

AG-GAG UPDATE: RECENT REMAND OF *PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. V. STEIN* AT THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In 2014, Craig Watts, a North Carolina poultry farmer for Perdue, allowed animal welfare organization, Compassion in World Farming, to film his farm.¹ He wanted to increase transparency in the industry after seeing a commercial for Perdue. The commercial showed animals roaming on acres of land enjoying wonderful living conditions, which was far from the reality on his farm.² After the film aired, Watts was labeled a rogue farmer by Perdue, which led to disputes with the company and Watts eventually terminated his contract.³

Now many states have ag-gag laws which prohibit farmers from highlighting the realities of industrialized farming. Generally, ag-gag laws—“ag” is short for agriculture and “gag” refers to silencing whistleblowers—criminalize recording, photographing or using any other type of media to record and share what is going on inside farms.⁴ Lobbyists for the laws claim they protect small business owners from false videos and slanderous statements.⁵ However, there has been much criticism of these laws, including from farmers who want to increase transparency. For example, Watts thinks having these laws in place equates to farmers “almost admitting they’re ashamed of what they’re doing,” and he mentions how important it is to not “allow an industry, specifically the animal agriculture industry, to self-regulate.”⁶ Ag-gag opponents argue that having ag-gag laws in place allows farms to keep functioning without accountability of their

¹ See Christina Cooke, *The Battle for Transparency on North Carolina Factory Farms*, CIVIL EATS (Oct. 13, 2018), <https://civileats.com/2017/06/26/transparency-north-carolina-factory-farms/>.

² See *id.*

³ See *id.*

⁴ Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1318 (2015).

⁵ *Id.*

⁶ Cooke, *supra* note 1.

actions because regulators do not check-in very often and no one is able to speak up against the farm under these laws.⁷

The first iteration of ag-gag laws focused on eliminating bad press for farms.⁸ The more recent iteration of the laws, however, goes further to protect against trespassing or stealing trade secrets.⁹ These laws suppress the type of information that can leave the farm and put limits on the type of language that can be shared about the farms as well.¹⁰

In January 2016, North Carolina passed its ag-gag law: The Property Protection Act.¹¹ Instead of holding the farms and the agriculture industry accountable through mandates such as changing the current standard of care and policies, North Carolina responded with a law that makes it a crime to report what is happening on the inside.¹² Watts warned that consumers only see idyllic depictions of farms and not reality.¹³ Activists are now banned by law from trying to change this image. With North Carolina's ag-gag law, the facade to the consumer continues.

I. NORTH CAROLINA'S AG-GAG LAW: THE PROPERTY PROTECTION ACT

North Carolina's ag-gag law was passed with opposition. While proponents argued it protects private property rights and the farm owners from libel,¹⁴ Governor McCrory vetoed the bill in the summer of 2015 because it "does not adequately protect or give clear guidance to

⁷ See Will Potter, *Sentinel Species: The Criminalization of Animal Rights Activists As "Terrorists," and What It Means for Civil Liberties in Trump's America*, 95 DENV. L. REV. 877, 892 (2018).

⁸ Marceau, *supra* note 4, at 1318.

⁹ *Id.*

¹⁰ *Id.* at 1319.

¹¹ N.C. GEN. STAT. § 99A-2 (2016).

¹² See Potter, *supra* note 7, at 892.

¹³ Cooke, *supra* note 1.

¹⁴ See Natasha Geiling, *The Unintended Consequences of North Carolina's 'Ag-Gag' Law*, THINK PROGRESS (Oct. 27, 2018), <https://thinkprogress.org/the-unintended-consequences-of-north-carolinas-ag-gag-law-6d3ccd42e572/>.

honest employees who uncover criminal activity.”¹⁵ He was also concerned “that subjecting these employees to potential civil penalties will create an environment that discourages them from reporting illegal activities.”¹⁶ Despite his concerns, super majorities in the House and Senate overruled the veto, making the Property Protection Act effective January 1, 2016. The relevant part of the Act reads:

(a) Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, “nonpublic areas” shall mean those areas not accessible to or not intended to be accessed by the general public.

(b) For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following:

(1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer.

(2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.

(3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.¹⁷

¹⁵ Dayton Martindale, *Ag-Gag Laws: The Less You Know The Better*, IN THESE TIMES (Oct. 27, 2018), <http://inthesetimes.com/rural-america/entry/18071/ag-gag-laws-what-you-dont-know-might-hurt-you>.

¹⁶ *Id.*

¹⁷ N.C. Gen. Stat. § 99A-2 (2016).

North Carolina's ag-gag law is distinct from its other state counterparts in two ways. First, it applies to all employment, not just the agricultural industry.¹⁸ Second, violation of the law is not a criminal offense; it is a civil offense.¹⁹ There is also a clause that puts exemplary damages at \$3,000 per day of recording.²⁰ Less than two weeks after the law became effective, People for the Ethical Treatment of Animals (“PETA”) brought a lawsuit in North Carolina against the act.²¹

II. PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. V. STEIN

PETA, joined by seven other organizations, sued Josh Stein as the Attorney General of North Carolina and Carol L. Folt, Chancellor of the University of North Carolina-Chapel Hill, on January 13, 2016 challenging the act’s constitutionality.²² Stein represented the State of North Carolina and Folt was joined because UNC operates a facility PETA once investigated and wanted to continue investigating.²³ In suing Stein and Folt, PETA argued § 99A-2 violated the First and Fourteenth Amendments of the United States Constitution.²⁴

The district court ruled that the plaintiffs failed to provide sufficient facts so it lacked jurisdiction to adjudicate the Plaintiffs’ claims.²⁵ Therefore, the court could not rule on the matter and the Defendants’ motion to dismiss was granted.²⁶

¹⁸ See Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 203 (2017).

¹⁹ See Cooke, *supra* note 1.

²⁰ *Id.*

²¹ *People for Ethical Treatment of Animals, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017), rev’d 737 F. App’x 122 (4th Cir. 2018).

²² *Id.*

²³ *Id.* at 374.

²⁴ *Id.* at 369.

²⁵ *Id.* at 386.

²⁶ *Id.*

PETA appealed to the United States Court of Appeals for the Fourth Circuit in June 2018.²⁷ In their appeal, Plaintiffs argue that they did allege sufficient facts to demonstrate standing. They claim “their allegations of injury pertain to an objectively reasonable chill on the exercise of their rights and self-censorship—an actual injury-in-fact for purposes of standing to assert a First Amendment challenge to the Act.”²⁸ The Court of Appeals reversed and remanded the case, holding that the Plaintiff organizations possessed Article III standing to challenge North Carolina General Statute § 99A-2 on First Amendment free speech grounds.²⁹

In the opinion, the Court focused on what the statute now prevents the plaintiffs from doing, including a time that PETA uncovered illegal and unethical abuse that a UNC Chapel Hill supervisor told the undercover workers not to report.³⁰ PETA uncovering this is now unlawful under § 99A-2.³¹

As of the time of this paper, the decision has not yet come out as to whether §99A-2 is or is not constitutional.

III. AG-GAG APPEAL OUTCOMES IN IDAHO AND UTAH

In both Idaho and Utah, courts have held state ag-gag laws as unconstitutional. In 2015, a district court in Idaho ruled that criminalizing news gathering and distribution went against the First Amendment.³² The Idaho ag-gag law “[gave] agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded,

²⁷ *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018).

²⁸ *Id.* at 129.

²⁹ *Id.*

³⁰ *See id.* at 127.

³¹ *See id.*

³² Potter, *supra* note 7, at 895.

effectively turning them into state-backed censors able to silence unfavorable speech about their facilities,” the Court said in the ruling.³³

In 2017, Utah also ruled their ag-gag law violated the First Amendment’s free-speech protections.³⁴ In *Legal Animal Defense Fund v. Herbert*³⁵, the District Court of Utah “rejected the state’s defense of the law, saying Utah had failed to show the ban was intended to ensure the safety of animals and farm workers from disease or injury.”³⁶ The court responded to those in support of the ag-gag law by noting that; “Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them.”³⁷

It’s likely that North Carolina’s bill will be struck down because of the similarities to those ruled unconstitutional in other states. Both Utah and Idaho’s bills kept people from recording, like North Carolina’s does. A difference between the two bills that were struck down and North Carolina’s is that North Carolina’s mentions theft of employer’s data, paper and records in addition to the filming. However, this is only one part of the bill and this would not necessarily take away anyone’s freedom of speech. The bill could be reformed to only maintain the theft provision and take out the recording and whistleblowing provisions which are the components ruled unconstitutional in the aforementioned states. Additionally, there is a policy argument to be made in favor of

³³ *Id.*

³⁴ See Bill Chappell, *Judge Overturns Utah’s ‘Ag-Gag’ Ban on Undercover Filming At Farms*, NPR (Oct. 13, 2018), <https://www.npr.org/sections/thetwo-way/2017/07/08/536186914/judge-overturns-utahs-ag-gag-ban-on-undercover-filming-at-farms>.

³⁵ 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

³⁶ Chappell, *supra* note 34.

³⁷ *Animal Legal Def. Fund*, 263 F. Supp. 3d at 1213.

abandoning the statute. Other states have recognized the constitutional dangers with ag-gag laws, and it's likely that those dangers will be found to outweigh the benefits in North Carolina.

IV. DANGERS OF AG-GAG LAWS TO SOCIETY

A. Lack of Transparency

Ag-gag laws not only harm the animals that are affected by abuse, but they harm the public. With these laws in place, there is a lack of transparency in our industrial meat and dairy production systems in which consumers are not told all of the effects of the industrial meat industry throughout the lifespan of the production.

Part of the problem with factory farms is the image that is portrayed by them on meat packages, egg cartons and commercials. What consumers see and equate with farming is not what most modern agriculture looks like, and consumers need third parties be able to show us that this image is unrealistic.³⁸ What happens from the time the animal comes to the farm to the time individuals consume it is widely unknown making it hard for the public to have a real grasp on production and standards. The USDA has promulgated regulations that “attempt to ensure food safety by examination of meat, poultry and eggs, but fail to supervise, inspect, or create standards on factory-farming operations in which animals and eggs are raised and produced.”³⁹ Due to the lack of regulations inside the animal feeding operations, it is imperative that people are able to expose the wrongdoings and dangers of the operations.⁴⁰

³⁸ Cooke, *supra* note 1.

³⁹ Amanda Belanger, *A Holistic Solution for Antibiotic Resistance: Phasing Out Factory Farms in Order to Protect Human Health*, 11 J. HEALTH & BIOMEDICAL L. 145, 159 (2015).

⁴⁰ *Id.*

Undercover investigations have led to the exposure of wrongdoings: animal abuse, abhorrent working conditions, food safety threats, and environmental hazards.⁴¹ The release of information gathered from the undercover investigations inspired a demand for industry changes and an increase in public education on the topic.⁴² Without being able to have this knowledge, society might not be able to demand change. It will be hard to gain support for improved animal conditions and addressed human health concerns without proof of the current lackluster status quo, especially in an industry so integral to our economy.

While the lack of transparency is an issue because it makes consumers unaware of the extent of the choices they are making on their plates, it is “also a freedom of expression issue, a workers’ rights issue, an environmental issue[,] and a public health issue.”⁴³ It is imperative for meat consumers to be fully informed regarding what their decisions mean for their bodies, the agricultural industry, and for the environment. With ag-gag laws in place, the ability to be a fully informed consumer is limited.

B. Consumer Health Effects

Eating mistreated meat and dairy can have an effect on our bodies, and currently consumers are unaware of these effects because of the lack of transparency in the system. The treatment of animals (both before and after production) has long-reaching consequences that affect humans once the meat and dairy have been consumed.⁴⁴ In an attempt to save money, some farms have gotten creative with animal feed. It is possible for animals in concentrated animal feeding operations (“CAFOs”) to have been fed “carcinogens, rocks, dirt, plastic[,]” and

⁴¹ *Id.* at 199.

⁴² *Id.*

⁴³ Potter, *supra* note 7, at 895 (quoting Vienna Colucci, *Amnesty Makes it 60*, AMNESTY INT’L USA: HUM. RTS. NOW BLOG (May 24, 2013, 3:15 PM), <http://blog.amnestyusa.org/us/amnesty-makes-it-60>.)

⁴⁴ *See* Belanger, *supra* note 39, at 154–55.

arsenic.⁴⁵ Some farms use their animals for feed, “which produces a meal consisting of feathers, skin, hair, hooves, blood, and intestines.”⁴⁶

Mistreatment of animals before and after slaughter can create human health risks. For example, mad cow disease, salmonella and other food-borne illnesses are transmitted to the consumer through the consumption of animals with these illnesses.⁴⁷

Due to large disease rates in livestock, CAFOs tend to use low doses of hormones in their livestock.⁴⁸ USDA researchers reported that 84% of surveyed hog farms use some amount of antibiotics.⁴⁹ The bigger the farm operation, the more likely it is to use antibiotics.⁵⁰ This subtherapeutic is problematic because “low-level doses are high enough to affect bacteria, but not high enough to kill them all off—giving bacteria the maximum chance to adapt, become antibiotic-resistant, and multiply.”⁵¹ When this occurs, the antibacterial medications that science has made available for human use will lose its potency and ability to fight off human infections.⁵²

In September 2018, The National Pork Producers Council pledged to join the global antibiotic resistance challenge.⁵³ However, rather than agreeing to stop antibiotics use on animals, the effort “will focus on improving antibiotic uses . . . and enhancing antibiotic use data

⁴⁵ *Id.* at 155.

⁴⁶ *Id.*

⁴⁷ See Weil, *supra* note 18, at 196.

⁴⁸ *Id.* at 197.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Shi-Ling Hsu, *Scale Economies, Scale Externalities: Hog Farming and the Changing American Agricultural Industry*, 94 OR. L. REV. 23, 50 (2015).

⁵² Belanger, *supra* note 39, at 154–55.

⁵³ *NPPC joins global antibiotic resistance challenge*, NATIONAL HOG FARMER (Oct. 13, 2018), <https://www.nationalhogfarmer.com/agenda/nppc-joins-global-antibiotic-resistance-challenge>.

sharing.”⁵⁴ The challenge’s hope is to create world-wide standards for how to best use antibiotics so that antibiotic resistance does not increase further than it already has.⁵⁵

C. Health of Employees and Nearby Populations

Duke researchers recently found that death from underlying diseases⁵⁶ is much higher in communities with high farm density.⁵⁷ Additionally, these communities had a greater risk of infant mortality and lower birth weight.⁵⁸ University of North Carolina researchers found that minorities and people of color are disproportionately affected by the location of CAFOs.⁵⁹

The Center for Disease Control has also done research on the effects of CAFOs on populations that live and work near or in the farms. They have found four common air pollutants released from CAFOs: ammonia, hydrogen sulfide, methane, and particulate matter.⁶⁰ With the exception of methane, these pollutants cause respiratory issues ranging from irritation to causing chronic respiratory issues like bronchitis and lung function deterioration.⁶¹ In the most severe cases, hydrogen sulfide can cause death.⁶² Pathogens found in animal manure can also cause diseases. While some of the diseases, like ringworm, are minor, the majority of the diseases have

⁵⁴ *Id.*

⁵⁵ *Id.* (In the United States, antibiotic resistance affects around 2 million people per year and causes death to around 23,000 of those 2 million).

⁵⁶ Underlying diseases were listed and included; among others, infections, organ diseases and anemia. See Olga Naidenko & Sydney Evans, *Duke University Study: N.C. Residents Living Near Large Hog Farms Have Elevated Disease, Death Risks*, ECOWATCH (Oct. 13, 2018), <https://www.ecowatch.com/duke-study-large-hog-farms-north-carolina-2606281665.html> (“30 percent more deaths among patients with kidney disease, 50 percent more deaths among patients with anemia, and 130 percent more deaths among patients with a blood bacterial infection, called sepsis.”).

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ See Steve Wing & Jill Johnston, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians*, NC POLICY WATCH, 7 (Oct. 13, 2018), <http://www.ncpolicywatch.com/wp-content/uploads/2014/09/UNC-Report.pdf>.

⁶⁰ Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, 5 (Oct. 13, 2018), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

⁶¹ *Id.* at 6.

⁶² *Id.*

severe symptoms like vomiting, joint pain, dehydration and fevers.⁶³ CAFOs can be particularly troubling because of how animals are housed; “[t]he potential for transfer of pathogens among animals is higher in confinement, as there are more animals in a smaller amount of space.”⁶⁴ Farm employees deal directly with pathogens when they work within these operations and directly with the animals because the pathogens can be transferred through fecal-oral transmission and inhalation. They can also affect nearby communities through transmission, drinking water, and accidental water consumption at nearby water activity areas.⁶⁵ The antibiotics that could be used to treat those who catch diseases from CAFOs are used on the animals.⁶⁶ Therefore, these diseases can have a deadly effect on those infected by them as the infection or disease might be resistant to the antibiotic.⁶⁷

V. CONCLUSION

The lack of transparency in the farming industry leads to negative health consequences in consumers, nearby populations and employees.⁶⁸ It is imperative to the health of people and the environment that farm conditions can be reported. However, ag-gag laws limit the ability of someone to create the necessary proof for claims like mistreatment.⁶⁹ This is where the law ultimately hurts more people than it claims to protect. North Carolina’s ag-gag law is protecting the farmers from scrutiny and punishment for consumer health issues.

People for the Ethical Treatment of Animals v. Stein has been remanded and it remains to be seen whether North Carolina’s ag-gag law (§99A-2) will be ruled unconstitutional or will

⁶³ *Id.* at 9-10.

⁶⁴ *Id.* at 9.

⁶⁵ *Id.*

⁶⁶ *Id.* at 10.

⁶⁷ *Id.*

⁶⁸ *Myths, CAFO: The Tragedy of Industrial Animal Factories* (Oct 13, 2018), http://www.cafothebook.org/thebook_myths_3.htm.

⁶⁹ Marceau, *supra* note 4, at 1332.

be kept in place. Based on the cases in Utah and Idaho, it is probable that North Carolina will lose their ag-gag bill once the case is retried.⁷⁰ In Utah's decision, the court noted that this law is not the right way to go about protecting the agricultural industry of the state.⁷¹ It is likely that the court for this case in North Carolina will agree and express similar sentiments in their decision based on the similarities between the recording rules in their statutes.

⁷⁰ See *supra* text accompanying notes 32-37.

⁷¹ See Potter, *supra* note 7, at 895.