



2021 Pennsylvania Farm Show Agricultural Law Symposium

January 12th

1:00-2:00pm (EST)

2:15-3:15pm (EST)

January 14th

1:00-2:00pm (EST)

2:15-3:15pm (EST)



2021 Pennsylvania Farm Show Agricultural Law Symposium

- January 12, 2021 (1:00 to 3:15)
 - The Year 2020 in Agricultural Law: The Year of Living Dangerously
 - Utility Scale Solar Leasing: How It Works and When It Doesn't
- January 14, 2021 (1:00 to 3:15)
 - Chesapeake Bay Developments: Moving the Ball or the Goal Line?
 - Pesticide Drama and Non-Target Liability



Logistics

- This webinar is being recorded
 - A link to the recording will be available on our YouTube channel:
 - [Center for Agricultural and Shale Law YouTube channel](#)
 - Materials will be available here:
 - <https://aglaw.psu.edu/event/agricultural-law-symposium/>
- Questions? Please use Q&A



Attn: Pennsylvania Attorneys

- *The Year 2020 in Agricultural Law*
- Attorneys fill out this form:
 - <https://forms.office.com/Pages/ResponsePage.aspx?id=RY30fNs9iUOpwcEVUm61LmEBt7czRAtMjG3HomNI9AZUMTFVNzVOOVhJR04ySEZaSkJQNEtVRVhKQy4u>
 - Two code words will be provided during this presentation
 - These codes must be entered onto the form in order to receive a CLE credit for this session



2021 Pennsylvania Farm Show Agricultural Law Symposium

**Pennsylvania Department of Agriculture
Secretary Russell C. Redding**



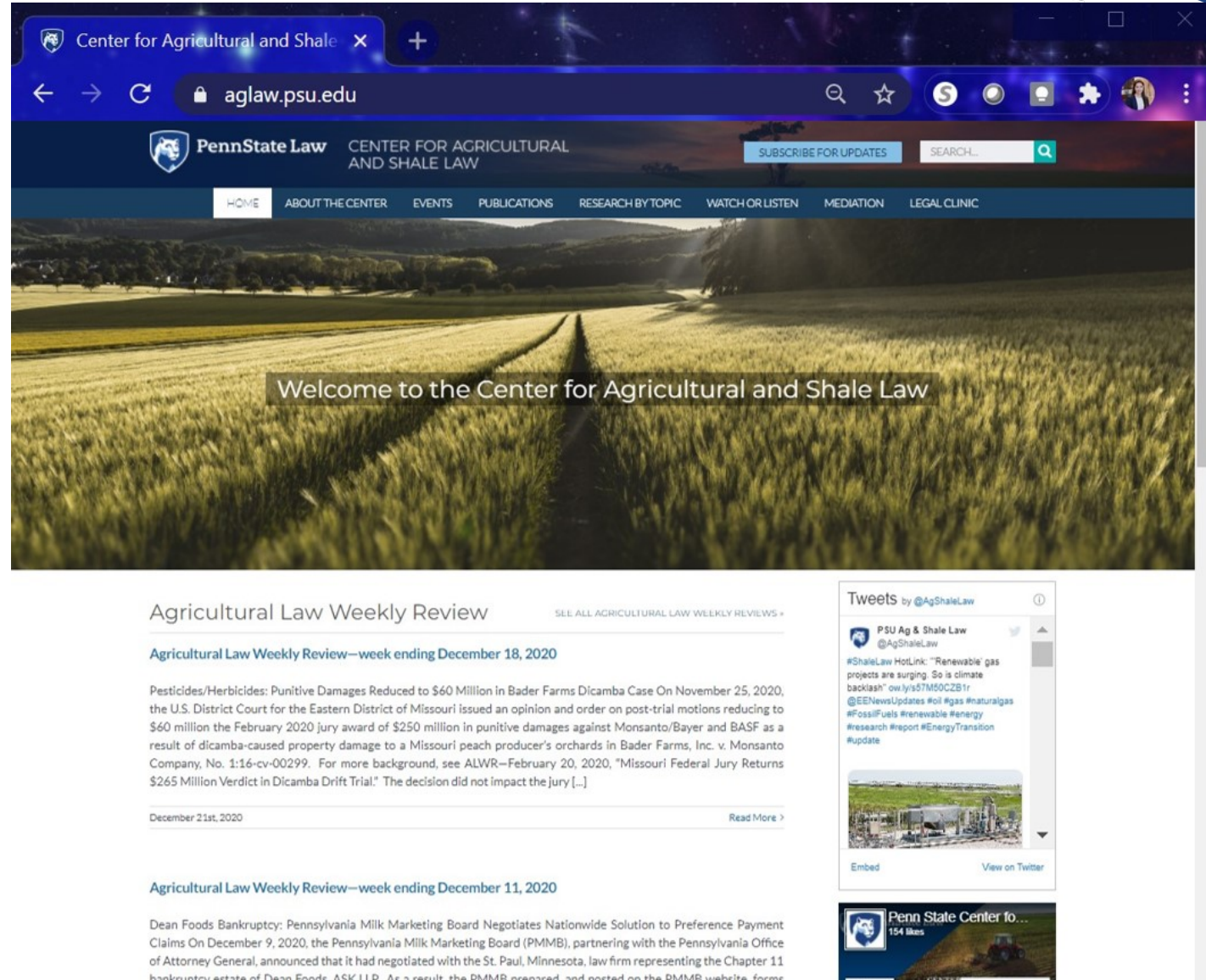


The Year 2020 in Agricultural Law: The Year of Living Dangerously

2021 Pennsylvania Farm Show Agricultural Law Symposium
January 12, 2021

Ross H. Pifer and Audry Thompson,
Penn State Center for Agricultural and Shale Law

Our new Website



The screenshot shows the website for the Center for Agricultural and Shale Law. The browser address bar displays "aglaw.psu.edu". The website header includes the PennState Law logo, the center's name, a "SUBSCRIBE FOR UPDATES" button, and a search bar. A navigation menu lists: HOME, ABOUT THE CENTER, EVENTS, PUBLICATIONS, RESEARCH BY TOPIC, WATCH OR LISTEN, MEDIATION, and LEGAL CLINIC. The main content area features a large image of a field with a path, overlaid with the text "Welcome to the Center for Agricultural and Shale Law". Below this, there are two sections for "Agricultural Law Weekly Review".

Agricultural Law Weekly Review

[SEE ALL AGRICULTURAL LAW WEEKLY REVIEWS >](#)

Agricultural Law Weekly Review—week ending December 18, 2020

Pesticides/Herbicides: Punitive Damages Reduced to \$60 Million in Bader Farms Dicamba Case On November 25, 2020, the U.S. District Court for the Eastern District of Missouri issued an opinion and order on post-trial motions reducing to \$60 million the February 2020 jury award of \$250 million in punitive damages against Monsanto/Bayer and BASF as a result of dicamba-caused property damage to a Missouri peach producer's orchards in Bader Farms, Inc. v. Monsanto Company, No. 1:16-cv-00299. For more background, see ALWR—February 20, 2020, "Missouri Federal Jury Returns \$265 Million Verdict in Dicamba Drift Trial!" The decision did not impact the jury [...]

December 21st, 2020 [Read More >](#)

Agricultural Law Weekly Review—week ending December 11, 2020


Dean Foods Bankruptcy: Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims On December 9, 2020, the Pennsylvania Milk Marketing Board (PMMB), partnering with the Pennsylvania Office of Attorney General, announced that it had negotiated with the St. Paul, Minnesota, law firm representing the Chapter 11 bankruptcy estate of Dean Foods. ASK LLP. As a result, the PMMB created, and posted on the PMMB website, forms

Tweets by @AgShaleLaw

PSU Ag & Shale Law @AgShaleLaw

#ShaleLaw HotLink: "Renewable" gas projects are surging. So is climate backlash" [ow.ly/s57M50CZB1r](#)

@EENewsUpdates #oil #gas #naturalgas #FossilFuels #renewable #energy #research #report #EnergyTransition #update



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Agricultural Law Weekly Review

The Agricultural Law Weekly Review provides an update of recent agricultural law developments from local, state, national, and international levels. Subscribe at pennstateoglaw.com.

Agricultural Law Weekly Review—week ending December 18, 2020

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December 21st, 2020 | Tags: [Agricultural Labor](#), [Biotechnology](#), [Invasive Species](#), [Pesticides/Herbicides](#)

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Agricultural Law Weekly Review—week ending December 11, 2020

Dean Foods Bankruptcy: Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims

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December 15th, 2020 | Tags: [Agribusiness](#), [Animal Health](#), [Conservation Programs](#), [Dairy Policy](#), [Food Labeling](#), [Industrial Hemp](#), [International Trade](#)

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HOME » ISSUE TRACKERS » AGRICULTURAL LAW ISSUE TRACKERS

Agricultural Law Issue Trackers

Penn State Law's Center for Agricultural and Shale Law is making available a research tool – the Issue Tracker – aimed at simplifying the historical developments relevant to selected agricultural legal topics by documenting relevant federal and state legislative, regulatory and litigation/judicial proceedings in a reverse chronological timeline format. The Issue Tracker also supplements legal developments, as appropriate, with relevant actions and statements of stakeholders directly involved.



Agricultural Antitrust, 2018 – present



Bioengineered Food Disclosure, 2016 – present



Cell-Cultured Food Regulations, 2018 – present



CERCLA / EPCRA Reporting, 2017 – present



COVID-19, 2020 – present



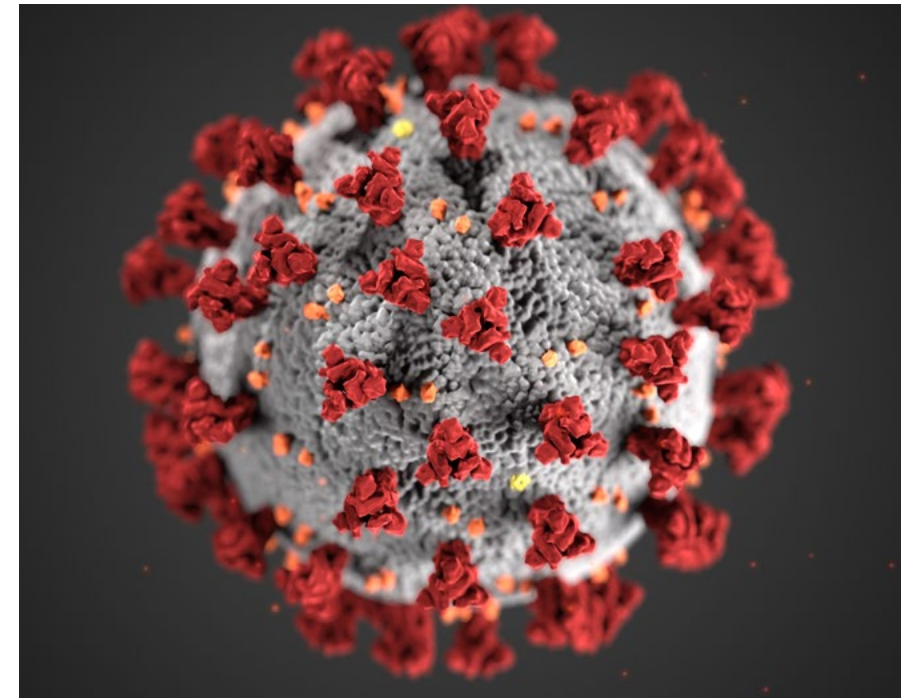
Genetically Modified Salmon, 2015 – present





Session Outline, Part I

- COVID-19
- Dairy
- Clean Water Act / WOTUS
- Renewable Fuel Standard
- Agritourism Immunity





COVID-19 Legal Developments

1. New Legislation/Programs Providing Financial Assistance to Agriculture/Farmers
2. Changes to Enforcement/Implementation of Existing Laws/Regulations/Programs Regulating Agricultural Production
3. Labor Law Changes & Compliance Impacting Ag Employers



COVID-19 Ag Legal Update Webinar Series

All Webinars are available for viewing at the **WATCH OR LISTEN** tab of our new website at **aglaw.psu.edu**

- #1 ***COVID-19 Legal Update*** (Jun. 3, 2020)
- #2 ***Focus on Dairy*** (Jun. 24, 2020)
- #3 ***Focus on Labor Laws*** (Jul. 14, 2020)
- #4 ***Focus on Direct Sales and Liability Prevention*** (Aug. 11, 2020)



New Financial Assistance Laws/Programs

The Big Four Initial COVID-19 Federal Laws Passed by Congress:

3/6/20

[P.L. 116-123](#)

Coronavirus Preparedness and Response Supplemental Appropriations Act

3/18/20

[P.L. 116-127](#)

Families First Coronavirus Response Act

3/27/20

[P.L. 116-136](#)

Coronavirus Aid, Relief, and Economic Security (CARES) Act

4/24/20

[P.L. 116-139](#)

Paycheck Protection Program and Health Care Enhancement Act



New Financial Assistance Laws/Programs

Other programs for Agriculture using authority of the “Big Four:”

- *Farmers to Families Food Box Program* – Initially announced on Apr. 17, 2020; 3 billion for USDA food purchases (\$461m fruit/veg; \$317m dairy; \$258m meats; \$175m combo) from vendors, boxed to distribute through existing networks between 5/15 – 6/30. \$1.2 billion in contracts awarded. PA = approx. \$35m.
 - 5th Round announced on Jan. 4, 2021; additional \$1.5 billion available for program deliveries through Apr. 30, 2021
 - As of Jan. 11, 2021, a total of 132 million food boxes have been distributed.



New Financial Assistance Laws/Programs

Other programs for Agriculture using authority of the “Big Four:”

- *Coronavirus Food Assistance Program (CFAP)*
 - \$16 billion in direct payments for enumerated commodities as compensation for losses due to price drop (>5%) or market supply chain disruption between btw Jan-Apr 2020. Applications opened 5/26 and closed 8/28.
 - Follows approx. \$27 billion paid in 2018 and 2019 in “Trade Aid” direct payments.
- *Second Round of Coronavirus Food Assistance Program (CFAP2)*
 - Additional \$14 billion in direct payments – price trigger commodities, flat-rate crops, and sales commodities



Changes to Enforcement/Implementation

Federal and State Actions - accounting for COVID-19 impacts upon producers and markets.

- 3/13/20 – US DOT FMCSA waived hours of service rules for truck transport of COVID-19 supplies/food/feed/livestock. The waiver has been repeatedly extended, most recently on 12/1. The waiver currently expires on 2/28/2021.
- 4/3/20 – FDA issued a guidance, in place for the duration of the HHS-declared public health emergency, relaxing the packaging and labeling requirements for retail shell eggs due to the necessity to reintegrate commercially packaged eggs into the consumer retail supply chain.
- FDA has issued 53 guidance documents, through 6/2/20, relaxing various regulatory standards in food and drug manufacturing.



Changes to Enforcement/Implementation

[4/28/20 Executive Order 13917](#) (85 FR 26313)

- delegation of the [Defense Production Act](#)'s (DPA) Presidential powers to USDA Secretary Perdue to exercise re:
 - “**meat and poultry in the *food supply chain***” b/c designated “essential to the nation defense.”
 - “**additional specific *food supply chain* resources** that Secretary Perdue may also designate “essential to the nation defense.”
- Effective 5/1/20



WEBINAR – OCTOBER 27 , 2020

12:00 p.m. – 1:00 p.m. EST

Each quarter, Penn State Law’s Center for Agricultural and Shale Law brings you a 30-minute round-up of the past quarter’s legal and regulatory developments in the dairy industry and a 30-minute focused topic of interest to dairy producers and professionals. This quarter’s topic:

Establishment and Impact of California’s FMMO 51 with Marvin Beshore, Esq., lead counsel on the petition establishing FMMO 51



PennState Law

Center for Agricultural
and Shale Law

Installments in this quarterly webinar series:

October 27, 2020, January 26, 2021,

April 27, 2021 and July 27, 2021.

The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information. This material is provided as part of that partnership and is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.



National Agricultural Library

UNITED STATES DEPARTMENT OF AGRICULTURE



Dairy Industry Bankruptcies

- Jan. 5, 2020 – Borden Dairy Co. filing
- Nov. 12, 2019 – Dean Foods filing
 - Nov. 2020 – Attempted clawback of “preference payments” from dairy farmers
 - Approx. 1000-1500 demand letters sent to farmers nationally (approx. 50-75 in PA)
 - 12/9/20 – announcement by PMMB of availability of forms to submit to bankruptcy estate counsel so that claim for repayment can be withdrawn.



USMCA

- Dec. 12, 2019 – approval by Mexico
- Jan. 29, 2020 – Pres. Trump signs USMCA following Congressional approval on Jan. 16, 2020
- Mar. 13, 2020 – full approval by Canada



USMCA

- Dec. 9, 2020 – 1st enforcement action initiated
 - US Trade Representative notified Canadian authorities of commencement of process and requested consultations regarding Canada’s dairy tariff-rate quotas.
 - Large amount of TRQ are reserved for “processors” and “further processors” which US alleges unfairly impacts ability of US dairy farmers to sell products.
- Canada has responded by challenging US tariffs on solar products.



Waters of the United States

- Feb. 14, 2019 – Proposed Rule published in Federal Register
- Sep. 12, 2019 – EPA announced repeal of 2015 Final Rule
- Jan. 23, 2020 – EPA and COE announced issuance of Navigable Waters Protection Rule
- Apr. 21, 2020 – Navigable Waters Protection Rule published in Federal Register
- June 22, 2020 – Effective date of Rule



Waters of the United States

- Defines scope of Clean Water Act coverage
- Waters of U.S. encompasses “ordinary meaning” of term
 - Tributary – perennial or intermittent
 - Lakes, ponds, and impoundments of jurisdictional waters
 - Adjacent wetlands – abuts a traditional navigable water, tributary, . . .



Waters of the United States

- General exclusion – waters not mentioned
- Specifically listed items not included:
 - Groundwater
 - Ephemeral features flowing as a result from precipitation
 - Diffuse stormwater runoff
 - Ditches
 - Artificial lakes and ponds



Clean Water Act – County of Maui v. Hawaii Wildlife Fund

- U.S. Supreme Court opinion issued on Apr. 23, 2020
- Issue: Does CWA require permit when point source discharge is conveyed to navigable waters through non-point source?
- Facts of case:
 - Injection of treated sewage into underground wells
 - Eventually travels half mile to enter Pacific Ocean



Clean Water Act – County of Maui v. Hawaii Wildlife Fund

- Ninth Circuit Court of Appeals – permitting standard is whether discharge was “fairly traceable” to a point source
- U.S. Supreme Court – permitting standard requires direct discharge or “functional equivalent of a direct discharge”



Clean Water Act – County of Maui v. Hawaii Wildlife Fund

- Relevant factors in determining “functional equivalent of a direct discharge”
 - Time and distance
 - Nature of material through which item travels
 - Dilution or chemical changes during flow
- Recognition that opinion does not present clear line
 - Reliance upon EPA for administrative guidance



Renewable Fuel Standard

- Originated in Energy Policy Act of 2005
- Expanded in Energy Independence and Security Act (2007)
- Administered by Environmental Protection Agency



Renewable Fuel Standard

- Statutory threshold of minimum volume of renewables in transportation fuel.
- After 2022, EPA determines the minimum volume threshold.
- EPA has waiver authority for volume thresholds.
- EPA determines which fuels are within program.



Renewable Fuel Standard

- Recurring legal issues
 - EPA exercise of waiver authority
 - EPA grant of Small Refinery Exceptions (SREs)
- *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assn*
 - Jan. 8, 2021 – US Supreme Court granted certiorari
 - 10th Cir. invalidated EPA's grant of SRE



Agritourism Immunity Legislation

- PA House Bill 1737 – passed both chambers of General Assembly on Nov. 20, 2020
 - Included agritourism immunity provisions originally in House Bill 1348
 - Required warning signs and written agreement
 - Exception for gross negligence
- Vetoed by Governor on Nov. 30, 2020
 - Veto statement referenced concerns about granting immunity for various COVID-19 concerns.



National Legislative/Litigation Developments

- **Right to Farm**
 - North Carolina & Indiana
- **First Amendment/Free Speech Issues**
 - Ag Gag Statutes – Kansas, North Carolina, & Iowa
 - Food Labeling – Oklahoma
- **Animal Welfare Issues**
 - California's Proposition 12
 - Cage Free Egg Laws – Colorado



Right to Farm

Damages Awarded: North Carolina

- *McKiver v. Murphy-Brown, LLC* (Fourth Circuit Court of Appeals, No. No. 19-1019)
 - [Opinion](#) issued November 19, 2020.
 - Upheld [trial court](#) finding of [liability](#), held N.C. Right to Farm Law inapplicable.
 - Upheld trial court's award of \$75,000 in compensatory damages for each plaintiff.
 - Remanded for recalculation of punitive damages without Smithfield's financial information (Jury awarded \$5 million for each plaintiff; reduced by state law to \$250,000).
 - Smithfield has since settled multiple N.C. lawsuits.



Right to Farm

Law Upheld: Indiana

- [Himsel v. Himsel](#), April 22, 2019 (Indiana Court of Appeals, Ind. Ct. App. 18A-PL-00645).
- Challenged [Indiana’s Right to Farm Act](#) as an unconstitutional “taking” without due process.
 - “(1) **A significant change** in the type of agricultural operation **does not include** the following: (A) The **conversion** from one **type** of agricultural operation to another type of agricultural operation. (B) A **change** in the **ownership** or **size** of the agricultural operation. (D) Adoption of new technology by the agricultural operation.”
- [Certiorari denied](#) by U.S. Supreme Court on Oct. 5, 2020.



First Amendment Issues: Farm Protection/ “Ag Gag” Statutes

Laws Struck Down/Declared Unconstitutional

- *Animal Legal Defense Fund, et al. v. Laura Kelly, et al.* (U.S. District Court for the District of Kansas, No. 18-2657-KHV.)
 - Kansas Farm Animal and Field Crop and Research Facilities Protection Act, K.S.A. §§ 47-1825 et seq., enacted in 1990
 - “**No person shall**, without the effective consent of the owner and **with the intent to damage the enterprise** conducted at the animal facility:
 - (1) Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;
 - (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;
 - (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or
 - (4) **enter an animal facility to take pictures by photograph, video camera or by any other means.**”
- Overbroad, prohibited speech based on content.
- Opinion issued January 22, 2020; Permanent Injunction issued April 3, 2020.



First Amendment Issues: Ag Gag Statutes

Laws Struck Down/Declared Unconstitutional

- [*PETA et al., v. Stein, et al.*](#) (U.S. District Court for the Middle District of North Carolina, No. 1:16CV2)
 - [North Carolina Property Protection Act](#), SL2015-500
 - created a trespass-based civil action against an employee who “records images or sound . . . and uses the recording to breach the person’s duty of loyalty to the employer”
 - Unconstitutional both facially and as-applied
 - Law served to regulate speech according to content - “to breach the person’s duty of loyalty”
 - “Recording is protected speech”
- Opinion issued June 12, 2020.



First Amendment Issues: Ag Gag Statutes

Law Intact – “Content Neutral”

- Iowa “Food Operation Trespass” Law [SF 2413](#)
 - “A person commits food operation trespass by entering or remaining on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property.”
 - Does not prohibit conduct based upon any intent of the actor
 - Identical to many states’ existing trespassing statutes
 - 1st offense = aggravated misdemeanor; subsequent offense = class “D” felony
- Enacted June 10, 2020
 - No challenges thus far



First Amendment Issues: Food Labeling

Oklahoma's Meat Consumer Protection Act HB 3806

- Enacted May 19, 2020, effective November 1, 2020
 - It is a misrepresentation to represent “a product . . . not derived from harvested production livestock” as meat.
 - Not a violation if the “packaging displays that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product.”
- Challenged in *Upton's Naturals Co. v. Stitt* (U.S. Dist. Court for the Western Dist. of Oklahoma, No. [5:20-cv-00938](#))
 - Denied injunction
 - Upton's use of terms “burger, bacon, chorizo, hot dog, jerky, meatballs, and steak” on plant-based products are potentially misleading to a reasonable customer.
 - Appealed to the Tenth Circuit



Animal Welfare: California Proposition 12

- Successor to California's Proposition 2 - passed in 2008, effective 2015
 - Prohibited confinement of sows, veal calves, and egg-laying hens in a manner that “prevents [them] from lying down, standing up,” “fully extending [the animal’s] limbs,” or “turning around freely.”
- Prop 12 passed November 2018, fully effective December 2021
- Amended California Health and Safety Code [Ch. 13.8 Farm Animal Cruelty](#)
 - Prohibits a farm owner/operator from “knowingly caus[ing] any covered animal to be confined in a cruel manner” **and a business owner or operator from “knowingly engag[ing] in the sale within the state of”** “whole veal meat,” “whole pork meat,” “shell eggs,” or “liquid eggs” that are the “product of a covered animal who was confined in a cruel manner.”



Animal Welfare: California Proposition 12

- “Confined in a cruel manner” Timeline:
 - “After December 31, 2019, confining a **calf raised for veal** with less than **43** square feet of usable floor space per calf; or
 - After December 31, 2021, confining a **breeding pig** with less than **24** square feet of usable floor space per pig; or
 - After December 31, 2019, confining an **egg-laying hen** with less than **144** square inches of usable floor space per hen; or
 - After December 31, 2021, confining an **egg-laying hen** with less than the amount of usable floor space per hen required by the 2017 edition of the United Egg Producers’ Animal Husbandry Guidelines for U.S. Egg-Laying Flocks: Guidelines for Cage-Free Housing, or **in an enclosure other than a cage-free housing system.”**



Animal Welfare: California Proposition 12 - Challenges

- *North American Meat Institute v. Xavier Becerra* (C.D. California, [2:19-cv-08569](#))
 - Preliminary injunction denied Nov. 22, 2019
 - Motion to dismiss granted Feb. 24, 2020
 - Ninth Circuit upheld denial of injunction Oct. 15, 2020
- *National Pork Producers Council, et. al v. Ross, et. Al* (S.D. California, [19-cv-02324](#))
 - Denied injunction April 27, 2020
 - Proposition 12 does not target interstate commerce; regulates in-state and out-of-state conduct equally
 - “Simply precluding” less expensive production process not a substantial burden on interstate commerce
 - Appealed to Ninth Circuit June 17, 2020



Animal Welfare: Cage Free Egg Laws

Colorado's [HB20-13463](#), "[Egg-laying Hen Confinement Standards](#)"

- By January 1, 2023 - chickens and other commercially producing egg-laying fowl enclosures must be no smaller than “one square foot of usable floor space per egg-laying hen”
- By January 1, 2025, must be in a “cage-free housing system.”
- Exceptions include farms with fewer than 3,000 egg-laying hens.
- All eggs sold in in-state must be from compliant sources regardless of where produced.



Animal Welfare: Cage Free Egg Laws – Other States

- California (see Proposition 12)
 - 2021 – all eggs sold in state must be cage-free
- Massachusetts: [2016 ballot initiative](#), Question 3
 - By 2022 – all eggs sold in state must be cage-free
- Washington: [HB 2049](#)
 - 2023 - all eggs sold in state must be cage-free
- Michigan: [SB 174](#)
 - 2024 - all eggs sold in state must be cage-free
- Oregon: [SB 1019](#)
 - 2024 - all eggs sold in state must be cage-free
- Rhode Island: [HB 7456](#)
 - Specifies confinement standards; only applies to in-state hens – effective 2023



Animal Welfare: Cage Free Egg Laws – Consumer-Driven, Industry, & Retailer/Restaurant Standards

- 100% cage free by 2025
 - [Restaurant Brands international](#)
 - [McDonalds](#), *announced 2015*
 - [Wal-Mart](#), *announced April 5, 2016*
 - [Kroger](#), *announced July 2016*
 - [Announced Kroger brand of cage-free eggs Sept. 6, 2016](#)
- Currently cage-free:
 - [Whole Foods](#) (“beyond cage-free”)
 - [Starbucks](#)
 - [Panera](#) (in U.S.)



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