

Federal court of appeals rules NC's ag-gag law is unconstitutional, signals a win for whistleblowers | The Pulse

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(Photo is from a hog nuisance lawsuit filed against Murphy-Brown; it is unrelated to the free speech litigation.)

In a [split decision](#) the Fourth Circuit Court of Appeals has upheld a [lower court ruling](#) that North Carolina's "ag-gag law" is unconstitutional and infringes on free speech.

The three-judge panel ruled 2-1: Justices Henry Floyd and Albert Diaz, both appointed by President Obama, wrote for the majority. Judge Allison Jones Rushing, an appointee of President Trump, issued a dissent.

At issue was the "[Property Protection Act](#)," passed by the North Carolina General Assembly in 2015. It allowed courts to assess civil fines on employees who took videos or photos — or even took handwritten notes — of a business's non-public areas to document alleged wrongdoing, and then passed that

information to anyone besides the employer or law enforcement. The fines were hefty: \$5,000 per day, plus attorney's fees.

While bill supporters argued that it protected businesses from the theft of trade secrets, its underlying intent was to thwart animal rights activists from getting hired at farms and research labs and then conducting undercover investigations.

Then-Gov. Pat McCrory, a Republican, vetoed the bill because he believed it would discourage employees, such as those working in nursing homes, from reporting illegal activities. Lawmakers overrode the veto.

There were multiple plaintiffs who sued the state over the measure: the ASPCA, People for the Ethical Treatment of Animals, Reporters Committee for Freedom of the Press, United Farm Workers and Food & Water Watch.

In addition to the state of North Carolina and UNC Chapel Hill, the NC Farm Bureau Federation intervened to defend the ag-gag law. (UNC was a defendant because it operates animal research labs.)

Yesterday's appellate court ruling upheld the heart of a district court decision that determined the law, as it applies to news gathering, ran afoul of the First Amendment.

"This decision is a remarkable victory for transparency and democracy," said Food & Water Watch Factory Farm Organizing Director Krissy Kasserman, who is based in North Carolina. "Advocating for a more just and sustainable food system requires shedding light on the abuses that happen behind closed factory farm doors. North Carolina's attempt to criminalize the publishing of valuable information was nothing more than an attempt to silence critics of factory farms. Thankfully the Fourth Circuit has protected the rights of investigators, whistleblowers and journalists to share information with the public."

The state had argued that undercover investigations in nonpublic areas were not protected by the First Amendment. The appellate court's majority disagreed. "That is a dangerous proposition that would wipe the Constitution's most treasured protections," Justice Floyd wrote.

The court found that not only was the distribution of the undercover material constitutionally protected, but so was the very act of documenting and creating the material.

The state had also argued that the law didn't punish speech, but disloyalty. The undercover recordings merely provided one way to prove that disloyalty. The court disagreed: "The First Amendment cannot so easily be evaded."

Similarly, the court lambasted the ag-gag law over the type of speech that would be penalized. Only recordings and images that were critical of the employer were off-limits; the law would not apply to those that were complimentary.

That strikes at the heart of the First Amendment. With a few exceptions — the best known example is yelling fire in a crowded movie theater — the government can't discriminate based on the content of the speech.

"The First Amendment's shield falls away only from those narrow categories for which the Constitution never intended protection," Justice Floyd wrote, "not from those that the legislative majority just prefers not to protect."

Nor have the court ever exempted speech from the First Amendment merely because of its location — like a workplace. And there is a distinction between private and government restrictions.

A private landowner, for example, can forbid people from gathering on their land to exercise their First Amendment rights. While the government could cite the people for trespassing, it can't jail them for their speech.

"The First Amendment limits the government," Justice Floyd wrote. "The government does not limit the First Amendment."

There is also collateral damage in the state's ag-gag law. It would also punish anyone who encouraged someone to conduct or participate in an undercover investigation.

If the state legislature was genuinely concerned in protecting private property as it alleged, then it needed to prove that it used existing laws "or less intrusive tools" to achieve that goal. "North Carolina concedes that the state produced no such evidence ..." Justice Floyd wrote.

For the dissent, Justice Rushing argued that the ag-gag law appropriately forbids trespassing. The act of trespassing, "interferes with the ownership or possession of real property," Justice Rushing wrote.

Nor is the act of recording by itself protected speech. The majority opinion did not distinguish between recording in public spaces and on private property, Justice Rushing wrote. Stealing documents or private wiretapping, for instance, is not constitutionally protected.

"Laws can prohibit using information to harm another person or breach an obligation without raising any First Amendment concern," Justice Rushing wrote.

The State Attorney General's Office said it reviewing the decision.

The North Carolina measure is modeled on legislation — the Animal and Ecological Terrorism Act — drafted in 2003 by the American Legislative Exchange Council.

ALEC has been widely derided as a "bill mill" and is funded largely by the conservative Koch Brothers and major corporations, such as ExxonMobil, Pfizer and Anheuser-Busch.

North Carolina's law is similar to measures passed by state legislatures in Kansas, Iowa, Idaho, Wyoming and Utah. The courts have struck those down, ruling they are unconstitutional.

Several media organizations also filed briefs supporting the plaintiffs, including the NC Press Association and the Society of Professional Journalists. Policy Watch is a member of the NCPA; Lisa Sorg is an SPJ member.