

9th Circuit strikes down most of Idaho's 'ag gag' law

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Cargill to pay \$70,000, plus legal fees, to Washington environmentalists

A federal appeals court has struck down as unconstitutional most of Idaho's so-called "ag gag" law, which criminalized hidden-camera recordings of farm operations.

The 9th U.S. Circuit Court of Appeals has upheld most of an earlier ruling that invalidated Idaho's statute because it violated free speech rights.

Specifically, the ruling rejected Idaho's argument that prohibiting an audio or visual recording of agricultural operations is a form of regulating an activity, rather than an expression of speech.

"This argument is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not," the 9th Circuit said.

The creation of content can't be considered as distinct from the content itself, since a painter can't create art without brushes and canvas and a musician can't play a song without instruments, the ruling said.

“The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score,” the 9th Circuit said. Similarly, the Idaho law singles out a certain type of activity — agricultural production — for protection, to shield it from controversy in the public eye, the ruling said.

“It would permit filming a vineyard’s art collection but not the winemaking operation. Likewise, a videographer could record an after-hours birthday party among co-workers, a farmer’s antique car collection, or a historic maple tree but not the animal abuse, feedlot operation, or slaughterhouse conditions,” according to the 9th Circuit.

Likewise, the 9th Circuit ruled that Idaho can’t prohibit people from gaining access to a farm through misrepresentation, particularly since the state already criminalizes trespass.

The misrepresentation provision is “problematic” because Idaho lawmakers made clear it’s intended to “quash investigative reporting” about dairy farms, the ruling said.

“The hazard of this subsection is that it criminalizes innocent behavior, that the overbreadth of this subsection’s coverage is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists,” the 9th Circuit said.

However, the 9th Circuit said two provisions of the law — using misrepresentation to obtain records and employment with the goal of causing harm — should be allowed to stand.

“Unlike false statements made to enter property, false statements made to actually acquire agricultural production facility records inflict a property harm upon the owner, and may also bestow a material gain on the acquirer,” the ruling said.

Similarly, the provision disallowing gaining employment through misrepresentation should stand because it requires the intent to inflict actual damages beyond emotional distress, the 9th Circuit said.

“The restitution clause focuses on actual, quantifiable economic loss as opposed to abstract damages such as reputational harm,” the ruling stated.

Idaho lawmakers passed the law in 2014 after footage of cattle abuse at an Idaho dairy was publicized by an animal rights group, resulting in public outrage against the farm.

The Animal Legal Defense Fund succeeded in overturning the statute the following year, when U.S. District Judge Lynn Winmill issued an injunction against its enforcement.

Idaho’s state government challenged that decision before the 9th U.S. Circuit Court of Appeals, which has now affirmed key aspects of Winmill’s opinion.

Attorneys for Idaho argued that lying to obtain a job at an agricultural facility and then secretly filming its operations are actions, not speech that’s protected by the U.S. Constitution’s First Amendment.

Prohibiting such conduct is “content neutral” because it applies to all people regardless of their viewpoints on animal agriculture, Idaho’s attorneys argued.

The Animal Legal Defense Fund countered that state laws prohibiting trespass, fraud and defamation already adequately protect farmers from the harms cited by Idaho lawmakers.

Rather, the “ag gag” law is a content-based attempt to suppress speech by animal welfare activists, since positive depictions of farm operations were unlikely to be penalized, the group argued.

The Idaho Attorney General’s office said it’s reviewing the decision and will discuss it with state officials.

Circuit Judge Carlos Bea issued a dissenting opinion from the 9th Circuit’s Jan. 4 ruling regarding the issue of gaining entry to a property through misrepresentation.

Under Idaho law, such unwanted access is considered a “cognizable harm” because landowners should be allowed to exclude others from their property for any reason or no reason at all, according to Bea.

By gaining license to enter a property, a person gains a material benefit, he said. “It confers the ability to do lawfully that which the law otherwise forbids and punishes as trespass.”

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