

No. 20-1538

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ANIMAL LEGAL DEFENSE FUND, ANIMAL EQUALITY,
CENTER FOR BIOLOGICAL DIVERSITY,
and FOOD CHAIN WORKERS ALLIANCE,**

Plaintiffs-Appellants,

v.

**JONATHAN and DEANN VAUGHT, d/b/a PRAYER CREEK FARM,
and, PECO FOODS, INC.,**

Defendants-Appellees.

Appeal from an Order by the United States District Court
for the Eastern District of Arkansas
Case No. 4:19cv-00442-JM

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), Arkansas Times, The Center for Investigative Reporting (d/b/a Reveal), The E.W. Scripps Company, Freedom of the Press Foundation, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Investigative Studios, Little Rock Sun Community Newspaper, The Media Institute, MediaNews Group Inc., Minnesota Newspaper Association, MPA - The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.¹ Amici have filed an accompanying motion seeking leave of Court to file this amici brief. Plaintiffs-Appellants consent to the filing of this brief. Defendants-Appellees do not consent.

Lead amicus the Reporters Committee is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media lawyers in 1970, when the nation’s press faced an unprecedented wave of

¹ No party’s counsel authored any part of this brief. No person other than *amici* or their counsel contributed money intended to fund the brief’s preparation or submission.

government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As members and representatives of the news media, amici have a strong interest in ensuring that journalists can report on matters of public concern without facing unconstitutional impediments to their newsgathering activities. Journalists depend on sources to inform them of dangerous, illegal, or unethical activities of concern to the public—and to provide documentation of such wrongdoing.

Investigative journalism focused on the agriculture industry and relying on sources within agricultural facilities has a long and storied tradition.

By exposing agricultural workers and others to potential civil liability, Ark. Code Ann. § 16-118-113 (the “Arkansas Ag-Gag Statute” or the “Act”) chills their willingness to speak to reporters and, in turn, prevents those reporters from informing the public. Amici respectfully submit this brief in support of Plaintiffs-Appellants to emphasize the public interests at stake in this case and to highlight the chilling effect of the Arkansas Ag-Gag Statute on journalists and their sources.

SUMMARY OF ARGUMENT

From Upton Sinclair more than a century ago to numerous Pulitzer Prize winners in recent years, journalists have a long and proud history of investigating and reporting on abusive, unsafe, and unsanitary conditions in the agriculture industry. Such reporting has helped spur several pieces of landmark federal legislation that ensure our food supply is safe. And just as the public depends on journalists to report on conditions and practices in agricultural and other commercial facilities, journalists depend on sources with firsthand knowledge of those conditions and practices to share what they know. The news media and their sources within agricultural facilities therefore have mutually reinforcing First Amendment interests in informing the public about the state of the nation's food supply and the conditions under which food is produced. And, as courts across the country have consistently held, so-called "ag-gag"² laws unconstitutionally infringe upon these vital interests.

The Arkansas Ag-Gag Statute deters speech and important news reporting on matters of the utmost public concern, including the treatment of workers, as

² The term "ag-gag" was coined by then-*New York Times* writer Mark Bittman in 2011. See Mark Bittman, *Who Protects the Animals?*, N.Y. Times (April 26, 2011), <https://perma.cc/N74F-JUE8>. "Ag-gag" refers to state laws that, among other things, forbid filming or photography at concentrated animal feeding operations or otherwise protect the agriculture industry by discouraging whistleblowing. Amici refer to Section 16-118-113 as the "Arkansas Ag-Gag Statute."

well as animals, and the safety of our food. The Act imposes civil liability on any “person who knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person’s authority to enter the nonpublic area.” Ark. Code Ann. § 16-118-113(b). This includes but is not limited to employees who enter nonpublic areas of commercial property “for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer” and then without authorization capture the employer’s data or documents, record images or sound from nonpublic areas, or place unattended recording devices, if those activities cause harm to the employer. Ark. Code Ann. § 16-118-113(c).³ The Arkansas Ag-Gag Statute’s reach is extremely broad. The Act is not limited to the agriculture industry and instead applies to any commercial facility. And the Act’s civil penalties are especially harsh. *See* Ark. Code Ann. § 16-118-113(e) (providing for recovery of compensatory damages, attorney’s fees, and/or statutory damages up to \$5,000 per day). By subjecting those who wish to expose conditions or wrongdoing in agricultural facilities or other commercial properties to such severe civil penalties, the Act discourages whistleblowers from coming forward and chills reporter-source communications, ultimately stifling the free flow of information to the public. That the Act imposes civil, rather than

³ The Act also provides that a “person who knowingly directs or assists another person to violate this section is jointly liable.” Ark. Code Ann. § 16-118-113(d).

criminal, penalties makes it no less of a threat to the unfettered exercise of First Amendment freedoms. As the Supreme Court has recognized, the fear of a large damage award can be just as infringing as concern about a possible criminal prosecution.

The chilling effect that the Arkansas Ag-Gag Statute has on Plaintiffs-Appellants Animal Legal Defense Fund (“ALDF”), Animal Equality, Center for Biological Diversity, and Food Chain Workers Alliance (“Plaintiffs”) creates an injury in fact sufficient to support Plaintiffs’ Article III standing.⁴ In suits filed by similar or the same plaintiffs challenging similar ag-gag laws in a similar posture, federal courts have consistently held that plaintiffs have standing to pursue a pre-enforcement challenge. Standing in these cases was premised on the chilling effect of such statutes, even when plaintiffs did not have specific plans to engage in the threatened speech at an exact time and location.

For these reasons, amici urge the Court to hold that Plaintiffs have standing to challenge this unconstitutional law.

⁴ Plaintiffs also assert two other theories for establishing standing: imminent harm and listener standing.

ARGUMENT

I. Journalists depend on sources within agricultural facilities to report on matters of public concern.

Plaintiffs have alleged that they wish to obtain information about agricultural facilities in order to inform the public. Complaint at ¶¶ 74, 86, 94. Members of the news media also frequently rely on sources—including Plaintiffs themselves—to provide newsworthy information about agricultural facilities that they, in turn, use to keep the public informed. *See* Complaint at ¶¶ 59, 61, 82 (alleging that Plaintiffs frequently provide the results of their investigations to journalists, who then report to the public about what the advocacy groups have uncovered). The Arkansas Ag-Gag Statute chills these critical reporter-source communications.

Sources who can provide firsthand information are the lifeblood of investigative reporting. Reporters covering agriculture and other industries frequently rely on whistleblowers and other sources to provide firsthand accounts, documents, photographs, or videos obtained from within commercial facilities in order to bring issues of public concern to light. *See The Hierarchy of Information and Concentric Circles of Sources*, Am. Press Inst., <https://perma.cc/Z76A-3SC3>. Access to documentary materials and eyewitness accounts enhances accuracy and credibility in reporting, increases transparency and reader trust, and enriches news

stories. *See, e.g.*, Deron Lee, ‘Ag-Gag’ Reflex, *Colum. Journalism Rev.* (Aug. 6, 2013), <https://perma.cc/Z5D5-GSJZ>.

Plaintiffs’ investigations have frequently provided source material to journalists reporting on the agriculture industry. For instance, in 2019, the *Lincoln Journal Star* in Nebraska reported on an undercover investigation by Plaintiff Animal Equality at Summit Calf Ranch. Matt Olberding, *Animal Rights Group Alleges Abuse at Nebraska Calf Operation*, *Lincoln J. Star* (July 18, 2019), <https://perma.cc/W8BX-GHP2>. As explained by the newspaper, the investigation revealed photos and videos of “calves freezing to death or enduring frozen limbs after they were left outside in temperatures well below freezing” as well as uncovering instances in which workers “jabbed and hit calves with sorting sticks and hut rods, allowed dogs to bite the calves, failed to provide veterinary care to sick calves and also performed procedures on the calves without using pain medication.” *Id.*

In 2016, several news outlets reported on the results of Plaintiff ALDF’s undercover investigation of a “puppy mill” in New Mexico. *See, e.g.*, *Animal Legal Defense Fund Wants New Mexico Kennel Shut Down*, *KRQE* (Feb. 29, 2016), <https://perma.cc/Z6KG-CXC5>. Using a hidden camera, ALDF’s investigator produced “a video that shows it all. Waste and urine, mangy fur, long nails and dogs left out in freezing temperatures can be seen.” *Id.* Following that

investigation and resulting news coverage, the United States Department of Agriculture opened an investigation into the breeder. Jessica Oh, *Breeder Who Sold Dogs to Coloradans Under Investigation*, KUSA 9 News (Mar. 5, 2016), <https://perma.cc/B9SZ-DLR6>.

Undercover investigations from ALDF have also informed media reports about Arkansas-based Tyson Foods, the state's second largest publicly traded company. For example, in 2015, Fox Business wrote about what an ALDF investigator discovered while working undercover for 21 days at a Tyson chicken facility in Texas. *Tyson Foods Under Fire as Second Video Shows Chicken Abuse*, Fox Business (Sept. 14, 2015), <https://perma.cc/Y9LX-C9KD>. The investigation raised questions about both the safety of workers and the handling of animals within the facility, where the investigator said she was required to "rip the heads off of live chickens. You could tell that the chickens were alive and scared as you put their heads into the hook." *Id.*; see also Cathy Siegner, *Undercover Investigation Alleges Abuse of Chickens, Workers at Tyson Slaughter Plant in Texas*, Food Safety News (Sept. 16, 2015), <https://perma.cc/S46V-6HQT>.

The reliance on sources exemplified in such reporting has long helped journalists safeguard the public interest and has prompted reform and improvements in the agriculture industry that benefit the public at large. Upton Sinclair's experiences interviewing health inspectors and industry workers at

Chicago slaughterhouses more than a hundred years ago informed his famed book, *The Jungle*, which led to revolutionizing reforms in the regulation of food production. James Diedrick, *The Jungle*, Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin, Keating, & James R. Grossman eds. 2005), <https://perma.cc/6CRY-QUWE>. Although the book is fiction, *The Jungle* described all too real unsanitary conditions at meatpacking facilities in the late-19th and early-20th centuries. *Id.* Sinclair’s work motivated the passage of the Pure Food and Drug Act and the Meat Inspection Act, both enacted in 1906, which instituted sweeping reforms in the meatpacking industry. *Id.*; *see also* Wallace F. Janssen, *The Story of the Laws Behind the Labels*, FDA, <https://perma.cc/KL3D-AS3S> (originally published in *FDA Consumer*, June 1981) (“A single chapter in Upton Sinclair’s novel, THE JUNGLE, precipitated legislation expanding federal meat regulation to provide continuous inspection of all red meats for interstate distribution, a far more rigorous type of control than that provided by the pure food bill.”). Sinclair’s reliance on interviews with whistleblowers, including slaughterhouse employees, was indispensable: “I sat at night in the homes of the workers, foreign-born and native, and they told me their stories, one after one, and I made notes of everything. In the daytime I would wander around the yards, and my friends would risk their jobs to show me what I wanted to see.” Upton Sinclair, *The Autobiography of Upton Sinclair* 109–10 (1962).

Sinclair's work began a long and storied history of journalists keeping the public informed about issues concerning the safety of the food supply and the conditions under which food is produced. For example, in the late 1960s, *Minneapolis Tribune* reporter Nick Kotz published a series of articles that revealed widespread unsanitary conditions in the country's meatpacking plants. 113 Cong. Rec. 21283-86 (daily ed. Aug. 3, 1967). Kotz's reporting contributed to the passage of the Meat Inspection Act of 1967, which broadened federal regulation of slaughterhouses in the United States. *Id.* at 21283. During a congressional session leading to the passage of the Act, Senator Walter Mondale thanked Kotz for bringing the issue to Congress's attention, saying "the press must take a major share of the credit for action in this area." *Id.* Kotz won a Pulitzer Prize for his reporting. See 1968—National Reporting, The Pulitzer Prizes, <https://perma.cc/HD9W-NR32>.

Many other journalists have received awards and honors for the impact of their reporting on agricultural issues as well. In 1996, *The News & Observer* in Raleigh, North Carolina, won the Pulitzer Prize for Public Service in recognition of its reporting on the environmental and health risks of waste disposal systems used in North Carolina's growing hog industry. See 1996—Public Service, The Pulitzer Prizes, <https://perma.cc/WV62-EXP7>. Michael Moss of *The New York Times* won a Pulitzer Prize in 2010 for calling into question the effectiveness of injecting

ammonia into beef to remove E. coli. *See* 2010—Explanatory Reporting, The Pulitzer Prizes, <https://perma.cc/VB43-SJ43>. And, in 2017, Art Cullen of *The Storm Lake Times* in Iowa received the Pulitzer Prize for editorials “fueled by tenacious reporting, impressive expertise and engaging writing that successfully challenged powerful corporate agricultural interests in Iowa.” *See* 2017—Editorial Writing, The Pulitzer Prizes, <https://perma.cc/Y3ZA-E6T2>.

Investigative journalism’s independent scrutiny of industry is all the more important because government inspections and oversight can be obstructed and result in incomplete public information. *See generally* Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov’t Reform, 111th Cong. (2010) (“House Oversight Hearing”), <https://perma.cc/YH5A-AR56>. For example, USDA inspector Dean Wyatt repeatedly reported abuses in a Vermont slaughterhouse facility he observed, and rather than taking action against the plant, his supervisors demoted and reprimanded him. *Id.* at 38-39. It was not until the Humane Society of the United States conducted an undercover investigation of the very plant Wyatt had complained about that the USDA finally ordered a criminal investigation and shut down the plant. *Id.* at 46, 51. Wyatt said the Humane Society’s footage showed even more egregious violations than he was aware of and captured one of his

subordinates, a federal investigator, standing by while plant workers skinned a calf that was still alive, in violation of the Humane Methods of Slaughter Act. *Id.*; see also Associated Press, *Vermont Slaughterhouse Closed Amid Animal Cruelty Allegations* (Nov. 3, 2009), <https://perma.cc/88HX-NXG5>; Cody Carlson, *A Call for USDA Vigilance in Humane Treatment of Food Animals*, Atlantic (Aug. 31, 2012), <https://perma.cc/X824-TWHH>. Legislators honored Wyatt at the congressional hearing as “a principled man, an exemplar of the highest standards” for reporting abuses he witnessed in meat-processing facilities. House Oversight Hearing at 52, 61.

In Arkansas, important reporting on agricultural facilities has focused on the treatment of farm workers. For example, in 2016, BuzzFeed reported on the large number of amputations and other injuries suffered by Tyson workers in Little Rock, Van Buren, and Springdale, Arkansas. Cora Lewis, *America’s Largest Meat Producer Averages One Amputation Per Month*, BuzzFeed News (Feb. 18, 2016), <https://perma.cc/PSZ5-YGNE>. In addition, Farm Aid has reported in-depth about the experiences of Arkansas farmers and the nature of their contractual relationships with Tyson. Farm Aid, *Corporate Power* (May 18, 2015), <https://perma.cc/ACG7-WGU3>. “They just took advantage of us,” said one farmer who produced chickens for Tyson. *Id.*

Other news reports in Arkansas have revealed the environmental impact of farming. In 2018, for example, Reveal from the Center for Investigative Reporting reported on the use by Arkansas farmers of the controversial weed killer Dicamba, which allegedly had severe environmental impacts. Liza Gross, *Scientists Warned this Weed Killer Would Destroy Crops. EPA Approved It Anyway*, Reveal (Nov. 13, 2018), <https://perma.cc/9QX9-CHKQ>. And, in 2016, the Huffington Post chronicled how pollution from Tyson’s farms has had particularly severe impacts on the waters of northwest Arkansas and eastern Oklahoma. John Rumpler, *Tyson’s Pollution Pathways: from Factory Farms to Fouled Waters*, Huffington Post (July 5, 2016), <https://perma.cc/Y4ZD-ATBB>. “Tyson came out on top of the polluter pile—with more than 55 million tons of manure in its supply chain, and its facilities responsible for dumping 104 million pounds of toxic pollutants into waterways over a five-year period.” *Id.*

During the COVID-19 pandemic, journalists have also reported on health and safety inside Arkansas’s meatpacking plants. As meat processing facilities became hotspots for outbreaks of the virus across the country, journalists used anonymous sources from inside Arkansas plants to report on workers’ concerns about the lack of protections from the virus. *See, e.g.,* Alice Driver, *Arkansas Poultry Workers Amid the Coronavirus: ‘We’re Not Essential, We’re Expendable,’* Arkansas Times (May 11, 2020), <https://bit.ly/2yKMqfu>; *see also* Zack Briggs,

Worker Safety Concerns Surface Following Coronavirus Outbreaks at Meat Processing Plants, ABC7-KATV (Apr. 29, 2020), <https://bit.ly/3ewtPCP>; Olivia Paschal & Rolando Zenteno, *Workers Say Arkansas' Poultry Giants Aren't Protecting Them from COVID-19*, Facing South (Apr. 28, 2020), <https://perma.cc/2MJR-FSEU>. Journalists later covered an outbreak of the virus at a Boar's Head plant in Arkansas. Joseph Flaherty, *2 Workers at Forrest City Meat Processing Plant Test Positive for covid-19*, Arkansas Democrat-Gazette (May 12, 2020), <https://perma.cc/6CJ6-BFSA>.

As all of this reporting demonstrates, sources and reporters have mutually reinforcing First Amendment interests in providing to the public information about the agriculture industry. Sources, like Plaintiffs, want to investigate conditions in agricultural facilities and share the results of their investigations. Journalists want to receive information from sources to inform the public. And the public is eager to learn about the safety of the food supply and other issues concerning the agriculture industry. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). The Arkansas Ag-Gag Statute chills all of that constitutionally protected activity.

II. The Arkansas Ag-Gag Statute applies broadly and imposes severe civil penalties, chilling the flow of information between potential sources and journalists.

Plaintiffs-Appellants allege that the Arkansas Ag-Gag Statute chills their exercise of their First Amendment rights and that the Act’s chilling effect is sufficient to establish their Article III standing. *See* Pls.-Appellants’ Br. at 25. Amici agree. *See Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (holding that “even if the plaintiff has not engaged in the prohibited expression as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences”); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (holding that a plaintiff may bring a pre-enforcement challenge where she “has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder”). By threatening potential sources with severe civil penalties—or at least causing them to fear the possibility of facing an expensive lawsuit—the Act restricts the flow of information from potential sources to journalists, resulting in less public information regarding the state of our nation’s food supply and agriculture industry.⁵ Moreover, the harsh civil penalties

⁵ The Act’s provision creating joint liability for a “person who knowingly directs or assists another person to violate this section is jointly liable,” Ark. Code

imposed by the Act—which is not limited to the agriculture industry—are just as chilling to the exercise of First Amendment rights as criminal penalties.

It is well-established that civil lawsuits can chill speech. In the context of defamation law, the Supreme Court has recognized that civil damages can have a chilling effect equal to or greater than that of potential criminal prosecution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”). Indeed, the high costs of defending against a civil lawsuit, alone, can inhibit speech, which has led many states across the country to pass laws protecting against strategic lawsuits against public participation, commonly known as SLAPPs. *See State Anti-SLAPP Laws*, Anti-SLAPP.org, <https://perma.cc/J8SM-RBM4>. Self-censorship for fear of civil liability or the expense of a civil lawsuit “dampens the vigor and limits the variety of public debate.” *Sullivan*, 376 U.S. at 279.

The Arkansas Ag-Gag Statute imposes especially severe civil penalties. Violators of the Act face not only compensatory damages but must also pay for their opponents’ “[c]osts and fees, including reasonable attorney’s fees.” Ark.

Ann. § 16-118-113(d), could, in theory, be read as an attempt to impose liability directly on journalists who cultivate sources within an agricultural facility. Any lawsuit directly against a journalist under the Act would raise serious constitutional concerns, *see Bartnicki v. Vopper*, 532 U.S. 514 (2001), but even the threat of such a suit could chill reporting.

Code Ann. § 16-118-113(e). More daunting still, in a case where compensatory damages cannot be adequately quantified, the law empowers courts to award up to \$5,000 for each day that a defendant acted in violation of the law. *Id.* The Act's civil penalties could easily add up to tens or hundreds of thousands of dollars in damages and legal fees. Would-be sources are certain to be chilled by these harsh civil penalties.

The Act is also exceedingly broad. It applies to a wide range of activities, including capturing or removing an employer's data or documents, recording images or sound from within an employer's property, or using an unattended camera or electronic surveillance device, among other things. Ark. Code Ann. § 16-118-113(c). Perhaps more significant, the Act is not limited to the agriculture industry, imposing liability on anyone "who knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area." Ark. Code Ann. § 16-118-113(b). Given this expansive language, media reports at the time of the bill's passage noted that it "could end up preventing whistleblowers from exposing dangerous or unsanitary working conditions in a variety of industries, including child care and restaurants." Andrew Amelinckx, *Arkansas "Ag-Gag" Legislation Could Be Bad News for All Whistleblowers*, Modern Farmer (Mar. 16, 2017), <https://perma.cc/CQA9-8LF2>. The Act could, for example, impose liability on a woman who records a colleague

sexually assaulting her in an office building, just as it does on a farm employee seeking to expose wrongdoing within an agricultural facility.

For all of these reasons, the civil penalties in the Arkansas Ag-Gag Statute impose a chilling effect that is just as, if not more, severe as that of the criminal penalties in the Iowa ag-gag law, which a district court in this circuit struck down, as discussed in more detail below. *See* Iowa Code Ann. § 717A.3A(2)(a); *Animal Legal Def. Fund v. Reynolds*, 353 F.Supp.3d 812 (S.D. Iowa 2019), *appeal docketed*, No. 19-1364 (8th Cir. Feb. 22, 2019). The threat of liability posed by the Arkansas Ag-Gag Statute chills constitutionally protected speech by deterring employees in Arkansas agricultural facilities and other commercial properties who witness misconduct at work from speaking to journalists and providing them with proof of wrongdoing. Even employees who happen upon such information accidentally may be dissuaded from providing it to the media for fear of facing prosecution under the statute under a theory—even if incorrect—that they sought employment for the purpose of sharing instances of wrongdoing with the press or otherwise obtained access to areas of the facility by false pretenses. Because investigative journalists rely on such employees to sound the alarm about risks to public safety and welfare, *see supra* Section I, the Arkansas Ag-Gag Statute prevents sources and news organizations from disseminating vital information and

harms the public. That chilling effect injures Plaintiffs-Appellants and is sufficient to establish their Article III standing.

III. The district court’s anomalous ruling conflicts with holdings of numerous other courts that similarly situated plaintiffs have standing for pre-enforcement challenges to ag-gag laws based on the chilling effect of those laws.

Several other federal courts have considered pre-enforcement constitutional challenges to ag-gag laws like the one Arkansas has enacted. Those courts have consistently held not only that the chilling effect of ag-gag statutes confers standing on plaintiffs similar or identical to Plaintiffs in this case, but also that the laws violate the First Amendment and are therefore invalid. Contrary to the district court’s decision in this case, Joint App’x at 122, courts have consistently found standing to challenge ag-gag laws even when they impose only civil penalties and even when the plaintiffs do not have precise plans for how they intend to violate the law at a specific time in the future. Indeed, the very concept of a chilling effect is that the plaintiffs *do not intend* to engage in speech that they otherwise would in the absence of the unconstitutional restriction.

Within this Circuit, the U.S. District Court for the Southern District of Iowa found that plaintiffs, including ALDF, had standing for a pre-enforcement challenge to Iowa’s ag-gag law and held that the law was an unconstitutional content-based speech restriction. *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901 (S.D. Iowa 2018) (denying motion to dismiss and holding that

plaintiffs had standing); 353 F.Supp.3d 827 (granting plaintiffs’ motion for summary judgment and striking down the law), *appeal docketed*, No. 19-1364 (8th Cir. Feb. 22, 2019) (appealing the trial court’s grant of plaintiffs’ motion for summary judgment, but not the trial court’s holding that plaintiffs had standing). In determining that the plaintiffs had standing, the district court in *Reynolds* emphasized that the mere fact that “undercover investigations may be complex is not a bar to standing.” 297 F. Supp. 3d at 915. Indeed, following this Court’s precedent, and looking to decisions of the U.S. Court of Appeals for the Tenth Circuit as well, the district court in *Reynolds* held that because “the First Amendment protects against the chilling of speech, it is not necessary for Plaintiffs to provide concrete operational blueprints—who, what, when, and where—for activities they do not intend to conduct when the entire basis for their claim is that the challenged law makes such activities *illegal*.” *Id.* (emphasis in original). The defendants appealed the district court’s ruling on the merits to this Court but did not contest plaintiffs’ standing on appeal. *See Animal Legal Def. Fund v. Reynolds*, *appeal docketed* No. 19-1364 (8th Cir. Feb. 22, 2019).

Similarly, in 2017, the U.S. District Court for the District of Utah struck down that state’s ag-gag law as an unconstitutional infringement on First Amendment rights. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017). Following clear Tenth Circuit precedent, the district court

held that the plaintiffs, which again included ALDF, had standing based on the chilling effect of the statute. As the court explained: “[T]o establish standing to sue based on a chilling effect on speech, a plaintiff must demonstrate only a present desire, *though no specific plans*, to engage in such speech.” *Id.* at 1200 (emphasis in original) (internal quotation marks omitted); *see also Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (“It makes no sense to require plaintiffs simultaneously to say ‘this statute presently chills me from engaging in XYZ speech,’ and ‘I have specific plans to engage in XYZ speech next Tuesday.’”). The state did not appeal that determination.

In addition, in 2018, the U.S. Court of Appeals for the Ninth Circuit struck down significant portions of Idaho’s ag-gag law, including its prohibition of surreptitious recording inside agricultural facilities, on First Amendment grounds. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). Neither the defendants in the case, the court of appeals, nor the district court raised the issue of ALDF’s standing to bring the pre-enforcement challenge to the law, even though as an Article III requirement, standing can be raised at any time either by the defendant or the court sua sponte. *See Animal Legal Def. Fund v. Otter*, 878 F.3d 1184 (D. Idaho 2015).

Although a number of states have enacted ag-gag laws that impose criminal penalties, courts have also found standing in pre-enforcement challenges to ag-gag

laws with only civil penalties, based on the statutes' chilling effect. In a case closely analogous to this one, the U.S. Court of Appeals for the Fourth Circuit considered a pre-enforcement challenge by eight public-interest plaintiffs, including ALDF, to North Carolina's ag-gag law, N.C. Gen. Stat. Ann. § 99A-2, on which the Arkansas Ag-Gag was modeled. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (unpublished); *see also* Joint App'x at 123. There, as here, the plaintiffs concretely alleged that they planned to carry out investigations in the future at certain farms but had not made specific plans to violate the law. *Id.* at 127–28. The Fourth Circuit held that the plaintiffs had standing because they had conducted undercover investigations in the past, the law prohibited their planned activities, and the plaintiffs had a reasonable fear that the law would be enforced against them. *Id.* at 130. The plaintiffs therefore established standing on the basis of “an actual and well-founded fear that the [act] will be enforced, and ha[ve] in fact self-censored [themselves] by complying with the [act], incurring harm all the while.” *Id.* at 131 (internal quotation marks and citations omitted).

The same is true here. The Act prevents Plaintiffs from conducting undercover investigations of agricultural facilities, chilling the exercise of their First Amendment rights. The stifling of those investigations in turn chills and deters journalists from engaging in newsgathering activity and reporting about

conditions in the agriculture industry—issues of paramount public interest and concern. Because Plaintiffs have suffered an injury in fact based on the chilling effect of the Arkansas Ag-Gag Statute, they have standing to sue under Article III.

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs-Appellants' brief, amici urge the Court to reverse the district court's order.

Dated: June 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the lengths permitted by Federal Rules of Appellate Procedure 29(a)(5) because it contains 4,985 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 2016 and has a typeface of 14-point Times New Roman.

Dated: June 3, 2020

/s/ Bruce D. Brown

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