practices could be considered statements about government regulation of them—but excludes others, such as those about agricultural practices that the government is not currently regulating.

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. However, their impact seems quite limited because (1) there have only been two reported cases involving APD statutes, and (2) only three out of the twelve states that provide a private cause of action under an APD statute have anti-SLAPP statutes. 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

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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. Therefore, a reasonable plaintiff will not pursue such a claim if there are alternative, constitutionally valid causes of action. 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. This may explain why there have been so few cases involving APD statutes.

1. **A court would likely find an APD statute to be unconstitutional.**

The First Amendment, which applies to state action through the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The framers’ purpose in protecting speech was to ensure the free flow of ideas that is necessary for democratic governance. This protection of speech extends to private causes of action because they can restrict speech just as much as direct government action. However, despite the Amendment’s absolutist language, the government may—subject to judicially-imposed limitations—prohibit certain types of expression. For example, individuals do not have free reign to engage in defamation.

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108 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 834. Ten years later, there have been no additional reported cases, and this hypothesis merits further exploration.
110 U.S. CONST. amend. I.
111 See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); see also Whitney v. California, 274 U.S. 357, 375–76 (1926) (Brandeis, J., concurring) (stating that the framers wanted to avoid state-imposed restrictions on speech because “believ[ed] in the power of reason as applied through public discussion”);
APD statutes probably violate the First Amendment free speech clause in several ways. These constitutional violations fall into two categories. The first includes violations that exist regardless of whether a court subjects APD claims to the same First Amendment limitations as those for defamation. The second category of violations contains those that arise if the constitutional limitations on defamation claims also apply to APD claims.

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. Second, because APD statutes impose liability for political speech, they are subject to strict scrutiny, which they cannot withstand. Finally, they impose an unconstitutional prior restraint on speech by allowing for injunctive relief.

114 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 STATE OF NEW HAMPSHIRE H.R. COMM. ON THE JUDICIARY & FAMILY LAW, REP. ON H.B. 1105 1 (Comm. Print 1998) (“[T]his bill . . . constitute[s] an attack on the 1st Amendment rights basic to our democracy.”); Should a New Cause of Action be Created Allowing Producers or Shippers of Perishable Food Products to Recover Damages from Persons Maliciously Disseminating False Information that the Food Product is not Safe for Human Consumption?: Hearing Before the Assemb. Comm. on the Judiciary, 1997–1998 Sess. 1–2 (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).

115 The First Amendment limitations on defamation claims probably also apply to APD claims. See infra subsection III.C.1.b.i. However, one cannot state with this with certainty 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 United States, Inc., 466 U.S. 485 (1984); Texas Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000), and Action for a Clean Env’t v. Georgia, 457 S.E.2d 273 (Ga. App. 1995).

116 See infra subsection III.C.1.a.i.

117 See infra subsection III.C.1.a.ii.

118 See infra subsection III.C.1.a.iii.
i. **APD statutes involve unconstitutional viewpoint discrimination.**

APD statutes unconstitutionally discriminate based on the speaker’s viewpoint. Laws that restrict “only one view of a particular subject” but not others on the subject “might be virtually per se unconstitutional.” Laws may not discriminate based on viewpoint even when the covered speech is of a type—such as defamation—that the government may restrict in a viewpoint-neutral manner. 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. Surely, this is the epitome of viewpoint discrimination.

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. Restrictions on political speech are subject to strict scrutiny,

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119 Wasserman, *supra* note 4, at 366; see Rosenberger v. Rectors 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.”); Lamb’s Chapel v. Center Morices Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (“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) (“Although 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.”).

120 *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (noting that “the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.”). *See also supra* note 114 and accompanying text (concerning types of speech that the government may restrict).

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

meaning that they must be narrowly tailored to serve a compelling state interest.\textsuperscript{123} Political speech includes—but is not limited to—attempts to influence “issue-based elections.”\textsuperscript{124} Much of the speech that is 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.\textsuperscript{125} For example, the FDA banned Alar following the \textit{60 Minutes} report on its cancer risk; the ban on feeding ruminant-derived protein to cows followed the Oprah broadcast; and Upton Sinclair’s \textit{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.”\textsuperscript{126} In addition, the South Dakota APD statute applies to statements against “generally accepted agricultural and management practices,”\textsuperscript{127} 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.\textsuperscript{128}

Because APD statutes make political speech actionable, they are subject to strict scrutiny, which they cannot withstand because they are underinclusive. A statute can only withstand strict scrutiny if it is narrowly tailored to serve a compelling government interest.\textsuperscript{129} A law is not narrowly tailored if it is underinclusive, meaning that it does not

\textsuperscript{123} \textit{Citizens United v. Federal Election Comm’n}, 130 S.Ct. 876, 891 (2010); \textit{McIntyre}, 514 U.S. at 347.
\textsuperscript{124} \textit{McIntyre}, 514 U.S. at 347; \textit{see also Meyer v. Grant}, 486 U.S. 414, 420 (1988) (regarding circulating a petition for a ballot initiative).
\textsuperscript{125} Wasserman, \textit{supra} note 4, at 382.
\textsuperscript{126} \textit{Id}.
\textsuperscript{127} S.D. CODIFIED LAWS § 20-10a-1(2) (2004).
\textsuperscript{128} Wasserman, \textit{supra} note 4, at 380–81.
affect other speech that damages the same interest. APD statutes are underinclusive 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. Concern about protecting the public from false information is not limited to information about produce, and damage to other industries may negatively impact the state economy just as much as damage to the agriculture industry. Thus, APD statutes fail strict scrutiny, and therefore violate the First Amendment.

iii. APD statutes violate the First Amendment by potentially imposing a prior restraint on speech.

Prior restraints on speech are per se unconstitutional. A prior restraints forbids a given communication before the communication is made. “Temporary restraining orders and permanent injunctions . . . are classic examples of prior restraints.” Some APD statutes could be interpreted to allow injunctive relief and, therefore, violate the First Amendment.

130 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.” Id. at 52.
131 Wasserman, supra note 4, at 377.
132 Id. at 378.
135 Id.
136 Gimensky & Ochroch, supra note 74, at 64. See ALA. CODE ANN. § 6-5-622 (LexisNexis Supp. 2004); ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3 (2000); LA. REV. STAT. ANN. § 3:4503 (West 2003); MISS. CODE ANN. § 69-1-255 (West 2009); N.D. CENT. CODE ANN. §§ 32-44-02 (Supp. 2005); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2005); OKLA. STAT. ANN. § 5-102(A) (West 2003); S.D. CODIFIED LAWS § 20-10A-2 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West 2005).
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 constitutional restrictions on defamation claims. First, APD statutes that allow public figure plaintiffs to recover without showing that the defendant acted with actual malice impose liability upon showing lesser degree of fault than is required for defamation claims.137 Secondly, 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.138 Thirdly, some APD statutes unconstitutionally burden the defendant with proving the statement’s truth.139 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.140

i. The First Amendment requirements for defamation claims should apply to claims under APD statutes.

The First Amendment strictly limits liability for defamation.141 The Supreme Court has not, however, decided the extent to which these limit common law disparagement and APD claims. However, in Bose Corp. v. Consumers Union of the United States,142 the Court accepted, though it did not decide on, a district court’s application of the actual malice requirement to common law disparagement.143 In addition, lower federal courts and state courts have directly applied the constitutional

137 See infra subsection III.C.1.b.i.
138 See infra subsection III.C.1.b.ii.
139 See infra subsection III.C.1.b.iii.
140 See infra subsection III.C.1.b.iv.
143 Id.
limitations on defamation to common law disparagement. Doing so makes sense: both involve alleged damage caused by publishing a false, negative statement. The difference is that one involves personal reputation and one 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 important, and thus less worthy of protection, than speech about individuals.” 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?

These limitations should also apply to APD statutes. 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,” 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. Furthermore, if the First Amendment only

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145 Johnson & Stahl, supra note 4, at 33.
147 Citizens United v. Federal Election Comm’n, 130 S.Ct. 876, 891 (2010), quoting Federal 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 (1926) (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 that the Supreme Court would likely apply First Amendment requirements to APD statutes because threat of liability under APD statutes chills expression in exactly the same way as in a defamation suit).
constrains common law claims, then those seeking to infringe on individual liberties could do so simply by creating statutory claims.

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 that the First Amendment requires for defamation claims are unconstitutional. Plaintiffs who are public officials or public figures cannot recover for defamation without proving that the defendant acted with actual malice, meaning that the defendant either knew that the statement was false or acted in reckless disregard of its truth or falsity.\(^\text{149}\) Other plaintiffs must only prove that the defendant was negligent about whether or not the statement was true.\(^\text{150}\) Plaintiffs can be public figures by either “occupy[ing] positions of . . . persuasive power and influence,” or “thrust[ing] themselves to the forefront of

\(^{149}\) Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Many potential plaintiffs under APD statutes arguably are public figures. See infra notes 152–54 and accompanying text. The court imposes heavier burden on public figures because they “invite attention and comment,” and because they can more easily communicate with large audiences—and thus refute false statements—than private individuals. *Id.* at 344–45.

\(^{150}\) *Id.* at 347 (holding that 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 15, at § 6:1. *Gertz* concerned a defendant that was a member of the media. *See Gertz* 418 U.S. at 323. The Supreme Court has not held whether a non-media defendant can be liable for defamation without a showing of fault. Though state courts 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 (Ala. 1983); *Bryan v. Brown*, 339 So. 2d 577 (Ala. 1976); *Antwerp Diamond Exch., Inc. v. Better Bus. Bureau*, 637 P.2d 733 (Ariz. 1981); *Nodar v. Galbreath*, 462 So. 2d 803 (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. Morris*, 949 S.W.2d 422 (Tex. Ct. App. 1997). *See also Sack, supra* note 15, at § 6:5:1 (“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 (Colo. 1978); *Sack, supra* note 15, at § 6:5:2. In any event, many statements actionable under APD statutes are made using some form of broadcast or print media. Cf. *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000) (concerning statements made on a television talk show).
particular public controversies in order to influence the resolution of the issues involved.”\(^{151}\)

Many APD statutes allow a plaintiff to recover without showing that 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 possibly have known that the statement was false.\(^{152}\) However, even statutes that require the plaintiff to prove that 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.\(^{153}\) Most or all APD plaintiffs should be required to show actual malice because they are public figures, because they are either large, well-known corporations; local public figures, with regard to statements made locally; or trade associations formed in order to inform the public of the industry’s point of view.\(^{154}\) Howard Wasserman argues that all plaintiffs in a class action APD suit should be treated as public figures because a class includes both public and private figures, and Supreme Court jurisprudence weighs in favor of protecting speech.\(^{155}\) Wasserman’s argument is persuasive because not doing so would render the First Amendment requirements for public figure plaintiffs meaningless by allowing public plaintiffs to avoid them simply by joining a private plaintiff.

\(^{151}\) Id. at 345.


\(^{154}\) 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.”

iii. APD statutes that lack an “of and concerning” requirement are unconstitutional.

The First Amendment allows imposing liability for defamation only if the statement at issue is “of and concerning” the plaintiff. This means that it must clearly identify a particular plaintiff. This determination is more difficult when the allegedly defamatory statement is about a group, as many statements actionable under APD statutes are. Two main factors determine whether a group member may recover for a defamatory statement about the group: (1) whether the statement is about some or all group members, and (2) the group’s size. Though it is not sufficient to show that a statement implicated only some group members, a statement that impugns every member may satisfy the requirement. Nonetheless, if the subject group is sufficiently large, the statement is not considered to be “of and concerning” any particular group member. Although “[i]t is not possible to set definite limits as to the size of the group or class,” plaintiffs usually only recover if there are twenty-five or fewer group members.

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157 See Rosenblatt, 383 U.S. at 82; Algarin v. Town of Wallkill, 421 F.3d 137, 139 (2d Cir. 2005).

158 See Algarin, 421 F.3d at 140; cf. RESTATEMENT, supra note 14, at § 564A cmt. b. (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.)

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

160 Fawcett Publ’ns, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), cert. denied, 376 U.S. 513 (1964) (statement that an entire football team used a performance-enhancing drug was “of and concerning” every member of the team); see 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.”).

161 See Algarin, 421 F.3d at 139; see also SACK, supra note 15, at § 2:9:4 (“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.”).

162 RESTATEMENT, supra note 14, at § 564A cmt. b. 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 (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
Some courts also, correctly, only allow plaintiffs to recover for common law disparagement for statements that are “of and concerning” that particular plaintiff.\footnote{163} Applying the “of and concerning” requirement to disparagement claims is proper because the harm caused to members of a large group that has been defamed is outweighed by the “public’s interest in free expression.”\footnote{164} 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.\footnote{165} 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.\footnote{166} For example, without such a requirement, “[i]f Oprah Winfrey had been liable for disparaging beef, she would be liable not just to the plaintiffs, but to every cattle grower in Texas and in every other state with a similar statute.”\footnote{167}

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. However, some APD statutes create liability for statements that are not of and concerning the plaintiff,\textsuperscript{168} 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 that the allegedly disparaging statement was true. In defamation and common law product disparagement cases stemming from statements about matters of public concern, the First Amendment requires that the plaintiff prove that a statement is false.\textsuperscript{169} The Court imposed this requirement in order to avoid the self-censorship that would otherwise result.\textsuperscript{170} APD statutes impose liability for statements about food safety, which is an issue of public concern.\textsuperscript{171} Because it is a matter of public concern, the plaintiff should have the burden of proving falsity, but some APD statutes unconstitutionally burden

\textsuperscript{168} 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 (Supp. 2005); Ohio Rev. Code Ann. § 2307.81(D)(3) (LexisNexis 2005). 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 § 6-2002(1)(a) (Michie 2004); Texas Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000); see also Jones, supra note 4, at 835 (Even if the statute doesn’t specifically say so, many statutes’ language suggests that “a wide range of persons” have standing.).

\textsuperscript{169} Milkovich v. Lorain Journal, 497 U.S. 1 (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 that a 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 will deter 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 15, at § 3:3.2.

\textsuperscript{170} Johnson & Stahl, supra note 4, at 36.

\textsuperscript{171} For a discussion of why food safety is an issue of public concern, see supra note 143 and accompanying text.
defendants with providing studies to prove the truth of their statements and proving that those studies are reasonable and reliable.\textsuperscript{172}

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. 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.\textsuperscript{173} The Court imposed this limitation both because the jury can award punitive damages in a way that punishes unpopular views, and because it would unnecessarily increase self-censorship.\textsuperscript{174} 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.\textsuperscript{175}

\textsuperscript{172} See ALA. CODE ANN. § 6-5-21(1) (LexisNexis Supp. 2004); GA. CODE ANN. § 2-16-2(1) (2000); 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 counts as “reasonable and reliable” science, given that scientists often disagree about data, methodology, how to interpret results, or who even counts as an expert. Jones, supra note 4, at 839; 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.”).

Requiring the defendant in an APD suit to prove the statement’s truth is not only unconstitutional, but is also unusual, given that 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. May 2010).


\textsuperscript{175} ALA. CODE ANN. § 6-5-622 (LexisNexis Supp. 2004); ARIZ. REV. STAT. ANN. § 3-113(A) (West 2002); FLA. STAT. ANN. § 865.065(3) (West 2000); GA. CODE ANN. § 2-16-3 (2000); LA. REV. STAT. ANN. § 3:4503 (West 2003); MISS. CODE ANN. § 69-1-255 (West 2009); N.D. CENT. CODE ANN. §§ 32-44-02 (Supp. 2005); OHIO REV. CODE ANN. § 2307.81(4)(C) (LexisNexis 2005); OKLA. STAT. ANN. § 5-102(A) (West...
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. In addition, agricultural producers often can sue under defamation laws instead. 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 that they likely would lose on constitutional grounds. Therefore, a reasonable plaintiff who has suffered a legitimate harm will pursue a defamation or common law disparagement action instead.

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 that sufficiently protect their interests 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 have a significant actual chilling effect, silencing some 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, the chilling effect cannot be the only reason that 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.