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## Gagged by Big Ag: Whistleblower Silencing Bill Threatens the Employee's Right to Uncover Workplace Wrongdoing

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COMMENT

GAGGED BY BIG AG: WHISTLEBLOWER  
SILENCING BILL THREATENS THE  
EMPLOYEE’S RIGHT TO UNCOVER  
WORKPLACE WRONGDOING

TARA COOLEY\*

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## INTRODUCTION

Of the butchers and floorsmen, the beef-boners and trimmers, and all those who used knives, you could scarcely find a person who had the use of his thumb; time and time again the base of it had been slashed, till it was a mere lump of flesh against which the man pressed the knife to hold it. The hands of these men would be crisscrossed with cuts, until you could no longer pretend to count them or to trace them. They would have no nails, – they had worn them off pulling hides; their knuckles were swollen so that their fingers spread out like a fan.<sup>1</sup>

In 1906, Upton Sinclair published the results of his undercover investigations in *The Jungle*, which exposed horrendous conditions faced by employees in the meat-packing industry.<sup>2</sup> This led to social outcry and major reform.<sup>3</sup> Undercover investigations provide an avenue to inform the public when businesses conduct unethical, hazardous, or unlaw-

<sup>1</sup> UPTON SINCLAIR, *THE JUNGLE* 82 (Paul Negri & Joslyn T. Pine eds., Dover Thrift Editions 12th ed. 2001) (1906). The story is based on Sinclair’s undercover investigations within the Chicago meatpacking industry in the 1900s, despite being a work of fiction.

<sup>2</sup> SINCLAIR, *supra* note 1.

<sup>3</sup> Following the release of *The Jungle*, the Meat and Inspection Act of 1906 and the Pure Food and Drug Act of 1906 were enacted. Upton Sinclair’s *The Jungle: Muckraking the Meat-Packing Industry*, CONST. RTS. FOUND., <http://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html> (last visited Feb. 23, 2019).

ful activities.<sup>4</sup> The investigator's right to access workplace settings is indispensable to safeguard the public's health and safety.<sup>5</sup> Vulnerable individuals, such as children and the elderly, are left unprotected without the investigator's access to the workplace.<sup>6</sup> Today, eight states have enacted whistleblower<sup>7</sup> silencing bills that criminalize and/or impose severe civil penalties against individuals who, like Sinclair, conduct undercover investigations to expose illegal and unethical practices.<sup>8</sup> Two of the state laws expand beyond food-processing facilities to target investigations within any work place, including childcare facilities and nursing homes.<sup>9</sup>

These whistleblower silencing bills, also known as 'ag-gag bills,'<sup>10</sup> began to emerge after undercover investigations severely damaged the image of factory farms.<sup>11</sup> For example, undercover investigators yielded footage of animal abuse: employees skinning alive day-old calves, grinding-up male chicks, and forcing injured animals to their kill spot by use of electric prods, fork lifts, and jabs to the eye.<sup>12</sup> After learning about these undercover investigations, 28 states attempted to enact ag-gag legislation between 1990 and 2017.<sup>13</sup>

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<sup>4</sup> See Brief for Amici Curiae in Support of Plaintiffs-Appellants Urging Reversal at 4, PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *vacated*, 737 F. App'x 122 (4th Cir. 2018), <https://www.rcfp.org/wp-content/uploads/imported/2017-08-11-peta-nc.pdf>.

<sup>5</sup> See *id.* at 5-9 (providing examples of disturbing practices that were exposed by undercover journalists, for example, the whistleblower who uncovered a history of careless inspections prior to the explosion of the oil rig Deepwater Horizon).

<sup>6</sup> See *id.* at 11-12 (presenting the example of the 1991 three-month investigation of a private nursing homes in Texas that uncovered disturbing recordings of the troubling treatment of the facility's elderly residents).

<sup>7</sup> A whistleblower is "an employee who turns against their superiors to bring [a] problem out in the open." *Whistleblower*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>8</sup> Current ag-gag laws exist in Alabama, Arkansas, Kansas, North Carolina, North Dakota, Missouri, Montana and Texas. Public Policy, *What Is Ag-Gag Legislation?*, ASPCA, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation> (last visited Feb. 23, 2019) (stating that ag-gag bills are designed to silence whistleblowers who reveal to the public the animal abuse that is occurring on factory farms).

<sup>9</sup> The Arkansas and North Carolina statutes broaden the application to any workplace setting. *Id.*

<sup>10</sup> Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> (last visited Feb. 23, 2019) (coining the term "ag-gag" to refer to legislation intended to silence investigators from exposing illegal and unethical practices within farm factories). The author uses the term "whistleblower silencing bill" to reflect the modern expansion of this legislation to hinder not only the investigations of farm factories, but of any business or organization.

<sup>11</sup> *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1195-97 (D. Utah 2017). A farm factory is a large industrial facility that raises animals for food. Factory Farms, *Farm Animals Need Our Help*, ASPCA, <https://www.aspc.org/animal-cruelty/farm-animal-welfare> (last visited Feb. 23, 2019).

<sup>12</sup> *Herbert*, 263 F. Supp. 3d at 1197.

<sup>13</sup> ASPCA, *supra* note 8.

The purpose of ag-gag legislation is to prevent the investigation of questionable operational practices within factory farms.<sup>14</sup> In the past, these investigations resulted in boycotts, bankruptcy, and criminal charges for farm factories and their owners.<sup>15</sup> For example, former federal contractors for the National School Lunch Program,<sup>16</sup> Hallmark Meat Packing Company and Westland Meat Company Inc., settled for a combined \$652 million after an undercover investigation revealed a video of the companies violating federal law by forcing cows, who were too sick to stand, to their feet in order to pass inspection.<sup>17</sup> The video<sup>18</sup> went public in 2008 and led to the largest recall of beef in United States (“U.S.”) history: 143 million pounds.<sup>19</sup>

Ag-gag laws vary from state-to-state.<sup>20</sup> For example, an ag-gag provision might prohibit access of agriculture facilities under false pretenses, misrepresentations on job applications, or video/audio recording at the facility.<sup>21</sup> Typically, these statutes criminalize the actions of undercover investigators who document and expose unethical practices within agricultural facilities.<sup>22</sup> The legislatures in 12 states have successfully enacted ag-gag bills, though the courts have subsequently struck down four of the laws as unconstitutional because they impermissibly restricted First Amendment rights.<sup>23</sup> Six of the active ag-gag laws impose criminal

<sup>14</sup> See *Our Opinion: Time’s Running Out for North Carolina’s Atrocious Ag-Gag Law*, WILSON TIMES (Jan. 11, 2019 9:01 PM), <http://wilsontimes.com/stories/our-opinion-time-running-out-for-nc-ag-gag,156820>.

<sup>15</sup> *Herbert*, 263 F. Supp. 3d at 1197-98.

<sup>16</sup> Press Release, U.S. Dep’t of Justice, *U.S. Intervenes in Suit Against Former Beef Suppliers to National School Lunch Program: Inhumane Treatment and Slaughter of Disabled, Non-Ambulatory Cattle at Issue* (May 1, 2009), <https://www.justice.gov/opa/pr/us-intervenes-suit-against-former-beef-suppliers-national-school-lunch-program>.

<sup>17</sup> Helena Bottemiller, *Landmark Settlement Reached in Westland-Hallmark Meat Case*, FOOD SAFETY NEWS (Nov. 18, 2012), <https://www.foodsafetynews.com/2012/11/landmark-settlement-reached-in-westlandhallmark-meat-case/> (stating “Westland/Hallmark went out of business after the abuse footage—which showed “downer” cows (animals unable to walk) being dragged, violently prodded, and forklifted—caused national outrage”). ASPCA, *supra* note 8. At the time of this incident the USDA prohibited the processing of meat from downer cows and a California law required that cows too sick to stand be humanely euthanized. 9 C.F.R. § 309.2(b) (2007).

<sup>18</sup> Videotape: *Crimes of Hallmark Westland Meat Company (Downer Cows Abuse)* (Vegan Century Oct. 29, 2011), <https://www.youtube.com/watch?v=y95vIdwM0Vs> (showing the images that sparked the controversy).

<sup>19</sup> Bottemiller, *supra* note 17. Prior to this incident, only four states introduced ag-gag legislation from 1990 to 2011: Alabama, Kansas, Montana, and North Dakota.

<sup>20</sup> ASPCA, *supra* note 8.

<sup>21</sup> See *Herbert*, 263 F. Supp. 3d at 1198. The terms agriculture facility, agriculture business, farms, and businesses are a few of the terms used within proposed state legislation to describe the businesses targeted by undercover investigations, and thus protected by the whistleblower silencing bills. ASPCA, *supra* note 8.

<sup>22</sup> ASPCA, *supra* note 8.

<sup>23</sup> Ag-gag laws imposing criminal penalties in Idaho, Iowa, Utah, and Wyoming were all struck down as unconstitutional. ASPCA, *supra* note 8; *Animal Legal Def. Fund v. Reynolds*, 2019

penalties; however, two laws—in the states of North Carolina and Arkansas—utilize a new strategy that imposes severe civil penalties on employees who conduct undercover investigations at their workplace.<sup>24</sup>

North Carolina unsuccessfully attempted to pass ag-gag legislation with criminal penalties in 2013 and 2014.<sup>25</sup> In 2015, North Carolina enacted the Property Protection Act (“PPA”), which permits employers to recover damages from an employee who captures video or data from nonpublic areas of the workplace.<sup>26</sup> There are two major differences between PPA and the traditional ag-gag statute.<sup>27</sup> First, PPA does not criminalize the act, but allows employers to recover severe civil penalties from an employee who violated the statute.<sup>28</sup> North Carolina was the first state to impose civil penalties in an ag-gag statute.<sup>29</sup> Consequently, there is no judicial guidance on how standing<sup>30</sup>—a justiciability requirement—applies in a First Amendment pre-enforcement challenge of an ag-gag law that imposes severe civil penalties.<sup>31</sup> Second, PPA is an ag-gag law and a piece of general anti-whistleblower legislation that applies to all employees in North Carolina regardless of the industry.<sup>32</sup> This broad drafting lessens the agricultural focus and impedes the ability of an employee in any industry to confront unethical treatment encountered on the job.<sup>33</sup>

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U.S. Dist. WL 140069 at \*1 (S.D. Iowa Jan. 9, 2019) (stating that the Iowa ag-gag law was unconstitutional because the false statements implicated by the statute were protected under the First Amendment and the statute did not survive strict or intermediate scrutiny).

<sup>24</sup> N.C. GEN. STAT. § 99A-2 (2016) (imposing severe civil penalties of \$5,000 a day for each day the defendant acted in violation of the statute); ARK. CODE ANN. § 16-118-113 (2017) (imposing severe civil penalties of \$5,000 a day for each day the defendant acted in violation of the statute). A \$5,000 a day penalty is severe for an undercover investigator whose work will last weeks, months or even years. CARMEN CUSACK, *ANIMALS AND CRIMINAL JUSTICE* 139 (Routledge 2017) (2015) (“Long term [investigations] typically last around six weeks, but could . . . last for many years.”).

<sup>25</sup> ASPCA, *supra* note 8.

<sup>26</sup> N.C. GEN. STAT. § 99A-2.

<sup>27</sup> *See* ASPCA, *supra* note 8.

<sup>28</sup> N.C. GEN. STAT. § 99A-2.

<sup>29</sup> *See* ASPCA, *supra* note 8; N.C. GEN. STAT. § 99A-2.

<sup>30</sup> Standing requires the plaintiff to establish an injury-in-fact, causation, and redressability to bring a claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>31</sup> In *PETA v. Stein*, the court held that the plaintiffs did not have standing because the relaxed standing requirement for First Amendment claims applied to criminal statutes, but not civil statutes. However, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded, holding that the plaintiffs possessed Article III standing to challenge PPA on First Amendment free-speech grounds. *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 378 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 129-31 (4th Cir. 2018).

<sup>32</sup> N.C. GEN. STAT. § 99A-2.

<sup>33</sup> *See* Dan Flynn, *Activists Challenge NC's New Ag-Gag Law in Federal Court*, FOOD SAFETY NEWS (Jan. 14, 2016), <https://www.foodsafetynews.com/2016/01/north-carolinas-new-ag-gag-law-challenged-in-federal-court/>.

In May 2017, the People for the Ethical Treatment of Animals, Inc. (“PETA”) brought a pre-enforcement First Amendment challenge of PPA, which the U.S. District Court for the Middle District of North Carolina dismissed because the plaintiffs did not meet the standing requirement.<sup>34</sup> While the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the decision holding that the plaintiffs proved an actual injury,<sup>35</sup> the court did not address how the standing requirement would apply to a challenge of PPA if the plaintiffs, lacking an actual injury, claimed a certainly impending injury.<sup>36</sup> Additionally, the decision remains unpublished and therefore lacks precedent.<sup>37</sup> The uncertainty surrounding the application of the standing requirement for statutes like PPA might encourage other states to draft similar bills,<sup>38</sup> further jeopardizing the rights of workplace whistleblowers.

Arkansas passed Act 606 in March 2017.<sup>39</sup> The legislation permits employers to seek severe civil penalties—up to \$5,000 a day—against employees who intentionally uncover wrongdoing in the workplace.<sup>40</sup> The Arkansas law, like North Carolina’s PPA, does not solely pertain to employees of agricultural businesses, but also applies to employees within any Arkansas business.<sup>41</sup> Additionally, Arkansas broadened the scope of the act so that it applies to any non-employee who “knowingly gains access to a nonpublic area . . . and engages in an act that exceeds the person’s authority.”<sup>42</sup>

The North Carolina and Arkansas laws are both examples of whistleblower silencing bills that have been disguised as property-protec-

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<sup>34</sup> PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 386 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122 (4th Cir. 2018).

<sup>35</sup> The U.S. Court of Appeals for the Fourth Circuit held that “Plaintiffs alleged injury for standing purposes is that they have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant exemplary damages under the Act if they move forward at all.” PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122, 130 (4th Cir. 2018).

<sup>36</sup> *Id.* at 131.

<sup>37</sup> When a court determines that a decision is without precedent, the court has expressed concern that it might be acting outside the law or inconsistently with established law. Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO L.J. 683, 684 (2018), <https://georgetownlawjournal.org/articles/264/invisible-adjudication-u-s-courts/pdf>. The Federal Rules of Appellate Procedure 32.1 mandates the permissibility of the citation of unpublished, nonprecedential opinions of the U.S. Court of Appeals, thus, *PETA v. Stein*, an unpublished decision, is available in the Federal Appendix. FED. R. APP. P. 32.1; PETA, Inc. v. Stein, 737 F. App’x 122 (4th Cir. 2018).

<sup>38</sup> See ARK. CODE ANN. § 16-118-113. Arkansas Act 606 has provisions like PPA and it was enacted less than two years after PPA.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

tion legislation.<sup>43</sup> PPA permits “recovery of damages for exceeding the scope of authorized access to property.”<sup>44</sup> Act 606 is a civil cause of action for unauthorized access to property.<sup>45</sup> Laws that restrict actions based on their communicative power raise considerable constitutional issues,<sup>46</sup> despite the importance of property protection.<sup>47</sup> With the enactment of whistleblower silencing bills, like PPA and Act 606, the constitutional First Amendment concerns extend beyond farm factories and jeopardize every employee’s right to uncover workplace wrongdoing.<sup>48</sup> When there is a risk that statutory provisions may chill free speech, judicial review is essential to ensure First Amendment rights are protected.<sup>49</sup> This Comment analyzes the court’s application of the standing doctrine in *PETA v. Stein*<sup>50</sup> to demonstrate that the dismissal of a challenge to a whistleblower silencing statute because the plaintiff lacked standing is detrimental to First Amendment rights. This Comment argues that a relaxed standing requirement must be applied to future pre-enforcement challenges of legislation that aims to silence whistleblowers, and therefore chills First Amendment rights.

Part I examines the court’s relaxed application of the standing requirement to criminal statutes that chill First Amendment rights. Part II argues for a relaxed application of the standing requirement to whistleblower silencing statutes, both criminal and civil, that chill First Amendment rights. Finally, Part III discusses the implication of the un-

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<sup>43</sup> ASPCA, *supra* note 8.

<sup>44</sup> N.C. GEN. STAT. § 99A-2.

<sup>45</sup> ARK. CODE ANN. § 16-118-113.

<sup>46</sup> See *Herbert*, 263 F. Supp. 3d at 1213 (“Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them.”).

<sup>47</sup> “The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 435 (1982).

<sup>48</sup> Press Release: ALDF, *Coalition Sues North Carolina over Constitutionality of ‘Anti-Sunshine’ Law* (Jan. 13, 2016), <https://aldf.org/article/coalition-sues-north-carolina-over-constitutionality-of-anti-sunshine-law/> (“North Carolina’s version is written so broadly that it would also ban undercover investigations of all private entities, including nursing homes and daycare centers. The North Carolina law threatens to silence conscientious employees who witness and wish to report wrongdoing.”).

<sup>49</sup> “When contesting the constitutionality of a criminal statute, ‘it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.’” *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

<sup>50</sup> *PETA brought the first pre-enforcement challenge of North Carolina’s Property Protection Act. PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 371 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122, 129-30 (4th Cir. 2018).



published *PETA v. Stein* decision and the likelihood of an increase in civil statutes silencing workplace whistleblowers.

## I. BACKGROUND

To appreciate the significance of PPA and Act 606, it is first necessary to understand whistleblowers' rights to access and expose workplace wrongdoing. Moreover, it is valuable to recognize the purpose of special interest groups and their potential influence on the design of new legislation. A comparison of PPA and Act 606 to traditional ag-gag laws highlights the potential impact on all workplace whistleblowers. Furthermore, PPA and Act 606 call attention to the uncertainty of the standing application in challenges to civil statutes threatening First Amendment rights.

### A. THE EMPLOYEE'S RIGHT TO UNCOVER WRONGDOING IN THE WORKPLACE

In November 2018, mother Kindsie watched a video that showed her four-year-old son's childcare teacher straddling her son on the floor, repeatedly slapping and pinching him.<sup>51</sup> Kindsie's son came home with welts and bruises.<sup>52</sup> After a teacher at the center quietly hinted to the concerned mother that there was trouble, Kindsie demanded to see the security cameras which uncovered the documented abuse of her son.<sup>53</sup> Kindsie believed that the center attempted to cover up the abuse and, if not for an employee at the center speaking up, the abuse would remain undiscovered.<sup>54</sup> The state charged the teacher with felony child abuse.<sup>55</sup>

The vulnerable individuals in society, such as young children and the elderly, depend on employees who witness abuse, wrongdoing, or illegal conduct to speak out.<sup>56</sup> Fortunately, employees have constitutional protections to ensure their ability to blow the whistle on wrongdoing in the workplace.<sup>57</sup> In addition, there are currently 22 federal laws that contain provisions protecting employees from retaliation for reporting the

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<sup>51</sup> J.D. Miles, *North Texas Daycare Worker Charged with Child Abuse*, CBS DFN (Nov. 19, 2018, 5:10 PM), <https://dfw.cbslocal.com/2018/11/19/north-texas-daycare-worker-charged-child-abuse/>.

<sup>52</sup> Miles, *supra* note 51.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> The First Amendment of the United States Constitution prohibits Congress from passing laws that abridge an individual's freedom of speech. U.S. CONST. amend. I.

misconduct of their employer.<sup>58</sup> For example, the Affordable Care Act, the Clean Air Act, and the Consumer Product Safety Improvement Act all include provisions protecting whistleblowers from “adverse action,” such as firing, intimidation, harassment, or reduction in pay or hours.<sup>59</sup> However, each whistleblower provision has specific requirements, depending on the federal law.<sup>60</sup> Thus, it may be complicated to determine which federal law provides the whistleblower with protection. Each federal whistleblower provision covers a specific category of employee, has specific actions that violate the provision, and has short and varying deadlines for filing an action.<sup>61</sup>

In addition, all states have some form of statutory safeguard for whistleblowers, and like federal protections, the application and the extent to which these statutes shield whistleblowers varies by state.<sup>62</sup> For example, in *Garcetti v. Ceballos*, the U.S. Supreme Court held that when public employees make a statement within the duties of their job they are not speaking as a citizen for First Amendment purposes.<sup>63</sup> The Court found that a district attorney’s memorandum was a work-related task and

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<sup>58</sup> U.S. Dep’t of Labor, *The Whistleblower Protection Program, Statutes*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.whistleblowers.gov/statutes> (last visited Feb. 23, 2019). For example, the Occupational Safety and Health Administration Act includes a provision, section 11(c), that “provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act.” 29 U.S.C. § 660(c).

<sup>59</sup> U.S. Dep’t of Labor, *supra* note 58; U.S. Dep’t of Labor, *The Whistleblower Protection Program, Protection from Workplace Retaliations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., [https://www.whistleblowers.gov/know\\_your\\_rights](https://www.whistleblowers.gov/know_your_rights) (last visited Feb. 23, 2019).

<sup>60</sup> U.S. Dep’t of Labor, *Occupational Safety and Health Admin. Directorate of Whistleblower Protection Programs (DWPP) Whistleblower Statutes Desk Aid*, OCCUPATIONAL SAFETY & HEALTH ADMIN., [https://www.whistleblowers.gov/whistleblower\\_acts-desk\\_reference](https://www.whistleblowers.gov/whistleblower_acts-desk_reference) (last visited Feb. 23, 2019).

<sup>61</sup> *Id.* For example, the Toxic Substances Control Act applies only to the private sector, permits thirty days to file and thirty days to complete, and protects employees from retaliation for reporting possible violations relating to industrial chemicals. 15 U.S.C. § 2622.

<sup>62</sup> *Whistleblower Protection Laws, Deputizing Workers to Identify and Report Hazards*, CPR, <http://www.progressivereform.org/WorkerWhistleblower.cfm> (last visited Feb. 11, 2019). For example, a North Carolina whistleblower statute states that “[i]t is the policy of this State that State employees shall have a duty to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting any of the following: (1) A violation of State or federal law, rule or regulation; (2) Fraud; (3) Misappropriation of State resources; (4) Substantial and specific danger to the public health and safety; (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority; (b) Further, it is the policy of this State that State employees be free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels.” The statute does not provide protections to non-state employees. N.C. GEN. STAT. § 126-84(a) (2018).

<sup>63</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

was not protected speech.<sup>64</sup> *Garcetti* assumed that state whistleblower laws provide protection to employees who uncover wrongdoing.<sup>65</sup> In *Trusz v. UBS Realty Investors, LLC*, the Connecticut Supreme Court determined the amount of protection that Connecticut workers receive,<sup>66</sup> but in most states it is unclear.<sup>67</sup> Employees depend on legislatures to enact statutes that protect their right to uncover wrongdoing because employees remain vulnerable to retaliation for whistleblower conduct.

## B. THE ROLE AND INFLUENCE OF SPECIAL INTEREST GROUPS

State legislators, as part of their oath, are responsible for upholding their state's constitution and the U.S. Constitution.<sup>68</sup> There is an inherent conflict between their duty to uphold the law and the influence of special interest groups, which might be contrary to the legislatures' duty to their constituents.<sup>69</sup> An inherent danger in legislative drafting is that the law may be influenced by special interest groups,<sup>70</sup> such as agricultural and food special interest groups.<sup>71</sup> For example, a legislator may help serve a special interest group by drafting a bill to avoid litigation that would

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<sup>64</sup> *Id.* at 410, 426.

<sup>65</sup> "The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." *Id.* at 425.

<sup>66</sup> *Trusz v. UBS Realty Investors, LLC*, 319 Conn. 175, 215-17 (2015) (holding that the state constitution protects employee speech related to official duties in a public workplace from employer discipline only if it involves a "comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," and that the protections extend to private employees).

<sup>67</sup> Robert Joyce, *Understanding the Limitations of North Carolina's Whistleblower Protection Act*, UNC SCH. OF GOV'T: COATES' CANONS: NC LOC. GOV'T LAW (July 8, 2010), <https://canons.sog.unc.edu/understanding-the-limitations-of-north-carolinas-whistleblower-protection-act/> (providing an example of state whistleblower limitations for government employees).

<sup>68</sup> "I, (name), do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all of the duties incumbent upon me as (name of office) according to the best of my ability and understanding. [This I do as I shall answer unto God.]" OHIO REV. CODE ANN. § 3.23 (West 2007).

<sup>69</sup> See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (demonstrating the conflict regarding the protection of the constitutional freedom of association and addressing concerns of legislative capture by special interest groups).

<sup>70</sup> See Chris Micheli, *How Interest Groups Influence Policymaking*, CAL. LAWMAKING (March 12, 2018), <https://www.capimpactca.com/2018/03/interest-groups-influence-policymaking/>. A special interest group is a group of individuals with shared interests working together to advance their cause. *Id.*

<sup>71</sup> Some of the powerful meat-lobbying organizations are the American Meat Institute, the National Meat Association, and the National Cattlemen's Beef Association. Steve Johnson, *The Politics of Meat*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/> (last visited Feb. 23, 2019).

threaten the objectives of the group.<sup>72</sup> One way to reduce the likelihood of a lawsuit is to complicate the path to judicial review for potential challengers.<sup>73</sup> If a court cannot hear a case, there can be no challenge to the statute's validity. The justiciability doctrines, namely standing, serve to limit the role of the courts in resolving public disputes and set forth specific requirements that must be met before a litigant may bring an action in federal court.<sup>74</sup> Thus, drafting legislation in a certain way to frustrate a plaintiff's path to judicial review may further the goals of special interest groups.

Another tactic used to achieve the goals of special interest groups, by evading judicial review, is to draft a statute that includes civil penalties as opposed to criminal liability.<sup>75</sup> Individuals facing civil penalties do not receive the same constitutional protections secured for criminal litigants by the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution.<sup>76</sup> The Amendments apply to government action, and not private, civil action.<sup>77</sup> This makes judicial review of civil statutes more difficult.<sup>78</sup> In the 1980s, the strategy of including civil penalties in legislation resulted in an unsuccessful attack on the pornography industry.<sup>79</sup> Legislative efforts attempted to slow down the spread of the pornography industry by granting individuals a means of recovery for the harm they experienced as a result of pornography.<sup>80</sup> The anti-pornography statutes

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<sup>72</sup> See Micheli, *supra* note 70.

<sup>73</sup> Plaintiffs must satisfy the justiciability requirements, standing, ripeness, mootness and political question, to bring a claim. See *Bombero v. Bombero*, 160 Conn. App. 118, 135 (2015). Thus, a statute may be drafted in a way that complicates the plaintiff's ability to satisfying the requirements.

<sup>74</sup> *Warth v. Seldin*, 422 U.S. 490, 498-99 (1978).

<sup>75</sup> See *Am. Book Sellers Ass'n v. Hudnut*, 771 F.2d 323, 333-34 (1985) (holding that an Indianapolis statute that permitted civil penalties to individuals emotionally injured by pornography was unconstitutional based on First Amendment free-speech rights).

<sup>76</sup> U.S. CONST. amends. IV, V, VI.

<sup>77</sup> *Id.*

<sup>78</sup> See *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 383-84 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018) (stating that while courts routinely apply a relaxed standing requirement to First Amendment challenges of criminal statutes, the application of the relaxed standing requirement to civil statutes is unclear).

<sup>79</sup> See *Am. Book Sellers*, 771 F.2d 323. See ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 24-30 (1985), <https://www.feministes-radicales.org/wp-content/uploads/2012/05/Catharine-A.-MacKinnon-Andrea-Dworkin-Pornography-and-Civil-Rights-A-New-Day-for-Women%E2%80%99s-Equality-1988.pdf> (outlining the movement to attack pornography, not by criminalizing the distribution and production of pornography, but by permitting severe civil penalties to individuals emotionally injured by pornography).

<sup>80</sup> See *Am. Book Sellers*, 771 F.2d at 324-25; see also DWORKIN & MACKINNON, *supra* note 79.

were ultimately determined to unconstitutionally infringe on First Amendment rights.<sup>81</sup>

Furthermore, in the 1990s, in opposition to *Roe v. Wade*, states unsuccessfully attempted to criminalize abortion.<sup>82</sup> Consequently, Louisiana enacted a statute to deter physicians from performing abortions by imposing civil liability for damages incurred by patients during abortions.<sup>83</sup> This tactic also raised constitutional concerns.<sup>84</sup> In *Okpaloby v. Foster*, the district court stated that the statute permitting tort liability against abortion providers “place[d] an unconstitutional undue burden on a woman’s right to abortion.”<sup>85</sup> On rehearing en banc, the Court of Appeals held that the plaintiffs did not satisfy the standing requirement.<sup>86</sup> Therefore, other states viewed this as a successful approach, which led to the enactment of similar statutes to deter physicians in their states from performing abortions.<sup>87</sup>

The above tactics have gained traction again with PPA as tools to achieve special interests.<sup>88</sup> The application of severe civil penalties in place of criminal prosecution may increase the possibility that PPA, and statutes alike, will evade review.<sup>89</sup>

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<sup>81</sup> See *Am. Book Sellers*, 771 F.2d. at 332-334.

<sup>82</sup> *Roe v. Wade*, 410 U.S. 113 (1973). Abortion was banned except when necessary to save the pregnant woman’s life or in limited cases of rape and incest. LA. STAT. ANN. §14:87 (1991), *invalidated by* *Sojourner v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992).

<sup>83</sup> LA. REV. STAT. § 9:2800.12(A) (2006). The Liability for Termination of Pregnancy Act states that “any person who performs an abortion is liable to the mother of the unborn child for any damages occasioned or precipitated by the abortion.”

<sup>84</sup> See *Okpaloby v. Foster*, 244 F.3d at 409-10 (5th Cir. 2001) (citing the district court’s opinion that statutes permitting tort liability for abortion providers “places an unconstitutional undue burden on a woman’s right to abortion”).

<sup>85</sup> See *id.* at 428-29 (discussing a Louisiana statute that allegedly forced physicians to stop performing abortions because of possible exposure to civil damage claims, thus achieving the goal of eliminating abortions, in which the court ultimately determined the plaintiffs had no case or controversy).

<sup>86</sup> See *id.* at 428-29 (holding by the U.S. Court of Appeals for the Fifth Circuit that the plaintiffs did satisfy the standing requirement).

<sup>87</sup> See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1153-54, 1157 (10th Cir. 2005) (further demonstrating the constitutional concerns regarding statutes imposing civil penalties to deter acts, and the difficulty for plaintiffs to prove standing in such cases).

<sup>88</sup> See N.C. GEN. STAT. § 99A-2.

<sup>89</sup> See *id.*; see also *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 386 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122 (4th Cir. 2018) (holding that the plaintiffs did not meet the standing requirement, which was reversed and remanded by the Court of Appeals for the Fourth Circuit; however, the unpublished decision lacks precedent).

### C. WHISTLEBLOWER SILENCING BILLS THAT IMPOSE SEVERE CIVIL PENALTIES

The purpose of traditional ag-gag laws is to dissuade undercover investigators from documenting disturbing practices occurring at farm factories,<sup>90</sup> while modern whistleblower silencing laws expand the restriction to any workplace setting.<sup>91</sup> Expanding the scope of these statutes to include all employees increases the likelihood that employees will choose not to expose the mistreatment of vulnerable individuals for fear of severe civil penalties.

#### 1. *North Carolina's Property Protection Act, the New Ag-Gag Law*

PPA, which is a civil—not criminal—statute, permits damages of up to \$5,000 a day for each day that an employee violates any of PPA's provisions.<sup>92</sup> An employee violates PPA if the employee “intentionally gains access to the nonpublic areas<sup>93</sup> of [the employer's] premises and engages in an act that exceeds the person's authority to enter those areas.”<sup>94</sup> Consequently, this may cause an employee engaged in an undercover investigation at work to be liable for up to \$450,000 in damages if they carried out the investigation for three months.<sup>95</sup> Even an employee

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<sup>90</sup> *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> (last visited Mar. 1, 2019).

<sup>91</sup> See N.C. GEN. STAT. § 99A-2.

<sup>92</sup> *Id.*

<sup>93</sup> “For the purposes of this section, ‘nonpublic areas’ shall mean those areas not accessible to or not intended to be accessed by the general public.” *Id.*

<sup>94</sup> “For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following: (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer. (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer. (3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data. (4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes. (5) An act that substantially interferes with the ownership or possession of real property.” *Id.*

<sup>95</sup> “[The] length of the investigation will be determined by a number of factors.” EUGENE FERRARO, UNDERCOVER INVESTIGATIONS FOR THE WORKPLACE 30 (Elsevier Science 2000) (stating an investigation can take weeks or months). An undercover investigator facing civil penalties under PPA for a three-month investigation, could owe up to \$450,000, or \$5,000 for each day. See N.C. GEN. STAT. § 99A-2.

with a strong desire to uncover the most disturbing behavior might reconsider, self-censor their speech, and leave the behavior uncovered.

The district court in *PETA v. Stein* dismissed the First Amendment pre-enforcement challenge of PPA because PETA did not meet the standing requirement.<sup>96</sup> The court implied that the pre-enforcement challenge would have been reviewable by applying a relaxed standing standard if PPA was a criminal statute.<sup>97</sup> The U.S. Court of Appeals for the Fourth Circuit later reversed and remanded the decision, holding that the plaintiffs satisfied standing by proving an actual injury.<sup>98</sup> The decision remains unpublished.<sup>99</sup> Therefore, a plaintiff raising a pre-enforcement challenge to similar whistleblower silencing laws will likely face a similar battle in satisfying the standing requirement.<sup>100</sup>

## 2. *Arkansas's Act 606 Modeled After the Property Protection Act*

Less than two years after the enactment of PPA, Arkansas passed a nearly identical ag-gag law, Act 606.<sup>101</sup> The Act imposes civil penalties on any employee that exceeds his or her authority to enter into a nonpublic area and damages the employer by capturing or removing documents or recording images or sounds, placing a camera, conspiring in organized theft of employer belongings, or committing an act that substantially interferes with ownership of the property.<sup>102</sup> In addition, employees can be held liable if they knowingly assist or direct another employee to violate the statute.<sup>103</sup>

There are several differences between PPA and Act 606.<sup>104</sup> Although Act 606 broadened its scope of applicability compared to PPA by applying liability to employees and non-employees alike, Arkansas has reduced the number of work settings that Act 606 applies to.<sup>105</sup> First, Act 606 applies to anyone who “knowingly gains access to a nonpublic area

<sup>96</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 386-87 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>97</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 378 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>98</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 130-31 (4th Cir. 2018) (holding the plaintiffs alleged a well-founded fear of injury).

<sup>99</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>100</sup> The appropriate application of the standing doctrine to whistleblower silencing bills imposing severe civil penalties is unclear. *See PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>101</sup> ARK. CODE ANN. § 16-118-113.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

<sup>105</sup> ARK. CODE ANN. § 16-118-113.

of a commercial property” and commits one of the acts noted above; whereas PPA only applies to employees.<sup>106</sup> Second, there are additional restrictions to Act 606’s application that are not present in PPA’s provisions.<sup>107</sup> Act 606 does not apply if the employer-at-issue is any of the following: a state agency, a public college or university, a police officer engaged in an investigation of commercial property, or a healthcare or medical services provider.<sup>108</sup> Arkansas acted swiftly to pass an ag-gag law mirroring North Carolina’s PPA.<sup>109</sup> Other states may follow North Carolina’s lead and pass anti-whistleblower legislation if PPA is not struck down as an unconstitutional restriction on the freedom of speech protected by the First Amendment.<sup>110</sup>

#### D. THE APPLICATION OF THE STANDING REQUIREMENT TO FIRST AMENDMENT INFRINGEMENT CLAIMS

The purpose of the standing doctrine is to safeguard the balance of power between the three branches of government, recognizing that judicial power can “[p]rofoundly affect the lives, liberty, and property of those to whom it extends.”<sup>111</sup> Merely alleging that a statute is unconstitutional does not guarantee judicial standing because advisory opinions are not permitted by the Constitution.<sup>112</sup> The standing requirement ensures that the plaintiff has the right to bring a legal claim and also safeguards the defendant from an insufficient claim.<sup>113</sup> The judiciary has overseen the evolution of the standing doctrine, which ensures that before a case may be heard the party seeking relief (1) has a concrete injury, (2) that

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> PPA went into effect on January 1, 2016 and Act 606 was passed in March 2017, only 14 months later. N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

<sup>110</sup> See ARK. CODE ANN. § 16-118-113.

<sup>111</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

<sup>112</sup> An advisory opinion is mere statutory interpretation without review of an actual controversy and violates the “case and controversy” requirement of the Constitution. U.S. CONST. art. III, § 2; see *Howell v. Tex. Workers’ Comp. Comm’n*, 143 S.W.3d 416, 440-41 (Tex. App.—Austin 2004, pet. denied). “The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-46 (1936).

<sup>113</sup> The standing test ensures that the plaintiff has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).



the injury was caused by the conduct of the defendant, and (3) the judicial process can remedy the injury.<sup>114</sup> Although constitutional review should be avoided whenever possible,<sup>115</sup> the threat to free speech carries a societal interest that makes judicial review essential.<sup>116</sup> In this context, without constitutional review of state statutes that threaten the First Amendment protections of whistleblowers, unethical behavior in the workplace may remain undiscovered.

A chilling effect occurs when an action has the indirect effect of dissuading speakers from exercising their First Amendment rights.<sup>117</sup> Penalties that deter action can include criminal and civil actions, or loss of state benefits or privacy.<sup>118</sup> An individual's chilled speech may satisfy the standing requirement.<sup>119</sup> The concrete injury requirement is met when a statute forces individuals to change their conduct to avoid liability.<sup>120</sup> In cases regarding chilled speech, the traditional requirements that the injury be concrete and particularized are relaxed to permit attenuated claims.<sup>121</sup> This relaxed standing requirement is an important protection that may prevent states from overreaching and enacting unconstitutional

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<sup>114</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). According to *Lujan*, to meet the standing requirements, first, the plaintiff must have suffered an injury in fact which is "concrete and particularized" (citing *Seldin*, 422 U.S. at 508) and "real and immediate," not "conjectural" or "hypothetical." *Id.* at 560 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, standing requires that the conduct caused the injury, thus, the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, it must be "likely," not merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 561 (citing *Simon*, 426 U.S. at 38).

<sup>115</sup> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander*, 297 U.S. at 346-48 (explaining the safeguards that the Court has implemented to ensure its review of constitutional questions is limited).

<sup>116</sup> See *Lopez v. Candaele*, 630 F.3d 775, 785-87 (9th Cir. 2010) (discussing the relaxed application of the standing doctrine in First Amendment challenges "to avoid the chilling effect of sweeping restrictions").

<sup>117</sup> "Where . . . a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 (1984).

<sup>118</sup> See N.C. GEN. STAT. § 99A-2 (imposing civil penalties); see IDAHO CODE § 18-7042 (imposing criminal penalties).

<sup>119</sup> *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("If the injury is certainly impending that is enough." (quoting *Pennsylvania v. West Virginia* 262 U.S. 553, 593 (1923))).

<sup>120</sup> *Meese v. Keene*, 481 U.S. 465, 475 (1987) ("[T]he need to take such affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury . . .").

<sup>121</sup> "[W]here a First Amendment challenge could be brought . . . there is a possibility that, rather than risk . . . challenging the statute, [one] will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be out-

anti-whistleblower laws by increasing the likelihood that such action by the states will undergo judicial review.<sup>122</sup>

The plaintiff satisfies the injury requirement in criminal litigation by a “credible threat” if a recently enacted statute facially restricts expressive activity.<sup>123</sup> However, to meet this exception, the plaintiff must prove that the threat is not “imaginary or wholly speculative.”<sup>124</sup> The reasoning for the exception is that an individual should not have to undergo criminal prosecution to seek relief.<sup>125</sup> Considering the differences between criminal and civil proceedings, the application of a relaxed standing requirement for civil plaintiffs is not well established.<sup>126</sup>

## II. THE NEED FOR A RELAXED APPLICATION OF THE STANDING REQUIREMENT TO CHILLING CIVIL STATUTES

The liberty interest of the Due Process Clause of the Fourteenth Amendment guarantees citizens certain protections against actions of state governments, including the rights guaranteed by the First Amendment of the Constitution.<sup>127</sup> States have a responsibility to act in a way that protects First Amendment rights.<sup>128</sup> However, if a state drafts a statute that infringes on these protections, judicial review is the most logical vehicle to address these concerns.<sup>129</sup> The District Court in *PETA v. Stein* dismissed a pre-enforcement challenge of PPA even though it acknowledged the possibility for the statute to chill First Amendment rights.<sup>130</sup> This sends a disquieting message that suggests the judiciary will not protect constitutional rights even when those very rights are threatened by governmental acts.

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weighed by society’s interest in having the statute challenged.” *Joseph H. Munson Co.*, 467 U.S. at 956.

<sup>122</sup> See *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 378-81 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122 (4th Cir. 2018).

<sup>123</sup> *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F. 3d 8, 13 (1st Cir. 1996).

<sup>124</sup> *Babbitt*, 442 U.S. at 302.

<sup>125</sup> *Id.* (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

<sup>126</sup> For example, a few differences between criminal and civil proceedings include punishment, standard of proof, and trial by jury. *Criminal and Civil Justice*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://victimsforcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice> (last visited Mar. 3, 2019).

<sup>127</sup> James W. Ely, Jr., *Due Process Clause*, HERITAGE GUIDE TO THE CONST., <http://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause> (last visited Mar. 3, 2019).

<sup>128</sup> Alan Rosenthal, *Beyond the Intuition that Says “I Know One When I See One,” How do You Go About Measuring the Effectiveness of Any Given Legislature?*, STATE LEGISLATURES MAG. (July/Aug. 1999), <http://www.ncsl.org/research/about-state-legislatures/the-good-legislature.aspx>.

<sup>129</sup> *Id.*

<sup>130</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 376 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122 (4th Cir. 2018) (“[T]he court is constrained from reaching the merits of Plaintiffs’ claims, notwithstanding the serious First Amendment issues at stake.”).

## A. THE FACIALLY UNCONSTITUTIONAL CHILLING EFFECT OF CIVIL STATUTES

The relaxed standing requirement, which permits pre-enforcement challenges to criminal statutes that chill free speech, should also apply to civil statutes that substantially chill First Amendment rights. If a statute causes a speaker to self-censor his protected speech, then the individual has been harmed.<sup>131</sup> If a civil statute chills free speech by permitting severe penalties against an individual, the statute's effect is like a criminal statute, thus the relaxed standard should apply.

## 1. A "Certainly Impending" Injury: Self-Censorship is Sufficient Harm

A concrete injury is one of the three standing requirements, but a fear of future injury can satisfy the requirement if the threatened injury is "certainly impending."<sup>132</sup> "Certainly impending" means that there is a substantial risk that the harm will occur.<sup>133</sup> Society's interest in protecting free speech outweighs other interests, such as the courts' interest in applying judicial avoidance principles in determining whether a case has standing.<sup>134</sup> In First Amendment cases, the injury requirement is met if an individual self-censors the right to free speech.<sup>135</sup> Therefore, the injury is that the speech was thwarted because the speech has not occurred and may never occur.<sup>136</sup>

PPA discourages undercover investigators from working to uncover unethical behavior in North Carolina businesses by threatening severe civil penalties.<sup>137</sup> The former governor of North Carolina, Pat McCrory, vetoed PPA because he was "concerned that subjecting employees to potential civil penalties would create an environment that discourages employees from reporting illegal activities."<sup>138</sup> The *PETA* court acknowledged that PPA raises a legitimate First Amendment concern.<sup>139</sup> The chilling of First Amendment rights, which PPA and similar

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<sup>131</sup> *Joseph H. Munson Co.*, 467 U.S. at 956.

<sup>132</sup> *Clapper v. Amnesty Int'l U.S.*, 568 U.S. 398, 409-10 (2013).

<sup>133</sup> *Id.* at 409.

<sup>134</sup> *Joseph H. Munson Co.*, 467 U.S. at 956.

<sup>135</sup> *Id.* at 967-68.

<sup>136</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006).

<sup>137</sup> See N.C. GEN. STAT. § 99A-2.

<sup>138</sup> Mark Binker & Laura Leslie, *Lawmakers Override McCrory Veto on Controversial 'Ag-Gag' Bill*, WRAL (June 3, 2015), <http://www.wral.com/lawmakers-override-mccrory-veto-on-controversial-private-property-bill/14687952/>.

<sup>139</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 376 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

whistleblower bills cause, is significant enough to support the consistent application of a relaxed standing requirement—generally only applicable to criminal statutes—to ensure the judicial review of potentially unconstitutional legislation.<sup>140</sup> While the U.S. Court of Appeals for the Fourth Circuit held that PETA satisfied the standing requirement, the analysis was pertaining to an actual injury and did not address the standing application in a “certainly impending” injury.<sup>141</sup>

## 2. *The Severe Civil Penalty: Remedial or Punitive?*

A statute like PPA that imposes severe civil penalties—punitive fines—on<sup>142</sup> individuals who exercise their free speech rights warrants constitutional protections as applied to criminal statutes.<sup>143</sup> In *U.S. v. Halper*, the Court, in determining whether a civil penalty constituted punishment, held that punishment “cuts across the division” between criminal and civil law.<sup>144</sup> A medical service provider was convicted under the False Claims Act, which permitted a \$2,000 fine for each of the 65 claims the medical provider violated under the Act, totaling over \$130,000.<sup>145</sup> Civil action to recover penalties is “punitive in character,” and resembles criminal penalties because the wrongdoer is punished.<sup>146</sup> After *Halper*, courts “look to [1] the purpose of the civil action and [2] the extent to which it is designed [to] punish[ ] or . . . reimburse[ ] the government’s expenses.”<sup>147</sup> If a civil statute imposing severe civil penal-

<sup>140</sup> The U.S. Court of Appeals for the Fourth Circuit held that the plaintiffs satisfied the standing requirement, but the court did not address the relaxed application of the standing requirement to civil statutes. *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122, 131 (4th Cir. 2018).

<sup>141</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122, 131 (4th Cir. 2018). The unpublished decision lacks precedent.

<sup>142</sup> A remedial fine compensates for actual or anticipated losses; a punitive fine compensates higher than reasonable for remedial purposes. Vikram Omar & David Reis, *Are Large Civil Fines For Minor Violations Unconstitutional? Applying Proportionality Standards Outside the Punitive Damages Context*, FINDLAW (June 11, 2004), <https://supreme.findlaw.com/legal-commentary/are-large-civil-fines-for-minor-violations-unconstitutional.html>.

<sup>143</sup> See *United States v. Halper*, 490 U.S. 435, 442 (1989) (discussing whether a civil penalty is equivalent to punishment and like a criminal penalty, the Court stated that case law did “not foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government’s damages and expenses as to constitute punishment”).

<sup>144</sup> The terms “criminal” and “civil” are insignificant because “civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.” *Id.* at 447-48.

<sup>145</sup> *Id.* at 437-38.

<sup>146</sup> *United States v. LaFranca*, 282 U.S. 568, 573-74 (1931).

<sup>147</sup> Eric Anielak, *Double Jeopardy: Protection Against Multiple Punishments*, 61 Mo. L. REV. 169, 175-76 (1996), <http://scholarship.law.missouri.edu/mlr/vol61/iss1/12>.

ties was drafted to punish actors, then the relaxed standing doctrine should apply.<sup>148</sup>

PPA's severe civil penalty of \$5,000 a day for each PPA violation can easily lead to enormous penalties for those who seek to uncover wrongdoing at their workplace.<sup>149</sup> Penalties could reach \$25,000 after only one week on the job, \$50,000 in just two weeks, and over \$200,000 after just a few months of employment.<sup>150</sup> The first question, whether the legislature intended to label PPA as civil or criminal, can be determined by reviewing a history of ag-gag legislation.<sup>151</sup> Since 1990, 28 states have introduced numerous statutes criminalizing activities related to the documentation of conditions within agricultural businesses.<sup>152</sup> PPA, like traditional ag-gag statutes, threatens individuals who wish to uncover the disturbing practices of agricultural businesses.<sup>153</sup> Although PPA implies a criminal intent, legislatures drafted PPA as a civil statute, perhaps to avoid the attention of whistleblowers.<sup>154</sup> PPA has the same intent as every other ag-gag criminal statute, but the legislature intentionally drafted it as a civil statute to benefit the special interests of North Carolina's agricultural businesses.<sup>155</sup> Thus, the same standing requirement should be applied to PPA as would be applied to ag-gag laws.<sup>156</sup>

Regarding the second consideration, PPA permits severe civil penalties—punitive damages—thus, the penalty is comparable to criminal punishment.<sup>157</sup> PPA is equivalent to a criminal statute not just because of

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<sup>148</sup> “[C]riminal prosecutions masquerading in the guise of civil penalties will not be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case.” Jonathan Charney, *Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 482 (1974), <http://scholarship.law.cornell.edu/clr/vol59/iss3/5>.

<sup>149</sup> See N.C. Gen. Stat. § 99A-2 (permitting fines up to \$5,000 a day for every day an individual violates PPA).

<sup>150</sup> See *id.*

<sup>151</sup> ASPCA, *supra* note 8.

<sup>152</sup> ASPCA, *supra* note 8.

<sup>153</sup> See N.C. GEN. STAT. § 99A-2; ASPCA, *supra* note 8.

<sup>154</sup> See *Our Opinion: Time's Running Out for North Carolina's Atrocious Ag-Gag Law*, *supra* note 14 (stating “while our state hasn't criminalized undercover investigations, it uses the threat of steep fines to deter would-be whistleblowers” and “ag-gag laws are plainly intended to stop undercover investigations that expose abuse and embarrass factory farms”).

<sup>155</sup> See *id.* (“Animal welfare groups often use secretly recorded video of poultry and livestock abuse to make their case for stricter farm regulations and food boycotts. That frightens farmers, who use their lobbying muscle to preempt the threat to their business. But the undercover operatives often uncover crimes, and without the evidence they gather, those crimes would go unpunished.”). North Carolina is the second-largest hog producer in the U.S., totaling approximately \$2.9 billion in sales. *2012 Ranking of Market Value of Ag Products Sold: North Carolina*, USDA CENSUS OF AGRIC., [https://www.nass.usda.gov/Publications/AgCensus/2012/Online\\_Resources/Rankings\\_of\\_Market\\_Value/North\\_Carolina/index.php](https://www.nass.usda.gov/Publications/AgCensus/2012/Online_Resources/Rankings_of_Market_Value/North_Carolina/index.php) (last visited Feb. 23, 2019).

<sup>156</sup> See ASPCA, *supra* note 8.

<sup>157</sup> See N.C. GEN. STAT. § 99A-2.

the amount of damages—\$5,000 a day—but also because of the broad application of violations applicable under the Act’s provisions.<sup>158</sup> The penalty not only applies to employees who violate the statute, but also applies to any individual who “directs, assists, compensates, or induces” another person to violate PPA.<sup>159</sup> PPA was not enacted to compensate employers for losses due to undercover investigations.<sup>160</sup> Although fines of \$250,000 or more are extreme, the recovery would not remedy the losses that businesses incur after wrongdoing is exposed: likely millions of dollars.<sup>161</sup> Hence, the goal of PPA is to punish whistleblowers, not to reimburse employers for injury caused by whistleblowers. When willing speakers chill their own speech due to fear of severe civil penalties, the statute punishes the speaker and thereby indicates a criminal statutory purpose.

## B. UNCONSTITUTIONAL CIVIL ACTION WITHOUT STATE ACTION

Only a government actor can chill First Amendment rights.<sup>162</sup> Some legislatures attempt to disguise state action as a private action so that a relaxed standing requirement is applied, which consequently makes it easier to avoid judicial review. As in PPA, the result is that employees and outsiders cannot challenge the unconstitutional threat to freedom of speech caused by a statute without risking severe civil penalties.<sup>163</sup>

### 1. *The Interplay of Private and Government Action Restricting First Amendment Rights*

Restraints on free speech without direct government action may still trigger the protections of the First Amendment rights.<sup>164</sup> For example, in *NAACP v. Alabama*, the Alabama Supreme Court held that a state statute that required NAACP to disclose the names of its members was unconstitutional.<sup>165</sup> However, NAACP could not bring its constitutional challenge “until it purged itself of contempt by divulging its membership

<sup>158</sup> PPA broadly applies to “any person who intentionally gains access to the nonpublic areas of another’s premises and engages in an act that exceeds the person’s authority to enter those areas” and imposes liability on the individual “to the owner or operator of the premises for any damages sustained.” N.C. GEN. STAT. § 99A-2.

<sup>159</sup> N.C. GEN. STAT. § 99A-2.

<sup>160</sup> *See id.*

<sup>161</sup> *See* Bottemiller, *supra* note 17.

<sup>162</sup> *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 (1979).

<sup>163</sup> *See* N.C. Gen. Stat. § 99A-2; *see also* PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev’d*, 737 F. App’x 122 (4th Cir. 2018).

<sup>164</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

<sup>165</sup> *Id.*

lists.”<sup>166</sup> Similarly, in PPA, the dismissal of the pre-enforcement challenge means that employees are required to violate PPA before the court will hear their constitutional challenges.<sup>167</sup> When state statutes permit private actors to seek damages against an individual for expressing his or her free-speech rights, there must be an immediate judicial recourse against such unconstitutional chilling of free speech.

The U.S. Supreme Court in *NAACP v. Alabama* held that private activity, like government action, can chill speech.<sup>168</sup> The Court held that the “interplay of governmental and private action” was sufficient to implicate the First Amendment.<sup>169</sup> Therefore, state laws that do not directly restrain speech, but create the conditions by which private actors can deter expressive conduct, may also fall within the scope of First Amendment prohibitions.<sup>170</sup> Private action chilling free speech, even without government action, may satisfy the standing requirement.

## 2. *Indirect Government Action Chilling Free Speech*

When provisions of a state statute chill free speech, indirect government action is at play regardless of whether the statute expressly permits government action.<sup>171</sup> In *Mobil Oil Corp. v. Attorney General of Virginia*, the court held that a statute imposing civil penalties was unconstitutional.<sup>172</sup> The court found that the Mobil Oil Corporation suffered a harm by self-censoring its actions.<sup>173</sup> However, the district court in *PETA* determined that this ruling did not apply to PPA.<sup>174</sup> In *Mobil Oil Corp.*, the statute specifically gave the Attorney General the authority to enforce the law and to investigate violations.<sup>175</sup> The court in *PETA* held that because the Attorney General was not expressly permitted by the statute to enforce the law, PPA was a completely private action; therefore, the relaxed standing requirement did not apply.<sup>176</sup> Yet, there was no indication in *Mobil Oil Corp.* that an expressed enforcement provision

<sup>166</sup> *Id.* at 454.

<sup>167</sup> See *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>168</sup> *NAACP*, 357 U.S. at 463.

<sup>169</sup> *Id.*

<sup>170</sup> See *id.*

<sup>171</sup> *Mobil Oil Corp. v. Att'y Gen. of Va.* 940 F.2d 73, 77 (4th Cir. 1991).

<sup>172</sup> *Id.* at 75.

<sup>173</sup> *Id.* at 76.

<sup>174</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 379 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

<sup>175</sup> *Mobil Oil Corp.*, 940 F.2d at 75.

<sup>176</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369, 379-80 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

was required to apply the relaxed standing requirement.<sup>177</sup> Here, North Carolina's enactment of PPA is the cause of the plaintiff's (PETA) decision not to participate in the prohibited act. Even without the Attorney General's express ability to enforce PPA, indirect government action is still at play and the relaxed standing requirement applies.

### III. PPA AND ACT 606 ENCOURAGE THE ENACTMENT OF NEW WHISTLEBLOWER SILENCING BILLS THAT INVADE THE EMPLOYEE'S RIGHT TO UNCOVER WRONGDOING

Fourteen months after North Carolina implemented PPA, Arkansas followed North Carolina's civil approach with the 2017 enactment of Act 606.<sup>178</sup> If this new design of civil ag-gag statutes is not struck down under judicial review, then state legislatures will continue to draft ag-gag laws that utilize this strategy and infringe on whistleblowers' rights. In June 2018, the Court of Appeals for the Fourth Circuit reversed and remanded the district court decision, holding that the plaintiffs proved an actual injury and thereby satisfied the standing requirement without relaxing the standard for First Amendment purposes.<sup>179</sup> A new standard is required to ensure that cases with certainly impending injuries are reviewable regardless of whether it is a criminal or civil case, and that the standing requirement remains intact.

#### A. THE THREAT TO EMPLOYEE WHISTLEBLOWERS IN ALL WORKPLACES

Whistleblower-protection laws guarantee free speech to workers willing to expose wrongdoing in the workplace.<sup>180</sup> Although there are federal and state laws that protect whistleblowers, the application of those laws varies by state and by situation.<sup>181</sup> There are various issues that plague whistleblowers within different areas of the law. For instance, in drafting the Defend Trade Secrets Act of 2016, Congress hoped to address the rising issue of misuse of disclosure agreements to discourage the reporting of illegal activities in the workplace.<sup>182</sup> PPA and the new

<sup>177</sup> *Mobil Oil Corp.*, 940 F.2d at 76.

<sup>178</sup> ARK. CODE ANN. § 16-118-113.

<sup>179</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018).

<sup>180</sup> Occupational Safety and Health Admin, *The Whistleblower Protection Program*, U.S. DEP'T OF LABOR, <https://www.whistleblowers.gov/> (last visited Mar. 3, 2019).

<sup>181</sup> *Id.*

<sup>182</sup> Peter Menell, *Misconstruing Whistleblower Immunity Under the Defend Trades Secrets Act*, CLS BLUE SKY BLOG (Jan. 3, 2017), <http://clsbluesky.law.columbia.edu/2017/01/03/misconstruing-whistleblower-immunity-under-the-defend-trade-secrets-act/>.



design of ag-gag legislation magnify the concern that whistleblower silencing laws deter employees from uncovering wrongdoing.<sup>183</sup> The silencing of workplace whistleblowers will increase with an increase of laws like PPA and Act 606.

An increased silencing of whistleblowers will have detrimental effects for the most vulnerable members of society. At age 90, Erytha Mayberry's daughters moved her to Quail Creek Nursing Home where she suffered ongoing abuse and neglect by her two primary nursing-home attendants.<sup>184</sup> Erytha's family attempted to discuss concerns with the nursing home after finding bruises on Erytha's arms and leg, but the nursing home refused to take action.<sup>185</sup> After Erytha told her daughters that someone "was hurting her mouth," her daughters placed hidden cameras in her private room.<sup>186</sup> The video captured disturbing footage of two workers slapping Erytha in the face and stuffing her mouth with latex gloves.<sup>187</sup> The video also showed the workers forcibly pushing on Erytha's stomach, causing her to urinate so they would not have to change her diaper again.<sup>188</sup>

Under PPA and Act 606, employees of Quail Creek Nursing Home could be fined up to \$5,000 a day for obtaining documents, recordings, or videotapes of such abuse.<sup>189</sup> Additionally, under Act 606, Erytha's daughters, who were nonemployees, could be found liable for damages to Quail Creek Nursing Home for secretly videotaping Erytha's private room to investigate concerns for the wellbeing of their mother.<sup>190</sup> Nursing homes are only one example of workplace settings where statutes like PPA and Act 606 would apply.<sup>191</sup> Childcare centers, restaurants, and a variety of businesses could also target employees, and in some cases nonemployees, for actions taken to expose wrongdoing in these facilities.<sup>192</sup>

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<sup>183</sup> See N.C. GEN. STAT. § 99A-2; see ARK. CODE ANN. § 16-118-113.

<sup>184</sup> *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1157-58 (2017).

<sup>185</sup> *Id.* at 1158.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

<sup>190</sup> ARK. CODE ANN. § 16-118-113.

<sup>191</sup> N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113. Act 606 provides an exception for healthcare and medical providers; thus, nursing home employees who provide medical care may be exempt under the statute.

<sup>192</sup> *Id.*

B. THE ROBERTS COURT: CONCERNS OF AN INCREASE IN  
OVERREACHING STATUTES

The immediate action of the Roberts Court to address legislative overreach is essential to prevent the continued drafting of whistleblower silencing bills. “[T]he effect of many of the [Roberts] Court’s decisions [is] to close the courthouse doors,”<sup>193</sup> but the Roberts Court has increased its review of standing cases compared to the Warren, Burger, and Rehnquist Courts that preceded it.<sup>194</sup> In some cases, the Court has provided a narrow interpretation of the standing doctrine, and in others, it has provided a more relaxed standing requirement. One of the most noteworthy standing cases that the Roberts Court has reviewed is *Clapper v. Amnesty International*.<sup>195</sup> In *Clapper*, the Court utilized the standing doctrine to avoid constitutional review of the executive branch’s foreign surveillance practices, ruling that the plaintiff did not prove that the injury was “certainly impending.”<sup>196</sup> Although the overall impact of the Roberts Court’s decisions on substantive individual rights is unclear, there are legitimate concerns that the decisions so far have not combatted the concerns of an overreaching legislative body.

Through inaction, the Supreme Court has permitted other courts to accept and dismiss the questionable conduct of state legislatures in enacting speech-chilling statutes. However, courts are not required to go beyond acknowledging the problem. The Supreme Court needs to address a clear solution to legislative overreach by broadening the application of the standing doctrine to reduce state legislatures’ use of the doctrine as a circumventive tool. Legislatures are challenging constitutional restrictions by using the PPA as the new vehicle to permit agricultural and other powerful businesses to have extensive influence in their potentially unethical practices, all while infringing on the First Amendment rights of their employees.

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<sup>193</sup> Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 437 (2007), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3812&context=facpubs>; see Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 5 (2007).

<sup>194</sup> Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 663 (2008), <http://epstein.wustl.edu/research/ChangeOrNot.pdf>.

<sup>195</sup> *Clapper v. Amnesty Int’l U.S.*, 568 U.S. 398, 414 (2013) (holding that the “speculative chain of possibilities” did not establish a potential future injury that was certainly impending or fairly traceable to the code).

<sup>196</sup> See *id.* at 409-14.

## IV. CONCLUSION

Agricultural businesses and state legislatures, influenced by special interests, aim to conceal the unethical practices existent within farm factories. The inhumane treatment of animals raised for food negatively impacts the quality of the food supply and the safety of the workers within the industry. The traditional ag-gag laws designed to prevent undercover investigators from entering farm factories transformed into whistleblower silencing laws. These statutes threaten the whistleblowers' right to access workplace settings and expose workplace wrongdoing. Without this access, vulnerable individuals who depend on undercover investigations to expose unethical behavior remain unprotected.

First Amendment free speech challenges "raise unique standing considerations that tilt dramatically toward a finding of standing."<sup>197</sup> A rise in statutes silencing workplace whistleblowers is expected because the unpublished *PETA v. Stein* decision failed to address a certainly impending injury in its application of the standing requirement.<sup>198</sup> Farm factories that struggled to pass legislation to protect their businesses from whistleblowers succeeded with the enactment of PPA.<sup>199</sup> The danger of PPA is that any state may enact a statute that limits employees' rights to uncover wrongdoing. The application of the relaxed standing requirement to free-speech claims alleging certainly impending injuries is essential. Regardless of whether a statute is criminal or civil, and whether direct government action is implicated, use of the relaxed standing requirement will ensure that courts can address alleged infringements of First Amendment rights. Inaction by the judicial branch will create a vast threat to individual rights and a detachment from the objective of the standing doctrine, which is intended to eliminate overreach—not empower it. Over 100 years later, state legislation threatens the same investigative methods that Upton Sinclair utilized to generate major reform in the food industry.<sup>200</sup> Today under PPA or Act 606, Sinclair's seven-week undercover investigation would expose Sinclair to \$250,000 in fines.<sup>201</sup> When a concerned whistleblower is menacingly silenced and prevented from exposing wrongdoing within factories, nursing homes, and child-care centers, the cost to society is devastating.

<sup>197</sup> *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010)).

<sup>198</sup> *PETA, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018).

<sup>199</sup> ASPCA, *supra* note 8.

<sup>200</sup> *See Sinclair*, *supra* note 1.

<sup>201</sup> *Upton Sinclair*, BIOGRAPHY, <https://www.biography.com/people/upton-sinclair-9484897> (last visited Mar. 3, 2019) (stating Sinclair spent several weeks investigating the meatpacking industry). The author used a seven-week investigation to estimate \$250,000 in fines at \$5,000 a day.