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# Beef Products, Inc. v. ABC News: (Pink) Slimy Enough to Determine the Constitutionality of Agricultural Disparagement Laws?

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## COMMENT

### ***Beef Products, Inc. v. ABC News: (Pink) Slimy Enough to Determine the Constitutionality of Agricultural Disparagement Laws?***

NICOLE C. SASAKI\*

#### I. INTRODUCTION

Between 1991 and 1997, thirteen states in the United States<sup>1</sup> enacted agricultural disparagement laws,<sup>2</sup> with the purpose of creating a new cause of action to protect agribusiness from criticism in ways that purposefully eliminated constitutional obstacles to recovery.<sup>3</sup> The threat of suit from this new cause of action presents serious implications for otherwise protected free speech pertaining to safety concerns and criticisms of our food system. Although these laws have been in place for over fifteen years, they have rarely been used in litigation, and the two cases

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\* J.D. *Magna Cum Laude*, Certificate in Environmental Law, Pace University School of Law, 2014; B.A. High Honors, 2008, University of California, Berkeley. I would like to thank Linda C. Fentiman for her guidance in crafting this Comment. I would also like to thank the PACE ENVIRONMENTAL LAW REVIEW editors and associates for their tireless work and dedication to this Comment.

1. Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas.

2. ALA. CODE § 6-5-621 (2012); ARIZ. REV. STAT. ANN. § 3-113 (2012); COLO. REV. STAT. ANN. § 35-31-101 (West 2012); FLA. STAT. ANN. § 865.065 (West 2012); GA. CODE ANN. § 2-16-2 (West 2012); IDAHO CODE ANN. § 6-2002 (West 2012); LA. REV. STAT. ANN. § 3:4502 (2011); MISS. CODE ANN. § 69-1-251 (West 2012); N.D. CENT. CODE ANN. § 32-44-02 (West 2011); OHIO REV. CODE ANN. § 2307.81 (West 2012); OKLA. STAT. ANN. tit. 2, § 5 (West 2012); S.D. CODIFIED LAWS § 20-10A-2 (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002 (West 2011).

3. Steven G. Brody & Bruce E.H. Johnson, *Advertising & Commercial Speech: A First Amendment Guide*, in AGRICULTURAL DISPARAGEMENT STATUTES § 8:4 (PLI, 2012).

that have resulted in published court opinions<sup>4</sup> were dismissed without the courts reaching a decision on the merits,<sup>5</sup> so none of these statutes has yet come under constitutional judicial review.<sup>6</sup> However, as this Comment will explore, a case recently filed in 2012 may have the merits to finally warrant such a review of whether these statutes will survive constitutional scrutiny under the First Amendment.

On September 13, 2012, Beef Products, Inc. (BPI) filed suit against the American Broadcasting Companies, Inc., ABC News and several individual news anchors (ABC News), and sources interviewed by ABC News to recover damages for “defamation, product and food disparagement, tortious interference with business relationships, and other wrongs.”<sup>7</sup> The case revolved around ABC News’ March and April 2012 news coverage of BPI’s product—lean finely textured beef (LFTB)—in which BPI claimed that ABC News “knowingly misled the public into believing that LFTB was not beef at all, but rather was an unhealthy ‘pink slime’ ‘hidden’ in ground beef as part of an ‘economic fraud’ masterminded by BPI.”<sup>8</sup> However, ABC News has moved to dismiss the case on the grounds that the lawsuit “directly challenges the right of a national news organization . . . to explore matters of obvious public interest—what is in the food we eat and

4. See generally *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998), *aff’d*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t v. Georgia*, 457 S.E.2d 273 (Ga. Ct. App. 1995).

5. *Winfrey*, 201 F.3d at 690 (observing “[t]he cattlemen’s complaints regarding the ‘Dangerous Food’ broadcast of ‘The Oprah Winfrey Show’ presented one of the first opportunities to interpret a food disparagement statute,” and finding “insufficiency of the cattlemen’s evidence . . . renders unnecessary a complete inquiry into the Act’s scope.”); *Action for a Clean Env’t*, 457 S.E.2d at 274 (finding that “[i]n this case there is no party to this action who seeks to uphold the constitutionality of the statute under attack,” and holding that “[b]ecause there is no adverse party to the proceeding, the trial court correctly dismissed appellants’ declaratory judgment action for failure to state a claim.”); see Rita Marie Cain, *Food, Inglorious Food: Food Safety, Food Libel, and Free Speech*, 49 AM. BUS. L.J. 275, 308 (2012) (citing Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 842 (2001)).

6. See Margot S. Fell, *Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 981, 982-83 (1999).

7. Complaint ¶ 1, *Beef Prods., Inc. v. ABC, Inc.*, 2012 WL 4017340 (S.D. Cir. Sept. 13, 2012) (No. 12-292) [hereinafter *Complaint*].

8. *Id.* ¶ 6.

how that food is labeled.”<sup>9</sup> This case is the first to rely on South Dakota’s agricultural disparagement law.<sup>10</sup> If the facts of the case were to support a judgment on the merits, then the courts would finally be forced to address the constitutionality of agricultural disparagement laws.

This Comment analyzes the likelihood of whether BPI’s case against ABC News will be decided on the merits, whether South Dakota’s agricultural disparagement statute will be upheld as constitutional, and thus the likelihood that other states’ statutes will be struck down, thereby preserving the public’s freedom to question and criticize the safety of our food system. First, Part I offers a brief introduction to agricultural disparagement laws, their historical application, and BPI’s pending lawsuit. Next, Part II reviews the context of the enactment of agricultural disparagement laws, summarizes the common elements of these laws, and discusses *Texas Beef Group v. Winfrey*. Parts III (A) and (B) discuss *BPI v. ABC News* and analyze whether the facts of the case are sufficient to permit a decision on the merits. Part III (C) analyzes the constitutionality of South Dakota’s agricultural disparagement statute under the First Amendment of the United States Constitution. Finally, Part IV concludes that BPI’s case will probably fail on the merits, and that South Dakota’s agricultural disparagement statute is likely unconstitutional under the First Amendment.

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9. Memorandum in Support of ABC Defendant’s Motion to Dismiss All Claims of Plaintiff Beef Products, Inc. at 4, *Beef Prods., Inc. v. ABC, Inc.*, No. 12-4183 (D.S.D. Oct. 31, 2012) [hereinafter Motion to Dismiss]. After ABC News had the case removed to federal court, the United States District Court for the District of South Dakota remanded the case to the Circuit Court of South Dakota on June 12, 2013. *Beef Prod., Inc. v. ABC, Inc.*, No. CIV 12292, 2014 WL 1245307, at \*1 (S.D. Cir. Mar. 27, 2014). On March 27, 2014, the Circuit Court of South Dakota granted in part and denied in part ABC News’ motion to dismiss, finding that S.D. Codified Laws § 20-10A preempts common law disparagement causes of action. *Id.* at \*4. Thus BPI’s claim under South Dakota’s agricultural disparagement statute will go forward.

10. Jones, *supra* note 5, at 842 (noting “[o]f the five cases, three originated in Texas, one in Georgia, and one in Ohio”).

## II. BACKGROUND

### A. *Auvil v. CBS 60 Minutes*

In 1990, Washington State apple growers brought a class action lawsuit against CBS “60 Minutes.”<sup>11</sup> The lawsuit sought to recover for the alleged damages suffered by the apple industry after the broadcast of the “60 Minutes” segment entitled “A’ is for Apple,” which highlighted the use of Alar, a carcinogenic pesticide that was commonly sprayed on apples at the time.<sup>12</sup> Most scholars have recognized the dismissal of this case as having led to the enactment of agricultural disparagement laws by state legislatures.<sup>13</sup>

The “60 Minutes” segment centered on a report by the Natural Resources Defense Council, entitled *Intolerable Risk: Pesticides in Our Children’s Food*, which summarized health risks to children associated with the use of pesticides on fruit.<sup>14</sup> The report concerned the spraying on apples of the chemical growth regulator, Alar, a known carcinogen.<sup>15</sup> The segment noted that Alar could not be removed by washing or peeling the fruit, and that it stayed in the fruit’s flesh and could thus be found in processed apple products, including apple sauce and apple juice.<sup>16</sup> The plaintiffs alleged that in response to the broadcast, there was a dramatic decrease in consumer demand for apples and apple products, and that those dependent on the apple economy lost millions of dollars.<sup>17</sup>

A class action suit was filed by Washington State apple growers in November 1990, and included a common law claim for

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11. See generally *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740 (E.D. Wash. 1993), *aff’d*, 67 F.3d 816 (9th Cir. 1995).

12. *Id.*

13. Fell, *supra* note 6, at 986; accord Cain, *supra* note 5, at 278; accord Jones, *supra* note 5, at 825; accord Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1, 3 (2000); accord Sara Lunsford Kohen, *What Ever Happened to Veggie Libel?: Why Plaintiffs are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261, 267 (2011).

14. *Auvil*, 67 F.3d at 818.

15. *Id.*

16. *Id.* at 818 n.2.

17. *Id.* at 819.

product disparagement.<sup>18</sup> To prove a claim of product disparagement, also known as trade libel, a plaintiff must: (1) “allege that the defendant published a knowingly false statement harmful to the interests of another,” and (2) “intended such publication to harm the plaintiff’s pecuniary interests.”<sup>19</sup> The United States District Court for the Eastern District of Washington granted summary judgment to CBS because the plaintiffs failed to produce sufficient evidence to create a triable issue of fact regarding the falsity of the broadcast.<sup>20</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit found that in order for a claim for product disparagement to be actionable, the plaintiff must prove the falsity of the disparaging statements.<sup>21</sup> With little guidance from existing case law on product disparagement, the court of appeals referred to defamation cases in deciding the falsity prong.<sup>22</sup>

The plaintiffs made three arguments, each of which the court rejected in turn. First, the plaintiffs challenged the use of animal studies to substantiate the report’s conclusion that ingesting Alar causes cancer in humans.<sup>23</sup> The court rejected this argument, finding that animal studies were a proper means of gauging cancer risks to humans.<sup>24</sup> Second, the plaintiffs argued that there had been no scientific study on cancer risks to children from pesticide use.<sup>25</sup> The court again rejected the plaintiffs’ argument, and found that the report asserted that traces of Alar on apples were more harmful to children than to adults because children ingest more apple products per unit of body weight than do adults.<sup>26</sup> Third, the plaintiffs argued that by viewing the entire broadcast segment, the jury could find that it contained a provably false message, because the burden of proving falsity could be satisfied by proof of the falsity of the implied message.<sup>27</sup>

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18. *Auvil*, 67 F.3d at 819.

19. *Id.* at 820 (citing RESTATEMENT (SECOND) OF TORTS § 623A (1977)).

20. *Id.* at 819.

21. *Id.* at 820 (citing RESTATEMENT (SECOND) OF TORTS § 623A (1977)).

22. *Id.*

23. *Id.* at 821.

24. *Auvil*, 67 F.3d at 821 (citations omitted).

25. *See id.*

26. *Id.*

27. *Auvil*, 67 F.3d at 822.

The court declined to adopt the plaintiffs' rationale, finding that falsity does not proceed from an implied, disparaging message.<sup>28</sup> In addition, the court found support in the Restatement (Second) of Torts that the standard for proving a statement's falsity in product disparagement must "[refer] to individual statements and not to any overall message."<sup>29</sup> Thus, the court of appeals affirmed the lower court's decision.<sup>30</sup> This negative precedent ultimately set the stage for the national response by state legislatures to create agricultural disparagement laws.<sup>31</sup>

### B. State Legislators' Response

*Auvil's* negative outcome for the apple growers prompted the agricultural industry to lobby state legislators "for protection from disparagement that would be easier to prove than traditional common law trade libel."<sup>32</sup> The meat industry, farming associations, and manufacturers of chemicals and pesticides lobbied with exceptional strength for the passage of agricultural disparagement laws.<sup>33</sup> Although most states have considered agricultural product disparagement legislation,<sup>34</sup> only thirteen have actually enacted such legislation.<sup>35</sup>

These agricultural disparagement statutes were largely similar, but some of the statutes did contain notable differences from the rest. To begin, most of the agricultural disparagement laws imposed civil liability, but Colorado's statute criminalized "knowingly [making] any materially false statement," for the

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28. *Id.*

29. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 651(1)(c) (1977)).

30. *Id.* at 823.

31. Perhaps ironically, even though the decision in *Auvil* led to the enactment of agricultural disparagement statutes across the United States, Washington State is without an agricultural disparagement statute. *See generally id.* at 820.

32. Cain, *supra* note 5, at 279.

33. Jones, *supra* note 5, at 832-33.

34. *Id.* at 833.

35. ALA. CODE § 6-5-621; ARIZ. REV. STAT. ANN. § 3-113; COLO. REV. STAT. ANN. § 35-31-101; FLA. STAT. ANN. § 865.065; GA. CODE ANN. § 2-16-2; IDAHO CODE ANN. § 6-2002; LA. REV. STAT. ANN. § 3:4502; MISS. CODE ANN. § 69-1-251; N.D. CENT. CODE ANN. § 32-44-02; OHIO REV. CODE ANN. § 2307.81; OKLA. STAT. ANN. tit. 2, § 5-102; S.D. CODIFIED LAWS § 20-10A-2; TEX. CIV. PRAC. & REM. CODE ANN. § 96.002.

purposes of price control, market quantity control, or restraining trade of food for humans or for domestic animals.<sup>36</sup>

The twelve remaining state statutes protected variations of perishable agricultural or aquacultural food products.<sup>37</sup> North Dakota's statute was broader, as it explicitly included the additional protection of agricultural producers and a "group or class and any association representing an agricultural producer."<sup>38</sup>

With a few variations, the majority of agricultural disparagement statutes lacked standards of proof, and instead required that evidence proving falsity be based on "reasonable and reliable scientific" inquiries, facts, or data.<sup>39</sup> However, Idaho's statute adhered to a "clear and convincing evidence"

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36. COLO. REV. STAT. ANN. § 35-31-101; *see* Cain, *supra* note 5, at 276. As such, the Colorado statute will not be included in the rest of this analysis, which will focus on civil liability.

37. Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, Ohio, South Dakota and Texas statutes all explicitly include the protection of aquacultural food products. ALA. CODE § 6-5-621(2) (protecting "agricultural or aquacultural" "perishable food product or commodity"); ARIZ. REV. STAT. ANN. § 3-113(E)(2) (protecting perishable "agricultural or aquacultural food product or commodity grown or produced in this state"); FLA. STAT. ANN. § 865.065(2)(b) (protecting perishable "agricultural or aquacultural food product or commodity grown or produced within the State of Florida"); GA. CODE ANN. § 2-16-2(2) (protecting perishable "agricultural or aquacultural food product"); IDAHO CODE ANN. § 6-2002(2) (protecting "[p]erishable agricultural food product . . . intended for human consumption"); LA. REV. STAT. ANN. § 3:4502(2) (protecting "[p]erishable agricultural or aquacultural food product"); MISS. CODE ANN. § 69-1-253(b) (protecting "perishable agricultural or aquacultural food product"); N.D. CENT. CODE ANN. § 32-44-02 (protecting "agricultural producer or an agricultural product"); OHIO REV. CODE ANN. § 2307.81(B)(3) (protecting perishable agricultural or aquacultural food product or commodity that is "grown, raised, produced, distributed, or sold within this state"); OKLA. STAT. ANN. tit. 2, § 5-101(1-2) (protecting "perishable agricultural food product . . . intended for human consumption"); S.D. CODIFIED LAWS § 20-10A-1(1) (protecting perishable food product of agriculture or aquaculture); TEX. CIV. PRAC. & REM. CODE ANN. § 96.001 (protecting perishable "food product of agriculture or aquaculture").

38. N.D. CENT. CODE ANN. § 32-44-03 (additionally protecting "entire group or class of agricultural producers or products").

39. ALA. CODE § 6-5-621(1); ARIZ. REV. STAT. ANN. § 3-113(E)(1); FLA. STAT. ANN. § 865.065(2)(a); GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); N.D. CENT. CODE ANN. § 32-44-01; OHIO REV. CODE ANN. § 2307.81(B)(2); OKLA. STAT. ANN. tit. 2, § 5-102(A); TEX. CIV. PRAC. & REM. CODE ANN. § 96.003.



standard,<sup>40</sup> and South Dakota's statute failed to state any standard for proof of falsity.<sup>41</sup>

In defining the term "disparagement," most of the states' statutes used language such as "not safe for human consumption."<sup>42</sup> South Dakota's statute used an expanded definition of "disparagement," which included "generally accepted agricultural and management practices [that] make agricultural food products unsafe for consumption by the public."<sup>43</sup> North Dakota's statute used a narrower definition, which only required that the agricultural producer be "damaged."<sup>44</sup>

Most of the states<sup>45</sup> differed between two primary variations of the required mental state: (1) "willful or malicious,"<sup>46</sup> and (2) knowledge of falsity.<sup>47</sup> North Dakota's statute required a *mens rea* of "willfully or purposefully."<sup>48</sup> Instead of affirmatively stating a required intent, the Alabama statute stated that "[i]t is no defense under this article that the actor did not intend, or was unaware of, the act charged."<sup>49</sup>

All twelve of the state statutes gave standing to the producer of the disparaged agricultural product to bring suit.<sup>50</sup> In

40. IDAHO CODE ANN. § 6-2003(2).

41. S.D. CODIFIED LAWS § 20-10A-1.

42. ALA. CODE § 6-5-621(1); ARIZ. REV. STAT. ANN. § 3-113(B); FLA. STAT. ANN. § 865.065(2)(a); GA. CODE ANN. § 2-16-2(1); IDAHO CODE ANN. § 6-2002(1)(b); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(B)(1); OKLA. STAT. ANN. tit. 2, § 5-101(1); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(3).

43. S.D. CODIFIED LAWS § 20-10A-1(2).

44. N.D. CENT. CODE ANN. § 32-44-02.

45. Arizona, Florida, Georgia and Idaho require an intent of "willful or malicious." Louisiana, Mississippi, Ohio, Oklahoma, South Dakota, and Texas require a mental state of "knowledge of falsity."

46. ARIZ. REV. STAT. ANN. § 3-113(A); FLA. STAT. ANN. § 865.065(2)(a); GA. CODE ANN. § 2-16-2(1); IDAHO CODE ANN. § 6-2002(1)(d).

47. LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(C); OKLA. STAT. ANN. tit. 2, § 5-102(A); S.D. CODIFIED LAWS § 20-10A-1(2); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(2).

48. N.D. CENT. CODE ANN. § 32-44-02.

49. ALA. CODE § 6-5-623.

50. ALA. CODE § 6-5-622; ARIZ. REV. STAT. ANN. § 3-113(A); FLA. STAT. ANN. § 865.065(3); GA. CODE ANN. § 2-16-2(3); IDAHO CODE ANN. § 6-2003(1); LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 69-1-255; N.D. CENT. CODE ANN. § 32-44-03; OHIO REV. CODE ANN. § 2307.81(C); OKLA. STAT. ANN. tit. 2, § 5-102(A); S.D. CODIFIED LAWS § 20-10A-2; TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b).

addition, anyone who “markets or sells” had standing in Alabama,<sup>51</sup> and “shippers, or an association that represents producers or shippers” had standing in Arizona.<sup>52</sup> “Any association representing producers” had standing in Florida,<sup>53</sup> “the entire chain from grower to consumer” had standing in Georgia,<sup>54</sup> and any “association representing an agricultural producer” had standing in North Dakota.<sup>55</sup> Ohio gave standing to producers and explicitly defined the term to include “a person who grows, raises, produces, distributes, or sells.”<sup>56</sup>

### C. *Texas Beef Group v. Winfrey*

In 1996, Texas cattle ranchers Texas Beef Group, Perryton Feeders, Inc., Maltese Cross Cattle Company, Bravo Cattle Company, Alpha 3 Cattle Company, Paul F. Engler, Cactus Feeders, Inc., Cactus Growers, Inc., and Dripping Springs Cattle Company<sup>57</sup> filed the most famous agricultural disparagement case to date when they sued Oprah Winfrey after she broadcast a television segment on Bovine Spongiform Encephalopathy, commonly known as Mad Cow Disease.<sup>58</sup>

The “Dangerous Food” episode of “The Oprah Winfrey Show” included a segment discussing the discovery of Mad Cow Disease in Britain, its symptoms, its threat to the United States, and the steps being taken to prevent an outbreak of Mad Cow Disease in the United States.<sup>59</sup> Howard Lyman, a former cattle rancher-turned-vegetarian<sup>60</sup> and guest on the show, allegedly exaggerated the threat of Mad Cow Disease in the United States.<sup>61</sup> The plaintiffs alleged that after the show was broadcast on April 16, 1996, there was a drastic drop in the fed cattle market in the

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51. ALA. CODE § 6-5-622.

52. ARIZ. REV. STAT. ANN. § 3-113(A).

53. FLA. STAT. ANN. § 865.065(3).

54. *See generally* GA. CODE ANN. § 2-16-2(3).

55. N.D. CENT. CODE ANN. § 32-44-03.

56. OHIO REV. CODE ANN. § 2307.81(B)(4).

57. *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 860 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000).

58. *Winfrey*, 201 F.3d at 682.

59. *Id.* at 683.

60. *Winfrey*, 11 F. Supp. 2d at 861.

61. *See id.*

Texas Panhandle, with declines in price and volume of sales that lasted for eleven weeks.<sup>62</sup>

On May 28, 1996 the Texas cattlemen sued Winfrey and Lyman alleging several causes of action, including false disparagement of perishable food products.<sup>63</sup> The plaintiffs claimed that the “Dangerous Food” episode was presented as a “scary story” which falsely suggested, “U.S. beef [was] highly dangerous because of Mad Cow Disease and that a horrible epidemic worse than Aids [sic] could occur from eating U.S. beef.” Additionally, the show allegedly caused an immediate crash in beef markets, thereby damaging the plaintiffs.<sup>64</sup>

In partially granting the defendants’ motion for judgment as a matter of law,<sup>65</sup> the United States District Court for the Northern District of Texas began its analysis of the plaintiffs’ agricultural disparagement claim with the language of Texas’ False Disparagement of Perishable Food Products Act.<sup>66</sup> Texas’ agricultural disparagement statute provided that the term “perishable food product” meant “a food product of agriculture . . . that [was] sold or distributed in a form that [would] perish or decay beyond marketability within a limited period of time.”<sup>67</sup> In addition, in order to impose liability for agricultural disparagement, the statute required that “the person [know] the information [was] false.”<sup>68</sup>

The court’s opinion acknowledged the role of the First Amendment in governing the plaintiffs’ cause of action and determining constitutional muster.<sup>69</sup> But the court ultimately determined that the plaintiffs had failed to satisfy the statutory elements, and consequently stopped its analysis without addressing the statute’s constitutionality. First, the court determined that the plaintiffs’ product was sold “*in the form of* live cattle,” and that live cattle were not “a food product that

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62. *Winfrey*, 201 F.3d at 684.

63. *Winfrey*, 11 F. Supp. 2d at 860 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 96.002).

64. *Id.* at 862.

65. *Id.* at 860.

66. *Id.* at 862 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 96.002).

67. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 96.001).

68. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 96.002).

69. *Winfrey*, 11 F. Supp. 2d at 862.

[would] perish or decay *beyond marketability* within a limited period of time” as required by the statute, and thus fell outside the protection of the Act.<sup>70</sup> Second, the court found that the plaintiffs failed to meet the statutory requirement that “the disparaging statement be knowingly made.”<sup>71</sup> The court determined that the plaintiffs failed to produce evidence by which a reasonable juror could conclude that the defendants had actual knowledge of the falsity of the statements made.<sup>72</sup> Thus, because the plaintiffs failed to meet two of the statutory requirements for Texas’ agricultural disparagement law, the court dismissed the case.

The United States Court of Appeals for the Fifth Circuit only reviewed one of the two findings made by the lower court in regard to the plaintiffs’ agricultural disparagement claim—whether the defendants knowingly disseminated false information about beef.<sup>73</sup> The court of appeals was more critical of the defendants than the lower court had been, accusing them of having “melodramatized” the Mad Cow Disease scare, specifically citing Winfrey’s exclamation that she was “stopped cold from eating another burger.”<sup>74</sup> Nevertheless, the court of appeals affirmed the lower court’s opinion that the plaintiffs had failed to sustain their burden of proving a genuine issue of material fact concerning liability under the Act.<sup>75</sup>

The Fifth Circuit expressly recognized that the suit presented one of the first opportunities for judicial review of a food disparagement statute.<sup>76</sup> Nevertheless, the court refrained from undertaking a constitutional analysis, because the lack of evidence made it unnecessary to inquire into the Act’s full scope.<sup>77</sup> Accordingly, no agricultural disparagement statute has made it past the merits to undergo judicial review for constitutionality.

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70. *Winfrey*, 11 F. Supp. 2d at 863.

71. *Id.* at 862.

72. *Id.*

73. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 687 (5th Cir. 2000).

74. *Id.* at 688.

75. *See id.*

76. *See id.* at 690.

77. *See Winfrey*, 201 F.3d at 690.,.

### III. ANALYSIS

#### A. South Dakota's Agricultural Disparagement Law

South Dakota's agricultural disparagement law is separated into four sections: (1) definition of terms,<sup>78</sup> (2) cause of action for damages,<sup>79</sup> (3) liability for treble damages,<sup>80</sup> and (4) statute of limitations of one year on actions for damages.<sup>81</sup>

Section 20-10A-2 creates a cause of action for damages: "Any producer of perishable agricultural food products who suffers damage as a result of another person's disparagement of any such perishable agricultural food product has a cause of action for damages and any other appropriate relief in a court of competent jurisdiction."<sup>82</sup> At first glance, and based on the damages plaintiff suffered, it would appear that BPI has a cause of action against ABC News. However, an in-depth analysis reveals that the facts of the case fail to satisfy several of the elements required for liability.

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78. S.D. CODIFIED LAWS § 20-10A-1 ("Definition of terms. Terms used in this chapter mean: (1) 'Agricultural food product,' any food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a period of time; and (2) 'Disparagement,' dissemination in any manner to the public of any information that the disseminator knows to be false and that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public; (3) 'Generally accepted agricultural and management practices,' agronomic and animal husbandry procedures used in the production of agricultural goods including tillage options, fertilizers, crop protection practices for crop production, and the feeding, transporting, housing, and health practices for livestock").

79. *Id.* § 20-10A-2 (stating "[a]ny producer of perishable agricultural food products who suffers damage as a result of another person's disparagement of any such perishable agricultural food product has a cause of action for damages and any other appropriate relief in a court of competent jurisdiction").

80. *See id.* § 20-10A-3 (stating "[a]ny person who disparages a perishable agricultural food product with intent to harm the producer is liable to the producer for treble the damages so caused").

81. *See id.* § 20-10A-4 (stating "[a]ny civil action for damages for disparagement of perishable agricultural food products shall be commenced within one year after the cause of action accrues").

82. *Id.* § 20-10A-2.

### 1. Agricultural Food Product

Section 20-10A-1(1) of South Dakota’s agricultural disparagement statute defined “agricultural food product” as “any food product of agriculture or aquaculture that [was] sold or distributed in a form that [would] perish or decay beyond marketability within a period of time.”<sup>83</sup>

### 2. Disparagement

Even if the court determined that LFTB was a perishable food product, the defendants argued that the plaintiffs were unable to satisfy the element of disparagement. Section 20-10A-1(2) of the statute defined “disparagement” as:

[D]issemination in any manner to the public of any information that the disseminator *knows to be false* and that states or implies that an agricultural food product is *not safe* for consumption by the public or that generally accepted agricultural and management practices make agricultural food products *unsafe* for consumption by the public.<sup>84</sup>

Accordingly, this element could be split into two subparts: (1) the defendant knew of the falsity of a statement and (2) the defendant stated or implied that an agricultural food product was unsafe for public consumption.<sup>85</sup>

## B. Case Background

On September 13, 2012, plaintiffs BPI, BPI Technology, Inc., and Freezing Machines, Inc., filed suit in the First Judicial Circuit Court of South Dakota against defendants American Broadcasting Companies, Inc., ABC News, Inc., and additional individual defendants.<sup>86</sup> The plaintiffs alleged claims of product and food disparagement, defamation, and tortious interference with business relationships.<sup>87</sup> This Comment will only focus on

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83. S.D. CODIFIED LAWS § 20-10A-1(1).

84. *Id.* § 20-10A-1(2) (emphasis added).

85. *Id.*

86. See Complaint, *supra* note 7, ¶¶ 25-27, 30-37.

87. *Id.* ¶ 1.

plaintiffs' twenty-sixth count: BPI's claim under South Dakota's agricultural disparagement statute.<sup>88</sup>

ABC News responded to plaintiffs' complaint on October 31, 2012 by moving to dismiss all of the plaintiffs' claims, asserting that none were viable.<sup>89</sup> The defendants further asserted that the case "[posed] a direct challenge to the right of ABC News to inform the public on a matter of obvious and legitimate public interest" as embodied in the First Amendment.<sup>90</sup>

LFTB is a beef product that was first developed by BPI in the 1970s using a mechanical process to remove fat from beef trimmings, allowing for the production of additional lean beef that had previously gone to waste.<sup>91</sup> BPI first processes beef trimmings through a de-sinewer to separate out cartilage and connective tissue, and then heats the remaining muscle tissue and fat.<sup>92</sup> The trimmings are next processed through centrifuges that remove virtually all of the fat from the beef trimmings, leaving 94% to 97% lean beef.<sup>93</sup> The lean meat is then exposed to ammonia gas to remove pathogens.<sup>94</sup> Finally, the lean beef is flash-frozen as an additional safety precaution to prevent pathogen growth while the product is in a frozen state.<sup>95</sup> The entire process is completed in under thirty minutes—less time than it takes for bacteria to grow—a final safety precaution.<sup>96</sup> In 1993, the USDA decided that BPI could label its product "lean finely textured beef" and authorized LFTB as a source of lean meat for ground beef, requiring no independent labeling.<sup>97</sup>

Plaintiff BPI produces, distributes, and sells LFTB,<sup>98</sup> and secures approval for LFTB from the United States Department of Agriculture (USDA).<sup>99</sup> The other plaintiffs, BPI Technology, Inc. and Freezing Machines, Inc., are involved in the development of

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88. *See id.* ¶ 22.

89. *See* Motion to Dismiss, *supra* note 9, at 1.

90. *Id.*

91. *See* Complaint, *supra* note 7, ¶ 53.

92. *See id.* ¶¶ 55-56.

93. *See id.* ¶ 57.

94. *See id.* ¶ 58.

95. *See id.* ¶ 59.

96. *See id.* ¶ 60.

97. *See* Complaint, *supra* note 7, ¶ 74.

98. *See* Complaint, *supra* note 7, ¶ 25.

99. *See id.*

technology and processing mechanisms used to produce LFTB.<sup>100</sup> Collectively, the plaintiffs are suing defendant ABC News, which broadcast “World News” with host Diane Sawyer.<sup>101</sup>

Plaintiffs had self-described BPI as “an American success story” prior to March 2012.<sup>102</sup> Plaintiffs contended that after ABC News’ coverage of LFTB, BPI’s sales of LFTB decreased from five million to less than two million pounds per week, resulting in the closure of three of its four production facilities and the lay-off of over 700 employees.<sup>103</sup> In contrast, ABC News asserted that BPI’s lawsuit was merely an attempt to recover for “the loss in the public’s appetite for LFTB.”<sup>104</sup>

### C. BPI’s and ABC News’ Legal Arguments

Plaintiffs’ claim of food disparagement against ABC News was founded on the allegation that the defendants “knowingly and intentionally published nearly 200 false and disparaging statements” about LFTB and BPI.<sup>105</sup> BPI’s primary assertion concerns ABC News’ “month-long vicious, concerted disinformation campaign against BPI,”<sup>106</sup> a campaign that ABC News characterized as merely a follow up on consumer questions in response to its first report on LFTB, broadcast on March 7, 2012.<sup>107</sup> The defendants asserted that the purpose of ABC News’ coverage of LFTB was to investigate “matters of obvious public interest—what is in the food we eat and how that food is labeled.”<sup>108</sup>

BPI additionally alleged that the “disinformation campaign” resulted in the creation of a “consumer backlash” against LFTB and BPI.<sup>109</sup> Plaintiffs claimed that the backlash’s strength was attributable to ABC News because during its lengthy coverage of LFTB, it represented to its audience that it was reporting “facts”

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100. *See id.* ¶¶ 26, 27.

101. *See id.* ¶¶ 30-32.

102. *Id.* ¶ 88.

103. *Id.* ¶ 19.

104. Motion to Dismiss, *supra* note 9, at 1.

105. Complaint, *supra* note 7, ¶ 1.

106. *Id.*

107. Motion to Dismiss, *supra* note 9, at 4-5.

108. Motion to Dismiss, *supra* note 9, at 4.

109. Complaint, *supra* note 7, ¶ 112.



about LFTB and BPI and repeatedly used the phrase “pink slime” to describe LFTB.<sup>110</sup> Plaintiffs alleged that the phrase “pink slime” was used to refer to LFTB in order to convince consumers that it was “not beef, or even meat,”<sup>111</sup> and was unsafe for consumption.<sup>112</sup> Additionally, plaintiffs claimed that ABC News’ use of the term “pink slime” was to convince viewers that BPI had engaged in “improper conduct to gain approval for LFTB from the USDA.”<sup>113</sup> Plaintiffs contended that, as a result of ABC News’ coverage of LFTB, consumers “demanded that grocery stores stop selling ground beef made with ‘pink slime.’”<sup>114</sup>

Plaintiffs contended that ABC News knew, as required for statutory liability, that it was broadcasting false statements regarding LFTB because it failed to use information provided by BPI and others in opposition to the “disinformation campaign.”<sup>115</sup> In addition, BPI claimed that the defendants’ statements were contrary to decisions from the USDA and the Food and Drug Administration,<sup>116</sup> and that ABC News failed to obtain information directly from the USDA until after the majority of its coverage of LFTB.<sup>117</sup> BPI also alleged that ABC News avoided broadcasting statements from beef and food safety experts because the facts about LFTB and BPI that they offered were inconsistent with the message of ABC News’ “disinformation campaign.”<sup>118</sup> However, according to ABC News, its early coverage of LFTB included commentary from the meat industry, which asserted that LFTB labeling was unnecessary.<sup>119</sup> In addition, after being contacted by BPI’s lawyers, ABC News broadcast BPI’s defenses that LFTB was nutritious and USDA approved, and also took further actions to include BPI’s perspective in additional segments.<sup>120</sup>

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110. *Id.* ¶¶ 112, 130.

111. *Id.* ¶ 131.

112. *Id.* ¶¶ 132-33.

113. *Id.* ¶ 134.

114. *Id.* ¶135.

115. *See* Complaint, *supra* note 7, ¶ 141.

116. *Id.* ¶ 151.

117. *See id.* ¶ 153.

118. Complaint, *supra* note 7, ¶ 154.

119. Motion to Dismiss, *supra* note 9, at 5.

120. *Id.* at 6-7.

Plaintiffs asserted that defendants' disparaging statements inferred that LFTB was unsafe for consumption, which was in direct opposition to LFTB's safety record. Plaintiffs noted that despite the fact that BPI sold over 5.4 billion pounds of LFTB since 1993, no reported health incident had been associated with LFTB.<sup>121</sup> In addition, BPI had been awarded by the beef industry and food safety organizations for its commitment to producing safe beef.<sup>122</sup> Yet, contrary to BPI's perceived negative inferences regarding LFTB, ABC News stated that it in fact repeatedly asserted the safety of LFTB for public consumption throughout its news coverage of LFTB.<sup>123</sup> Thus, ABC News urged that it was inconceivable its direct statements attesting to the safety of LFTB could be inferred to have the exact opposite meaning—that LFTB was unsafe for consumption.

#### D. Judicial Review on the Merits

##### 1. Agricultural Food Product

BPI asserted that it was a producer of LFTB, an agricultural food product, and that LFTB, like other beef products, would perish or decay beyond marketability within a given amount of time.<sup>124</sup> However, the final step of flash freezing the LFTB<sup>125</sup> may lead the court to find that the product was not in fact perishable because it was sold in a frozen state. Though this argument was not raised in the defendants' motion to dismiss, the court may decide the issue *sua sponte*, taking guidance from the concurring opinion of Circuit Judge Edith H. Jones in *Texas Beef Group v. Winfrey*. Judge Jones' opinion interpreted the term "beyond marketability" in Texas' agricultural disparagement statute,<sup>126</sup> finding that "the purpose of the statute's definition [was] to distinguish perishable from processed food products."<sup>127</sup> Likewise, LFTB resulted from highly technical processes, was

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121. Complaint, *supra* note 7, ¶ 235.

122. *Id.* ¶ 236.

123. Motion to Dismiss, *supra* note 9, at 7.

124. Complaint, *supra* note 7, ¶ 676.

125. *Id.* ¶ 59.

126. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 690 (5th Cir. 2000) (Jones, J., concurring).

127. *Id.* at 690-91.

sold in a final frozen state,<sup>128</sup> and could theoretically be stored in a frozen state indefinitely. Thus, the court may find that LFTB was not protected by South Dakota's agricultural disparagement statute, because it was too processed to qualify as a perishable food product.

## 2. Disparagement

### a. "Knows to Be False"

Plaintiffs alleged that during ABC News' coverage of LFTB, defendants knowingly made false statements about BPI and LFTB.<sup>129</sup> Additionally, BPI contended that ABC News had access to a wide variety of sources that showed the falsity of these statements.<sup>130</sup> If ABC News did know that its statements were false, then this evidence would support the satisfaction of the first subpart of the statutory requirement for disparagement.

However, in its motion to dismiss, ABC News gave three defenses to BPI's allegation that it knew its statements about LFTB were false. First, ABC News argued that the alleged false statements were "non-actionable 'rhetorical hyperbole' or 'imaginative expression.'"<sup>131</sup> Next, ABC News argued that the alleged false statements were substantially true.<sup>132</sup> In support of this defense, ABC News directed the court to examine the exhibits attached to BPI's Complaint for evidence that "BPI's claims amount to an inconsequential quibbling over word choice."<sup>133</sup> Lastly, ABC News argued that BPI's objection to ABC News' word choice was non-actionable, because any "subjective assessment" suggested through ABC News' words would not be a "provably false statement of fact."<sup>134</sup> In *Texas Beef Group v. Winfrey*, the United States Court of Appeals for the Fifth Circuit noted that despite the fact that defendants "melodramatized" the

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128. Complaint, *supra* note 7, ¶¶ 53, 55-60.

129. *Id.* ¶ 13.

130. *Id.* ¶ 14.

131. Motion to Dismiss, *supra* note 9, at 22 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 20 (1990)).

132. Motion to Dismiss, *supra* note 9, 26-35.

133. *Id.* at 28.

134. *Id.*

Mad Cow Disease scare, the plaintiffs still failed to carry their burden of proving a genuine issue of material fact concerning statutory liability.<sup>135</sup> Under these rationales, it is probable that the court will find that ABC News' allegedly false statements were non-actionable and/or substantially true. Thus, the first subpart of the element of disparagement will not be met.

**b. “Not Safe for Consumption by the Public”**

Plaintiffs contended that between March 7, 2012 and April 3, 2012, ABC News published multiple statements that implied that LFTB was not safe for public consumption.<sup>136</sup> In its complaint, BPI alleged that the defendants made eight types of statements implying that LFTB was not safe for public consumption.<sup>137</sup>

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135. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 688 (5th Cir. 2000).

136. Complaint, *supra* note 7, ¶ 677.

137. *Id.* These alleged categories are: (1) “Defendants called, described or referred to LFTB as ‘pink slime,’ implying that “LFTB was not safe for public consumption because it was a noxious, repulsive, and filthy fluid”; (2) “Defendants stated that selling ground beef with LFTB was ‘economic fraud’ and ‘food fraud,’ implying that “selling ground beef with fraud [sic] was ‘fraud’ because LFTB was not safe for public consumption”; (3) “Defendants stated that LFTB was being produced from ‘waste,’ ‘low-quality’ or ‘low-grade’ trimmings or ‘scraps,’ implying that “LFTB was not safe for public consumption because it was made with inferior and contaminated beef trimmings”; (4) “Defendants stated that the beef trimmings used to produce LFTB were ‘once only used in dog food and cooking oil,’ implying that “LFTB was not safe for public consumption because it was made with inferior and contaminated beef trimmings”; (5) “Defendants used derogatory terms to describe LFTB and ground beef made with LFTB,” implying that “LFTB was an unsafe product being included in ground beef”; (6) “Defendants published false statements regarding the process used by BPI to temper beef trimmings when producing LFTB,” falsely stating “that LFTB cooked or simmered the beef trimmings,” implying that “ground beef with LFTB was not safe for public consumption because a cooked product was being added to fresh ground beef” and implying that “using LFTB could contaminate fresh ground beef”; (7) “Defendants published false statements regarding BPI’s use of ammonium hydroxide . . . regarding the method, volume, and purpose of BPI’s ammonium hydroxide process,” implying that “the beef trimmings used to produce LFTB were contaminated and not safe for public consumption”; and (8) between March 7, 2012 and April 3, 2012, “Defendants ABC and ABC News published and republished the above statements in segments during World News broadcasts where each segment was defamatory in and of itself because the totality of the segment created the false impression that BPI’s product, LFTB, was not safe for public consumption,” with the implications being drawn from “the way Defendants ABC and ABC News covered, portrayed, and juxtaposed information regarding LFTB.” Complaint, *supra* note 7, ¶¶ 677-85.

Plaintiffs asserted that the defendants' statements were "false by implication" because LFTB was safe for public consumption, and that these statements and their implications were disparaging to BPI and LFTB.<sup>138</sup> Additionally, plaintiffs alleged that defendants knew the falsity of these disparaging statements, or "recklessly disregarded their falsity," when they broadcast them.<sup>139</sup> However, all of these implications and inferences that BPI identified as disparaging were in direct conflict with what ABC News claimed to have directly reported—that LFTB was safe to eat.<sup>140</sup>

In its motion to dismiss, ABC News focused on safety as the determinative factor of whether a statement made was disparaging under the statute. ABC News claimed that it repeatedly asserted the safety of LFTB for public consumption, and made no contradictory statements.<sup>141</sup> For example, the ABC News Anchors stated that, "the USDA and food industry experts [agreed] that lean, finely textured beef [was] safe and wholesome," "[t]he USDA [was] clear in saying, pink slime [was] safe," and "[t]he USDA [said] BPI's product [was] safe to eat."<sup>142</sup> Contrary to BPI's allegation that ABC News attacked the safety of LFTB, ABC News asserted that the statements that BPI found objectionable were not regarding the safety of LFTB, but instead concerned "its general desirability as a component of ground beef."<sup>143</sup> ABC News merely directed the public's attention to a

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138. *Id.* ¶ 687.

139. *Id.* ¶ 688.

140. Motion to Dismiss, *supra* note 9, at 11.

141. *Id.* (providing the following evidence that ABC News reported the safety of LFTB for human consumption: "Compl. Ex. 9 (3/21/12 World News) ('the USDA and food industry experts agree that lean, finely textured beef is safe and wholesome'); Compl. Ex. 7 (3/16/12 World News) ('The government agrees the product is safe.');" Compl. Ex. 6 (3/15/12 World News) ('The USDA is clear in saying, pink slime is safe.');" Compl. Ex. 5 (3/13/12 Good Morning America) (Dr. Richard Besser, ABC News' Chief Health and Medical Editor: 'Bottom line, FDA says it's safe'); Compl. Ex. 3 (3/8/12 World News) ('the USDA says it's safe to eat'); Compl. Ex. 15 (3/9/12 Online Report) ('the United States Department of Agriculture says it's safe to eat'); Compl. Ex. 16 (3/14/12 Online Report) (same); Compl. Ex. 10 (3/26/12 World News) ('The USDA says BPI's product is safe to eat'); Compl. Ex. 22 (3/26/12 Online Report) ('the USDA says it's safe to eat'); Compl. Ex. 11 (3/29/12 World News) ('the USDA food safety undersecretary . . . assured the product is safe to eat)').

142. Motion to Dismiss, *supra* note 9, at 11

143. *Id.*

fact that the public was previously unaware of—that most ground beef contained LFTB—and then responded to consumer concerns about the labeling of LFTB as an ingredient in ground beef.

When framed in this manner, BPI's argument was analogous to an argument made by the plaintiffs in *Texas Beef Group v. Winfrey*, which was rejected by the United States Court of Appeals for the Fifth Circuit.<sup>144</sup> The court rejected the plaintiffs' argument that the manner in which the "Dangerous Food" segment was edited made the content of the segment knowingly false.<sup>145</sup> It noted that when "[s]tripped to its essentials, the cattlemen's complaint [was] that the 'Dangerous Food' show did not present the Mad Cow issue in the light most favorable to United States beef."<sup>146</sup> The court explained that "[s]o long as the factual underpinnings remained accurate, as they did here, the editing did not give rise to an inference that knowingly false information was being disseminated."<sup>147</sup> By adopting this reasoning in BPI's case, the court could find that as long as ABC News directly asserted the safety of LFTB, then the defendants could not be held liable for any inferences to a contradictory interpretation.

Though not legally binding on the United States District Court of South Dakota, the reasoning of the court of appeals in *Winfrey* could be instructive in providing a framework for the analysis of allegations of inferred disparagement. While the reasoning in *Winfrey* concerned the satisfaction of the *mens rea* requirement,<sup>148</sup> it could nevertheless be easily applied to the case at hand to analyze the statutory requirement that liability be based on statements regarding the safety of the product.<sup>149</sup> Similar to the accuracy of the underlying facts in *Winfrey*,<sup>150</sup> ABC News here unequivocally stated that LFTB was safe for public consumption.<sup>151</sup> In both cases, the underlying facts failed to satisfy the respective statutory requirements. Consequently, the

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144. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 689 (5th Cir. 2000).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Winfrey*, 201 F.3d at 689.

149. S.D. CODIFIED LAWS § 20-10A-2.

150. *Winfrey*, 201 F.3d at 688-89.

151. *See generally* Motion to Dismiss, *supra* note 9.

alleged inferences based on these underlying facts could not be used to satisfy the second subpart of the statutory requirement of disparagement.

### **3. Statutory Requirements Not Met**

In conclusion, although BPI suffered severe damage from the decline in consumer demand for LFTB, it will likely have great difficulty supporting its claim of agricultural disparagement against ABC News. The court may find that LFTB was not a perishable food product due to its technical processing and frozen state. Alternatively, the court may find that ABC News did not knowingly make false statements about LFTB, because its statements were substantially true and/or non-actionable speech on an issue of public concern deserving of protection by the First Amendment. Additionally, the court may find that LFTB was not disparaged because ABC News did not directly state that it was unsafe for public consumption, and in fact attested to LFTB's safety. Since several of the key elements of South Dakota's agricultural disparagement law were not satisfied, it would be unlikely that BPI's agricultural disparagement claim would prevail.

### **E. Judicial Review for Constitutionality**

Assuming *arguendo* that BPI did prevail on its agricultural disparagement claim, it would be probable that the court would find South Dakota's agricultural disparagement statute unconstitutional under the First Amendment of the United States Constitution. Although no agricultural disparagement statute has been reviewed for constitutionality, the court would likely analyze the statute using the same tests established for common law defamation claims under the First Amendment, and find that ABC News' commentary on food safety deserves free speech protection.

#### **1. The First Amendment**

The First Amendment of the United States Constitution states, in relevant part, that "Congress shall make no law . . .

abridging the freedom of speech, or of the press.”<sup>152</sup> The Fourteenth Amendment applies the First Amendment to the states.<sup>153</sup> Speech is protected under the rationale of assuring the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>154</sup>

## 2. Defamation

A common law cause of action for defamation consists of four elements: (1) a false and defamatory statement is made concerning the plaintiff, (2) the statement is published to an unprivileged third party, (3) the fault of the publisher amounts to at least negligence, and (4) injury to the plaintiff’s reputation is caused by the publication.<sup>155</sup> Defamation is divided into two subcategories—libel, which applies to written or printed words and television broadcasts, and slander, which applies to spoken words.<sup>156</sup> Plaintiffs have the burden of proving seven elements to establish liability for defamation: (1) the defamatory character of the communication, (2) publication by the defendant, (3) application to the plaintiff, (4) the recipient’s perception of its defamatory meaning, (5) the recipient’s perception of its intended application to the plaintiff, (6) special harm to the plaintiff resulting from its publication, and (7) the defendant’s liable *mens rea* regarding the truth or falsity and the defamatory nature of the communication.<sup>157</sup> A defendant could be liable for defamation of a for-profit corporation if the statement prejudices the corporation conducting its business or deters others from dealing with it.<sup>158</sup> The United States Supreme Court has developed significant case law concerning the additional limitations and standards for defamation causes of action as required under the

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152. U.S. CONST. amend. I.

153. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936).

154. *Roth v. United States*, 354 U.S. 476, 484 (1957).

155. RESTATEMENT (SECOND) OF TORTS: ELEMENTS STATED § 558 (1977); *see* RESTATEMENT (SECOND) OF TORTS: DEFAMATORY COMMUNICATION DEFINED § 559 (1977).

156. RESTATEMENT (SECOND) OF TORTS: LIBEL AND SLANDER DISTINGUISHED § 568 (1977); RESTATEMENT (SECOND) OF TORTS: RADIO AND TELEVISION § 568A (1977).

157. RESTATEMENT (SECOND) OF TORTS: BURDEN OF PROOF § 613 (1977).

158. RESTATEMENT (SECOND) OF TORTS: DEFAMATION OF CORPORATION § 561 (1977).



First Amendment. Liability for defamation has been considerably limited by the protections of free speech provided by the First Amendment, as discussed below.

### 3. Actual Malice

Although the United States Supreme Court has never reviewed an agricultural disparagement statute, critics agree that courts should apply the standards created for constitutional review in the 1964 defamation case, *New York Times Co. v. Sullivan*.<sup>159</sup> In that case the plaintiff alleged that an advertisement published in the *New York Times* contained statements that imputed police misconduct to him as a supervisor of the Montgomery, Alabama police department.<sup>160</sup> The Court held that the guarantees of the First Amendment required public officials who sued for defamation to prove that the alleged defamatory statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>161</sup> Despite the evidence of factual inaccuracies and other procedural failures, the Court found that the plaintiff in *Sullivan* presented only enough evidence to prove negligence,<sup>162</sup> thus failing to show that the defendant published the advertisement with “the recklessness required for a finding of actual malice.”<sup>163</sup>

The United States Supreme Court expanded the *Sullivan* standard to include “public figures” in the 1967 consolidated case of *Curtis Publ’g Co. v. Butts*.<sup>164</sup> In the first of the two cases considered, *Curtis Publ’g Co. v. Butts*, the defendant published an article, which accused the plaintiff of fixing a football game.<sup>165</sup> The plaintiff was a well-known and respected football coach.<sup>166</sup> In the second case, *Associated Press v. Walker*, the defendant distributed a news dispatch that identified the politically

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159. Jones, *supra* note 5, at 835; Fell, *supra* note 6, at 1020; *see generally* N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

160. *Sullivan*, 376 U.S. at 256-58.

161. *Sullivan*, 376 U.S. at 279-80.

162. *Id.* at 286-87.

163. *Id.* at 288.

164. *See generally* Curtis Publ’g Co. v. Butts, 388 U.S. 130 (1967).

165. *Id.* at 135.

166. *Id.* at 135-36.

prominent plaintiff as having led rioters in a charge against federal marshals at a desegregation riot.<sup>167</sup>

The Court determined that both plaintiffs “commanded a substantial amount of independent public interest at the time of the publications,” and thus both qualified as “public figures”<sup>168</sup> with sufficient access to the media to be able to rebut false or defamatory statements.<sup>169</sup> Therefore, the Court held that a “public figure” who is not a public official may recover damages for defamation based “on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>170</sup> There was sufficient evidence to satisfy the *Sullivan* standard in *Butts*, where the Court found “serious deficiencies in investigatory procedure.”<sup>171</sup> But there was insufficient evidence to satisfy the *Sullivan* standard in *Walker*, where there were no departures from accepted publishing standards.<sup>172</sup> Justice Warren made it explicit in his concurring opinion that the *Sullivan* standard applied to both “public figures” and “public officials.”<sup>173</sup> Thus, a plaintiff who qualifies as a “public figure” is required to prove actual malice to prevail on a defamation claim against the media.

In *Bose Corp. v. Consumers Union of U.S., Inc.*, the United States Supreme Court recognized the application of the *Sullivan* standard of actual malice to a lawsuit for product disparagement.<sup>174</sup> The plaintiff sued a consumer review magazine for product disparagement regarding an unfavorable review of the sound quality of the plaintiff’s loudspeakers.<sup>175</sup> The United States District Court for Massachusetts ruled that the plaintiff was a “public figure” and applied *Sullivan*, which was accepted by both the United States Court of Appeals for the First Circuit and the United States Supreme Court, because the

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167. *Id.* at 140.

168. *Id.* at 154 (citation omitted).

169. *Butts*, 388 U.S. at 155 (citation omitted).

170. *Id.*

171. *Id.* at 156-57.

172. *Butts*, 388 U.S. at 156, 159.

173. *Id.* at 164 (Warren, J., concurring in result).

174. *See Bose Corp. v. Consumers Union U.S., Inc.*, 466 U.S. 485 (1984).

175. *Id.* at 487.

plaintiff did not contest the lower court's analysis.<sup>176</sup> The Court held that the plaintiff failed to provide clear and convincing evidence that the defendants wrote the review at issue with actual malice.<sup>177</sup> However, the Court did not explicitly hold that *Sullivan* was applicable to product disparagement cases, noting that it merely accepted the application of *Sullivan* for the purposes of deciding the case.<sup>178</sup> Thus, it is unclear whether the court would find that *Sullivan* governed agricultural disparagement cases.<sup>179</sup>

In *Gertz v. Robert Welch, Inc.*, the United States Supreme Court decided the standard to be used when a private plaintiff filed a defamation suit against the media.<sup>180</sup> The lawsuit arose out of the 1968 shooting of a youth by a police officer in Chicago, who was later convicted of second-degree murder.<sup>181</sup> The plaintiff served as legal counsel for the family of the deceased youth in the subsequent civil litigation against the police officer.<sup>182</sup> Although the plaintiff had little involvement in the criminal prosecution of the police officer, the defendant published a magazine article that depicted the plaintiff as "an architect of the 'frame-up.'"<sup>183</sup>

The Court distinguished *Gertz* from *Sullivan* and *Butts* under the rationale that private individuals were more vulnerable to injury than public officials and public figures, and they were also more deserving of recovery.<sup>184</sup> Thus, the Court held that *Sullivan* did not apply to defamation cases brought by private plaintiffs,<sup>185</sup> and it created a separate standard allowing the States to individually define the appropriate standard of liability for a publisher or broadcaster of defamatory statements about a private individual, with the caveat that the States not impose liability without fault.<sup>186</sup> However, any such new standard set by the States applied only to compensatory damages for actual

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176. *Id.* at 492.

177. *Id.* at 513.

178. *Id.*

179. *Id.*

180. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

181. *Gertz*, 418 U.S. at 325.

182. *Id.*

183. *Id.* at 325-26.

184. *Id.* at 345.

185. *Id.* at 346.

186. *Id.* at 347.

injury.<sup>187</sup> In these instances, to recover for punitive damages, the Court held that plaintiffs could not recover without proving the defendant's "knowledge of falsity or reckless disregard for the truth"—an actual malice standard.<sup>188</sup> The Court determined that the plaintiff in *Gertz* was neither a public official nor a public figure, and thus reversed and remanded the case to be retried under the new standards for private plaintiffs.<sup>189</sup>

Agricultural disparagement laws have been criticized because many require the defendant to have a *mens rea* less stringent than the *Sullivan* standard of actual malice.<sup>190</sup> It is unclear whether a court would follow *Bose* and apply the *Sullivan* standard of actual malice or apply the less demanding standard created by *Gertz* for recovery by private plaintiffs.

Regardless of which standard the court chooses to apply, South Dakota's statute would probably survive judicial scrutiny. South Dakota's statute requires the plaintiff to show that the defendant knew that the information was false and that the defendant stated or implied that the "agricultural food product [was] not safe for consumption by the public."<sup>191</sup> Thus, the statute's standard creates a more stringent burden than that of actual malice as required by *Sullivan*. Actual malice, as defined by the Court in *Sullivan*, meant "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>192</sup> South Dakota's statute could only be satisfied by one of the two mental states that make up actual malice—knowledge of falsehood—and it is therefore a more stringent requirement. Thus, South Dakota's statute would likely withstand constitutional judicial scrutiny, because it requires a *mens rea* more stringent than actual malice—the most stringent *mens rea* under First Amendment jurisprudence.

It is unlikely that the court would apply the less demanding standard created in *Gertz* to South Dakota's statute, because the statute requires the plaintiff to prove a separate mental state to hold the defendant liable for punitive damages. Pursuant to

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187. *Gertz*, 418 U.S. at 349.

188. *Id.*

189. *Id.* at 352.

190. Cain, *supra* note 5, at 290-92; Jones, *supra* note 5, at 838.

191. S.D. CODIFIED LAWS § 20-10A-1(2).

192. *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964) (emphasis added).

South Dakota's agricultural disparagement statute, a producer could collect treble damages from "[a]ny person who disparage[d] a perishable agricultural food product *with intent to harm* the producer."<sup>193</sup> In contrast, under *Gertz*, a private plaintiff could recover punitive damages by showing the defendant acted with actual malice—either actual knowledge of falsity or recklessness about whether it was false.<sup>194</sup> Thus, the statute's standard for recovering compensatory damages was more stringent than that required for recovering punitive damages under *Gertz*. Accordingly, the court could infer that a heightened mental state was required to establish liability for agricultural disparagement, thereby justifying the application of the heightened *Sullivan* standard to agricultural disparagement statutes.

#### 4. Proof of Falsity

In *Philadelphia Newspapers, Inc. v. Hepps*, the United States Supreme Court held that where a media outlet published "speech of public concern," private plaintiffs in defamation suits must show that the statements at issue were false in order to recover damages.<sup>195</sup> A series of newspaper articles were published by the defendant, which implicated the plaintiff, a stockholder in a "Thrifty" stores franchise, in involvement with the Mafia and participation in government interference.<sup>196</sup> Pennsylvania law presumed that defamatory statements were false, thus shifting the burden of proving truth to the defendant.<sup>197</sup> The Court overturned Pennsylvania's law, finding that it must fall "to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."<sup>198</sup> The Court's decision rested on resolving the chilling effect of deterred speech due to fear of liability, and described this effect as "antithetical to the First Amendment's protection of true speech on matters of public concern."<sup>199</sup>

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193. S.D. CODIFIED LAWS § 20-10A-3 (emphasis added).

194. *Gertz*, 418 U.S. at 349 (1974).

195. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986).

196. *Id.*

197. *Id.* at 770 (citation omitted).

198. *Id.* at 776.

199. *Id.* at 777.

This issue was determinative in *Auvil v. CBS 60 Minutes (I)*, which arguably initiated the creation of agricultural disparagement statutes.<sup>200</sup> The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision granting the defendant's motion for summary judgment, holding that the apple growers failed to raise a genuine issue of material fact concerning the falsity of statements made during the broadcast of "A' is for Apple."<sup>201</sup> Thus, state legislators crafted their agricultural disparagement statutes to implicitly shift to the defendant the burden of proving truth.<sup>202</sup> One critic argued that the statutes "suggest that the speaker must prove the factual basis for a statement, rather than the plaintiff proving the falsity of it."<sup>203</sup> Agricultural disparagement statutes that shift the burden of proof to the defendant are probably unconstitutional under *Hepps*. But South Dakota's statute was different from these other statutes, because it failed to state, explicitly or implicitly, which party had the burden of proof.<sup>204</sup> Consequently, a court would probably interpret the statute to be constitutional, by explicitly putting the burden of proof on the plaintiff.

##### 5. "Of and Concerning"

In *New York Times v. Sullivan*, the Court made an additional holding that in order to sustain a claim of libel, the plaintiff had to prove that "the words were published 'of and concerning' the plaintiff . . ." <sup>205</sup> When it applied this test in *Sullivan*, the Court found that there was insufficient evidence to support a jury finding that the advertisement at issue, which did not explicitly identify the plaintiff, was made "of and concerning" the plaintiff.<sup>206</sup>

Critics argue that agricultural disparagement statutes too broadly define who could bring suit, thus failing to satisfy the "of

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200. *Auvil v. CBS 60 Minutes*, 67 F.3d 816, 823 (9th Cir. 1995).

201. *Id.*

202. Cain, *supra* note 5, at 281; Jones, *supra* note 5, at 838-39.

203. Cain, *supra* note 5, at 281.

204. S.D. CODIFIED LAWS § 20-10A-1.

205. *N.Y. Times v. Sullivan*, 376 U.S. 254, 267 (1964).

206. *Id.* at 288.

and concerning” element required by *Sullivan*.<sup>207</sup> One critic finds the definition to be too broad when standing is extended to groups other than just “producers,”<sup>208</sup> while a second critic finds that even the group “producers” is too overly inclusive.<sup>209</sup> South Dakota’s agricultural disparagement statute only gives standing to the producers of disparaged agricultural products.<sup>210</sup> Though it is a narrow definition when compared with other states’ statutes, South Dakota’s statute may not be narrow enough to withstand constitutional review. Under the standard set forth in *Sullivan*, the court may determine that the term “producers” is too broad to limit liability to published words “of and concerning” the plaintiff. The term “producers” may include any producer of an agricultural product, as opposed to a specific producer identified by the published statements, thus potentially allowing liability for statements made that were generally disparaging of an agricultural product, but not “of and concerning” the plaintiff.

In *Auvil v. CBS 60 Minutes (II)*, the Washington State apple growers’ class action lawsuit filed against the Natural Resources Defense Council and Fenton Communications, the United States District Court for the Eastern District of Washington dismissed the plaintiffs’ lawsuit for failure to prove that the “60 Minutes” segment about apples sprayed with the carcinogenic pesticide Alar was “of and concerning” the plaintiffs specifically.<sup>211</sup> The court found that the broadcast was “‘of and concerning’ all apples whether treated with Alar or not,” and that “every apple grower in the country was identified.”<sup>212</sup> Thus under this reasoning, the court would likely find that South Dakota’s statute was unconstitutional because it lacked a sufficiently narrow “of and concerning” element as required by the protective limitations of the First Amendment.

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207. Fell, *supra* note 6, at 1032; Jones, *supra* note 5, at 836.

208. Jones, *supra* note 5, at 837.

209. Fell, *supra* note 6, at 1032.

210. S.D. CODIFIED LAWS § 20-10A-2.

211. *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 935 (E.D. Wash. 1992) (dismissing the plaintiffs’ claims against the Natural Resources Defense Council and Fenton Communications) (*Auvil II*).

212. *Id.*

## 6. South Dakota's Statute is Unconstitutional

In sum, despite the constitutionality of most of South Dakota's statute, it would probably fail constitutional review under the "of and concerning" requirement. The statute's required *mens rea* is more stringent than the actual malice standard required by *Sullivan*. Furthermore, South Dakota's statute would likely be interpreted to properly place the burden of proof on the plaintiff to prove falsity, again satisfying the constitutional standard for liability established in *Hepps*. Nevertheless, the statute may allow for standing that is too broad to meet the *Sullivan* requirement that statements be made "of and concerning" the plaintiff. By giving standing to all producers of a disparaged agricultural food product, the statute may allow for recovery by plaintiffs who are merely general producers, rather than expressly identified producers. Accordingly, if the court were to judicially review South Dakota's agricultural disparagement statute for constitutionality, it would likely find South Dakota's statute to be unconstitutional under the First Amendment.

## IV. CONCLUSION

To conclude, BPI has likely failed to provide sufficient evidence to hold ABC News liable for the alleged disparagement of LFTB. BPI will probably be unable to meet several of the requirements of South Dakota's agricultural disparagement statute. First, it is unclear whether LFTB, sold as a frozen final product, is sufficiently perishable to qualify under South Dakota's statutory definition of an agricultural food product. Next, ABC News raised convincing defenses that it did not knowingly make false statements about LFTB. Finally, ABC News expressly asserted the safety of LFTB for public consumption, so there could be no inference to the contrary. ABC News responded to consumer concern regarding the labeling of LFTB as an ingredient in ground beef. The public wanted to know more about LFTB, and ABC News rose to the occasion, making a substantial contribution to the market place of ideas that was well within the protections of the First Amendment. Therefore, BPI's lawsuit would likely fail on the merits.



If the court were to conduct a judicial review of South Dakota's agricultural disparagement statute, it would likely find that the statute violates the First Amendment's protected right to freedom of speech. South Dakota's statute, giving standing to producers of disparaged agricultural products, would likely be too broad to meet the constitutional requirement that defamatory statements be "of and concerning" the plaintiff. As noted above, all agricultural disparagement statutes give standing to the producers of disparaged food products. Therefore, if South Dakota's agricultural disparagement statute is struck down as unconstitutional under the First Amendment, then all agricultural disparagement statutes would also be unconstitutional. Such a precedent striking down an agricultural disparagement law on First Amendment grounds would assure media outlets that they could continue to provide information to consumers about agricultural products and their labeling, or lack thereof, without the threat of liability for the disclosure of unsavory information. The safety and contents of the food we eat is an issue of public concern, and related commentary deserves protection by the First Amendment.