



2018 Ag Gag Update

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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



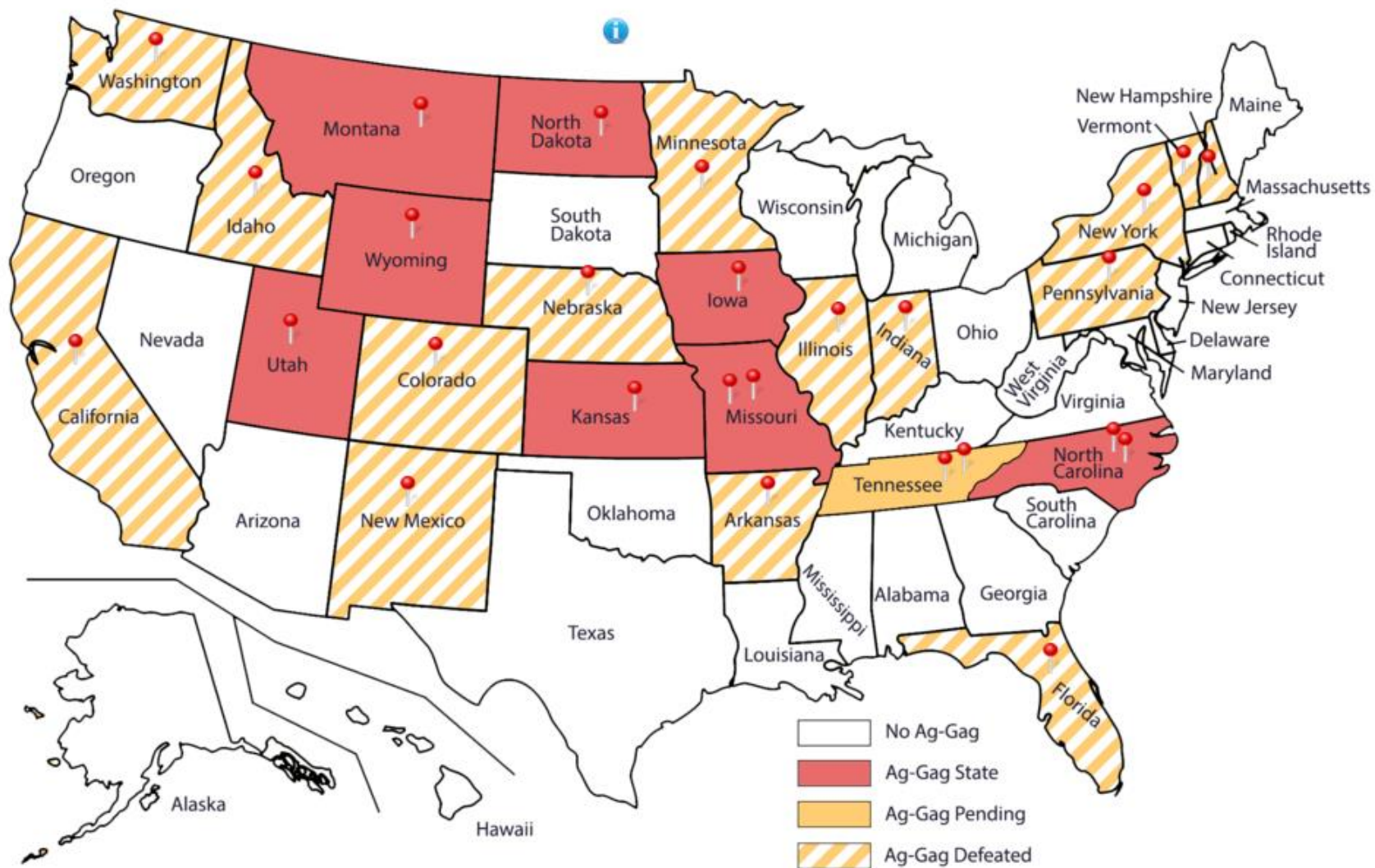
Current state ag gag laws

- 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



2017 Utah district court ruling

- 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



Utah, con't

- 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 amdt
 - In the Medal of Honor case SCOTUS declined to exclude all falsehoods from 1st amdt protection
- Because all employment application lies don't always cause legal harm, they are not excluded from 1st amdt 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 1st 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



2018 Idaho ct of appeals ruling

- 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 amdt, &
- Criminalizing videotaping ag operation without permission also violated 1st amdt
- Dissenting judge would have ruled criminalizing entry onto farm by misrepresentation (trespass) is not a 1st amdt 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