Pigs in the Boardroom: A *Caremark* Claim Against Smithfield Foods

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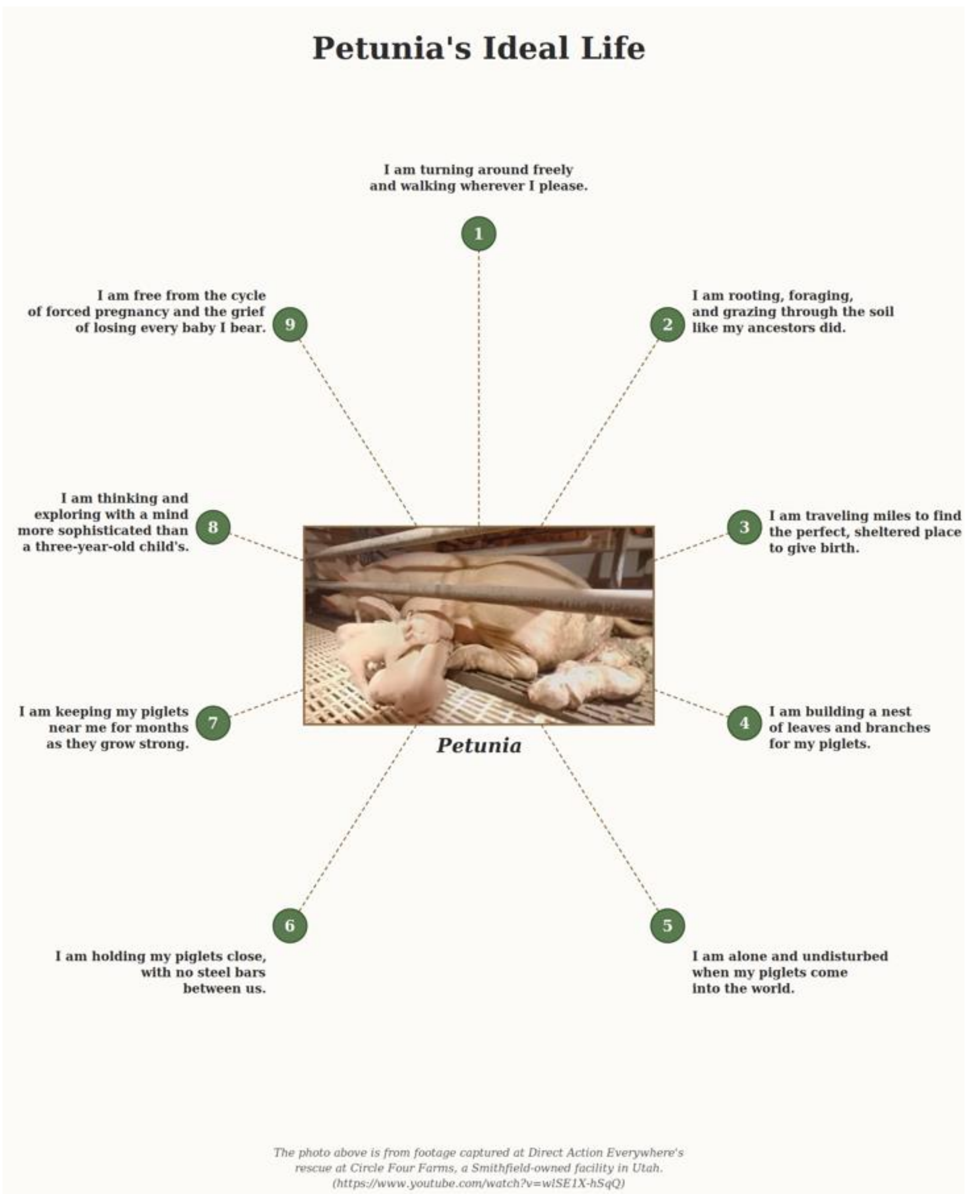
I. My Client, Petunia, a Smithfield Pig

A. Petunia's Ideal Life

Below is an example of a potential client, Petunia. She is a representation of the suffering countless pigs endure at facilities owned by Smithfield Foods and others like them. This diagram shows nine spokes of a life Petunia would lead if she were not property of Smithfield. This paper returns to spokes 1 and 6 later as conditions that could be materially improved for Petunia if the legal theory this paper proposes were to succeed.



B. Meet Petunia

Petunia is a pig living at a facility owned by Smithfield Foods in Waverly, Virginia, the site of a 2010 Humane Society of the United States (HSUS) investigation, exposing abuse of pregnant pigs like Petunia.[1] Like all livestock under American law, Petunia is property, specifically the property of Smithfield Foods, Inc., a Hong Kong-owned company based in Virginia and publicly traded on Nasdaq.[2] Petunia cannot be a plaintiff, but she does not need to be. This paper argues that Petunia's life can be improved through corporate law that treats her not as an entity with legal standing, but as a business risk to the company that owns her.

In the words of Cambridge University Professor Dr. Donald Broom, pigs, like Petunia, "have the cognitive ability to be quite sophisticated. Even more so than dogs and certainly [more so than] three-year olds."[3] In the wild, Petunia would spend more than half of her time foraging, rooting, and grazing, but she has access to none of these activities in her cage where she experiences boredom, frustration, and psychological trauma.[4] At Smithfield, Petunia only has access to her cage where she displays this trauma through bar-biting, an activity researchers describe as an "abnormal, repetitive behavior induced by repeated coping attempts, frustration, and/or brain dysfunction."[5] If she were pregnant outside of a factory farm, Petunia would walk several miles to find the perfect place to build a nest to give birth, and just like a human mother, she has the instinct to love, protect, and nurture her newborn babies who would spend the first

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[1] Associated Press, *Pigs Subject to Abuse at Virginia Factory Farm, Humane Society of the United States Says*, *L.A. Times* (Dec. 16, 2010), https://www.latimes.com/archives/blogs/la-unleashed/story/2010-12-16/pigs-subject-to-abuse-at-virginia-factory-farm-humane-society-of-the-united-states-says.
[2] *Smithfield Foods, Inc. Common Stock (SFD)*, Nasdaq, https://www.nasdaq.com/market-activity/stocks/sfd (last visited May 10, 2026).
[3] Marco Kaisth, *Eating Stupid Pigs*, *Philosophy Now*, Issue 119 (2017), https://philosophynow.org/issues/119/Eating_Stupid_Pigs.
[4] Humane Society of the United States, *An HSUS Report: The Welfare of Sows Used for Breeding in the Pig Industry*, https://www.humaneworld.org/sites/default/files/docs/hsus-report-welfare-breeding-sows-pig-industry.pdf (last visited May 10, 2026).
[5] *Id*.

few months of their lives with their mother nursing, playing, and foraging for food together.[6] However, at Smithfield, Petunia will always be separated from her piglets by the bars of her cage.

Petunia's pregnancy will last approximately 114 days.[7] Prior to a 2021 HSUS lawsuit, Smithfield publicly claimed that on its company-owned facilities, like the Waverly facility, it had eliminated "gestation crates and has transitioned pregnant pigs to group housing."[8] In reality, that was untrue and Smithfield still confined pigs in these cages for four to six weeks at the start of each pregnancy cycle before moving them to group housing, a fact the company disclosed when settling the HSUS lawsuit.[9]

The "gestation crates" referenced by Smithfield refer to cages two feet wide and seven feet long, a space too small for Petunia to turn around. The livestock industry uses language like "gestation" to refer to her pregnancy and "crate" to refer to her cage. This paper avoids the word gestation which deemphasizes the significance of pregnancy to Petunia. This paper also uses the word cage to more accurately describe what is a "stall with metal bars and a concrete floor,"[10] which is to say a barred cell.[11] Likewise, this paper avoids calling Petunia "pork," instead referring to her as a pig. One researcher on the philosophy of communication noted that "the use of [the term pork] disguises the fact that the body parts we purchase and consume are the

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[6] *Id*.
[7] HSUS Report, *Welfare of Sows Used for Breeding*, *supra* note 4.
[8] Jacqui Fatka, *HSUS Files Lawsuit Against Smithfield's Sow Housing Claims*, *Farm Progress* (Oct. 18, 2021), https://www.farmprogress.com/farm-operations/hsus-files-lawsuit-against-smithfield-s-sow-housing-claims.
[9] The Humane Society of the United States and Smithfield Foods Reach Resolution of Pig Welfare Litigation, Humane World for Animals (Jan. 28, 2025), https://www.humaneworld.org/en/news/humane-society-united-states-and-smithfield-foods-reach-resolution-pig-welfare-litigation.
[10] Humane Society Veterinary Medical Association, *HSVMA Veterinary Report on Gestation Crates*, 1 https://www.humanevma.org/assets/pdfs/hsvma_veterinary_report_gestation_crates.pdf (last visited May 10, 2026).
[11] *Cage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/cage (last visited May 10, 2026) (defining "cage" as "a barred cell for confining prisoners").

objectified remains of former subjects."[12] This claim has been backed up by empirical research showing that when a menu item is listed as a "pig" instead of as "pork" restaurant goers are significantly less likely to order it.[13]

When Petunia is ready to give birth, she will be moved to what her owners call a "farrowing crate," a separate cage where she will remain for both the birthing and nursing process.[14] In the wild, Petunia would have left her herd one to two days before giving birth to her piglets, seeking a private, sheltered place to build a nest with grass, sticks, and leaves.[15] Petunia would have been an attentive mother, responding to her piglets' cries, and defending her piglets if they are threatened.[16] Of course at Smithfield, none of this is possible. Petunia, who can weigh over 550 pounds when she gives birth,[17] will be confined to a metal cage of fourteen square feet.[18] Or to put it differently, an animal weighing over three times the average human[19] will spend her pregnancy and lactation periods in a cage less than the size of the average human coffin.[20] She will not be able to turn around, build a nest, or isolate herself. Instead, she expresses this innate desire by pawing the floor, nosing the bars of her cage, and scraping her snout on the concrete floor.[21]

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[12] Cathy B. Glenn, *Constructing Consumables and Consent: A Critical Analysis of Factory Farm Industry Discourse*, 28 *J. Commc'n Inquiry* 63, 69 (2004).
[13] Jonas R. Kunst & Sigrid M. Hohle, *Meat Eaters by Dissociation: How We Present, Prepare and Talk About Meat Increases Willingness to Eat Meat by Reducing Empathy and Disgust*, 105 *Appetite* 758, 763 (2016).
[14] HSUS Report, *Welfare of Sows Used for Breeding*, *supra* note 4.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *California Proposition 12, the Farm Animal Confinement Initiative FAQs About Pigs*, https://animalwelfare.ucdavis.edu/uploads/6/3/7/0/63703691/prop_12_faq_swine.pdf (last visited May 10, 2026).
[19] Sarah C. Walpole et al., *The Weight of Nations: An Estimation of Adult Human Biomass*, 12 BMC Pub. Health 439, 3 (2012) (reporting a global average adult body mass of 62 kg).
[20] *What Are the Dimensions of a Standard Funeral Casket in the U.S.?*, Overnight Caskets (Jan. 22, 2024), https://www.overnightcaskets.com/blog/what-are-the-dimensions-of-a-standard-funeral-casket-in-the-us.
[21] HSUS Report, *Welfare of Sows Used for Breeding*, *supra* note 4.

The bars of Petunia's cage also separate her from her piglets. Although piglets can reach through the bars to nurse, the farrowing cage is designed so that the piglets are separated from their mother when they are not nursing.[22] According to Dr. Sarah Ison of Compassion in World Farming, "seeing mother pigs in barren cages, attempting to build nests while surrounded by metal with no nesting material, is painful to watch. They have such intent in their eyes to prepare for birth, and their frustration and distress is plain to see. They get cuts and grazes on their faces attempting to nose and root through the steel bars."[23] Studies vary as to the age at which piglets are weaned in nature, with estimates ranging from as little as sixty days to as much as twenty-two weeks.[24] But, at Smithfield, Petunia will only spend a fraction of that time with her piglets as mothers are separated from their babies at approximately twenty-one days in factory farming operations.[25] After her piglets are taken away from her, Petunia will be impregnated again on average five days later,[26] with that cycle continuing for three to five years until she is slaughtered.[27]

C. Which of Petunia's Ideals Can This Legal Theory Help With?

The legal theory articulated in this paper will address Petunia's freedom of movement, and the conditions she lives in while giving birth and nursing: spokes 1 and 6 from Section I.A. Baselines for these are already required by European Union (E.U.) law which, relative to the conditions at Smithfield, mandates less time in isolation for pregnant pigs, increased access to

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[22] *Id*.
[23] World Animal Protection, *Mother Pigs Deserve Better* (May 10, 2018), https://www.worldanimalprotection.us/latest/blogs/mother-pigs-deserve-better.
[24] HSUS Report, *Welfare of Sows Used for Breeding*, *supra* note 4.
[25] Bianca F. Metallo et al., *The Effect of Weaning Age on Physiological, Behavioral, and Performance Indicators of Welfare in Weaned Piglets*, 301 Livestock Sci. 105816, 1 (2025).
[26] R. V. Knox et al., *An Analysis of Survey Data by Size of the Breeding Herd for the Reproductive Management Practices of North American Sow Farms*, 91 J. Animal Sci. 433, 439 (2013).
[27] MSPCA, *Farmed Animal Welfare: Pigs*, https://www.mspca.org/animal_protection/farm-animal-welfare-pigs (last visited May 10, 2026).

nesting material and longer time spent with her piglets.[28] More stringent requirements have already been adopted in other parts of Europe, including a total ban on the use of farrowing cages in Sweden, Switzerland, and Norway, with phaseouts being implemented in Austria, Germany, Finland, Denmark, and the United Kingdom.[29]

II. The Legal Landscape Governing Petunia

A. Federal Laws Fail Petunia

The Animal Welfare Act (AWA) provides some protections for animals used for research, animals in zoos and animals kept as pets, but it excludes from its definition of "animal" any farm animals used for food or breeding.[30] There have been failed Congressional attempts to amend the AWA to improve Petunia's living conditions with House Representative Veronica Escobar (D-TX) introducing the Pigs in Gestation Stalls Act in both 2022 and 2023, aimed at prohibiting housing that prevented pigs from being able to turn around and establishing minimum space requirements.[31] While the Humane Methods of Livestock Slaughter Act lists as its aims the prevention of "needless suffering," it applies only to slaughter and does not affect the treatment of an animal during its life.[32]

B. Anti-Cruelty Laws in Pig-Farming States Exempt Customary Farming Practices

Similar to its federal counterpart, anti-cruelty law in Virginia, where Smithfield and its Waverly facility are located, also systematically excludes animals like Petunia who live on these facilities. While § 3.2-6570 of the Virginia code provides that "any person who deprives any

[28] Council Directive 2008/120/EC, Official Journal of the European Union (L 47) 5, 7, 11.
[29] Free Farrowing, *Welfare Legislation*, https://www.freefarrowing.org/know-the-rules/welfare-legislation (last visited May 10, 2026).
[30] 7 U.S.C.A. §§ 2131, 2132 (West).
[31] H.R. 7004, 117th Cong. (2022); H.R. 2939, 118th Cong. (2023).
[32] 7 U.S.C.A. § 1901 (West).

animal of necessary food, drink, shelter, or emergency veterinary treatment" is guilty of a misdemeanor, it also exempts "farming activities."[33] Other states with a significant presence of factory pig farms have similarly weak laws. Anti-cruelty laws in North Carolina exempt "lawful activities conducted for purposes of production of livestock,"[34] and Iowa's state code criminalizes failing to provide care for livestock only when it is "inconsistent with customary animal husbandry practices."[35] Both federally and often at the state level, exemptions for "farming activities" and "customary practices" create a cycle where the pig industry defines actions and customs which become codified as legal, preventing the pig industry from ever violating the law.

C. State Laws That Protect Pigs

In 2016 Massachusetts passed Question 3 by fifty-five percentage points, prohibiting pigs from being held in spaces which prevented them from "lying down, standing up, fully extending its limbs, or turning around freely."[36] Similarly, in 2018, California passed Proposition 12 by twenty-five percentage points, banning the sale of pig products from facilities where pregnant pigs were confined to cages under twenty-four square feet in size or lacked the ability to turn around freely, lie down, stand up, or fully extend their limbs.[37] This was challenged by various industry organizations, but was upheld by the Supreme Court in 2023 in *National Pork Producers Council v. Ross*.[38]

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[33] Va. Code Ann. § 3.2-6570 (West).
[34] N.C. Gen. Stat. Ann. § 14-360.
[35] Iowa Code Ann. § 717.2 (West).
[36] Massachusetts Question 3, Minimum Size Requirements for Farm Animal Containment (2016), *Ballotpedia*, https://ballotpedia.org/Massachusetts_Question_3,_Minimum_Size_Requirements_for_Farm_Animal_Containment_(2016) (last visited May 10, 2026).
[37] California Proposition 12, Farm Animal Confinement Initiative (2018), *Ballotpedia*, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (last visited May 10, 2026).
[38] *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

Several other states have similar prohibitions. Nine other states, Arizona, Colorado, Florida, Maine, Michigan, New Jersey, Ohio, Oregon, and Rhode Island, have enacted bans on the use of these cages.[39] Together with the Massachusetts and California ballot initiatives, these laws reflect a clear consensus that the use of the most restrictive cages for pregnant pigs does not meet generally accepted animal welfare standards. This consensus has been consistently upheld in court. According to Wayne Pacelle, president of Animal Wellness Action and the Center for a Humane Economy, there have been twenty-three consecutive losses for factory farming interests in trying to overturn California's Proposition 12 and other laws similar to it.[40] The U.S. International Trade Commission (USITC) warned that if Proposition 12 were upheld in *National Pork Producers* and domestic producers ultimately failed to comply, trade flows could shift toward California increasing its imports from Canada or the EU, locations more likely to comply with the law's limits on housing pregnant pigs.[41]

D. Smithfield's Commitments and Failures Include Company-Owned and Contract Farms

Over the past two decades Smithfield has made many commitments to improving living conditions for pregnant pigs like Petunia, only to fail to do so. In 2007, it promised to ban the use of these restrictive cages within ten years, but only two years later in 2009, it backtracked citing

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[39] *See* Ariz. Rev. Stat. Ann. § 13-2910.07; Colo. Rev. Stat. Ann. § 35-50.5-102 (West); Fla. Const. art. X, § 21; Me. Rev. Stat. Ann. tit. 7, § 4020; Mich. Comp. Laws Ann. § 287.746 (West); N.J. Stat. Ann. § 4:22-16.1 (West); Ohio Admin. Code 901:12-8-02; Or. Rev. Stat. Ann. § 600.150 (West); 4 R.I. Gen. Laws Ann. § 4-1.1-3 (West).

[40] Wayne Pacelle, *Federal Judge Tosses Justice Department Attack on California Laws Forbidding Extreme Cage Confinement of Laying Hens*, Center for a Humane Economy (Mar. 20, 2026), https://centerforahumaneeconomy.org/judge-tosses-attack-on-laws-forbidding-cage-confinement-of-hens.

[41] Kim Ha, *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, U.S. International Trade Commission Executive Briefings on Trade (May 2023), https://www.usitc.gov/publications/332/executive_briefings/ebot_proposition_12_and_us_pork_industry.pdf.

"financial pressures within the company."[42] In 2010, an undercover investigation at the facility where Petunia currently lives showed no change to the cramped living conditions Smithfield had pledged to improve in 2007.[43] Then, in 2011, facing pressure from HSUS and the general public, Smithfield again announced it would phase out restrictive cages for pregnant pigs.[44] Yet, by 2013, less than 40% of pregnant pigs had been moved to group housing on Smithfield-owned facilities.[45] Then in 2018, Smithfield announced that it had fulfilled its commitment stating that it "maintain[s] group housing for all pregnant [pigs] on company-owned farms globally."[46] However, a 2021 HSUS lawsuit claimed that what Smithfield refers to as "group housing" is merely an interim period of less than half of a pig's pregnancy in which they are not confined to a cage.[47] After four years of litigation, Smithfield acknowledged as much in settling the lawsuit, admitting it "continued [the] use of gestation crates at the beginning of [pig] breeding cycles."[48] Effectively, these HSUS investigations are serving as oversight mechanisms at Smithfield farms, where none currently exist. Through the legal pathways described in this paper, Smithfield can be forced to enact meaningful oversight of its facilities and implement a system for employees to report noncompliance and animal abuse.

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[42] Smithfield Foods, *Smithfield Announces Gestation Stall Phase-Out*, National Hog Farmer (Dec. 9, 2011), https://www.nationalhogfarmer.com/hog-welfare/smithfield-announces-gestation-stall-phase-out.
[43] *Id*.
[44] Brett LoGiurato*, McDonald's Pork Supplier Smithfield Farms Reaffirms Commitment to Phase Out Gestation Crates*, *International Business Times* (Dec. 8, 2011), https://www.ibtimes.com/mcdonalds-pork-supplier-smithfield-farms-reaffirms-commitment-phase-out-gestation-crates-380834.
[45] Humane Society of the United States, *An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows*, https://www.humaneworld.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf (last visited May 10, 2026).
[46] The Humane Society of the United States Sues World's Largest Pork Producer for Misleading Consumers, *PR Newswire* (Oct. 18, 2021), https://www.prnewswire.com/news-releases/the-humane-society-of-the-united-states-sues-worlds-largest-pork-producer-for-misleading-consumers-301401780.html.
[47] *Id*.
[48] *Resolution of Pig Welfare Litigation*, *supra* note 9.

The commitments Smithfield has made with regard to its more than 1,900 contract facilities[49] are even weaker than those it has made for its own operations. In 2014 Smithfield announced that it was "recommending" by 2022 its contract facilities change their policies on caging pigs during their pregnancies offering a "sliding scale of incentives" for contractors who did so.[50] Yet, that 2022 deadline came and went without any press release or public report on contractor compliance. In terms of compliance and oversight, the opposite seems to be true. In the two weeks before filing its S-1 form with the SEC in connection with going public, Smithfield sold 28,000 pigs to one of its contract facilities and 150,000 pigs to another.[51] The plan seems clear: not only are the protections on company-owned facilities more limited than what Smithfield initially claimed, the percentage of pigs covered by even those limited protections is shrinking.

E. Litigation Against Smithfield

The lawsuit mentioned in the previous section brought against Smithfield by HSUS survived a motion to dismiss in 2022 with the court finding that statements made by Smithfield could mislead a reasonable consumer to believe that they no longer use individual crates during the breeding process which it admittedly still does.[52] Although it never admitted liability directly in the case, Smithfield settled with HSUS in 2025 and changed some of its marketing materials as part of the settlement.[53]

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[49] Smithfield Foods, Inc., *Registration Statement (Form S-1)*, at 131 (Jan. 6, 2025), https://www.sec.gov/Archives/edgar/data/91388/000162828025000470/smithfieldfoods-sx1.htm.
[50] Smithfield Foods Recommends Its Contract Growers Convert to Group Housing for Pregnant Sows, *GlobeNewswire* (Jan. 7, 2014), https://www.globenewswire.com/news-release/2014/01/07/600779/10063123/en/Smithfield-Foods-Recommends-Its-Contract-Growers-Convert-to-Group-Housing-for-Pregnant-Sows.htm.
[51] Registration Statement, *supra* note 49, at 76.
[52] *The Humane Society of the United States v. Smithfield Foods, Inc*., No. 2021 CA 003777 B, slip op. at 9 (D.C. Super. Ct. Oct. 24, 2022).
[53] *Resolution of Pig Welfare Litigation*, *supra* note 9.

These misrepresentations continue today. As of July 2026, Smithfield still includes marketing material on its website that is measurable and discernible and at a minimum, inconsistent with itself. First, it still claims that “today, all Smithfield company-owned facilities employ group-housing systems.”[54] This same source also goes on to claim that "[pigs] stay in individual stalls for 35-42 days after they are bred"; that "group pens on Smithfield's company-owned facilities allow 19-24 sq. ft. per [pig]"; and that "Smithfield limits the time [pigs] spend in individual stalls to breeding purposes only."[55] The claim that “today, all Smithfield company-owned farms employ group-housing systems” as an opening statement with caveats buried later on in the document is materially misleading to a reasonable consumer or investor who reads the statement “all farms employ group housing” and thinks that pregnant pigs actually live in group housing, not in “individual stalls for 35-42 days after they are bred.” These ongoing misrepresentations are not just a consumer protection problem for Smithfield, they are also the kind of measurable claims that, made by a newly public company, expose Smithfield to the corporate liability discussed later in the following section.

F. Petunia’s Corporate-Law Connection

In January 2025, Smithfield became a publicly traded company listed on the Nasdaq stock exchange.[56] This matters for Petunia. Before its IPO, Smithfield was the wholly owned subsidiary of Hong Kong-based WH Group,[57] and the legal pathways for advocating for Petunia and others like her were largely limited to consumer protection claims and changes in state law as discussed in previous sections. After its IPO, Smithfield and its board of directors became

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[54] Smithfield Foods, Inc, *Group-Housed Pork FAQ* (July 2024), https://assets-us-01.kc-usercontent.com/2d80ba31-2f39-008c-c58b-646f56b50e5e/2d8f690b-7235-4438-b90f-074b8a797c4a/Group-housed%20pork%20FAQ%20July%202024.pdf (last visited May 10, 2026).
[55] *Id*.
[56] Registration Statement, *supra* note 49.
[57] *Id*.

subject to public-company corporate law. The universe of potential plaintiffs is now expanded to include shareholders who can seek a derivative action. As described in greater detail in Section III, this may be the most promising pathway for forcing change at Smithfield and improving Petunia's life. This section lays out the framework for these pathways.

There are three important pieces of this framework. First, since Smithfield is incorporated in Virginia, the internal affairs doctrine, which states that "only one State should have the authority to regulate a corporation's internal affairs,"[58] along with generally accepted principles of corporate law, require that questions about the duties Smithfield's directors owe to the company and its shareholders be governed by Virginia corporate law.[59] Second, the Virginia Stock Corporation Act (VSCA) is the primary source of Virginia corporate law and it explicitly requires a director to "discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation."[60] However, no language in the VSCA, nor any Virginia Supreme Court decision interpreting it, has detailed what this standard requires as it relates to oversight of critical compliance risks. The most extensively developed body of authority on that question is Delaware's, where the Court of Chancery held in *In re Caremark Intern. Inc. Derivative Litigation*, that "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."[61] Section III further develops this idea as it relates to Smithfield's board. Since both Virginia statutory and common

58 *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).
59 *See* Restatement (Second) of Conflict of Laws § 302 (1971) (issues involving the rights and duties of a corporation and its shareholders, officers, and directors are determined by the local law of the state of incorporation).
60 Va. Code Ann. § 13.1-690(A) (West).
61 In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

law are silent on the issue of overseeing critical compliance risks, applying this legal theory relies on a Virginia court finding Delaware's reasoning persuasive. This reliance is not a given and is discussed further in Section III.C.1. Third, the VSCA imposes the requirement that no shareholder may commence a derivative proceeding until a written demand has been made on the corporation to take suitable action and either ninety days have passed or the corporation has rejected the demand.[62]

Section III explains how this looks in practice. Essentially, this requirement means a shareholder must send a written demand letter to Smithfield's board laying out the risks associated with the continued use of pregnancy cages and demanding the board correct this. If the board agrees to the changes in the demand letter, Petunia's life immediately improves. If, as expected, the board rejects these demands or fails to act within ninety days, the shareholder may then file a derivative action:[63] a proceeding brought on behalf of the corporation stating a claim on behalf of the corporation, which the directors have refused to pursue.[64] In a derivative action, the shareholder's complaint must "allege with particularity facts establishing that the requirements of subsection A or B [of VSCA § 13.1-672.4] have not been met."[65] These subsections require the plaintiff to contest the disinterestedness of the directors who made the determination, the adequacy of their review, or the good faith of their decision that the demands are not in the corporation's best interests.[66]

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[62] Va. Code Ann. § 13.1-672.1(B) (West).
[63] *Id*.
[64] *Simmons v. Miller*, 261 Va. 561, 573 (2001).
[65] Va. Code Ann. § 13.1-672.4(C) (West).
[66] Va. Code Ann. § 13.1-672.4(A) – (B) (West).

III. Improving Petunia's Life Through Corporate Law

A. The Proposed Reform: Housing Standards Similar to the European Union

This paper only proposes that Smithfield meet the standard already required of those raising pigs in the E.U. Since 2008, the E.U. has recognized that "[pigs] prefer to have social interactions with other pigs when provided with freedom of movement and environmental complexity" and thus "keeping [pigs] in continuous close confinement should therefore be prohibited."[67] Additionally, they require that pigs be in groups "during a period starting from four weeks after [breeding] to one week before the expected time of farrowing."[68] Under E.U. law, using pregnancy cages is treated as an exception at the beginning and ending of a pig's pregnancy, while at Smithfield, it is the status quo Petunia must return to with every breeding cycle, for a period seven to fourteen days longer than the E.U. allows.[69]

These reforms directly address spoke 1 (ability to turn and walk) and spoke 6 (nursing her piglets without bars separating them) related to Petunia's ideal life illustrated in Section I.A. These reforms also align with the commitments Smithfield already makes like the statement that "company-owned farms employ group housing systems."[70] These reforms are realistic next steps for Smithfield. Eleven states already require at least as much.[71] Purchasers of Smithfield's products, like McDonald's, have publicly supported ending the use of pregnancy cages.[72] Even the USITC has warned that failing to enact these reforms could result in buyers shifting away from Smithfield to producers in Canada and the E.U.[73]

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[67] Council Directive 2008/120/EC, *supra* note 28, at 5.
[68] *Id*. at 7.
[69] *Smithfield FAQ*, *supra* note 54.
[70] *Id*.
[71] *See* state laws cited *supra* note 39; Ballotpedia, *supra* note 36; Ballotpedia, *supra* note 37.
[72] LoGiurato, *supra* note 44.
[73] Ha, *supra* note 41.

B. Primary Legal Theory: A *Caremark* Derivative Claim

Although Virginia has not directly adopted Delaware's *Caremark* doctrine outlined in this section, the analysis below relies on a Virginia court recognizing the VSCA's silence on a board's duty related to oversight and thus finding *Caremark*'s reasoning persuasive. This paper addresses that assumption and the obstacles associated with it more fully in Section III.C.1.

1. *Caremark*: The Duty of Oversight

In *In re Caremark Intern. Inc. Derivative Litigation*, the court recognized the duty of directors to oversee corporate compliance, holding that a "director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system…exists."[74] The threshold for liability is "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—[that] will establish the lack of good faith that is a necessary condition to liability."[75]

2. *Stone*: The Two-Prong Test

Next, *Stone ex rel. AmSouth Bancorporation v. Ritter* formally adopted *Caremark* as Delaware Supreme Court doctrine and established the standard of oversight liability as the duty of loyalty, holding "it follows that because a showing of bad faith conduct in the sense described in…Caremark, is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty."[76] The court created a disjunctive two-prong test for oversight liability holding that a director may be liable where "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from

[74] *Caremark*, 698 A.2d at 970.
[75] *Id*. at 971.
[76] *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

being informed of risks or problems requiring their attention."[77] This is important because Smithfield's charter protects its directors from monetary damages "to the full extent permitted by the [Virginia Stock Corporation] Act."[78] However, this Act explicitly does not allow for "the liability of …[a] director [to] be limited as provided in this section if the…director engaged in willful misconduct."[79] A director who consciously disregards known fiduciary duties, which is what *Stone* requires for *Caremark* liability, falls squarely within this willful misconduct exception. Thus, *Stone* establishes the framework for a derivative claim against Smithfield's directors, despite the protections provided in Smithfield's charter.

3. *Marchand*: Single-Product Companies and the Insufficiency of Regulatory Compliance

Then, in *Marchand v. Barnhill* the Delaware Supreme Court applied the *Caremark* framework to reverse a lower court's dismissal of a derivative claim, providing a clear roadmap for a claim against a single-product company.[80] The court held, "[a]s a monoline company that makes a single product—ice cream—Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat. That is, one of Blue Bell's central compliance issues is food safety."[81] Pig products are Smithfield's only product and humane treatment of pigs is critical to consumers' confidence in continuing to buy this product. Most importantly, the court specifically mentioned a defense made by Blue Bell, one Smithfield also would likely raise against a *Caremark* claim, namely that it was in fact complying with federal regulations. The court in *Marchand* held this type of compliance to be insufficient stating, "the

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[77] *Id*.
[78] Smithfield Foods, Inc., *Amended and Restated Articles of Incorporation of Smithfield Foods,* Article V(B) (Jan. 28, 2025), https://www.sec.gov/Archives/edgar/data/91388/000162828025002996/exhibit31-8xk.htm.
[79] Va. Code Ann. § 13.1-692.1(B) (West).
[80] *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).
[81] *Id*. at 809.

fact that Blue Bell nominally complied with FDA regulations does not imply that the board implemented a system to monitor food safety at the board level."[82] While Smithfield could point to USDA inspections and internal audits, *Marchand* establishes that this is insufficient without board-level oversight. The court held that the complaint sufficiently stated a *Stone* prong one violation, finding that "Blue Bell's board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments."[83]

Collectively these three cases establish that a board's failure to implement oversight of a critical compliance risk breaches the duty of loyalty even when a charter includes certain statutory carveouts. The rest of this section argues that Smithfield's board has failed its shareholders in exactly this way.

4. *Clovis*: Directors' Failures to See Red Flags

Since *Marchand* was decided, the Delaware Court of Chancery has applied its test with facts similar to the situation at Smithfield. In *In re Clovis Oncology, Inc. Derivative Litigation*, the court held that shareholders adequately pleaded that members of the company's board of directors breached their fiduciary duties when they "ignored red flags that Clovis was not adhering to the clinical trial protocols, thereby placing FDA approval of the drug in jeopardy."[84] The court emphasized that the *Marchand* duty is heightened when "a monoline company operates in a highly regulated industry."[85] Smithfield is exactly this kind of company. Pig products are its only product line, and its production is highly regulated at both the state and

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[82] *Id*. at 823.
[83] *Id*. at 809.
[84] *In re Clovis Oncology, Inc. Derivative Litig*., No. CV 2017-0222-JRS, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019).
[85] *Id*.

federal levels. In finding plaintiffs had sufficiently pleaded their claim, the court repeatedly noted the board's conscious ignorance of "red flags."[86] Just as the court found Clovis's board had failed to monitor red flags surrounding its clinical trials of a drug critical to the company's success, so too has Smithfield ignored red flags, including the 2010 HSUS investigation at the Waverly facility,[87] the 2013 failure to meet its group housing target,[88] and the discrepancy between its public statements on group housing and its actual practice, which drove the 2021 HSUS lawsuit.[89]

In the same way the court in *Clovis* found that the board "allowed the Company to deceive regulators and the market regarding the drug's efficacy,"[90] Smithfield's board also deceived the public about the treatment of pregnant pigs on its facilities. If a *Caremark* claim survived dismissal in *Clovis* on the strength of ignored internal red flags alone, it should survive here, where Smithfield's board has ignored both the internal red flags discussed above and the external signals of a shifting legal landscape where states are increasingly implementing bans on pregnancy cages either through the ballot box or the state house, with eleven having done so already. The public learned of many of these red flags through external investigations, particularly those conducted by HSUS, not through internal Smithfield oversight. This is exactly the type of disregard described in the first prong of the *Stone* test: "the directors utterly failed to implement any reporting or information system or controls."[91] The creation of a whistleblower system described in Section III.B.5 directly remedies this.

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[86] *Id*.
[87] Associated Press, *supra* note 1.
[88] Welfare Issues with Gestation Crates for Pregnant Sows, *supra* note 45.
[89] *Resolution of Pig Welfare Litigation*, *supra* note 9.
[90] *Clovis Oncology*, 2019 WL 4850188, at *1.
[91] *Stone*, 911 A.2d at 370.

5. *Boeing*: Applying the Prongs of *Stone* and a Model for Settlement

Two years later, in *In re Boeing Company Derivative Litigation*, the court again applied the same *Caremark* framework to the board of a single-product manufacturer, holding that plaintiffs adequately pleaded a case against Boeing's board of directors after two Boeing 737 MAX crashes. The court held the board's liability "may be based on the directors' complete failure to establish a reporting system for airplane safety, or on their turning a blind eye to a red flag representing airplane safety problems."[92] This approach deals with both prongs of *Stone*'s test: the absence of an oversight system and ignoring a known risk. This also helps set up a framework for evaluating Smithfield's board, which also fails both prongs of the test. This case ultimately settled out of court with Boeing agreeing to pay $237.5 million to shareholders and to implement reforms to its corporate governance, such as expanding its board of directors to include a member with safety experience and creating a program for employees to raise safety concerns.[93]

Boeing is the model for what a *Caremark* claim against Smithfield could realistically achieve. This paper does not argue that Smithfield's board will someday be held personally liable at trial. *Caremark* cases almost always settle before reaching the merits stage. Rather, it argues that a *Caremark* claim against Smithfield could survive a motion to dismiss, creating the same settlement leverage that produced the governance reforms in *Boeing*. What could that look like for Petunia? Smithfield could adopt the EU standards discussed in Section III.A and implement a board-level animal welfare committee. It could also create a confidential whistleblower system for employees to report animal abuse or other examples of noncompliance directly to the board.

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[92] *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *1 (Del. Ch. Sept. 7, 2021).
[93] David Shepardson, *Boeing Directors Agree to $237.5 Million Settlement Over MAX Safety Oversight, Reuters* (Nov. 5, 2021), https://www.reuters.com/legal/transactional/boeing-directors-agree-2375-million-settlement-over-max-safety-oversight-2021-11-05.

This remedy is analogous to the program Boeing created for employees to raise safety concerns and specifically remedies the *Stone* prong-one failure described in Section III.B.4. A whistleblower program could surface the types of abuses HSUS investigators have been finding over the past two decades more quickly. This type of settlement would not free Petunia from a life of suffering, but it would make her life immediately better by forcing Smithfield to implement meaningful reform, to acknowledge the welfare of its animals at the board level, and to allow employees to report abuse when they see it.

C. Obstacles and How to Address Them

1. *Caremark* is Not Binding in Virginia

As mentioned at the beginning of Section III.B, Virginia has not directly adopted the *Caremark* doctrine. The VSCA merely creates the requirement of "good faith business judgment,"[94] and to date, no Virginia Supreme Court decision has read into this the requirement of board-level monitoring of critical compliance risks. This entire legal theory relies on a Virginia court looking to the Delaware decisions discussed in Section III.B and finding them persuasive. While this may at first seem like a stretch, according to the U.S. District Court for the Eastern District of Virginia it is, in fact, "not uncommon."[95]

The Eastern District in *Pagliara v. Federal Home Loan Mortgage Corporation* held that where courts have been required to interpret Virginia corporate law, they have historically looked for guidance from other courts, "especially Delaware corporate law."[96] The court goes on to give examples of Virginia courts "looking to Delaware for guidance on stockholder derivative litigation," and "finding a 'great persuasive authority' in Delaware cases discussing standing to

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[94] Va. Code Ann. § 13.1-690(A) (West).
[95] *Pagliara v. Fed. Home Loan Mortg. Corp.*, 203 F. Supp. 3d 678, 692 n.18 (E.D. Va. 2016).
[96] *Id*.

bring a derivative lawsuit."[97] The *Pagliara* court itself in deciding how to interpret the VSCA turned to Delaware for guidance in interpreting the VSCA statute described in Section III.C.2. When the defendant moved to dismiss under the theory that the plaintiff demanded inspection of corporate records with an improper purpose, the court found Virginia case law to be underdeveloped and turned to Delaware.[98] The VSCA and *Caremark* standards fit well together, and thus expecting a Virginia court to turn to *Caremark* or *Stone* for guidance in interpreting the VSCA is not unreasonable. Where VSCA § 13.1-690 makes several references to the requirement of "good faith," so too does the court in *Caremark* finding "lack of good faith…is a necessary condition to liability."[99] Where VSCA § 13.1-692.1 preserves liability for a "director engaged in willful misconduct,"[100] a court could very well find *Stone* illustrative where it states that "directors [who] fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities…breach their duty of loyalty."[101]

It is important to acknowledge that as persuasive as Delaware corporate law may be, no Virginia court is bound by it. Smithfield will likely argue for a different interpretation of the VSCA. Still, the strength of the underlying facts: a monoline company in a highly-regulated industry, repeated broken commitments, and no apparent board-level oversight, gives a Virginia court a strong reason to find the holdings of Delaware courts persuasive.

2. A Most Difficult Theory

As the court in *Caremark* noted, this legal theory is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." [102] But, as discussed in

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[97] *Id.*
[98] *Id.* at 689.
[99] *Caremark*, 698 A.2d at 971.
[100] Va. Code Ann. § 13.1-692.1(B) (West).
[101] *Stone*, 911 A.2d at 370.
[102] *Caremark*, 698 A.2d at 967.

Section III.B, *Marchand* and several cases since demonstrate that a well-pleaded case can survive a motion to dismiss when (1) a risk is mission critical and (2) there is no board-level monitoring system of that risk. To overcome this high bar, a potential plaintiff should be prepared to develop a strong set of facts before filing. VSCA § 13.1-771(C)(1) states that eligible shareholders may inspect and copy "excerpts from minutes of any meeting of, or records of any actions taken without a meeting by, the board of directors."[103] This statute goes on to state that any "shareholder for at least six months immediately preceding delivery of the shareholder's demand" is eligible to request this inspection.[104] This inspection would clearly show whether or not Smithfield currently has any sort of animal welfare oversight system in place. If the inspection shows no such system, then the first prong of the *Stone* test, that "the directors utterly failed to implement any reporting or information system or controls,"[105] is satisfied. As in *Marchand* where the court in denying defendant's motion to dismiss held that the "board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments,"[106] the plaintiffs building a case against Smithfield could request records of these three items per § 13.1-771(C)(1). So, although applying this legal theory may be "most difficult," the courts have provided a playbook in *Stone* and *Marchand* for how to do so.

3. Business Judgment Rule Defense

Smithfield will likely raise the business judgment rule as a defense. Under Virginia law, the business judgment rule states that a "corporate director ordinarily has no individual liability for business decisions made in accordance with his good faith judgment of the best interests of

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[103] Va. Code Ann. § 13.1-771(C)(1) (West).
[104] Va. Code Ann. § 13.1-771(D)(1) (West).
[105] *Stone*, 911 A.2d at 370.
[106] *Marchand*, 212 A.3d at 809.

the corporation, [and] the decision itself is also entitled to the same presumption."[107] Applied to a *Caremark* claim, this would seem to absolve Smithfield's board from any liability provided they made business decisions in good faith. While the business judgment rule protects business decisions made in good faith, it says nothing about the failure to make decisions or the failure to maintain a reporting system to inform decisions in the first place. The court in *Stone* made this point clear, holding director liability exists if directors "consciously failed to monitor or oversee" company operations or "fail[ed] to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities."[108] This type of conduct is not the type of business judgment protected by Virginia law, it is the absence of business judgment altogether.

Even if the business judgment rule were available as a defense, its "good faith" requirement would not survive the fact pattern discussed in Section II.D. This pattern of public commitments and subsequent noncompliance from 2007 to 2018 is not the record of a good faith business judgment. It is the record of a board that was either not making animal welfare decisions at all or was making them and failing to monitor that they were honored. The same can be said about the board's disregard of a shifting legal landscape where eleven states have enacted bans on the use of cages during a pig's pregnancy,[109] and the USITC warning that continued use of these cages could result in customers sourcing products abroad.[110] Thus, this derivative claim would argue that a board failing to respond to such a clearly shifted legal landscape is not exercising the kind of "good faith" business decisions protected by this rule.

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[107] *Lake Monticello Owners' Ass'n v. Lake*, 250 Va. 565, 571 (1995).
[108] *Stone*, 911 A.2d at 370.
[109] *See* state laws cited *supra* note 39; Ballotpedia, *supra* note 36; Ballotpedia, *supra* note 37.
[110] Ha, *supra* note 41.

4. Industry-Wide Practice Defense

Smithfield will also likely raise the defense that its conduct of continuing to use cages during a pig's pregnancy is consistent with industry standards, and it should not be held liable for failing to exceed industry norms. This argument makes the board's inaction seem like standard industry practice and casts the derivative claim as a critique of animal welfare practices of the country rather than specific negligence on the part of Smithfield's board. Yet, industry practice is not a shield to a *Caremark* claim. In fact, *Marchand* rejects this line of defense, stating that compliance with applicable standards is not a substitute for board-level oversight. "At best, Blue Bell's compliance with [FDA] requirements shows only that management was following, in a nominal way, certain standard requirements of state and federal law. It does not rationally suggest that the board implemented a reporting system to monitor food safety or Blue Bell's operational performance."[111] The same holds true for compliance with industry norms. The derivative action is not about whether Smithfield's practices are in line with the industry, it is about whether Smithfield's board is adequately monitoring critical compliance risks. This has nothing to do with industry practice, and even if it did, Smithfield has already publicly committed to exceeding industry practice by announcing it would end the use of cages during a pig's pregnancy in 2007, 2011, 2014, and 2018.[112] To back off of these commitments now and merely follow industry practice would be a business risk unto itself.

IV. Conclusion

Corporate law, not animal welfare law, may offer the most realistic pathway to improving the lives of pregnant pigs like Petunia at Smithfield's facilities. By going public in 2025,

[111] *Marchand*, 212 A.3d at 823.
[112] PR Newswire, *supra* note 46.

Smithfield exposed itself to a *Caremark* derivative action, a claim that does not require Petunia to have legal standing but rather treats her as a mission-critical compliance risk to the corporation that owns her.

A *Caremark* derivative action should not be expected to ever be decided on its merits. Rather, merely surviving a motion to dismiss creates settlement leverage for enacting welfare reforms. The *Boeing* case serves as a model for what this could look like. Similar to how Boeing agreed to reforms to its corporate oversight, so too could Smithfield agree to make meaningful animal welfare reforms as discussed in Section III.B.5. These changes would address spokes 1 and 6 from Petunia's ideal life illustrated in Section I.A by increasing freedom of movement, giving her access to group housing, and longer time with her piglets.

A successful *Caremark* claim will be a lengthy process. Inspecting Smithfield's records, filing a demand letter, waiting for demand refusal, filing a complaint, surviving a motion to dismiss, negotiating a settlement, and ultimately implementing that settlement will take several years. Petunia's pregnancy lasts 114 days. She is impregnated again less than a week after weaning. This cycle repeats until her slaughter three to five years into her life. By the time any of these reforms are enacted at her Waverly facility or elsewhere, Petunia will be gone. This paper does not pretend otherwise. However, this novel legal theory provides a very real pathway for improving the lives of the next Petunia and the one after her and the one after her. This paper's author believes so strongly in this theory that upon finishing it, he purchased a single share of Smithfield stock. He would be proud to someday pursue this legal pathway on behalf of the current Petunia and those yet to come.