Ag-Gag laws meet the First Amendment: Two recent Eighth Circuit cases

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Animals cannot speak, but can you and I not speak for them and represent them? Let us all feel their silent cry of agony and let us all help that cry to be heard in the world. —Rukmini Devi Arundale

The desire to protect animal rights and investigate potential animal cruelty at large animal breeding factories is a strong one. So too is the desire to impose legislative barriers, through laws typically known as "Ag-Gag" laws, to such intrusion to protect a state's local agriculture interests. This article focuses on litigation around two such laws in Iowa, although First Amendment challenges to other state Ag-Gag laws are widespread.

The earlier appellate ruling

The recent history of Ag-Gag litigation in Iowa begins with the Eighth Circuit Court of Appeals' decision in *Animal Legal Defense Fund v. Reynolds* (*ALDF I*). There, plaintiffs, led by the Animal Legal Defense Fund, challenged two parts of a 2012 law aimed at protecting "agricultural production facilities": Iowa Code § 717A.3A(1) subpart (a) (the access provision) and subpart (b) (the employment provision). The Animal Legal Defense Fund argued that, but for these provisions, their advocates could lawfully "make false statements" to gain entry to such facilities and engage in investigations leading to press publication of any uncovered cruel conditions. In *ALDF I*, the court held that the access provision, which precluded a deceptive effort to gain access to an agricultural facility, was consistent with the First Amendment. However, the court held that the employment provision, which precluded efforts to obtain employment to gain access to such a facility with an intent to "commit an act not authorized by the owner of the agricultural production facility," was unnecessarily restrictive of First Amendment rights.

The specific statutory language that the Eighth Circuit found unconstitutional made it an offense for a person to "[m]ake a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, [if he] knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized" (quoting Iowa Code §

717A.3A(1)(b)). The court faulted the statute for lacking some form of materiality requirement, i.e., a connection between the false speech and an effort to secure employment (as opposed to lying to appeal to the interviewer's perceived favorite sports team), to satisfy constitutional free speech standards.

A second set of statutory provisions and new decisions in the District Court

In 2019, the Iowa legislature tried again by enacting Iowa Code § 717A.3B, which criminalizes the act of gaining access or employment to an "agricultural production facility" with the intent to "cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer."

On judicial review, the district court held that this new statutory mandate was also unlawful. Although Iowa's new law regulated "unprotected speech," even this type of speech can only be regulated by states if the regulation satisfies a "content-neutral" requirement. The court held that unprotected speech "does not grant the government a free license to regulate that speech based on viewpoint." The court determined that a strict scrutiny standard applied after it determined section 717A.3B discriminated based on the viewpoint of those who opposed the conditions of the animals. The court ultimately held that Iowa's statute did not satisfy strict scrutiny because it did not "focus solely on the right to exclude, the legally cognizable harm of trespass, but only on the right to exclude those with particular viewpoints." The statute's text "imposes liability based on the 'intent' of the trespasser." Thus, someone would *not* be punished if they trespassed with the purpose of praising the conditions of the facility. In sum, the district court found that this law was unconstitutional because it singled out individuals or entities who held negative views of agricultural production facilities—i.e., places where "agricultural animal[s]" are located.

Under the "if at first you don't succeed, try, try again" adage, in 2021 the Iowa legislature enacted a third statutory limit to protect local farm producers. This provision specifically prohibited the "knowing placement or use of a camera or electronic surveillance equipment" that transmits images while on "trespassed" land. Turning to this separate provision, the district court held that the new Iowa Code § 727.8A also violated the First Amendment. The court found that Section 727.8A was not "a narrowly tailored regulation"—specifically, it could snare mere trespassers who were filming on the property. The district court took a broad view of the statutorily proscribed conduct (trespassing) as part of an overall process to produce a videotape—something that has a clear "speech" component. Although the state argued that it was only limiting conduct, the district court found this distinction unpersuasive in this context.

The Eighth Circuit reverses and upholds both Ag-Gag laws

On January 8, 2024, the Eighth Circuit issued two opinions upholding both of Iowa's more recent Ag-Gag statutes.

In *ALDF II*, the court of appeals upheld Iowa's statute precluding "trespassing" at Iowa agricultural facilities. The court held that the revised statute passed constitutional muster, avoiding the lack-of-materiality constitutional problem that doomed the earlier Iowa statute challenged in *ALDF I*. That is, it found that the revised statute permissibly focused on false speech designed solely to gain access or employment.

The court accepted that the revised statute regulated speech—albeit false or deceptive speech. It then reasoned that, even if deemed to impact speech, the revised Iowa statute was *not* a content-based regulation because it focused on "acts thought to inflict greater individual or societal harm."

For the Eighth Circuit, the revised Iowa statute was not "content oriented." Rather, the court accepted the position that if a statute reflects an intent to punish those who commit an arguable crime it is a "permissible restriction on intentionally false speech undertaken to accomplish a legally cognizable harm." Because the court held that the Iowa statute was not "content-oriented" that was the end of the inquiry—no heightened scrutiny needed to be applied.

In a second opinion issued on the same day, in *ALDF III*, the Eighth Circuit rejected the claims of the challengers as to the 2021 Iowa statute protecting its agricultural farms against photographic documentation. The statute in question focused solely on trespassing by the placement or use of camera or other video surveillance in investigating agricultural facilities. This type of trespassing now constituted an aggravated misdemeanor for the first offense and a felony crime for subsequent violations.

In the first part of its opinion, the Eighth Circuit rejected the state's challenge to the standing of the animal rights group. The court conceded that the plaintiffs below *had* standing to assert claims as to the statutory provision as to the "use" of cameras, but then, divided the single sentence in the statute into two parts and held that plaintiffs *lacked* standing to assert a claim relating to the "*placement*" of cameras. This linguistic legerdemain ignores the statutory phrasing, which punishes the knowing "placement or use" of a camera or other video recording device that then "transmits or records images or data while the device is on the trespassed property. . . ." The Eighth Circuit's effort to distinguish between mere "placement" of a camera versus "use" of that camera simply ignores the rest of the sentence in this short statute.

In the second portion of its opinion, the court agreed with the district court that the First Amendment applies to the portion of the statute regulating the use of cameras and that a state law must be "narrowly tailored" to serve significant state interests. But the court determined that the lower court misapplied this First Amendment standard of review. The Eighth Circuit noted that "[p]roper characterization of the State's interests is critical to the narrow-tailoring analysis. . . . A constrictive mischaracterization of the government's interests tends to unnecessarily invalidate a law." In its assessment of the statutory goals, the court emphasized the law's intent to protect the "privacy rights of individuals on their property." But the court did not address the law's potential overbreadth when applied to the economic reality in Iowa and elsewhere—that many farms are

now corporate-owned entities. This avoidance was strategic: there is no recognized privacy right for corporations. The court then re-weighed the interests in favor of the state and reached its ineluctable holding that the law banning all use of a camera (or other video devices) on trespassed property was constitutional.

Ag-Gag and the future of animal rights investigations

The future of Iowa's newest two laws imposing severe limits on cameras, videos, and other forms of investigation is uncertain, given that the time for filing a petition for certiorari has not yet run. In the interim, however, animal production facilities maintain a highly favored position in Iowa.