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Ag-Gag Laws are Gaging the Right to Free Speech:

Opinion of Animal Legal Defense Fund v. Kim Reynolds

Introduction:

Iowa is the largest producer of corn, soybeans, pork, and eggs; each producer contributes to one-fourteenth of the United States food supply (*Value-Added Agriculture*). Agricultural production is visible throughout the state as numerous cornfields and large confinement buildings when driving along the highways. Yet, agricultural productions have been sanctioned to many undercover investigations, animal abuse allegations, non-GMO protests, lawsuits, and more through the years. Still, in the last decade, the state has established anti-whistleblower legislation, better known as ag-gag laws, from the Iowa lawmakers. The Iowan law, established in 2012 for restricting or prohibiting the recording at industrialized farming operations, was held up in the 8th U.S. Circuit Court of Appeals on August 10, 2021 (Morris). The Animal Legal Defence Fund is suing Governor Kim Reynolds for her partaking in signing this legislation as censoring their First Amendment right by enforcing jail time when exposing the treatment of animals in industrial farming facilities when alerting the public to food and employee safety.

What are Ag-gag laws and their importance? In their simplest form, Ag-gag laws are a type of legislation that stops activist groups from recording video or photos without the owner's consent. This type of legislation has been put in place since the 1990s, protecting agriculture operations in different industries like livestock and crop productions from the false narrative and misleading propaganda from activist groups. Many large agricultural states have placed these

laws to protect their producers and their reputation along with their commodities, so the agricultural markets are not damaged in a lack of protest/demand from consumers.

Yet, the ag-gag lawsuits did not start until 2011 when Iowa passed the *Agricultural Production Facility Trespass Law* (Iowa Code 717A.3A). This law forbids undercover hiring and filming activity of agriculture operations and, if convicted, could face charges of misdemeanor and felony offenses and hefty fines. Many animal rights groups have sued Iowa due to the censoring of speech when publishing information to the public about food, employee, and animal safety. The Iowan law specifically targets whistleblowers of the activist groups and causes a chilling effect with their right to free speech when wanting to expose operations of neglect or abuse.

Ag-gag laws are very similar to the Strategic Lawsuit Against Public Participation (SLAPP) laws which also create a chilling effect on speech "...and healthy debate by targeting those who communicate with their government or speak out on issues of public interest (*What is a SLAPP?*). The laws also are intended to intimidate those who disagree with the legislation or drain the whistleblower's financial resources. The SLAPP, ag-gag legalization has become a First Amendment issue for journalists and whistleblowers over the right to free speech concerning informing the public about food safety, the treatment of livestock, and environmental concerns with the danger of receiving criminal charges.

In 2012, former Gov. Terry Branstad signed the "Agricultural Production Facility Trespass Law" but has been added onto through the last ten years. Current Gov. Kim Reynolds has been sued for signing the 2019 newer updated ag-gag law, Iowa Code 717A.3A by the Animal Legal Defense Fund (ALDF). The ALDF is a multi-organization group that comes to the defense to protect animals' rights through legal disputes.

Plunging deeper into Iowa Code 717A.3A, “Agricultural Production Facility Fraud,” prohibits a person(s) from obtaining animal production facilities under false pretenses. It also prohibits making false statements at the time of employment with an animal production facility with the intent to commit unauthorized acts on that premises. If convicted of breaking the Iowa code, the defendant is charged with an aggravated misdemeanor and could spend two years in jail with a fine between \$855 and \$8,540 (Morris). The ALDF says this violates their First Amendment as Iowa’s state government is censoring speech. The government should have no hold on this speech as an investigator, journalist, animal rights activist, and so forth when recording audio or video of the facilities and sharing with the media under the presumption of portraying the agricultural production facilities in a negative light.

The lawsuit was upheld in the 8th U.S. Circuit Court of Appeals partially. Under the First Amendment, lying about the reason for employment is protected, but it was ruled the First Amendment does not protect video without the owner’s consent. The Iowa law is put at the same level of equality to stop camera and recording devices while on private property without consent while also criminalizing the taking of soil and water samples or samples from animals without permission for the owner, which ALDF disagrees with.

THESIS:

Based on how the law is written, Iowa's ag-gag laws (*Iowa Code 717A.3A, Iowa Code 717A.3B*) should be unconstitutional due to the censoring of speech of the First Amendment to citizens, journalists, and whistleblowers exposing food and animal health and safety.

In the last ten years, many ag-gag law states have had their laws ruled unconstitutional due to being too broadly written or the First Amendment protections for the whistleblower(s). The ALDF has sued Kansas, Idaho, and Utah where the courts have decided to overturn the

states statute and ruled in favor of the First Amendment and the right to free speech and freedom of the press when whistleblowing as a citizen, activist, or journalist. All three of these states have criminal charges when breaking their ag-gag law. The state governments were trying to control whistleblowers' speech when reporting. The First Amendment protected their speech and publishing with no sanctions from the government, whether at the federal, state, or local jurisdiction.

In Kansas, the case *ALDF v. Kelly*, the false statements in seeking employment were ruled constitutional. The 2-1 decision was ruled unconditional as daunting undercover work by activists and journalists.

“The dissent suggests the intent requirement in speech offenses—specifically, fraud and threats—demonstrate that intent requirements cannot violate the First Amendment. When the government prohibits threatening, it is to prevent the harm directly caused by the threat—the fear suffered by the target of that threat. Requiring an intent to threaten in such a case “reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’”

Under the First Amendment, false statements are protected, and the law was too general and was not compelling the government interest. This means when a whistleblower can lie to a future agricultural employer (or any employer) about their intentions of wanting a job as not needing actual malice in a lawsuit as a private citizen.

“The statute is aimed at conduct unprotected by the First Amendment.” Ward, 398 F.3d at 1249. The dissent attempts to apply this precedent to the Act, but it does not have a primary, conduct-based offense. Instead, the Kansas statute is speech-based and therefore infringes on protected First Amendment speech.”

In Idaho, *ALDF v. Wasden*, recording audio and videoing agriculture operations was ruled constitutional. The law was signed in February 2014 and was sued by 19 activist groups in March 2014, and "Idaho's ag-gag statute infringes on the First Amendment rights of journalists who want to inform the public about food safety" causes a chilling effect. The chilling effect of censoring speech comes when a journalist is granted consent.

“The statute prohibits anyone from entering “an agricultural production facility” and making an audio or video recording “without the facility owner’s express consent.” §18-7042(1)(d). There are plenty of scenarios where journalists enter property and record with implied consent or with the consent of someone who is not the owner, and they should not be criminally penalized for it. Under the statute, it is a crime for a reporter to record an interview with an employee, potentially even a manager, of a facility — whether it be a meat-processing plant, a beekeeping facility, or a plant nursery — because the manager gave consent, but the owner did not. Likewise, it is a crime for a news crew to film the owner spreading seeds in an open field while standing on the edge of the land, even if the owner gave implied consent by willingly answering questions after knowing he was being filmed” (*Animal Legal Defense Fund v. Wasden*).

When the Idahoan law was written, the law was too broad, and the content of strict scrutiny does not apply. The court ruled, stating, “No matter the state interest asserted, Idaho’s ag-gag statute is not narrowly tailored to be the least restrictive means of achieving these interests. A blanket gag on all image and audio recordings of agricultural operations is overly broad and unnecessary, criminalizing several constitutionally protected newsgathering activities. Though a law may have some valid applications, the court must consider whether it may be overbroad as applied in any given situation, infringing on otherwise protected speech. As the

Supreme Court has recognized, we must be aware of “the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application’.” *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).”

Finally, in Utah, *ADF v. Herbert* was ruled to violate the whistleblower's First Amendment rights in informing the public about food safety. It combines the two types of ag-gag law of lying at the time of employment and recording video, audio, or photos when pursuing undercover work in agricultural facilities. The Utah law was challenged by two animal activists who were arrested while protesting. Then resulted in the Utah law becoming the first ag-gag state in the U.S. to be ruled unconstitutional as violating the First Amendment. In the case law, it declares,

“Because members of the public cannot themselves monitor all of the production facilities that produce their food, they rely on investigative journalists, food safety organizations, federal regulators, and whistleblowers to inform them about the safety of the food they eat. The government should not be allowed to use the statute to censor speech about such an important topic under the First Amendment. The press has a constitutional right to gather and publish information of public concern, such as food safety, and the public has the right to receive this valuable speech. Under Utah’s “ag-gag” statute , these investigations and publications would be nearly non-existent, and public knowledge of and debate on this important matter of concern would be stunted.”

Also, the statute is considered content-based law and does not pass strict scrutiny. The court ruled Utah's code is unconstitutional as not narrowly tailored, causing the strict scrutiny to not apply to the statute.

“Regardless of Utah’s state interests, Utah’s ag-gag statute is not narrowly tailored to be the least restrictive means of achieving these interests. A gag on images and audio recordings of agriculture operations is overly broad and unnecessary, criminalizing a number of constitutionally-protected newsgathering activities. Though a law may have some valid applications, the court must consider whether it may be overbroad as applied in any given situation, infringing on otherwise protected speech...Utah’s statute cannot be upheld, even if the government asserted it would tailor its use of the statute...,” (*Animal Legal Defense Fund v. Herbert*).

Utah’s ag-gag law was very similar to Iowa's code 717A.3A, offenses relating to agricultural production, about undercover and whistleblowing in agriculture operations. This means if the laws are both similarly written, Iowa law should be unconstitutional too, as it will not pass the strict scrutiny standard when it comes to lying to an employer of intentions of whistleblowing and when filming and/or photographing the facilities. There is freedom of speech and press without worrying about jail time or fines.

The lawsuit from ALDF and wins from the three states of Kansas, Idaho, and Utah, establish a pattern of checks and balances through the judicial reviews about ag-gag laws. The balances can be seen as content-based laws not passing the strict scrutiny standard, causing the law to be ruled unconstitutional.

Counter argument:

The supporters of ag-gag laws help protect farmers, ranchers and agricultural processing plants from potential undercover sting investigations. These laws were put in place due in the 2000s when many animal rights groups exposed confinement facilities and brought attention to the living conditions of animals and employee working conditions. Many farmers in Iowa

attended this issue to missing communication with the general public about complex agricultural practices.

An article from DTN Progressive Farmer titled “Lost Connections: Bridging the Gap Between Consumers and Food Producers,” sums up this issue from Roxi Beck, a worker of the non-profit The Center for Food Integrity (CFI), whose mission is to improve food producers earn consumer trust. She said,

"The disconnect we see today exists because there's this lack of in-person access, or feet on the farm, for the general public," Beck noted. "Less than 2% of people actually farm today in this country. People do not trust what they do not know." Yet 65% of people tell the Center for Food Integrity (CFI), they want to know more about where their food comes from” (Myers).

Farming and ranching have evolved with technology to produce more quickly under less land and resources. The communication gap between producer and consumer has gotten bigger and bigger even though consumers want to know where their food is coming from. Transparency is a demand; however, select agriculture practice is still not understood by some customers meaning more education for the general public and communication with producers and consumers.

Yet, how is the law written? In Drake Law Journal Opinion, (Tuttle) Kansas, Montana, and North Dakota Law have non-criminalizing offenses when violating their ag-gag laws. It remarks, “The Iowa law uses different language than the Kansas, Montana, and North Dakota laws in that it does not criminalize taking photographs or recordings. Instead, the Iowa law is designed to prevent authorization onto agricultural facilities under false pretenses, including lying on a job application,” (p.247).

Iowa's ag-gag law was written with genuinely good intentions to assist protect for agriculture producers, but what does the law say? "The Arizona Law Journal Opinion" (Topel) analyzes Iowa's ag-gag law, 717A.3B, "Agricultural production facility trespass," which is currently under review in the courts with "Iowa Code 717A.3A". The article examines, "Under strict scrutiny, the statute is presumed unconstitutional and will only be upheld if it is narrowly tailored to serve a compelling state interest."

Conclusion:

The Ag-Gag Laws in *Animal Legal Defense Fund v. Reynolds* are no longer constitutional in the people's interest. They should be held inadequate for the state of Iowa as not narrowly tailored based on past case law rulings in the United States. It violated the First Amendment rights of journalists and whistleblowers, and the law creates a chilling effect and censoring of speech with the fear of jail time, which is not constitutional.

The First Amendment protects the right for journalists and whistleblowers to inform the citizens of agricultural food and animal operations conditions and health. Censoring of video and audio recording is unconstitutional even on private property if it means informing the public of the health and safety of food and animal operations.

The Iowa or federal government must either outlaw ag-gag laws or rewrite laws to be specifically narrowly tailored to be fully constructional.

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