2018 ag gag update

- We have two more federal court opinions regarding whether state ag gag statutes are constitutional.
- 2017 Utah federal district court opinion holding Utah ag gag statute unconstitutional, and
- 2018 9th circuit court of appeals opinion holding part of Idaho ag gag statute constitutional (employment-related misrepresentation) & part unconstitutional (undercover video).
- Iowa & NC ag gag laws also being litigated.
- Utah not appealing 2017 district court ruling.
Current state ag gag laws

- general purpose: make undercover animal activist/employee videos illegal
- Kansas 1990: recording illegal with intent to cause harm
- Mont 1991: recording illegal with intent to criminally defame
- ND 1991: recording illegal without owner’s consent
- Iowa 2011: recording illegal without owner’s consent
- Utah 2012: recording illegal without owner’s consent
- Missouri 2012: recording illegal unless turned over to law enforcement within 24 hours
ag gag laws, con’t

- Idaho 2014: video recording illegal without owner’s consent
- violation of all these statutes are criminal violations
- NC 2016: “property protection act:” property owner can sue videographer if video of private property is made public without property owner’s permission
- Arkansas 2017: ditto
- violation of NC & Arkansas statutes are civil violations not crimes
Civil v criminal remedies

- Most things made criminal by ag gag statutes can be taken to court by livestock producer
  - Lying on employment application—misrepresentation
  - Taking videos without permission on private property—trespass
- In either case, producer would have to prove economic damages in order to recover $$
  - But can get *nominal* damages ("$10") for bare trespass with no significant economic damages
Civil v criminal, con’t

- Most ag gag laws make employment application lying & making unapproved videos a criminal offense
  - Money penalty and/or jail time for violation
- Don’t need to prove economic damages to get a criminal conviction
- Ag gag laws subject to US constitution free speech provisions
  - State can’t normally send someone to jail for what they say (or take videos of) except in very limited circumstances
Judge began by listing several livestock production abuses exposed by undercover videos:

- 2007 California downer cows
- 2009 Iowa hatchery male chick disposal
- 2009 Vermont slaughterhouse male dairy calves
- 2011 Texas cattle mistreatment
- 2011 Iowa laying hen mistreatment

This by implication shows the social utility of undercover videos in exposing farm animal mistreatment:

- Caused economic harm to exposed operations
In these kinds of cases where free speech violations are being alleged, the courts go through a three-step process to determine whether the state statute is constitutional or not.

1. Is the speech at issue protected by the 1st amendment (does the 1st amendment even apply)?

2. If so, how closely must the judge scrutinize the state law to protect free speech interests, and

3. Has the state justified any interference with free speech rights.
Free speech rights

- Background: sedition; religious freedom etc.
- Are lying on the employment application & taking videos protected speech?
  - Obscenity, defamation, child pornography, fraud & true threats of physical harm are not protected under 1st amendt
  - In the Medal of Honor case SCOTUS declined to exclude all falsehoods from 1st amendt protection
- Because all employment application lies don’t always cause legal harm, they are not excluded from 1st amendt protection
  - E.g. all employment app lies don’t necessarily lead to harm to animals & employees
Free speech rights, con’t

- Liar (whistleblower) is not automatically a trespasser unless the liar also causes trespass-type harm that property owner could collect money damages for in a civil lawsuit.
- Video recording is speech protected by 1\textsuperscript{st} amdt.
- Court concluded that ag gag required strict scrutiny;
  - Have to look at what someone actually said to determine whether or not statute was violated—content analysis
  - Lesser scrutiny if speech content irrelevant
- This makes it more difficult for state to justify free speech interference.
Ag gag does not withstand free speech strict scrutiny

- Presumption is that state law will not withstand “strict scrutiny” but state can make the case that it does if law (1) furthers a compelling state interest and (2) restrictions are narrowly tailored to achieve that interest.

- No compelling state interest: ag producers have adequate civil remedies if they suffer actual economic harm.

- State argued whistleblowers were threat to animal wellbeing because unqualified but admitted this was speculative.

- Real purpose to prevent “vegetarian anti-meat propaganda” not a compelling state interest.

- Decision will not be appealed.
Majority (2-1 opinion) concluded that criminalizing employment application misrepresentation & access to business records *did not* violate US Constitution

Criminalizing entry onto farm by misrepresentation did violate 1st amdtt, &

Criminalizing videotaping ag operation without permission also violated 1st amdtt

Dissenting judge would have ruled criminalizing entry onto farm by misrepresentation (trespass) is not a 1st amdtt violation [but not the videotaping]
What’s next? 😊

- The dissent in the 2018 Idaho case will give ag gag proponents hope
- Eventual legal outcome on constitutionality of ag gag restrictions is unclear at this point
- No SCOTUS ruling likely (if ever) until there is a clear “dispute among the circuits”
  - Only one circuit court ruling to date [Idaho] but other cases are in the works
- Check back next year 😊 let me know if you want cases