No. 19-1364

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, et. al.,

Plaintiffs-Appellees,

v.

KIMBERLY REYNOLDS, GOVERNOR, et. al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION
HON. JAMES E. GRITZNER

BRIEF OF AMICUS CURIAE, IOWA FEDERATION OF LABOR AFL-CIO IN SUPPORT OF THE PLAINTIFF-APPELLES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the Federation states that it is not a corporation.

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STATEMENT OF IDENTITY, INTENT AND AUTHORITY TO FILE THE BRIEF

The brief as amicus curiae is authored solely by counsel for the Federation, is funded exclusively by the Federation, and was authorized by the governing body of the Federation.

ARGUMENT

THE COURT SHOULD AFFIRM THE DECISION OF THE DISTRICT COURT BECAUSE ENFORCEMENT OF SECTION 717A.3A OF THE IOWA CODE VIOLATES THE RIGHTS OF EMPLOYEES TO ORGANIZE UNDER THE NATIONAL LABOR RELATIONS ACT AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Federation urges the District Court correctly concluded that Iowa Code §717A.3A violates the First Amendment of the United States Constitution because it is content-based regulation of speech which is presumptively unconstitutional and cannot withstand judicial scrutiny. *Animal Legal Defense Fund v. Reynolds*, 353 F. Supp. 3d 812, 822-27 (SD Iowa 2019). In addition, the Federation urges the Court to affirm the District Court's ruling because the statute, as applied to employees covered by the National Labor Relations Act (NLRA), is preempted by the NLRA because it interferes with the employees' rights to organize and engage in other protected activities under Section 7 of the NLRA.[1]

[1] In reaching its conclusion, the Court, like others, focused on the statute as a response to undercover investigations of agricultural operations, especially the treatment of animals by breeders and other handlers of animals, by journalists who published the results of their work which triggered public outrage toward the practices within the agricultural industry. *Animal Legal Defense Fund v. Reynolds*, 353 F. Supp. 3d 812, 816-18 (S.D. Iowa 2019). *See* Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms, 42 Envtl. L Rep. News & Analysis 10960, 10962-10966 (2012). While the Federation agrees with this general view of the purpose of the statute - to eliminate undercover investigations of the industry- it submits another effect of the legislation whether

The Federation urges Section 717A.3A as applied to employees seeking to work at agricultural production facilities is preempted by the NLRA. The cornerstone of the NLRA is Section 7, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

The Supreme Court held in *Golden State Transit Corp. v. City of Los Angeles* ("*Golden State II*"), 493 U.S. 103, 108 (1989), that the NLRA, 20 U.S.C. § 141 et. seq., creates rights in labor and management that are protected against governmental interference. In so holding, the Court rejected the defendant city's argument that the NLRA does not secure rights against the state because the duties of the state are not expressly set forth in the text of the statute, explaining that the NLRA "creates rights in labor and management both against one another and against the state." *Id*. at 109 (quoting Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b): "It is the purpose of and policy of this chapter . . . to

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intended or not was to criminalize activities protected by the National Labor Relations Act.

prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ."). Thus, the Court concluded in *Golden State II* that the NLRA "confers certain rights 'generally on employees and not merely as against the employer'" *Id*. (citing *Hill v. Florida ex. rel. Watson*, 325 U.S. 538, 545 (1945)).

The NLRA contains no statutory preemption provision. The Supreme Court has explained, however, that Congress implicitly mandated preemption as necessary to implement federal labor policy. *Garmon* preemption, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. Los Angeles* (*"Golden State I*"), 475 U.S. 608, 613 (1986). In turn, *Garmon* preemption forbids states to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

The Federation urges Iowa Code Section 717A.3A prohibits activity protected by the NLRA. Specifically, where, as here, state law interferes with the exercise of the rights protected by Section 7 of the NLRA, there is an actual conflict, and the law is preempted by direct operation of the Supremacy Clause. See *Garmon*, 359 U.S. at 244 ("When it is clear or may fairly be assumed that

the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield"); see also, *id*. at 239 (Obvious conflict, actual or potential, leads to easy judicial exclusion of state action"). Because efforts to organize a workplace are a form of concerted activity protected under Section 7, Iowa Code Section 717A.3A, which prohibits obtaining employment by making a false statement or representation as part of an application or agreement to be employed, necessarily conflicts with the NLRA, it is therefore preempted.

Moreover, review of the terms of Section 717A.3A of the Iowa Code, analysis of the applicability of the Section to persons and businesses covered by the terms of the National Labor Relations Act and consideration of rights guaranteed to employees under the federal law further support the Federation's position. And, the Federation examines each facet of its stance in turn.

The statute by its terms makes criminal two acts: (1) obtaining access to an "agricultural production facility" by false pretenses and (2) making a false statement or representation to obtain employment at an "agricultural production facility" knowing the statement is false and intending to commit an act not authorized by the owner of the facility, knowing the activity is not authorized.

Iowa Code §717A.3A-1 a and b. Critical to any analysis of the statute is the meaning of the term "agricultural production facility."

The statute defines "agricultural production facility" to mean an "animal facility" or a "crop operation property." Iowa Code § 717A.1-3. An "animal facility" is defined as a location where an agricultural animal is maintained for agricultural production purposes. Such locations include a farm, a livestock exhibition, and a vehicle used to transport the animal. Iowa Code § 717A.1-5a. "Agricultural production" means any activity related to maintaining an agricultural animal or a crop on crop operation property. Iowa Code § 717A.1-2. A "crop operation property" includes real property where crops are planted and the structures on the land, as well as vehicles which transport the crops from the crop operation. Iowa Code § 717A.1-9 a and b.

Notably, the word "maintain" is also defined. Regarding animals, it means keeping and proving for the care and feeding of any animal "including any activity relating to confining, handling…transporting …the animal." Iowa Code § 717A.1-11a. In regard to crops, it means keeping and preserving any crop "by planting… harvesting, and storing the crop; or storing… the crop's seed."[2] Iowa Code § 717A.1-11b.

[2] The statute also defines "agricultural animal" as an animal that is maintained for its parts or products having commercial value. Iowa Code § 717A.1-1a. Crop is

In short, the Federation submits that by its terms, Section 717A.3A broadly applies to and is intended to apply to all facilities and operations involved in the raising of livestock and crop farming performed in the State.[3] The Federation urges that many of those facilities and operations and the individuals employed at them come within the coverage of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board despite the fact Section 2(3) expressly excludes "agricultural laborers" from the scope of the Act. 29 U.S.C. § 152(3).

In this regard, the United States Supreme Court has held that only workers (1) who engage in specific farming tasks or (2) who are employed by farm owners or work on farms and perform work "incident to or in conjunction with such farming" are excluded from coverage under the National Labor Relations Act. *Holly Farms v. NLRB*, 517 U.S. 392, 116 S. Ct. 1396 (1996). Correspondingly, many individuals who perform work at an "agricultural production facility" as defined by the Iowa statute constitute employees under the National Labor Relations Act. *E.g.*, *Hodgson v. Wittenberg*, 464 F. 2d 1219 (5th Cir. 1972); *NLRB*

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defined as "any plant maintained for its parts or products having commercial value…" Iowa Code § 717A.1-7a.

[3] The definition of "agricultural production facility" does not clearly include facilities the activities of which involve the processing of agricultural animals or crops for the production of food or industrial products. *See Animal Defense Fund v. Wasden*, 878 F. 3d 1184, 1191 n. 6 (9th Cir. 2018); *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1198 n. 27 (D. Utah 2017).

v. Tovrea, 111 F. 2d 626 (9th Cir. 1940) (employees working in facilities where livestock is confined for processing or resale – locations for confining, handling agricultural animals are agricultural production facilities); *Davis Grain Corp.*, 203 NLRB 319 (1973) (employees of grain elevator operator – property used in storing crops is an agricultural production facility); *Lucas County Farm Bureau Cooperative Ass'n. v. NLRB*, 289 F. 2d 844 (6th Cir. 1961); *NLRB v. Central Oklahoma Milk Producers Ass'n.*, 285 F, 2d 495 (10th Cir. 1960) (employees of farmers' cooperative associations are not engaged in farming – but property used by cooperative for storing crops is an agricultural production facility); *NLRB v. Kent Bros. Transp. Co.*, 458 F.2d 480 (9th Cir. 1972); *NLRB v. Hudson Farms, Inc.*, 681 F. 2d 1105 (8th Cir. 1981); *Valmac Industries, Inc. v. NLRB*, 599 F. 2d 246 (8th Cir. 1979); *NLRB v. Gass*, 377 F.2d 438 (1st Cir. 1967) (employees who haul crops and animals for storage or marketing – vehicles used in transporting crops or animals are agricultural production facilities.) In short, the Federation submits many categories of individuals who work at "agricultural production facility" locations are "employees" under the terms of the National Labor Relations Act. In turn, such individuals are entitled to the protections extended to workers under the federal statute. *Holly Farms Corporation v. NLRB*, 517 U.S. 392, 397, 116 S. Ct. 1396, 1400 (1996); *NLRB v. Town & Country Electric, Inc.*, 516 U.S.

85, 89, 116 S. Ct. 450, 453 (1995) (worker rights granted by National Labor Relations Act apply only to "employees" as defined in the law).

A fundamental right of "employees" under the federal law is the right to organize fellow workers to join a union and to engage in other concerted activity for their mutual aid and protection as employees. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 89; 116 S. Ct. 450, 453 (1995). In exercising those rights, there has developed the practice of "salting" where "a union inserts its organizers into some employer's workforce in the hope that they will be able to organize it." *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F. 3d 1110, 1111 (7th Cir. 2002). Against challenges that such union organizers ("salts") are not "employees" as defined in the National Labor Relations Act, the Courts have disagreed in regard both to organizers who are paid as employees of a union and to those who volunteer to serve as a "salt" on behalf of a union. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 116 S. Ct. 450 (1995) (paid "salts" are employees); *NLRB v. Fluor Daniel, Inc.*, 161 F. 3d 953, 961-63 (6th Cir. 1998) (volunteer "salts" are employees).

More to the point, a "salt" has a federally protected right to conceal his status as a union organizer in order get a job. *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB.*, 280 F. 3d 1110 (7th Cir, 2002). In *Hartman*, the Court stated:

> The question presented by this case…is whether a salt may lie to get a job…We think that he may, at least if the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job…A lie about his union status or unionizing objective is not material…an employer cannot turn down a job applicant just because he's a saltor other type of union organizer or supporter. 280 F. 3d at 1112.

The Federation submits Section 717A.3A-1a and b expressly make such activity in obtaining access to an agricultural production facility by obtaining employment at the facility through misrepresentation a crime.[4] Thus, enforcing the Iowa statute against workers who are "employees" under the National Relations Act directly interferes with their protected federal rights.

Section 717A.3A-3a creates further problems. The Section makes persons who conspire to commit or aid and abet commission of "agricultural production facility fraud" also criminally liable. Thus, the activities of union officers, employees, or members who engage in planning and coordinating a "salting" campaign, but who do not themselves make a misrepresentation to obtain

[4] Section 717A.3A-1b requires an intent to obtain employment to commit an act which the individual knows is not authorized by the prospective employer. It is difficult to perceive the existence of an employer that has "authorized" its employees in advance to organize its facility. Indeed, the use of the practice of "salting" stems from employer resistance to unionization of its workforce and employers exercising their right to deny access to its property to non-employees under the federal law. *Animal Legal Defense Fund v. Otter*, 44 F. Supp. 3d 1009, 1022 (D. Idaho 2014). *See, Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S. Ct. 841 (1992) (general right of employers under NLRA to restrict access to its property by non-employee union organizers).

access to or employment at an "agricultural production facility," are similarly interfered with by the statute.

As the Court in *Hartman* noted, the "only purpose of criminalizing such a lie (lying about union status) could be to discourage salting, an activity protected by the Act." 280 F. 3d 1110, 1113 (7th Cir. 2002).[5] Not only are the organizing rights of employees and their unions protected by the Act but also they are protected under the First Amendment as "free expression, assembly and association." *Allee v. Medrano*, 416 U.S. 802, 814-15, 94 S. Ct. 2191, 2200 (1974); *Mote v. Walthill*, 902 F. 3d 500, 507 (5th Cir. 2018); *AFGE v. Stone*, 502 F. 3d 1027 (9th Cir. 2007) (at 1033: "Indeed, the Supreme Court has squarely held that a union may have standing to challenge governmental interference with organizing activities.") Since the District Court's conclusion that Section 717A.3A violates the First Amendment eliminates the interference with protected employee and union rights arising from enforcement of the statute, the Federation urges the Court to affirm the decision of the District Court.

The Federation also urges that allowing the statute to stand creates an additional burden on employees and unions' exercise of their protected rights. If Section 717A.3A is applied to employee salting of an "agricultural production

[5] *See Leiser Construction, LLC v. NLRB*, 281 Fed. Appx. 781 (10th Cir. 2008) (unpublished) (at 789: "Omission of union affiliation on a job application form, however, is perfectly acceptable to avoid discrimination based on union activity.")

facility," the statute is likely preempted by the National Labor Relations Act. As noted in regard to the employment application misrepresentation before it, the Court in *Hartman* stated: "if interpreted to entitled an employer to turn down a job application on the basis of a lie about salt status, the statute would be preempted by the National Labor Relations Act because it would interfere with union organizing activity without any justification consistent with the Act." 280 F. 3d 1110, 1113 (7th Cir. 2002). *See Wright Electric, Inc. v. Ouellette*, 686 N.W.2d 313, 318-25 (Ct. App. Minn. 2004) (employer state law damage claims against employee based on concealment of union status when applying for job were preempted by NLRA). But, in response to a charge of a violation of Section 717A.3A, the employee who engaged in the speech activity being penalized and a union charged as an accomplice will be required to raise and prevail on the claim of preemption in the criminal proceeding. *See Williams v. NFL*, 582 F. 3d 863, 880 (8th Cir. 2009). This additional burden placed on the First Amendment and National Labor Relations Act rights of employees and unions further justifies upholding the District Court's decision finding the Iowa statute unconstitutional.

In sum, the Federation urges the Court to affirm the decision of the District Court that the provisions of Iowa Code §717A.3A violate the First Amendment of the Constitution. Since employees working at certain agricultural production facilities as defined by the statute are protected in their right to engage

in union organizing at the facilities both by the National Labor Relations Act and the First Amendment, the enforcement of the statute on such employees and their unions directly penalizes them for exercising their rights. Further, enforcement of the statute places additional burdens on employees and unions to establish their rights which are protected by the National Labor Relations Act which should preempt the provisions of the state law. Consequently, the Federation urges the Court to affirm the District Court's decision.

CONCLUSION

Based upon the foregoing, the Federation respectfully requests this Court to affirm the lower court's opinion.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of 6,500 words of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B). This Brief contains 2,932 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Time New Roman style. This Brief has been scanned for viruses and is virus free in compliance with 8th Cir. R. 28A(h).

/s/ Jay M. Smith
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Attorneys for Amicus Curiae

Dated this 21st day of June 2019.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Dated this 21st day of June 2019.