The Unaddressed Force of the First Amendment's Petition Clause Underlying Evolving and Expanding Ag-Gag Legislation

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Nestled throughout the vast white sand dunes in west Texas and southeastern New Mexico lay a plethora of shinnery oaks. Beneath these low, shrubby trees, the dunes sagebrush lizard hides from the sun and buries itself in the sand. This rare species of lizard is at risk—as the number of shinnery oaks dwindle, so does it. In 2018, two environmental nonprofits, Defenders of Wildlife and the Center for Biological Diversity, petitioned the U.S. Fish and Wildlife Service for an official determination that this rare species qualifies as threatened or endangered under the Endangered Species Act.[1] The petition itself was an incredibly detailed seventy-three-page document.[2] It included research about the dunes sagebrush lizard's population structure, natural history, and habitat requirements and analyzed prevalent threats to the species.[3] Committed advocates, including scientists, experts, and lawyers, devoted countless hours studying the lizard, compiling information, and crafting this listing petition.

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[1] Ctr. for Biological Diversity & Defs. of Wildlife, Petition to List the Dunes Sagebrush Lizard as a Threatened or Endangered Species and Designate Critical Habitat (May 18, 2018), https://ecos.fws.gov/docs/petitions/92210//1040.pdf.

[2] *Id.*

[3] *Id.*

Under the Endangered Species Act, a determination of the classification of a species is made on the basis of the best scientific and commercial data available, and petitioners must present substantial evidence indicating that a species is threatened or endangered.[4] But petitioners who plan to submit information to government agencies are threatened by state legislation that imposes liability for the collection of agricultural and environmental data. This is called "ag-gag" legislation. It emerged in the 1990s and was aimed at deterring undercover journalism and whistleblowers at agricultural facilities.

Some states have extended these laws even further to cover non-agricultural facilities or the collection of environmental data.[5] Specifically, in recent years, North Carolina,[6] Arkansas,[7] and Wyoming[8] passed legislation threatening the First Amendment's Petition Clause by broadening the traditional scope and purpose of ag-gag legislation. In 2015, North Carolina passed a statute that imposes a civil penalty when an employee captures or removes data from an employer's premise and uses the information against the

[4] 16 U.S.C. § 1533(b)(1)–(3)(A) (2018); *see also* Humane Soc'y of the U.S. v. Pritzker, 75 F. Supp. 3d 1, 11 (D.D.C. 2014).
[5] *See* People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[6] N.C. GEN. STAT. § 99A-2 (2018).
[7] ARK. CODE ANN. § 16-118-113 (2017).
[8] WYO. STAT. ANN. § 6-3-414 (2017); WYO. STAT. ANN. § 40-27-101 (2017).

employer.[9] Similarly, an Arkansas law passed in 2017 permits civil litigation against individuals that release documents or recordings from a nonpublic area of commercial property with the intent of causing harm to the owner.[10] In 2015, Wyoming passed two statutes, one that imposed criminal liability and one that imposed civil liability, for the collection of resource data.[11] These statutes have been referred to as "data trespass" laws. These three states have attempted to achieve the same objectives of traditional ag-gag legislation but used a different tactic by not limiting the scope of the legislation to agricultural facilities. Consequently, these statutes further inhibit collection of data under the facade of protecting property and preventing trespass.

The criminalization of data and environmental resource collection raises concerns about the First Amendment right to petition. In lawsuits challenging the ag-gag legislation in North Carolina and Wyoming, plaintiffs initially argued that the statutes violated the right to petition under the First

[9] N.C. GEN. STAT. § 99A-2 (2016).
[10] ARK. CODE ANN. § 16-118-113 (2017).
[11] *See* WYO. STAT. ANN. § 6-3-414 (2015); WYO. STAT. ANN. § 40-27-101 (2015).

Amendment.[12] But the Fourth Circuit and the Tenth Circuit did not address the argument in either case.[13]

The Petition Clause forbids any "law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[14] Citizens' right to communicate information to state and federal agencies is essential because it allows constituents to advocate for their interests and participate in the democratic process. Moreover, under the Administrative Procedure Act's ("APA") notice-and-comment requirement, federal agencies must consider and respond to public comments that typically include data and scientific information.[15] The public's ability to comment on proposed rules is significant because the information provided in comments can influence an agency's decision.

Gathering scientific information and data is vital to investigating violations of environmental laws, exposing animal cruelty, listing species as endangered, and uncovering threats to public health. Through ag-gag legislation, North Carolina,

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[12] People for the Ethical Treatment of Animals, Inc. v. Stein, 259 F. Supp. 3d 369, 371–72 (M.D.N.C. 2017); Complaint at 51–53, W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231, No. 15-CV-169 (D. Wyo. filed Sept. 29, 2015).
[13] *See generally* People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[14] U.S. CONST. amend. I.
[15] 5 U.S.C. §§ 553–559 (2018); *see generally* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015).

Arkansas, and Wyoming essentially attempted to criminalize and penalize environmental advocacy and whistleblowing. The statutes discourage, deter, and punish citizens who gather data. If citizens are unable to access such data and information, the statutes violate the right to petition. Individuals will not be able to petition the government because they cannot provide data and information. This is particularly applicable to advocacy groups' work with endangered species and clean water. Ag-gag laws could inhibit the study and discovery of endangered species. Additionally, several environmental regulations, such as the Clean Water Act, rely, to some extent, on private citizens to aid the government in discovering violations.[16]

From a public policy standpoint, protecting the right to petition is vital. Citizens' ability to expose misconduct at agricultural facilities or petition to list a species as endangered protects the evident link between the environment and human health. Neglecting environmental issues and wrongdoing leads to species and human suffering.[17] Clean air, water and land

[16] Jeff Guo, *Wyoming Doesn't Want You to Know How Much Cow Poop is in its Water*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/20/wyoming-doesnt-want-you-to-know-how-much-cow-manure-is-in-its-water%3foutpuType=amp; *see generally* Clean Water Act, 33 U.S.C. §§ 1362–1365 (2018).

[17] *See generally Environmental & Climate Justice*, NAACP, https://www.naacp.org/issues/environmental-justice/; *The Link Between the Environment and Our Health: Would People Care More About the Environment if They Had*

decrease disease and reduce public health problems.[18] Consequently, federal laws, state laws, and citizen involvement in protecting natural resources are essential. For example, the Endangered Species Act ("ESA") is a crucial environmental law because its implications venture beyond protecting species. Biodiversity combats climate change and protecting species' habitats leads to safer water and air filtration for humans.[19] Habitats and ecosystems are also important in mediating climate-related stressors and the effect of weather events.[20] Therefore, protecting species like the dunes sagebrush lizard is important because it leads to well-balanced ecosystems, which also protects humans.

Furthermore, protecting our ecosystems also safeguards the agriculture industry, tourism, and economic activities. The agriculture industry benefits from environmental protections, which ensure crops are disease-resistant and sustain habitats for

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a Better Understanding of How it Affects Them Personally?, SCI. AM.: HEALTH (Jan. 28, 2011), https://www.scientificamerican.com/article/environment-and-our-health/.

[18] *See generally Public Health, Environmental and Social Determinants of Health*, WORLD HEALTH ORGANIZATION, https://www.who.int/phe/en/.

[19] *See generally* Katie Bleau, *Biodiversity on the Brink: The Consequences of a Weakened Endangered Species Act*, YALE ENV'T REV. (Jan. 28, 2020), https://environment-review.yale.edu/biodiversity-brink-consequences-weakened-endangered-species-act; Justin Worland, *How the Endangered Species Act Helps Save Humans, Too*, TIME: SCI. & ENV'T (Feb. 15, 2017), https://time.com/4671860/endangered-species-act-reform-climate-change/.

[20] *See generally 2018 Environmental Performance Index: Biodiversity & Habitat*, NEW HAVEN, CT: YALE CTR. FOR ENVTL. L. & POL'Y, https://epi.envirocenter.yale.edu/2018-epi-report/biodiversity-habitat.

both crops and animals.[21] Moreover, millions of people visit various U.S. National Parks every year to participate in wildlife-related activities. This creates American jobs and produces substantial economic revenue.[22] Certain livelihood activities, such as agriculture and fishing, are reliant on healthy ecosystems and are directly dependent on natural resources.[23] Thus, the power of citizens to petition the government to safeguard the environment has far reaching consequences for society as a whole.

This Note explores the current state of ag-gag law and explains why courts should not overlook alleged violations of the First Amendment's right to petition. Part I recounts a brief history of ag-gag laws and includes relevant case law. Part II addresses the emergence of broader ag-gag legislation extending to data and non-agricultural facilities and analyzes the cases in North Carolina and Wyoming. Part III discusses the right to

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[21] *Biodiversity and Ecosystem Services*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, http://www.fao.org/agriculture/crops/thematic-sitemap/theme/biodiversity/en/.

[22] The outdoor recreation economy creates 7.6 million American jobs, accounts for $887 billion in consumer outdoor recreation spending each year, and creates over $125 billion in federal, state, and local tax revenues. It is an overlooked economic giant. *The Outdoor Recreation Economy*, OUTDOOR INDUS. ASS'N, http://www.outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.

[23] *See generally 2018 Environmental Performance Index: Biodiversity & Habitat*, NEW HAVEN, CT: YALE CTR. FOR ENVTL. L. & POL'Y, https://epi.envirocenter.yale.edu/2018-epi-report/biodiversity-habitat; Justin Worland, *How the Endangered Species Act Helps Save Humans, Too*, TIME: SCI. & ENV'T (Feb. 15, 2017), https://time.com/4671860/endangered-species-act-reform-climate-change/. Preservation of the environment and management of natural habitats contributes to economic security in the United States.

petition and freedom of speech to demonstrate how each is intended to serve a distinct end. Finally, Part IV considers the uncertainty of the right to petition in relation to ag-gag law and discusses why it should not be subsumed by freedom of speech. Additionally, Part IV uses the petitioning process for listing a species under the ESA to illustrate the importance of the public's ability to gather information to communicate with federal agencies.

I. BRIEF HISTORY AND RECENT DEVELOPMENTS IN AG-GAG LAW

The genesis of "ag-gag" law in the 1990s intended to prevent transparency and undermine regulation of the agricultural industry. These laws originated as an attempt to combat animal rights advocates conducting undercover investigations from exposing wrongdoing. [24] Hence, whistleblowers are punished for recording footage in agricultural facilities, effectively banning the collection of evidence documenting abuse against livestock and various other public health concerns.[25] Over twenty-five states have attempted to pass

[24] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017).
[25] Dan Flynn, *2013 Legislative Season Ends with 'Ag-Gag' Bills Defeated in 11 States*, FOOD SAFETY NEWS (July 30, 2013), https://www.foodsafetynews.com/2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/.

ag-gag legislation, but only ten states have succeeded—Arkansas,[26] Idaho,[27] Iowa,[28] Kansas,[29] Missouri,[30] Montana,[31] North Carolina,[32] North Dakota,[33] Utah,[34] and Wyoming.[35] Ag-gag legislation has been struck down as unconstitutional in Utah, Idaho, Iowa, Wyoming, Kansas, and North Carolina.[36] Courts

[26] ARK. CODE ANN. § 16-118-113 (2017) (creating a civil cause of action for private entities to sue an individual that captures or removes the employer's data, paper, records or records images or sounds and uses it a manner that damages the employer).
[27] IDAHO CODE § 18-7042 (2018) (prohibiting committing the crime of interfering with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015), *aff'd in part and rev'd in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018).
[28] IOWA CODE § 717A.3A (2018) (criminalizing gaining access or employment by providing false information and subsequently committing an unauthorized act), *invalidated by* Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019).
[29] KAN. STAT. ANN. § 47-1827(c)–(d) (2018) (criminalizing entering an animal facility and taking recordings or photographs with intent to harm the owner), *invalidated by* Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020). The district court held that the law violates the First Amendment because it targets negative views about animal facilities and discriminates based on viewpoint.
[30] MO. REV. STAT. § 578.405 (2018) (criminalizing obtaining access to an animal facility under false pretenses for the purpose of performing unauthorized acts); MO. REV. STAT. § 578.013 (2018) (requiring farm employees to turn over video recordings or photos capturing animal abuse to law enforcement within twenty-four hours).
[31] MONT. CODE ANN. § 81-30-103(2) (2017) (criminalizing entering an animal facility to take video recordings or photographs with the intent to commit criminal defamation).
[32] N.C. GEN. STAT. § 99A-2 (2018) (creating a civil cause of action for private entities to sue individuals that remove data or any material or make secret recordings and prohibits unauthorized entry into nonpublic areas of another's premises).
[33] N.D. CENT. CODE § 12.1-21.1-02 (2017) (prohibiting entering an animal facility and attempting to use recording devices).
[34] UTAH CODE ANN. § 76-6-112 (2017) (criminalizing providing false information on an employment application with the intent to record images at an agricultural operation), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).
[35] WYO. STAT. ANN. § 6-3-414 (2017); WYO. STAT. ANN. § 40-27-101 (2017) (creating civil liability and criminal liability, respectively, for trespassing to unlawfully collect resource data), *aff'd by* W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016), *rev'd by* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[36] *See* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017); People for the Ethical Treatment of Animals, Inc. v. Stein, No. 1:16CV25, 2020 WL 3130158 (M.D.N.C. June 12, 2020); Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D.

have addressed and found First Amendment freedom of speech violations,[37] but courts remain mum on whether these ag-gag laws violate the right to petition.

In *Animal Legal Defense Fund v. Herbert*, the United States District Court for the District of Utah held that a statute that criminalized acts of obtaining access to agricultural operations under false pretenses and recording images was a violation of the First Amendment,[38] stating "the fact that speech occurs on a private agricultural facility does not render it outside First Amendment protection." [39] The district court followed the Seventh and Fourth Circuit's logic that "lying to gain entry, without more, does not render someone a trespasser." [40] Individuals must cause trespass-type harm (legally cognizable harm) for these lies to fall outside First Amendment protection.[41] Additionally, Utah did not provide evidence that safety was the actual reason behind the law, and it appeared that the law was tailored toward blocking undercover investigators from revealing abuses at agricultural facilities.[42] The district court stated, "Utah

Iowa 2019); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).
[37] *Id.*
[38] *Herbert*, 263 F. Supp. 3d at 1211, 1213.
[39] *Id.* at 1209.
[40] *Id.* at 1205 (noting absent guidance from the Utah appellate courts and Tenth Circuit but that the approach taken by the Seventh and Fourth Circuits is persuasive).
[41] *Id.* at 1203.
[42] *Id.* at 1213.

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."[43]

Similarly, in *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit held that an Idaho statute prohibiting persons from entering private agriculture production facilities without express consent from the owner and subsequently making a video or audio recording violated the First Amendment.[44] The circuit court stated that there is a First Amendment right to film matters of public interest.[45]

Recently, an Iowa ag-gag statute that criminalized undercover investigations at agricultural facilities was struck down by the United States District Court for the Southern District of Iowa as a violation of the First Amendment in *Animal Legal Defense Fund v. Reynolds*.[46] In this case, the defendant's interest in private property was not compelling in the First Amendment sense for purposes of free speech challenges because the statute's prohibitions were not narrowly tailored to protect property.[47] The Iowa Attorney General appealed this case, and it

[43] *Id.*
[44] Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1205 (9th Cir. 2018).
[45] *Id.* at 1203 (citing Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995)).
[46] Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019).
[47] *Id.* at 824 (citing Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1211–12 (D. Utah 2017); Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1207–08 (D. Idaho 2015).

will go before the Eighth Circuit.[48] The Eighth Circuit will likely rely on the Tenth's Circuits ruling in *Western Watersheds v. Michael* and the Ninth Circuit's ruling in *Animal Legal Defense Fund v. Wasden*.[49]

The cases in Utah, Idaho, and Iowa are examples of traditional ag-gag legislation that specifically targets agricultural operations. But North Carolina, Arkansas, and Wyoming have attempted to mask ag-gag legislation by not singling out the agriculture industry explicitly in the statutes passed. The language in these statutes does not appear to be aimed at preventing the gathering of information at agricultural facilities, but the objective and result of the statutes is the same as previous ag-gag laws.

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[48] Donnelle Eller, *Iowa Appeals Ag-Gag Law That a Federal Judge Ruled Unconstitutional*, DES MOINES REG. (Feb. 21, 2019), https://www.desmoinesregister.com/story/money/agriculture/2019/02/21/iowa-appeals-ag-gag-law-federal-judge-ruled-unconstitutional-aclu-animal-cruelty-working-conditions/2938507002/.

[49] "If the Eighth Circuit follow[s] the reasoning of the Ninth Circuit in *Wasden*, it could overturn the district court's ruling finding that the lying was constitutionally protected." Kristine A. Tidgren, *Federal District Court Says Iowa's Ag Fraud Statute Unconstitutional*, IOWA ST. UNIV. CTR. FOR AGRIC. L. & TAX'N (Jan. 16, 2019), https://www.calt.iastate.edu/blogpost/federal-district-court-says-iowas-ag-fraud-statute-unconstitutional. Having the intent to engage in "unauthorized acts," however, is not the same as having the intent to "cause economic or other injury." The Eighth Circuit could rule differently based upon the broader language in the Iowa statute.

II. ANALYSIS OF A NEW KIND OF AG-GAG LEGISLATION

Ag-gag legislation passed in North Carolina, Arkansas, and Wyoming broadens the type of employers and the type of property covered, rather than limiting it to agricultural facilities. This new type of ag-gag legislation creates a danger not only to free speech, but also to the right to petition under the First Amendment. Citizens' ability to gather information and collect data is essential for petitioning the government to address public concerns. The broader the scope of ag-gag statutes, the greater the risk of a violation of constitutional rights.

In *People for the Ethical Treatment of Animals, Inc. v. Stein*, the United States District Court for the Middle District of North Carolina ruled that the plaintiffs lacked standing for failing to provide sufficient facts in order to adjudicate a claim challenging an ag-gag statute.[50] The statute at issue—the North Carolina Property Protection Act—creates a civil cause of action for an employer against employees who record images or sound or remove documents from the employer's premise.[51] The plaintiffs alleged that the statute violated the United States and North

[50] People for the Ethical Treatment of Animals, Inc. v. Stein, 259 F. Supp. 3d 369, 386 (M.D.N.C. 2017).
[51] N.C. GEN. STAT. § 99A-2 (2018).

Carolina Constitutions' free speech and petition clauses.[52] The Fourth Circuit reversed and remanded the case, holding that the plaintiffs possessed standing to challenge the statute on First Amendment free speech grounds, and on remand, the district court found that several provisions of the statute are unconstitutional and violate the First Amendment's freedom of speech.[53] Under First Amendment standing framework, when a challenged statute has "an objectively reasonable chilling effect" on the exercise of rights, plaintiffs have sufficiently satisfied the injury-in-fact requirement.[54]

Significantly, the circuit court and district court declined to address the plaintiff's allegation of a right to petition violation. The statute punishes a person or employee who captures or removes data, papers records or other documents and then uses the information to breach the duty of loyalty to the employer.[55] This inhibits citizens from whistleblowing and gathering resources and collecting data for petitions.

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[52] *Stein*, 259 F. Supp. 3d at 371–72.
[53] People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018); People for the Ethical Treatment of Animals, Inc. v. Stein, No. 1:16CV25, 2020 WL 3130158 (M.D.N.C. June 12, 2020).
[54] *Stein*, 737 F. App'x at 129 (quoting Cooksey v. Futrell, 721 F.3d 226, 229 (4th Cir. 2013)).
[55] N.C. GEN. STAT. § 99A-2 (2018); *see also* Dan Flynn, *North Carolina's 'Civil' Approach to 'Ag Gag' Getting Federal Review*, FOOD SAFETY NEWS (June 10, 2019), https://www.foodsafetynews.com/2019/06/north-carolinas-civil-approach-to-ag-gag-getting-federal-review/.

Similar to North Carolina, Arkansas passed a far-reaching law that effectively bans all undercover investigations of private entities.[56] As a result, misconduct not only at agricultural facilities is protected, but misconduct at other private entities, such as nursing homes is also protected. The challenge to the Arkansas statute was dismissed in federal district court, and in March 2020, the plaintiffs appealed to the Eighth Circuit.[57] This ongoing litigation in the Eighth Circuit provides an opportunity for a circuit court to address the underlying force of the Petition Clause in relation to ag-gag legislation.

In 2014, Western Watersheds Project, a nonprofit, routinely sent volunteers to check rivers in Wyoming for contamination in order to protect public waters.[58] The nonprofit discovered that the streams were infected with E. coli due to grazing cattle that create mudslides of fecal bacteria in water, which led to dangerous pathogens that contaminated drinking

[56] ARK. CODE ANN. § 16-118-113 (2017).
[57] Plaintiffs' Notice of Appeal, Animal Legal Def. Fund v. Vaught, No. 4:19-cv-00442-JM, (E.D. Ark. filed Mar. 12, 2020), https://www.biologicaldiversity.org/programs/environmental_health/pdfs/Arkansas-Ag-Gag-2020-03-12-Dkt-No-53-NOA.pdf; *see also* Linda Satter, *Animal Advocates Set To Appeal Dismissal of Challenge to Arkansas 'Ag-Gag' law*, NW. ARK. DEMOCRAT GAZETTE (Mar. 16, 2020), https://www.nwaonline.com/news/2020/mar/16/animal-advocates-set-to-appeal-dismissa-1/.
[58] Jeff Guo, *Wyoming Doesn't Want You to Know How Much Cow Poop is in its Water*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/20/wyoming-doesnt-want-you-to-know-how-much-cow-manure-is-in-its-water%3foutpuType=amp.

water and crops.[59] Subsequently, ranchers sued WWP for trespassing. Though it was cloaked as attempt to protect property, *Western Watersheds Project v. Michael* at its heart was a thinly veiled attempt to silence environmental advocacy groups from monitoring public lands.[60]

Most of the data collected by WWP was on public land, but volunteers may have also gathered data on private land.[61] Property owners have the power to sue in civil court for damages for accidental trespassing when harm occurs like destroying someone's garden.[62] But taking photographs of wildlife and collecting water samples does not harm property.[63] Therefore, under trespass law, a plaintiff must prove that a defendant trespassed intentionally.[64] This conflict illustrates the tension "between property rights and the government's authority to regulate for the greater good."[65]

As a result of the conflict between WWP and ranchers, in 2015, Wyoming enacted two statutes. One imposed civil liability and one imposed criminal liability upon any person who

[59] *Id.* Additionally, in some parts of Wyoming, the only possible way to reach public land is by traveling through private property.
[60] *WWP Fights Back in Wyoming Trespass Lawsuit*, W. WATERSHEDS PROJECT, https://www.westernwatersheds.org/2015/02/om-303/ (last visited Mar. 21, 2020).
[61] Guo, *supra* note 58.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

"[c]rosses private land to access adjacent or proximate land where he collects resource data" like the data at issue in *Western Watersheds*.[66] Activities such as photographing vegetation or wildlife, gathering water samples, recording the location where data was acquired, and note-taking on habitat conditions qualify as collecting resource data.[67] The law suppressed any data, whether collected on private or public property, while trespassing.[68] WWP filed suit, arguing that the statutes "violated the Free Speech and Petition Clauses of the First Amendment [and] the Equal Protection Clause of the Fourteenth Amendment."[69] After WWP filed their complaint, Wyoming amended the two statutes and struck provisions about the submission of resource data to a state or federal agency of the government.[70] As a result, the plaintiffs amended their complaint to omit the alleged violation of the right to petition claim, and the district court granted the defendant's motion to dismiss.[71]

The Tenth Circuit reversed and remanded, holding that the statutes prohibiting the crossing of private land to get to

[66] WYO. STAT. ANN. § 6-3-414(c)(i); WYO. STAT. ANN. § 40-27-101(c)(i), *invalidated by* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[67] WYO. STAT. ANN. § 6-3-414(e)(i), (iv); WYO. STAT. ANN. § 40-27-101(h)(i), (iii), *invalidated by* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[68] Guo, *supra* note 58.
[69] *Michael*, 869 F.3d at 1192–93.
[70] *Id.* at 1193.
[71] *Id.*

adjacent public land to collect resource data were subject to the First Amendment, and the "collection of resource data constitutes the protected creation of speech."[72] Moreover, the statutes restricted citizens' ability to participate in public policy and debate.[73] For example, under the ESA, petitioners may submit photographs and other information in a petition to "present 'substantial scientific' evidence showing that a species is endangered or threatened."[74] Collection of resources constituted protected speech because the First Amendment protects photographs, videos, and recordings, and for that protection to have value, the creation of speech must fall within the First Amendment.[75]

But the Supreme Court has held that the "right to speak and publish does not carry with it the unrestrained right to gather information."[76] In this case, the Wyoming statutes applied to actions that are subject to the First Amendment because they are the creation of speech, such as photography.[77] The Tenth Circuit relied on *Zemel v. Rusk*[78] to illustrate the point that not all

[72] *Id.* at 1195–96.
[73] *Id.* at 1195.
[74] *Id.* at 1195 (citing 16 U.S.C. § 1533(b)(3)(A)).
[75] *Id.* at 1196; *see* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).
[76] *Michael*, 869 F.3d at 1197 (10th Cir. 2017) (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).
[77] *Id*. at 1197; *see* Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 793 (2011).
[78] 381 U.S. 1 (1965).

regulations "incidentally restricting access to information trigger First Amendment analysis."[79] *Zemel* concerned a travel ban to Cuba, and journalists challenged it.[80] The Supreme Court ruled that the restriction was constitutional because it did not inhibit the free flow of information.[81] If the plaintiffs in *Western Watersheds* had argued that the Wyoming statutes prohibited free flow of information, *Zemel* might have controlled the decision.[82] But the statute in *Zemel* would have to had banned travel "for the purpose of writing about or filming what they observe" in order to be analogous to the Wyoming statutes.[83]

The Tenth Circuit remanded *Western Watersheds*, and the district court found that the statutes were content-based restrictions on speech, subject to strict scrutiny, and violated the First Amendment right to free speech because they were not narrowly tailored.[84] Notably, the Tenth Circuit did not address WWP's claim that the Wyoming statutes violated the Petition Clause.[85] In their original complaint, WWP stated that

[79] *Michael*, 869 F.3d at 1197.
[80] *Id.*
[81] *Id.*; *see* Zemel v. Rusk, 381 U.S. 1 (1965).
[82] *Michael*, 869 F.3d at 1197.
[83] *Id*.
[84] W. Watersheds Project v. Michael, 353 F. Supp. 3d 1176, 1186–91 (D. Wyo. 2018).
[85] *Data Gathering and the Right to Petition*, MEDIA FREEDOM & INFO. ACCESS CLINIC (Jan. 2, 2019), https://law.yale.edu/mfia/case-disclosed/data-gathering-and-right-petition. "Following *Western Watersheds*, the question remains: When a law interferes with an individual's ability to gather data necessary for a proper petition, does it violate her right to petition." The author points out that the Supreme Court has

Wyoming's data censorship statutes violated the Petition Clause because they directly interfered with individuals' ability "to express their ideas . . . and concerns to their government."[86]

Before being amended, the Wyoming statutes' provisions regarding the punishment of resource data submitted to state or federal agencies already violated the right to petition. Using data to expose public health concerns or provide information regarding species via submission to state or federal government is precisely the logic behind the Petition Clause. It acts as a way for citizens to petition and communicate with the government. Perhaps this explains why WWP, in this specific instance, decided to not re-allege a Petition Clause violation in their amended complaint once the Wyoming statutes were amended.[87]

Wyoming's choice to strike the provision about submission of resource data to state and federal agencies was not dispositive of a violation of the right to petition. The amended

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dismissed right to petition arguments in the past and focused on the Speech Clause. Additionally, the author emphasizes that "journalists and researchers would be well-advised to emphasize that data creation is protected speech, rather than merely an element of a successful administrative petition." But going forward, plaintiffs should continue to argue violations of both the Speech Clause and the Petition Clause. If arguments of a right to petition violation cease to be made, courts will not have the chance to address the issue, despite continuously ignoring it in ag-gag cases.

[86] Complaint at 75, W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231, No. 15-CV-169 (D. Wyo. filed Sept. 29, 2015) (quoting Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011)).

[87] *Id.*

statutes no longer explicitly addressed the submission of data to the government, but the statutes still punished citizens for collecting data, gathering soil samples, and taking photographs of wildlife.

Although *Western Watersheds* illustrates a victory for First Amendment protections, courts should take this a step further and address how citizens' right to petition is violated, too. The Tenth Circuit and other courts have found ag-gag legislation unconstitutional under the Speech Clause, but no courts have addressed whether these types of laws that interfere with citizens' ability to collect data violate the Petition Clause.[88] Ag-gag laws like Wyoming's data trespass statutes restrict freedom of speech and also significantly constrain the right to petition by deterring citizens from gathering vital information that is used to effectively petition the government. [89]

Ag-gag legislation attempts to silence whistleblowers and inhibit data collection to protect a business interest or reputation under the guise of preventing people from trespassing to protect

[88] *See* People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); People for the Ethical Treatment of Animals, Inc. v. Stein, No. 1:16CV25, 2020 WL 3130158 (M.D.N.C. June 12, 2020); Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).
[89] *Id.*

property. This not only warps the true purpose of punishing trespassers but prevents citizens from petitioning the government to discuss matters of potential public danger and concern. As Justin Pidot, a professor of law, stated, "[w]hen you have a state government creating a law criminalizing people revealing truthful information about illegal conduct, then something's gone horribly astray in our democracy."[90]

III. THE RIGHT TO PETITION VERSUS FREEDOM OF SPEECH

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[91]

The Declaration of Independence emphasizes the importance of the right to petition, and this right has played a significant role throughout American history. It was first recognized as a right to petition the King, and in the early eighteenth century, petitions were the main way citizens communicated with government officials.[92] While this right

[90] Guo, *supra* note 58. Justin Pidot is a law professor at the University of Arizona. He was also a law professor at the University of Denver in the past.
[91] THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).
[92] John Inazu & Burt Neuborne, *Interactive Constitution: Right to Assemble and Petition*, THE NAT'L CONST. CTR.: CONST. DAILY (Aug. 14, 2017), https://constitutioncenter.org/blog/interactive-constitution-right-to-assemble-and-petition.

received a lot of attention in the revolutionary era, the modern Supreme Court treats the right to petition as subsumed within the right to freedom of speech.[93] This undervalues the importance of providing independent protection to the right to petition, which is designed to serve a distinct end.[94]

Justice Kennedy of the Supreme Court recognized, "[b]oth speech and petition are integral to the democratic process, although not necessarily in the same way."[95] Despite this, courts have treated the right to petition as "a right co-extensive with the other expressive rights of the First Amendment."[96] It appears under modern Supreme Court jurisprudence, the right to petition is collapsed within freedom of speech, but the right to petition should be analyzed independently.[97] Though the right to petition and freedom of speech are inevitably linked, each is a distinct and important right that allows citizens to engage in our democracy.[98] The right to petition allows citizens to possess the ability to communicate

[93] *Id.*
[94] *Id.*
[95] Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011).
[96] Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 68 (1993).
[97] David Bernstein, *The Heritage Guide to the Constitution: Freedom of Petition*, THE HERITAGE FOUND., https://www.heritage.org/constitution/#!/amendments/1/essays/141/freedom-of-petition.
[98] *Right to Petition: The Freedom to Speak to the Government*, INST. FOR FREE SPEECH (Jan. 1, 2018), https://www.ifs.org/blog/right-to-petition-the-freedom-to-speak-to-the-government/.

and "express their ideas, hopes, and concerns to their government and their elected representatives," [99] whereas freedom of speech cultivates "the public exchange of ideas that is integral to deliberative democracy . . .."[100]

The Petition Clause is distinguishable from general speech protected by the Speech Clause because speech used in petitioning activity is communication specifically directed to the government.[101] The right to petition was crafted to minimize risks that elected officials might favor the "narrow partisan interests of their most powerful supporters" instead of considering themselves as proxies for their constituents.[102] Perhaps part of the reason that courts often overlook the right to petition is because petitions have been "reduced to a formality" absent any obligation to respond to the petitioners.[103] Today, "an energized right to petition might link modern legislators more closely to the entire electorate they are pledged to serve."[104]

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[99] *Guarnieri*, 564 U.S. at 388.
[100] *Id.*
[101] James Madison said that the Petition Clause was drafted so "people 'may communicate their will' through direct petitions to the legislature and government officials." McDonald v. Smith, 472 U.S. 479, 482 (1985) (citing 1 Annals of Cong. 738 (1789)).
[102] John Inazu & Burt Neuborne, *Interactive Constitution: Right to Assemble and Petition*, THE NAT'L CONST. CTR.: CONST. DAILY (Aug. 14, 2017), https://constitutioncenter.org/blog/interactive-constitution-right-to-assemble-and-petition.
[103] *Id.*
[104] *Id.*

Historically, the Supreme Court has neglected the Petition Clause.[105] This inattention has failed to give the Petition Clause the specific jurisprudence that it deserves. In time, the Court did establish modern Petition Clause precedent in *McDonald v. Smith*,[106] one of the few pure petition cases. But unfortunately, the Court did not take the opportunity to give the Petition Clause independent force. In *McDonald*, the Court held that the Petition Clause does not provide absolute immunity to petitioners who allegedly express libelous statements in petitions to government officials.[107] The Court also stated that "there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions."[108]

Yet the Court's holding disregarded the historical value and importance of the right to petition, especially given American colonists' recognition of the right to petition long before the right to freedom of speech. "[T]he right to petition was deeply rooted in Anglo-American history long before the

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[105] *See generally* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES (2012); Norman B. Smith, *"Shall Make No Law Abridging …": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986).
[106] 472 U.S. 479 (1985).
[107] *Id.* at 485.
[108] *Id.*

Framers incorporated this right into the Constitution."[109] Additionally, the petition right was an absolute right against the government, which influenced the intention of the Framers when adopting the First Amendment.[110] The historical intent of the Framers is a useful tool in determining the importance of the Petition Clause in modern society. The Court's reluctance to give petitioning activity independent force from other First Amendment protections ignores history.

Furthermore, in *McDonald*, the Court misapplied the defamation standard developed in *New York Times v. Sullivan*[111] by failing to recognize that a government petition is distinct from a newspaper.[112] When a newspaper is published, the audience is the public at large. *Sullivan* addressed constitutional speech and press protections concerning a newspaper.[113] There, the Court articulated a standard that prohibits a public official from recovering damages for defamatory statements unless it is proven that the statement has been made with actual malice, meaning a statement was made "with knowledge that it was false or with

[109] Rebecca A. Clar, *Martin v. City of Del City: A Lost Opportunity to Restore the First Amendment Right to Petition*, 74 ST. JOHN'S L. REV. 483, 492 (2000).
[110] *Id.*
[111] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[112] "[A]s long as the government [is] one of the intended audiences, the quintessential nature of [a] petition remain[s] intact." Dr. JoAnne Sweeny, *"LOL No One Likes You": Protecting Critical Comments on Government Officials' Social Media Posts Under the Right to Petition*, 2018 WIS. L. REV. 73, 87 (2018).
[113] *Sullivan*, 376 U.S. at 266, 279–82.

reckless disregard of whether it was false or not."[114] This differs from absolute immunity for libelous statements, which means public officials cannot not recover any damages.[115] "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[116] Justice Brennan's statement behind the rationale of actual malice is also relevant to absolute immunity.

Differing from speech and press freedoms, petitioning activity involves a citizen speaking directly to the government while exercising a constitutional right.[117] Petitioning the government is more similar to filing a lawsuit than publishing a newspaper. Communication involved in petitioning activity is

[114] *Id.* at 280.
[115] *Id.* at 295 (Black, J., concurring). Justice Black argued that the press was vulnerable to destruction without granting "absolute immunity for criticism of the way public officials do their public duty."
[116] *Id.* at 282–83.
[117] In certain instances, individual liberties will be subject to limitations, such as the punishment of libelous or false statements. Freedom of speech and freedom of the press do not enjoy free reign. There is a natural discomfort in permitting a citizen to petition the government using false information or statements. For example, if scientists purposely manipulate data or submit false research in order to list an animal as endangered, should this speech enjoy absolute immunity? Is it reasonable to expect a government agency, or in McDonald's case, the President, to evaluate the truth of statements submitted in a petition? The precedent the Court handed down in *McDonald* continues to create a chilling effect on petitioners who want to come forward with information or concerns regarding elected officials. Additionally, Bruce Ennis, who represented McDonald said, "[m]y client had a constitutional right to petition the government, even if the statements were false . . . Both from a historical and constitutional perspective, the U.S. Supreme Court wrongly decided [the] case." David L. Hudson Jr., *First Amendment Triumphs Mark Attorney's Supreme Court Record*, FREEDOM F. INST. (Sept. 25, 1998), https://www.freedomforuminstitute.org/1998/09/25/first-amendment-triumphs-mark-attorneys-supreme-court-record/.

analogous to participation in other government-related functions, such as testifying in judicial proceedings, during which private citizens enjoy absolute immunity from common law libel actions.[118] Therefore, the rule of absolute immunity from common law libel actions should have been extended to petitions directed to the national government in McDonald's case.[119]

Though many Supreme Court rulings since *McDonald* have effectively subsumed the right to petition within freedom of speech, the Court has cautioned against presuming "that Speech Clause precedents necessarily and in every case resolve Petition Clause claims."[120] In the most recent Petition Clause case, *Borough of Duryea, Pennsylvania v. Guarnieri*, Justice Kennedy wrote that an analysis of a violation of the Petition Clause must "be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns."[121]

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[118] Brief for Petitioner at 31, McDonald v. Smith, 472 U.S. 479 (1985) (No. 84-476), 1985 WL 669968.
[119] But the Petition Clause should not provide immunity from every statement made in petitioning activity to the government, such as irrelevant details of a public official's private life if it is not relevant to the concern or inquiry at hand. *See id.* at 6–7. Being held criminally liable for providing false information to the government is another matter, just as perjury is another matter concerning testimonial statements. The relevant inquiry in *McDonald* concerned libelous statements.
[120] Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011).
[121] *Id.* at 388–89.

Additionally, Justice Kennedy emphasized that the right of free speech and the right to petition are not identical, and in a case where the Petition Clause requires a distinct analysis, "the rules and principles that define the two rights might differ in emphasis and formulation."[122] However, the Court noted that in some cases the considerations that "shape the application of the Speech Clause to [plaintiffs' claims] apply with equal force to claims by [plaintiffs] under the Petition Clause."[123] In those cases, the public concern test developed in Speech Clause cases applies to Petition Clause cases.[124] Though Justice Kennedy did give independent force to the Petition Clause by noting that there cases in which the Petition Clause deserves its own analysis, the Court did not provide any guidance as to what triggers this distinct analysis.[125]

As a result, some circuit courts have overlooked the words of Justice Kennedy's dicta about the important distinction between the Speech and Petition Clauses and continue to subsume right to petition violations under freedom of speech violations by taking advantage of the Court's determination that

[122] *Id.* at 389.
[123] *Id.*
[124] *Id.*
[125] After *Guarnieri,* a federal district court found that because "[t]he parties [in this case] do not ask for a distinct analysis[,]" the Petition claim is analyzed under the same standards as the Speech claim. Järlström v. Aldridge, 366 F. Supp. 3d 1205, 1212 n. 2 (D. Or. 2018).

speech and petition rights are cognate.[126] Recently, in *Berkshire v. Beauvasis*, the Sixth Circuit stated that a cause of action under the right to petition requires the same analysis applied to a claim arising under speech[127] The circuit court derived this rationale from a 1997 Sixth Circuit case,[128] but it should have also addressed the Supreme Court's most recent discussion on the Speech and Petition Clauses. Arguably, if plaintiffs outline different and specific violations of the Speech Clause and the Petition Clause in the first place, this should be enough to trigger a separate analysis for right to petition claims.[129] But the Sixth Circuit's decision illustrates that *Guarnieri* has been interpreted by circuit courts as an unwillingness to give the Petition Clause independent meaning.

Given the Supreme Court's neglect of the Petition Clause and the rare amount of pure Petition Clause cases, there has not been nearly as much scholarly discourse about this right in comparison to other First Amendment protections, such as speech and religion. However, Ronald J. Krotoszynski, Jr. of the

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[126] *Guarnieri*, 564 U.S. at 388.
[127] 928 F.3d. 520, 532 (6th Cir. 2019) (quoting Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1226 (6th Cir. 1997)).
[128] *Id.*
[129] Should plaintiffs have to explicitly state that an alleged Petition Clause violation deserves distinct analysis or ask for a distinct analysis? Presumably, this would be an easy task to implement into a complaint. But pleading a Speech Clause violation and a Petition Clause violation to begin with indicates that there are different reasons for each violation.

University of Alabama School of Law analyzed the forgotten petition clause in his book *Reclaiming the Petition Clause: Seditious Libel, "Offensive" Protest, and the Right to Petition the Government for Redress of Grievances*.[130] Krotoszynski argues that the current First Amendment doctrine subsumes the right to petition under speech and gives the right to petition little independent force.[131]

One interesting point Krotoszynski touches on is defining "petitioning" activity.[132] This is a point of tension in ag-gag and data trespass cases. Circuit courts have only addressed plaintiffs' alleged speech violations, not petition violations, in ag-gag cases because they have appeared to find the speech point more interesting or have found that the petition point would be resolved by addressing the speech issue.[133] Krotoszynski references Professor Harry Kalven[134] who suggests that "petitioning" speech must be distinguished from general speech if the right to petition is to have independent force from the other First Amendment rights.[135] One important difference of the right

[130] RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES 163 (2012).
[131] *Id.* at 164.
[132] *Id.* at 162–79.
[133] *See* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018); People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
[134] Harry Kalven was a professor of law at the University of Chicago.
[135] RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES 164–65 (2012).

to petition is that it is targeted at the government, a specific group.[136]

Additionally, during a congressional debate, James Madison emphasized that the right to petition was specifically aimed to serve as a vehicle for participating in government.[137] The text of the First Amendment protects the right "to petition the Government for a redress of grievances."[138] From a narrow textual interpretation, this essentially means to ask the government to solve a problem. An originalist view of the word "petition" would severely limit the scope to presenting an actual physical document that is signed by supporters to a government official.[139]

But the Petition Clause should not be limited to this narrow scope. In the twenty-first century, the act of petitioning is not limited to circulating a document for signatures.[140] Today, government officials invite communication with constituents on social media platforms like Facebook, Twitter, or Instagram. This enables individuals to directly communicate grievances and

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[136] *Id.* at 164.
[137] Through the First Amendment "people 'may communicate their will' through direct petitions to the legislature and government officials." McDonald v. Smith, 472 U.S. 479, 482 (1985) (quoting 1 Annals of Cong. 738 (1789)); *see also* THE FEDERALIST NO. 84 (Alexander Hamilton).
[138] U.S. CONST. amend I.
[139] RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES 165 (2012).
[140] *Id.*

has created "a new avenue of petitioning the government."[141] Moreover, government agencies explicitly instruct citizens to petition the government. For example, citizens must submit a petition to the U.S. Fish and Wildlife Service to list a species as endangered or threatened.[142] These petitions typically contain scientific research, data, statistics, and photographs. And advocacy organizations and citizens exert substantial effort and time to gather these resources for presentation to the government.

Furthermore, the Supreme Court has given the Petition Clause some additional independent effect via the Noerr-Pennington doctrine.[143] Through this doctrine, the Justices stated that a concept of "indirect" petitioning exists via billboards, print advertisements, and broadcast commercials.[144] Though the Court did expand the force of the Petition Clause to mass media communications, it was inattentive towards traditional ways of

[141] Dr. JoAnne Sweeny, *"LOL No One Likes You": Protecting Critical Comments on Government Officials' Social Media Posts Under the Right to Petition*, 2018 WIS. L. REV. 73, 108 (2018).
[142] 16 U.S.C. § 1533 (2018); *see also Listing a Species as a Threatened or Endangered Species, Section 4 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/esa-library/pdf/listing.pdf (last visited May 11, 2020).
[143] E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).
[144] Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1315 (2008) (citing *E. R.R. Presidents Conference*, 365 U.S. at 132–40, which held that a generic mass media campaign was protected petitioning activity because it was focused on influencing governmental action).

petitioning.[145] The Petition Clause should afford more protection to well-established forms of petitioning seen throughout history, such as the submission of documents to the government. The Court should also embrace the notion of the Noerr-Pennington doctrine and include messages directed at government like the act of gathering data for submission to the government as petitioning activity.

IV. INDEPENDENT FORCE OF THE PETITION CLAUSE AND AG-GAG LEGISLATION

A. Uncertainty of the Right to Petition in Relation to Ag-gag law

The statutes in North Carolina, Arkansas, and Wyoming represent the growing trend of evolving ag-gag legislation being passed among states. While courts have stricken this legislation down on free speech grounds, it remains uncertain as to whether courts will give the petition clause the attention it commands in these cases. More importantly, expanding ag-gag legislation to censor data demonstrates a bigger threat to the right to petition than traditional ag-gag legislation. The right to petition has been threatened by past ag-gag legislation that essentially prevents the punishment of injustice agricultural practices, but these new

[145] *Id.* There is no historical basis for treating mass media communications as petitions and the contemporary doctrine "affords no meaningful right of access to government[,]" which is inconsistent with history.

statutes covering data gathered in other industrial settings threaten the right to petition even further. Data is vital for communicating concerns to the government in order to implement change and voice societal concerns. Ag-gag laws protect misconduct and potential dangers to the public. For example, Wyoming conveniently enacted its data trespass statutes after a group of Wyoming ranchers wanted to sue citizens from the Western Watersheds Project who were collecting data from public rivers and streams on the presence of E. coli allegedly caused by industrial cattle grazing.[146] Additionally, like their Wyoming counterpart, the North Carolina and Arkansas ag-gag laws fail to hold private entities accountable for wrongdoing by punishing whistleblowers. The overreach of private property protection is outweighed by First Amendment protections and public interest. Other states' attempts to pass ag-gag legislation in this realm could pose a public health and safety issue.

Evolving ag-gag legislation illustrates First Amendment issues with the right to petition and the right to free speech. Although the right to petition and freedom of speech work in tandem to communicate ideas to the government, they serve

[146] *Update on Wyoming Trespass Law and Lawsuit*, W. WATERSHEDS PROJECT, https://www.westernwatersheds.org/2015/05/om-311/ (last visited Feb. 27, 2020).

different functions. The right to petition involves communicating directly with the government.[147] *Western Watersheds*, the Wyoming case, demonstrates that states are trying to broaden ag-gag legislation and are attempting to use other areas of law, such as trespass law, to do so. Courts have found freedom of speech violations in ag-gag cases,[148] but right to petition violations should not go unaddressed.

B. Why the Right to Petition Should not be Subsumed by Freedom of Speech

Another purpose of the right "to petition the Government for a redress of grievances"[149] is to serve as a checking function. The Supreme Court has recognized that this is a vital component to the validity of our institution that rests on representation.

> In a representative democracy, such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the

[147] *See* U.S. CONST. amend. I.
[148] *See* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017); People for the Ethical Treatment of Animals, Inc. v. Stein, No. 1:16CV25, 2020 WL 3130158 (M.D.N.C. June 12, 2020); Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).
[149] U.S. CONST. amend. I.

> people cannot freely inform the government of their wishes . . . would raise important constitutional questions.[150]

Petitioning the government gives power to the people by allowing them to participate in self-governance. Citizens' ability to check abuses of governmental power is essential to society. In the *McDonald* case discussed earlier, the plaintiff petitioned against an appointment of an individual to high federal office selected by the President. Because the plaintiff "could not vote against the appointment, petitioning was the only way he could participate in the decision-making process."[151] A weak right to petition doctrine subjects citizens to barriers and possible costs of litigation if they can be sued for libelous statements.

Furthermore, counsel for the petitioner in *McDonald* made an excellent point regarding two early examples that capture the historical and central function of the right to petition in the constitutional structure of self-government.[152] First, the response to the Alien and Sedition Acts of 1798 demonstrate that petitioning was used as a mechanism by the states to resist a

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[150] E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961).
[151] Brief for Petitioner at 45, McDonald v. Smith, 472 U.S. 479 (1985) (No. 84-476), 1985 WL 669968. Additionally, another example of this type of activity was the appointment of Supreme Court Justice Kavanaugh. Dr. Christine Blasey Ford, a constituent, sent a confidential letter to a representative of the government detailing her concern about the appointment. Similar to McDonald, as the President has the power to nominate a Supreme Court justice, Dr. Ford's only avenue was to petition the government.
[152] *Id.* at Appendix.

constitutional crisis.[153] The Alien Acts included the power to deport foreigners and made it harder for immigrants to vote.[154] The Sedition Act threatened the right to petition, and petitioning activity criticizing the government in general, because it prohibited public opposition to the government.[155] The Acts deprived citizens of opportunities to balance power between government and its constituents through communication.

The second example is the abolitionists' petitioning campaign in the 1830s. "Interference with the right to petition was also intimately associated with the constitutional crisis over slavery. Because petitioning was the principal way abolitionists attempted to influence governmental policy, 'the problem of freed and fugitive slaves became intertwined with the right of petition.'"[156] Petitions to abolish slavery accumulated for over forty years, and the House of Representatives responded to this by passing a series of gag rules.[157] Abolitionists strongly opposed this, including John Quincy Adams, who stated "I hold this resolution to be a direct violation of the Constitution of the

[153] *Id.*
[154] Alien Enemy Act, ch. 58, 1 Stat. 570 (1798); Alien Friends Act, ch. 58, 1 Stat. 577 (1798).
[155] Sedition Act, ch. 73, 1 Stat. 596 (1798).
[156] Brief for Petitioner at Appendix, McDonald v. Smith, 472 U.S. 479 (1985) (No. 84-476), 1985 WL 669968.
[157] *Id.* (citing Register of Debates 4052 (May 26, 1836)). The gag rules tabled, without discussion, petitions regarding slavery.

United States, of the rules of this House, and of *the rights of my constituents*." [158] Additionally, an Ohio senator at the time, Thomas Morris, stated, "[i]s not the right of petition a fundamental right?" [159] Thus, this demonstrates that citizens believed that the right to petition was an essential right belonging to the people.[160] This argument used by abolitionists at that time about the right to petition is as equally powerful as the recognition of free speech in modern times.[161] Restricting the ability to petition the government ought to be outside the legislative authority of Congress.

Furthermore, the Petition Clause affords citizens a right, distinct from speech freedoms, to seek redress of grievances by directly communicating with the government. As discussed earlier, the insignificance of the Petition Clause in modern Supreme Court jurisprudence is due to inattention, and because "the Court feels that it can resolve its cases on other First Amendment grounds, so it need not consider the Petition Clause."[162] But the Court's focus on a singularly expansive idea

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[158] *Id.* (citing Register of Debates 4053 (May 26, 1836) (emphasis added)).
[159] *Id.* (quoting Senator Thomas Morris of Ohio). The senator further stated, "I believe it is a sacred and fundamental right, belonging to the people, to petition Congress for the redress of grievances. While this right is assured by the Constitution, it is incompetent to any legislative body to prescribe how the right is to be exercised, or when, or [] what subject; or else this right becomes a mass mockery."
[160] Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185, 190 (1977).
[161] *Id.*
[162] Krotoszynski & Carpenter, *supra* note 144, at 1305.

of speech encompassing the right to petition belittles the importance of the independent force that it deserves. The right to petition gives citizens a direct role in the legislative process, links legislators to the people that they serve, and allows constituents to inform the government about their concerns. While the right to petition does not include a right of response, it provides an avenue for citizens to speak to government.[163]

At its core, differing from free speech, the right to petition is about the right to bring complaints about public policy to the government. The Supreme Court even acknowledged that "civil rights protests constituted petitions for a redress of grievances [during the 1960s],"[164] and recognized the right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights [and the Court has] explained that the right is implied by 'the very idea of a government, republican in form.'"[165] Because the Petition Clause deserves independent force, it should protect the right to communicate directly to government officials in a

[163] Additionally, the right to petition includes formal submissions to government agencies.

[164] Krotoszynski & Carpenter, *supra* note 144, at 1308–09 (citing Gregory v. Chicago, 394 U.S. 111 (1969); Adderley v. Florida, 385 U.S. 39, 40–42 (1966); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion); Henry v. Rock Hill, 376 U.S. 776 (1964) (per curiam); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960)). Krotoszynski and Carpenter also note that "majority opinions uniformly avoided developing an independent theory of the Petition Clause, relying instead on the other First Amendment freedoms for its decisions[.]"

[165] BE & K Construct. Co. v. NLRB, 536 U.S. 516, 524-–25 (2002) (quoting Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967); United States v. Cruikshank, 92 U.S. 542, 552–53 (1875)).

meaningful way [166] and support citizens' ability to gather information and data used for presentation to the government.

Similar to the restrictions placed on the abolitionists, ag-gag legislation prevents citizens' ability to communicate with the government about important issues. While the government does not necessarily have to respond to petitioners, petitions have the power to influence the government. The abolitionist movement and other civil rights movements precisely demonstrate that petitions are integral to implement social change.[167] Undercover journalists exposing misconduct at agricultural facilities and citizens petitioning government agencies in order to protect the environment are acts rooted in the right to petition's underlying values—that citizens perform a checking function on government and can participate in self-governance.

C. Depiction of Petitioning the U.S. Fish and Wildlife Service to Demonstrate the Importance of the Public's Ability to Gather Information to Communicate with the Federal Government

The small, striped dunes sagebrush lizard remains unlisted and imperiled. Defenders of Wildlife and the Center for

[166] Krotoszynski & Carpenter, *supra* note 144, at 1318.
[167] Civil rights groups protesting and petitioning the government to fight racial discrimination lead to change, such as the passage of federal legislation like the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

Biological Diversity's May 2018 petition remained unanswered by the U.S. Fish and Wildlife Service ("FWS") for more than two years.[168] After the agency failed to act, the conservation organizations sued in 2019[169] to compel the "90-day finding" required under the ESA.[170] As a result, FWS agreed to decide by June 30, 2020 whether to consider a proposal to list the dunes sagebrush lizard and launch a one-year review, and on July 15, 2020 FWS announced that it is launching a new evaluation of the lizard's status.[171] Under the ESA, FWS within the Department of the Interior manages terrestrial and freshwater species, and the National Marine Fisheries Service ("NMFS") within the Department of Commerce manages marine and anadromous species.[172] The Secretary of the Interior or the Secretary of Commerce, as applicable, must review the species' status if the petition presents substantial scientific information that listing is warranted.[173]

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[168] *U.S. Fish and Wildlife Service to Consider Endangered Listing for Dunes Sagebrush Lizard*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 30, 2020), https://biologicaldiversity.org/w/news/press-releases/trump-administration-consider-endangered-listing-dunes-sagebrush-lizard-2020-04-30/.
[169] *Id.*
[170] 16 U.S.C. § 1533(b)(3)(A) (2018).
[171] 85 Fed. Reg. 43203–43204 (July 16, 2020); *see U.S. Fish and Wildlife Service to Consider Endangered Listing for Dunes Sagebrush Lizard*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 30, 2020), https://biologicaldiversity.org/w/news/press-releases/trump-administration-consider-endangered-listing-dunes-sagebrush-lizard-2020-04-30/.
[172] 16 U.S.C. § 1532(15) (2018).
[173] *Id.* § 1533(b)(3)(A).

The requirements of the petition process to list a species under the ESA illustrates the importance of the public's ability to gather information to communicate directly with the federal government. Under the APA, FWS follows rulemaking procedures,[174] and the ESA listing process includes several opportunities for public input.[175] Public input often starts in the petitions themselves, but citizens also have a chance to comment, generally during a sixty-day period, after FWS or NMFS publishes a proposed rule.[176] FWS analyzes the information received in public comments during final rulemaking.[177]

Additionally, the ESA, by incorporation of the APA, allows any citizen who is interested to petition an agency for issuance of a rule or regulation within the agency's power.[178] Citizen petitions have been an essential source for listing species and providing research to FWS. A listing petition requires an immense amount of documentation, scientific information, and data.[179] For example, in the case of the dunes sagebrush lizard,

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[174] *See* 5 U.S.C. §§ 553–559 (2018).
[175] 16 U.S.C. § 1533.
[176] *Id.* § 1533(b)(4) (incorporating the APA's notice and comment requirements, APA, 5 U.S.C. § 553 (2018), with respect to "any regulation promulgated to carry out the purposes" of the ESA).
[177] *Id.*
[178] *Id.* § 1533(3)(A) (citing 5 U.S.C. § 553(e). The ESA also grants FWS the power to list species on an emergency basis. *Id.* § 1533(b)(7).
[179] 50 C.F.R. § 424.14 (2018).

the petitioners compiled data regarding population, genetics, habitat requirements, diet and predators, threat analysis and more.[180] Because listing decisions are based solely on scientific and commercial data available,[181] the compilation of this scientific data, often by citizens, is an essential component in the decision-making process in endangered species listings. Thus, the ESA presumes that any interested citizen has the ability to submit a scientifically crafted petition to aid FWS or NMFS in its determination. Restricting access to scientific data or agriculture information through data trespass laws or ag-gag legislation severely undermines citizens' ability to petition the government and eliminates opportunities to comment on matters of public concern.

Furthermore, threats to petitioners' ability to gather scientific data have led to lawsuits against agencies in the judicial system. For example, in August 2019 under the Trump Administration, FWS enacted rollbacks of the ESA.[182] The changes to the Act make it easier to delist species and allow economic considerations for listing determinations, instead of

[180] Ctr. for Biological Diversity & Defs. of Wildlife, Petition to List the Dunes Sagebrush Lizard as a Threatened or Endangered Species and Designate Critical Habitat (May 18, 2018), https://ecos.fws.gov/docs/petitions/92210//1040.pdf.
[181] 16 U.S.C. § 1533(b)(1)(A).
[182] Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/climate/endangered-species-act-changes.html.

relying solely on scientific analysis.[183] As a result, a coalition of twenty attorneys general filed suit arguing that the decision of FWS and NMFS to revise key requirements and purposes of the ESA is unlawful.[184] The suit alleges that the changes by these government agencies are arbitrary and capricious under the APA.[185] If petitioners "are unable to obtain their own data to present to a reviewing court, they will face an uphill battle in refuting an agency's assertion on judicial review that its action was reasonable."[186]

The ESA is vital to the protection of species. Scientists, lawyers, and advocates have played an integral role by studying species, collecting resources, and gathering data. Spurred by their passion and drive to protect the environment, advocates continuously submit information to the government through public comment. The APA requires notice-and-comment, but the constitutional right to petition is another underlying layer of

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[183] *Id.*
[184] Kim Wynn, *Attorneys General Challenge Changes to Endangered Species Act*, GRAND FORKS HERALD (Oct. 23, 2019), https://www.grandforksherald.com/news/government-and-politics/4735232-Attorneys-general-challenge-changes-to-Endangered-Species-Act.
[185] Kevin Stark, *California Leads Lawsuit Against Rollback of Endangered Species Protections*, KQED SCIENCE (Sept. 25, 2019), https://www.kqed.org/science/1948003/california-leads-lawsuit-against-rollback-of-endangered-species-protections; *see* First Amended Complaint, California v. Bernhardt, No. 4:19-cv-06013-JST, (N.D. Cal. filed Oct. 22, 2019), https://oag.ca.gov/system/files/attachments/press-docs/28%20First%20Amended%20Complaint.pdf.
[186] Carrie A. Scrufari, *A Watershed Moment Revealing What's at Stake: How Ag-Gag Statutes Could Impair Data Collection and Citizen Participation in Agency Rulemaking*, 65 UCLA L. REV. DISCOURSE 2, 23 (2017).

protection. Moreover, ag-gag legislation mirrors historical attempts of "the gag-rule" to stifle petitions.[187] Under the right to petition, the states cannot make laws that prohibit the "use [of] channels and procedures of state and federal agencies and courts to advocate their causes and points of view . . .."[188] Ag-gag legislation does exactly this. It stalls citizens' ability to use information and gather data in order to report concerns to government agencies.

CONCLUSION

Though the right to petition is often overlooked, it is a powerful tool for implementing change and allows citizens the ability to address injustices and voice concerns to the government. This right is perhaps so fundamental and engrained in the United States that it has been taken for granted. But each protection of the First Amendment serves a specific purpose while simultaneously working in harmony. Freedom of religion guarantees that the government shall not endorse religion, demand that citizens practice a certain religion, or prohibit the

[187] Krotoszynski & Carpenter, *supra* note 144, at 1304.
[188] Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972); *see* 15 U.S.C. § 15 (2012).

belief of a certain religion.[189] Freedom of the press allows the publication of opinions to reach audiences without censorship from the government. Freedom of assembly, or association, ensures that people have the ability to gather publicly or privately to discuss or advocate for change about matters important to them. Freedom of petition is the ability to communicate with the government itself. Finally, while freedom of speech is inevitably the common denominator between all of these rights by being the most basic component of individual expression—being free to say what you want without interference from the government––these other rights cannot be subsumed by speech. "The textual rhythm of [the] First Amendment [illustrates the cycle] of a democratic idea, moving from the [depth] of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains [a] valuable guide to the kind of democracy the Constitution guarantees."[190]

[189] The Supreme Court has placed some limits on the freedom to practice religion. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Reynolds v. United States, 98 U.S. 145, 166 (1878).

[190] Aaron H. Caplan, *Review Essay–The First Amendment's Forgotten Clauses*, 63 J. LEGAL EDUC. 532, 553 (2014) (quoting Amicus Brief of the ACLU and the Brennan Center for Justice at NYU School of Law in Support of Appellants at 20, Vieth v. Jubelier, 541 U.S. 267 (2004) (No. 02-1580) 2003 WL 22069782).

To reduce the other First Amendment rights to subsets of speech is to allow important degrees and distinctions amongst each right to slip into the shadows. The Framers had specific protections in mind for each of the First Amendment rights.[191] The right to petition has aided citizens in voicing concerns to the government and has been utilized to ignite social change. Therefore, it deserves independent force from the other First Amendment Rights. Courts should find that the right to petition calls for the government to facilitate meaningful access to government and strike ag-gag legislation down on both speech and petition grounds.[192]

It is essential for citizens to have the ability to exercise the right to petition in the wake of ag-gag legislation and data trespass statutes. Petitioning activity plays a vital role in safeguarding the environment and other public concerns. Ag-gag legislation and data trespass laws violate individuals' constitutional right to petition by restricting the manner in which an individual can report data or information and by limiting the type of data and information a citizen can present to the

[191] *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton); Norman B. Smith, *Shall Make No Law Abridging …: An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986).
[192] *See* Krotoszynski & Carpenter, *supra* note 144, at 1318.

government. Interfering with citizens' ability to communicate with the government presents a danger to the democratic process and effectively limits which citizens the government will hear. "The Petition Clause should play no less meaningful a role in helping to secure democratic deliberation than do the Speech, Press and Assembly Clauses . . .."[193]

The right to petition should be not be subsumed by freedom of speech, and it should be utilized to reinforce the protection citizens deserve from ag-gag legislation. Although circuit courts and district courts have correctly found that these types of laws violate freedom of speech, courts should take this a step further and address how citizens' right to petition is violated, too. Accordingly, the next district court or circuit court to address ag-gag legislation or data trespass statutes should hold that these laws violate the Petition Clause of the First Amendment. Citizens must retain the ability to gather data to guarantee safe agricultural practices, to fight human-induced environmental threats, and to sustain the diverse and incredible species with which we co-exist.

[193] *Id.*