

Is There a Constitutional Way To Protect Animal Ag Facilities?

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Overview

In response to attempts by activist groups opposed to animal agriculture, legislatures in several states over the last 30 years have enacted laws designed to protect specified livestock facilities from certain types of interference. Some of the laws have been challenged on free speech and equal protection grounds with a few courts issuing opinions that have largely found the laws constitutionally suspect. Most recently, the statutes in Iowa and Kansas were construed by two different U.S. Circuit Courts of Appeals.

Recent court developments involving legislative attempts to protect confinement animal agriculture – it's the topic of today's article.

General Statutory Construct

The basic idea of state legislatures that have attempted to provide a level of protection to livestock facilities is to bar access to an animal production facility under false pretenses. At their core, the laws attempt to prohibit a person having the intent to harm a livestock production facility from gaining access to the facility (such as via employment) to then commit illegal acts on the premises. See, e.g., *Iowa Code §717A.3A*. Laws that bar lying and trespass coupled with the intent to do physical harm to an animal production facility likely are not constitutionally deficient. Laws that go beyond those confines may be.

Recent Court Opinions

2017 developments. 2017 saw several courts issue opinions on various state provisions. In North Carolina, a challenge to the North Carolina statutory provision was dismissed for lack of standing. *People for the Ethical Treatment of Animals v. Stein*, 259 F. Supp. 3d 369 (M.D. N.C. 2017). The plaintiffs, numerous animal rights activist groups, brought a pre-enforcement challenge to the North Carolina Property Protection Act. They claimed that the law unconstitutionally stifled their ability to investigate North Carolina employers for illegal or unethical conduct and restricted the flow of information those investigations provide. As noted, the court dismissed the case for lack of standing. On appeal, however, the appellate court reversed. *PETA, Inc. v. Stein*, 737 Fed. Appx. 122 (4th Cir. 2018). The appellate court determined that the plaintiffs had standing to challenge the law through its "chilling effect" on their First Amendment rights to investigate and publicize actions on private property. They also alleged a reasonable fear that the law would be enforced against them.

The Utah law, however, was deemed unconstitutional. *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017). At issue was Utah Code §76-6-112 which criminalizes the entering of a private agricultural livestock facility under false pretenses or via trespass to photograph, audiotape or videotape practices inside the facility. While the state claimed that lying, which the statute regulates, is not protected free speech, the court determined that only lying that causes "legally cognizable harm" falls outside First Amendment protection. The state also argued that the act of recording is not speech that is protected by the First Amendment. However, the court determined that the act of recording is protectable First Amendment speech. The court also concluded that the fact that the speech occurred on a private agricultural facility did not render it outside First Amendment protection. The court determined that both the lying and the recording



provisions of the Act were content-based provisions subject to strict scrutiny. To survive strict scrutiny the state had to demonstrate that the restriction furthered a compelling state interest. The court determined that “the state has provided no evidence that animal and employee safety were the actual reasons for enacting the Act, nor that animal and employee safety are endangered by those targeted by the Act, nor that the Act would actually do anything to remedy those dangers to the extent that they exist.” For those reasons, the court determined that the Act was unconstitutional.

A Wyoming law experienced a similar fate. *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), *rev'g.*, 196 F. Supp. 3d 1231 (D. Wyo. 2016). In 2015, two new Wyoming laws went into effect that imposed civil and criminal liability upon any person who “[c]rosses private land to access adjacent or proximate land where he collects resource data.” Wyo. Stat. §§6-3-414(c); 40-27-101(c). The appellate court, reversing the trial court, determined that because of the broad definitions provided in the statutes, the phrase “collects resource data” included numerous activities on public lands (such as writing notes on habitat conditions, photographing wildlife, or taking water samples), so long as an individual also records the location from which the data was collected. Accordingly, the court held that the statutes regulated protected speech in spite of the fact that they also governed access to private property. While trespassing is not protected by the First Amendment, the court determined that the statutes targeted the “creation” of speech by penalizing the collection of resource data.

Ninth Circuit. In early 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit issued a detailed opinion involving the Idaho statutory provision. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The Ninth Circuit’s opinion provides a roadmap for state lawmakers to follow to provide at least a minimal level of protection to animal production facilities from those that would intend to do them economic harm. According to the Ninth Circuit, state legislation can bar entry to a facility by force, threat or trespass. Likewise, the acquisition of economic data by misrepresentation can be prohibited. Similarly, criminalizing the obtaining of employment by false pretenses coupled with the intent to cause harm to the animal production facility is not constitutionally deficient. However, provisions that criminalize audiovisual recordings are suspect.

Eighth Circuit. In 2021, the U.S. Court of Appeals for the Eighth Circuit construed the Iowa law and upheld the portion of it providing for criminal penalties for gaining access to a covered facility by false pretenses. *Animal Legal Defense Fund v. Reynolds*, No. 19-1364, 2021 U.S. App. LEXIS 23643 (8th Cir. Aug. 10, 2021). This is the first time that any federal circuit court of appeals has upheld a provision that makes illegal the gaining of access to a covered facility by lying.

Conversely, the court held that the employment provision of the law (knowingly making a false statement to obtain employment) violated the First Amendment because the law was not limited to false claims that were made to gain an offer of employment. Instead, the provision provided for prosecution of persons who made false statements that were incapable of influencing an offer of employment. A prohibition on immaterial falsehoods was not necessary to protect the State’s interest – such as false exaggerations made to impress the job interviewer. The court determined that barring only false statements that were material to a hiring decision was a less restrictive means to achieve the State’s interest.

Note. The day before the Eighth Circuit issued its opinion concerning the Iowa law, it determined that plaintiffs challenging a comparable Arkansas law had standing to bring the case. *Animal Legal Defense Fund v. Vaught*, No. 20-1538, 2021 U.S. App. LEXIS 23502 (8th Cir. Aug. 9, 2021).

Tenth Circuit. In *Animal Legal Defense Fund, et al. v. Kelly*, No. 20-3082, 2021 U.S. App. LEXIS 24817 (10th Cir. Aug. 19, 2021), the court construed the Kansas provision that makes it a crime to take pictures or record videos at a covered facility “without the effective consent of the owner and with the intent to damage the enterprise.” The plaintiffs claimed that the law violated their First Amendment free speech rights. The State claimed that what was being barred was conduct rather than speech and that, therefore, the First



Amendment didn't apply. But, the court tied conduct together with speech to find a constitutional violation – it was necessary to lie to gain access to a covered facility and consent to film activities. As such, the law regulated protected speech (lying with intent to cause harm to a business) and was unconstitutional. The court determined that the State failed to prove that the law narrowly tailored to a compelling state interest in suppressing the “speech” involved. The dissent pointed out (correctly and consistently with the Eighth Circuit) that “lies uttered to obtain consent to enter the premises of an agricultural facility are not protected speech.” The First Amendment does not protect a fraudulently obtained consent to enter someone else's property.

Conclusion

There presently is a split between the Eighth and Tenth Circuits on the constitutionality of the Iowa and Kansas laws with respect to the issue of gaining access to a covered facility by lying. That's a key point. If access can be barred by sifting out liars with intent to do a covered facility harm, then the video issue is largely mooted. The issues will likely continue in the courts for the foreseeable future.



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