

NINTH CIRCUIT STRIKES DOWN PARTS OF IDAHO'S AG-GAG LAW; OTHER LAWS FACE LEGAL CHALLENGES

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The Ninth Circuit's recent decision striking down parts of Idaho's ag-gag law, which aims to deter undercover investigation by making it a crime to lie to gain entry into animal facilities, is the latest court decision to hold that lies and false statements, without more, are protected under the First Amendment, but may ultimately provide a framework for drafters to create an ag-gag law that passes constitutional scrutiny.

In the meantime, the Fourth Circuit Court of Appeals heard oral arguments yesterday in a challenge to North Carolina's ag-gag law mounted by a coalition of animal-protection, consumer-rights, and food-safety organizations. The law took effect on January 1, 2016, after North Carolina's Republican-controlled state legislature overrode a veto of the bill by the state's former governor. The coalition, led by People for the Ethical Treatment of Animals (PETA), filed suit days after the law took effect.

Utah, Wyoming, Iowa, and Missouri have all adopted similar laws. Utah's law was struck down in July 2017, and Wyoming and Iowa's laws are currently facing legal challenges. Missouri's law, passed last year, is similar to Iowa's, but includes an exception for anyone sharing pictures or video of animal abuse with law enforcement. That provision appears to have shielded the law from a legal challenge. Legislatures in 14 other states have taken up similar bills.

States began enacting these so-called "ag-gag" laws in the late 2000s in response to highly publicized film footage acquired through undercover investigations at animal facilities. The laws make it a criminal act to lie to gain entry into animal facilities and film their operations without consent from the owner. However, just as quickly as the states began enacting legislation to address this issue, groups such as the Animal Legal Defense Fund ("ALDF") and PETA began challenging the laws as violating free speech rights protected under the First Amendment.

Utah was the first state to face a lawsuit challenging the constitutionality of its ag-gag law. ALDF and PETA filed the lawsuit back in 2013, but the federal district court in Utah only recently issued its opinion on July 7, 2017. In *Animal Legal Defense Fund v. Herbert*, 263 F.Supp.3d 1193 (D. Utah 2017), the district court agreed with ALDF and PETA that Utah's ag-gag law violated free speech rights protected under the First Amendment and struck down the law in its entirety. Not only did this

landmark decision paved the way for future challenges to state ag-gag laws, but it also likely had an effect on lawsuits already pending in courts across the country.

Wyoming was one of those states with an ag-gag challenge pending in federal court. But in *Western Watersheds Project v. Michael*, 196 F.Supp.3d 1231 (D. Wyo. 2016), the challengers were dealt a blow when the federal district court held that the First Amendment did not protect the activities at issue and dismissed their claims. The victory for Wyoming was short lived as the Tenth Circuit soon weighed in on appeal. The Tenth Circuit issued its opinion in *Western Watersheds Project v. Michael* on September 7, 2017, and reversed and remanded to the district court. The court did not decide the constitutionality of Wyoming's ag-gag law, but instead resolved the threshold issue regarding application of the First Amendment, and held that it did apply to the regulated activities at issue. With that direction, the court remanded to the district court to determine what constitutional scrutiny level should apply and whether such restrictions on speech would survive scrutiny. While not a wholesale loss for ag-gag law advocates, the situation in Wyoming left many advocates questioning the future of ag-gag laws.

Idaho enacted its ag-gag law in 2014, and the first lawsuit challenging the law was filed shortly thereafter. Idaho's *Interference with Agricultural Production* law included four provisions. The first three criminalized lying to gain access to, employment at, or records of the agricultural production facility. The final provision related to audio or video recordings without consent once on the premises of such facility. But unlike in Wyoming, in *Animal Legal Defense Fund v. Otter*, 118 F.Supp.3d 1195 (D. Idaho 2015), the federal district court struck down the law in its entirety. Idaho appealed to the Ninth Circuit, which ultimately decided the issue in its January 4, 2018 opinion.

The Ninth Circuit provided needed clarity on each provision of Idaho's ag-gag law by affirming the ruling on the entry and recording provisions and reversing the ruling on the records and employment provisions. In doing so, the court agreed with the district court in its determination that lies and false statements, without more, are protected under the First Amendment. The court also agreed that the acts of recording audio or video are expressive acts constituting speech protected under the First Amendment. But the more telling analysis came when the court tackled the remaining two provisions.

The court first noted that while false statements are generally protected speech, such speech is not afforded protection if it is "for the purpose of material gain" or it inflicts a "legally cognizable harm." The court's reasoning then followed that false statements made to obtain records from the agricultural facility confer a benefit on the individual making the false statement while harming the property rights of the records' owner. Therefore, the court held that the speech at issue in the records provision was not protected under the First Amendment.

The court upheld the employment provision on similar grounds. The court first noted that the provision was expressly limited in its application to only those who lie to obtain employment with the intent to cause economic or other injury. Therefore, false statements made to obtain

employment at agricultural production facilities along with the requisite intent to inflict legally cognizable harm removes that speech from protection under the First Amendment. The court narrowed the harm to include only direct economic loss and excluded reputational and publication damages from its scope. In doing so, the court created a heightened intent requirement involving concrete economic injury beyond the mere publicity or awareness motives generally seen in past undercover investigations.

This opinion from the Ninth Circuit shows that ag-gag laws may not be gagged for good. If anything, the opinion provides a framework to assist ag-gag law drafters in navigating the constitutional labyrinth. One thing is for sure, ag-gag litigation is far from over. A challenge to North Carolina's ag-gag law was recently dismissed on standing grounds, and a lawsuit filed this past October takes aim at Iowa's ag-gag law.

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