UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANIMAL LEGAL DEFENSE FUND, **IOWA CITIZENS FOR COMMUNITY IMPROVEMENT**, **BAILING OUT BENJI, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.**, and **CENTER FOR FOOD SAFETY** Plaintiffs, v. **KIMBERLY K. REYNOLDS**, in her official capacity as Governor of Iowa, **TOM MILLER**, in his official capacity as Attorney General of Iowa, and **BRUCE E. SWANSON**, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	**CASE NO. 4:17-cv-362** **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Introduction

This case arises out of Iowa's enactment and threatened enforcement of Iowa Code § 717A.3A, known as Iowa's Ag-Gag law, which criminalizes undercover investigation at agricultural facilities. A person violates the Ag-Gag law by willfully 1) obtaining access to an agricultural production facility by false pretenses, or 2) making a knowingly false statement or representation as part of the job application process at an agricultural production facility with an intent to commit an act that the facility's owner has not authorized.

The law has the effect of criminalizing undercover investigative activities targeting agricultural operations. It requires journalists and investigators to disclose that they seek to engage in an undercover investigation as part of the employment process, eliminating any possibility that they will be permitted access to these facilities.

Plaintiffs are organizations that (a) would carry out these types of investigations were it not for the law; or (b) rely on information collected through such investigations to advance their political advocacy. Investigations of this type have revealed to authorities and the public systematic and horrific animal abuse, leading to food safety recalls, citations for environmental and labor violations, plant closures, and criminal convictions. Such investigations and the public conversation they ignite are an integral part of the discussion surrounding animal rights and agriculture policy.

Not surprisingly, the animal agriculture industry is eager to prevent such investigations. To this end, animal agriculture industry groups have pressured state legislatures to enact laws that criminalize undercover investigations in their industry. Under these laws, which include Iowa Code § 717A.3A, animal rights and food safety advocates, as well as investigative journalists, are cast as criminals.

Iowa's Ag-Gag law violates the First Amendment to the United States Constitution because it is content- and viewpoint-discriminatory and overly broad. Plaintiffs urge this Court to grant them summary judgment, striking down Iowa Code § 717A.3A as unconstitutional, and permanently enjoining its enforcement.

Statement of Facts

I. Undercover Investigations of Animal Agriculture Expose Inhumane and Unsafe Practices.

Undercover investigations in the animal agriculture industry are typically undertaken by whistleblowers who have obtained a job through the usual channels, then document activities in the facility through a hidden camera while performing the tasks required of them as employees. Plaintiffs' Statement of Undisputed Material Fact ("SUMF") ¶¶ 6-8, 32-34. When obtaining employment, investigators actively or passively conceal their investigatory motive, as well as their affiliations with journalistic or advocacy groups. SUMF ¶¶ 12, 13, 32. During their investigations, investigators use hidden recording equipment to document violations of applicable laws and regulations, including unsanitary practices, cruelty to animals, pollution, sexual misconduct, labor law violations, and other matters of public importance—all while performing the tasks assigned by the employer. SUMF ¶¶ 7, 30.

Undercover investigations in industrial agricultural facilities are of tremendous political and public concern. For example, in 2007, an undercover investigator at the Westland/Hallmark Meat Company in California filmed workers forcing sick cows, many unable to walk, into the "kill box" by repeatedly shocking them with electric prods, jabbing them in the eye, prodding them with a forklift, and spraying water up their noses. Matthew L. Wald, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. TIMES (Mar. 13, 2008),

http://www.nytimes.com/2008/03/13/business/13meat.html. In 2009, undercover investigators at a Vermont slaughterhouse operated by Bushway Packing obtained similarly gruesome footage of days-old calves being kicked, dragged, and skinned alive. *Vermont Slaughterhouse Closed Amid Animal Cruelty Allegations*, L.A. TIMES (Nov. 3, 2009, 4:12 PM), http://latimesblogs.latimes.com/unleashed/2009/11/vermont-slaughterhouse-closed-amid-animal-cruelty-allegations.html. A few years later, an undercover investigator at E6 Cattle Company in Texas filmed workers beating cows on the head with hammers and pickaxes and leaving them to die. Kevin Lewis, *Charges Filed in E6 Cattle Case*, PLAINVIEW DAILY HERALD (May 26, 2011, 11:30 AM), http://www.myplainview.com/news/article/Charges-filed-in-E6-Cattle-case-8414335.php.

As the nation's leading producer of pork and eggs, as well as a major source of other animal products, Iowa animal agricultural facilities have been subject to numerous investigations by animal rights organizations. In 2011, undercover investigators at Iowa's Sparboe Farms documented hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses. *McDonald's Cuts Egg Supplier After Undercover Animal Cruelty Video*, L.A. TIMES (Nov. 18, 2011, 2:24 PM), http://latimesblogs.latimes.com/money_co/2011/11/mcdonalds-cuts-egg-supplier-after- undercover-animal-cruelty-video.html. Using an undercover investigator posing as an employee, Plaintiff People for the Ethical Treatment of Animals ("PETA") documented and exposed the misconduct of workers at a Hormel Foods supplier in Iowa who beat pigs with metal rods, stuck clothespins into pigs' eyes and faces, and kicked a young pig in the face, abdomen, and genitals to make her move while telling the investigator, "You gotta beat on the bitch. Make her cry." SUMF ¶ 33. Another PETA investigation revealed horrific treatment of cows at an Iowa kosher slaughterhouse, some of whom remained conscious for as long as two

minutes after their throats had been slit. SUMF ¶ 34. Undercover investigations at animal agricultural facilities also document unsafe working conditions, improper food safety practices, violations of labor law, and violations of environmental law. SUMF ¶¶ 7, 30.

II. Iowa Responds to Undercover Investigations by Criminalizing Them.

In 2012, the Iowa Legislature passed House File 589, 84 Gen. Assemb., 2nd Reg. Sess. (Iowa 2012), eventually codified at Iowa Code § 717A.3A, which created the crime of "agricultural production facility fraud" (hereinafter "Ag-Gag").

A person violates Iowa's Ag-Gag law if he or she willfully:

a. Obtains access to an agricultural production facility by false pretenses[, or]

b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.

Iowa Code § 717A.3A. An "agricultural production facility" is "an animal facility" as defined in the Iowa Code or a "crop operation property." *Id*. § 717A.1(3). An "animal facility" includes "a location where an agricultural animal is maintained for agricultural production purposes, including but not limited to a location dedicated to farming . . , a livestock market, exhibition, or a vehicle used to transport the animal," as well as animal research locations, veterinary facilities, kennels, and pet shops. *Id*. § 717A.1(5). An "agricultural animal" is defined to include "[a]n animal that is maintained for its parts or products having commercial value." *Id*. § 717A.1(1)(a).

The first conviction for violation of § 717A.3A is a serious misdemeanor, and a second or subsequent conviction is an aggravated misdemeanor. *Id*. § 717A.3A(2). Such convictions may be punishable with fines as well as imprisonment. Iowa Code § 903.1. In addition, a person can be

held criminally liable for conspiring to violate this statute or for aiding and abetting a violation. *Id*. § 717A.3A(3)(a).

Iowa appears to have enacted its Ag-Gag law in response to a major factory farm investigation at Iowa Select Farms, which revealed workers hurling piglets onto a concrete floor and pigs with open sores who received no treatment, along with other horrors. Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS, June 29, 2011, http://abcn.ws/2luiOsP. The Ag-Gag law was enacted the very next year after this investigation became public. The Iowa legislators who passed the law were clear that the law was intended to protect the commercial agricultural industry from critical speech and "make producers feel more comfortable." SUMF ¶ 78. (then-State Senate President Jack Kibbie). Then-Senator Tom Rielly defended the law by stating that animal activists "want to hurt an important part of our economy . . . . These people don't want us to have eggs; they don't want people to eat meat . . . . What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name." SUMF ¶ 79. The late Senator Joe Seng stated that the law was passed to "protect agriculture . . . [and] not have any subversive acts to bring down an industry," SUMF ¶ 80, that the law was "passed mainly for protection of an industry that is dedicated to actually feeding the world in the next 25 years." SUMF ¶ 81. A spokesman for the Governor told a newspaper that the Governor "believes undercover filming is a problem that should be addressed." SUMF ¶ 82.

III. The Ag-Gag Law Injures Plaintiffs

Since the law's enactment, Plaintiffs Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), and Iowa Citizens for Community Improvement (CCI) have not undertaken an investigation utilizing undercover techniques to gather evidence in Iowa

out of fear of prosecution. SUMF ¶¶ 10, 16, 35, 37, 39, 48, 51. Plaintiff Bailing Out Benji, which has largely ceased undercover investigations for fear that it will be discovered and prosecuted under the Ag-Gag law, has been chilled from publicizing or otherwise utilize undercover footage it has obtained in filing state and federal complaints for fear of criminal prosecution. SUMF ¶¶ 58, 63-64. Plaintiffs Center for food Safety (CFS) and Bailing Out Benji have also suffered injuries from being deprived of the pipeline of information that comes from organizations that conduct the undercover investigations that CFS and Bailing Out Benji use in their advocacy. SUMF ¶¶ 60-61, 72-74. And each Plaintiff has suffered an organizational resource injury by diverting resources to combat the unlawful Ag-Gag law. SUMF ¶¶ 19-21, 40-41, 52-53, 65-66, 76-77.

IV. Federal Courts Struck Down or Severely Limited Similar State Statutes.

A. The Idaho Ag-Gag Statute.

In 2014, in response to an employment-based undercover investigation of a large commercial Idaho dairy, Idaho enacted its Ag-Gag law, codified at Idaho Code Ann. § 18-7042. The Idaho law applies only to "agricultural production facilit[ies]," Idaho Code Ann. § 18-7042(2)(b), and sought to criminalize non-employees "enter[ing] an agricultural production facility by . . . misrepresentation," *id*. § (a), or "obtain[ing] employment with an agricultural production facility by . . . misrepresentation with the intent to cause economic or other injury to the facility's operations[.]" *Id*. § (1)(c).

ALDF, PETA, and CFS, along with a coalition of other plaintiffs, brought a pre- enforcement challenge to the Idaho law, alleging the statute violated the First and Fourteenth Amendments. The district court found that the Idaho Ag-Gag law violated the First and Fourteenth Amendments, granted summary judgment to the plaintiffs, and enjoined the law's enforcement. *Animal Legal Def. Fund v. Otter*, 118 F.Supp.3d 1195, 1200 (D. Idaho 2015) ("*Otter*").

On appeal, the Ninth Circuit affirmed in part and reversed in part. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) ("*Wasden*"). Specifically, the Ninth Circuit found that the statute's prohibition on gaining access to an agricultural facility through misrepresentation criminalized constitutionally protected speech. *Id*. at 1194. Relying on the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709, 722-23 (2012) (plurality opinion), invalidating the Stolen Valor Act, 18 U.S.C. § 704—which criminalized false claims that the speaker had received a Congressional Medal of Honor without any element requiring the government to show the lie was made for the purpose of achieving any material gain—the Ninth Circuit held that lies are constitutionally protected, so long as they do not cause an otherwise legally cognizable harm. *Wasden*, 878 F.3d at 1194-95. "The hazard" of a prohibition on gaining access by misrepresentation "is that it criminalizes innocent behavior, that the overbreadth of [that prohibition] is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists." *Id*. at 1195. An entry by misrepresentation "alone does not constitute a material gain, and without more, the lie is pure speech." *Id*.

Because the access provision restricted pure speech, the Ninth Circuit subjected it to strict scrutiny under the First Amendment, which it did not survive. *Id*. at 1196-97. Addressing Idaho's asserted interest in protecting against trespasses, the Ninth Circuit noted that trespassing was already a crime in Idaho and "as a number of the legislators made clear and the [animal agriculture] lobby underscored, the statute was intended to quash investigative reporting on agricultural production facilities," making the statute "even more problematic." *Id*. at 1196-97. "The focus of the [Idaho] statute to avoid the 'court of public opinion' and treatment of investigative videos as 'blackmail' cannot be squared with a content-neutral trespass law." *Id*. at 1197. The Ninth Circuit found it "troubling that criminalization of the[] misrepresentations [the statute sought to

criminalize] opens the door to selective prosecutions—for example, pursuing the case of a journalist who produces a 60 Minutes segment about animal cruelty versus letting the misrepresentation go unchecked in the case of [a] teenager [who obtains a restaurant reservation in his mother's name]." *Id*. The court found that the breadth of the prohibition on access by misrepresentation "is so broad that it gives rise to suspicion that it may have been enacted with an impermissible purpose." *Id*. at 1198 (citing Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 455 (1996)). While the Ninth Circuit determined that strict scrutiny was appropriate under *Alvarez*, it noted that the prohibition on access by misrepresentation would fail intermediate scrutiny as well. *Id*.

Reviewing the Idaho Ag-Gag statute's section prohibiting gaining employment by misrepresentation with the intent to cause economic injury, the Ninth Circuit denied Plaintiffs' claim that this section was facially unconstitutional, but only after applying an important narrowing construction. *Id*. at 1201-03. The court found that the section's additional element requiring an intent to injure provides a "clear limitation" that "cabins the prohibition's scope" and takes the prohibition outside of the scope of lies protected by *Alvarez*. *Id*. at 1201. The circuit court rejected the State's argument that "entry onto the property and material gain are coextensive," and distinguished lies to gain entry from lies made to misappropriate records of an agricultural production facility that do inflict a material, legally cognizable harm because theft of records involves tangible injury and material gain not present when a person merely trespasses and passively observes (or records) a scene. *Id*. at 1195, 1199.

Thus, for example, a person who lied to gain employment with the intent to engage in physical destruction of the agricultural operation's property could legitimately be prosecuted under Idaho's employment misrepresentation provision. But in construing the employment provision's

"economic injury" requirement, Idaho Code Ann. § 18- 7042(1)(c), together with the statute's provision for restitution for "economic loss," *id*. § (4) (providing for restitution pursuant to Idaho Code § 19-5304, Idaho Code § 19-5304), the court found that the injury a potential employee intends to cause must involve direct, tangible harms—such as the value of destroyed property or medical expenses—and not the type of "reputational damages" that flow from the exposés typical of employment-based undercover investigations. *Wasden*, 878 F.3d at 1202. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" the Ninth Circuit construed the employment subsection to exclude those who misrepresent themselves to gain employment who only intend to cause "reputational and publication" injuries. *Id*. (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc)).[1]

B. The Utah Ag-Gag Statute.

Utah introduced its own Ag-Gag statute, Utah Code § 76-6-112, less than a month after Iowa passed its version. Like both the Iowa and Idaho's Ag-Gag laws, the Utah law criminalized "obtain[ing] access to an agricultural operation under false pretenses." *Id*. § (2)(b).[2]

ALDF and PETA, along with a coalition of other plaintiffs, brought a pre-enforcement challenge to the Utah law, alleging the statute violated the First and Fourteenth Amendments. On cross-motions for summary judgment, the district court found that the plaintiffs had standing to bring their challenge and that the Utah Ag-Gag law failed strict scrutiny under a First Amendment

[1] The court also recognized that Idaho's prohibition on recording the operation of an animal agriculture facility was a prohibition on speech, *Wasden*, 878 F.3d at 1203, that the prohibition was content-based, *id*., both under- and over-inclusive, and failed strict scrutiny. *Id*. at 1204-05.
[2] Like Idaho's (but not Iowa's) law, the Utah Ag-Gag also prohibited the type of audiovisual recording that is typical of undercover investigations at agricultural facilities. Utah Code § 76-6-112(2)(a), (c), (d).

analysis. *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1199-213 (D. Utah 2017) ("*Herbert*"). As to standing, that Court noted that ALDF and PETA "wish to conduct operations at agricultural facilities in Utah . . . [b]ut they presently have no intention to do so because they fear Utah may prosecute them" *Id*. at 1200. Utah argued that the plaintiffs did not have standing because they did "not show[] they have any concrete plans to actually violate the law," but the district court found "that is not what the law requires." *Id*. Instead, the court found, "to establish standing to sue based on a chilling effect on speech, a plaintiff must demonstrate only 'a present desire, though no specific plans, to engage in such speech,'" which the plaintiffs had done. *Id*. (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc)).

As to the merits, the court found that the First Amendment applied to the Utah's Ag-Gag statute's lying provision because the lies prohibited by the statute did not cause legally cognizable harm, as required by *Alvarez* for lies to fall outside the scope of the free speech clause. Conducting a detailed survey of the caselaw, the court found that not every lie used to obtain access to private property results in a trespassory harm: "the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has occurred)." *Id*. at 1203 (internal citations omitted). "In other words, . . . lying to gain entry, without more, does not itself constitute trespass." *Id*.

The court recognized that even in the context of obtaining employment, a variety of lies do not result in any cognizable harm to the employer, including "for example, an applicant's false statement during a job interview that he is a born-again Christian, that he is married with kids, that he is a fan of the local sports team ... [, and] putting a local address on a resume when the applicant is actually applying from out of town." *Id*.

After determining that the First Amendment applied, the court surveyed the caselaw and concluded that "in the wake of *Alvarez*, lower courts have generally applied strict scrutiny to laws implicating lies" and determined that "[t]his approach makes sense." *Id*. at 1210. Because "enforcement authorities [must] examine the content of the message that is conveyed to determine whether a violation has occurred,'" the lying prohibition was content-based, making strict scrutiny appropriate. *Id*. (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014)).

The court concluded that the Utah Ag-Gag statute failed strict scrutiny. *Id*. at 1211-13. It first noted that "it is not clear that [the state's asserted interests] were the actual reasons motivating the Act," noting the legislators' statements of purpose and animus against animal protection advocates. *Id*. at 1212. But even assuming the interests the state defended the law on were the actual interests that motivated the law's passage, that Ag-Gag law was not narrowly tailored to those interests. *Id*. at 1212-13. The law was both over-inclusive, leaving untouched "the employee who lies on her job application but otherwise performs her job admirably, [while] it criminalizes the most diligent well-trained undercover employees." *Id*. at 1212-13. The law was also under-inclusive, doing nothing to address "the exact same allegedly harmful conduct when undertaken by anyone other than an undercover investigator." *Id*. at 1213.[3]

The court invalidated the Utah Ag-Gag law, and the state did not appeal.

Procedural History

Plaintiffs filed this suit challenging the Iowa Ag-Gag law on the ground that it violates the First and Fourteenth Amendments. Plaintiffs seek a declaration that the Ag-Gag statute is

[3] Like the Ninth Circuit in the Idaho Ag-Gag case, the Utah district court also struck down the Utah Ag-Gag's prohibition on certain forms of audiovisual recording, finding that recording receives First Amendment protection and the prohibition failed strict scrutiny. *Id*. at 1206-13.

unconstitutional—on its face and as applied to Plaintiffs—and injunctive relief to prevent Defendants from enforcing the law.

The Defendants—Governor Kimberly Reynolds, Attorney General Tom Miller, and Montgomery County Attorney Bruce Swanson (collectively, "the State")—moved to dismiss arguing that the Plaintiffs lacked standing and that they failed to state a claim under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

On February 27, 2018, this Court granted the State's motion to dismiss Plaintiffs' Equal Protection Clause claim and denied the motion in all other respects. Order, Dkt. No. 39 ("MTD Order").

With regard to standing, this Court found that those Plaintiffs who engage in undercover investigation asserted an injury in fact in the chilling of their protected speech. *Id*. at 10-16. It also found that CFS, despite not conducting undercover investigations itself, adequately alleged an informational injury based on the Ag Gag law's chilling effect on the ability of groups like ALDF or PETA to conduct such investigations. *Id*. at 15. Finally, this Court found that Plaintiffs asserted injuries in fact "from having to direct organizational resources toward combatting § 717A.3A." *Id*. at 16-17.

With regard to Plaintiffs' First Amendment claims, the Court found that the statute "restricts speech," *id*. at 18, that both subsections of the Iowa Ag-Gag law "are content-based on their face," *id*. at 21, and that the statute's prohibition on false or misleading statements of fact were not exempt from constitutional scrutiny under *Alvarez* because they criminalized lies that do not result in material harm. *Id*. at 27-31.

Plaintiffs now move for summary judgment. Because, as a matter of law, the Ag-Gag statute criminalizes speech based on its content, and because the law does not survive strict or intermediate scrutiny, summary judgment is appropriate at this time.

Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Facial challenges to the constitutionality of statutes or regulations under the First Amendment often involve pure questions of law appropriate for resolution on summary judgment. *See, e.g.*, *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Argument

This facial challenge involves no dispute of material fact that the Ag-Gag law violates the First Amendment.

First, Plaintiffs have standing to bring a facial challenge to the Ag-Gag because Plaintiffs 1) face a credible threat of prosecution under the law that chills their speech; 2) have deflected their financial and human resources to identify and combat an alleged unlawful practice; and/or 3) have has their right to receive information and ideas restricted by the law.

Second, the Ag-Gag law violates the First Amendment because it is a content- and viewpoint-based restriction on speech that does not survive strict, or even intermediate, scrutiny.

I. Plaintiffs Have Standing to Challenge the Constitutionality of Iowa's Ag-Gag Law.

A. Plaintiffs Have Standing Based on Their Credible Fear of Enforcement.

To establish standing, Plaintiffs need only demonstrate a credible threat of prosecution under Iowa's Ag-Gag law. The threat of enforcement is sufficient to demonstrate that "a party [can] 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc*., 454 U.S. 464, 472 (1982)).

Plaintiffs claiming violations of their First Amendment rights establish an injury "even if the plaintiff has not engaged in the prohibited expression as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004); *see also St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) ("When a party brings a pre-enforcement challenge to a statute that provides for criminal penalties and claims that the statute chills the exercising of its right to free expression, the chilling effect alone may constitute injury."). "[A]ctual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [a] law." *Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2342 (2014) ("*SBA List*").

In determining whether a credible threat exists, courts presume that statutes will be enforced, and this presumption is even stronger for recently enacted statutes. *See, e.g.*, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (in pre-enforcement challenges to recently enacted statutes, courts "assume a credible threat of prosecution in the absence of compelling contrary evidence").

Under this standard, plaintiffs have standing when they have (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute," and (2) that "there exists a credible threat of prosecution thereunder." *SBA List*, 134 S. Ct. at 2342; *281 Care Comm. v. Arneson*, 638 F.3d 621, 625-30 (8th Cir. 2011) ("*281 Care Comm. I*"); *281 Care Comm. v. Arneson*, 766 F.3d 774, 781 (8th Cir. 2014) ("*281 Care Comm. II*").

Allowing plaintiffs who are chilled by the existence of a criminal law to seek pre-enforcement equitable relief rather than "deliberately break the law and take his chances in the ensuing suit or prosecution," "promotes good public policy by breeding respect for the law." *Gaertner*, 439 F.3d at 488; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (finding plaintiffs had standing to bring pre-enforcement challenge to criminal statute where plaintiffs claimed they had previously engaged in the conduct prohibited by the statutes and would do so again absent the statute).

Plaintiffs face a credible threat of prosecution that chills their speech because they intend to engage in conduct arguably affected with a First Amendment interest and they face a credible threat of prosecution under the Ag-Gag law. *SBA List*, 134 S. Ct. at 2342.

First, there is no dispute that Plaintiffs are chilled from conducting investigations that would violate the Ag-Gag statute and that they would conduct such investigations but for the law. ALDF has a concrete desire to engage in speech and expressive conduct that violate the Ag-Gag statute, a specific interest in agricultural investigations in Iowa, and would like to conduct an investigation at an agricultural production facility in Iowa. Moreover, ALDF has conducted animal welfare investigations in Iowa before, and "has identified agricultural production facilities where it would seek to conduct undercover, employment-based investigations, but it has not pursued employment

at those facilities due to its reasonable fear of prosecution under the Ag-Gag law." SUMF ¶¶ 10, 11-16. An ALDF applicant would apply for and obtain the job under what the statute would consider the false pretense of being a typical applicant, thus violating subsection (a) of the Ag-Gag statute. SUMF ¶ 12. ALDF applicants would also violate subsection (b) by making affirmative misrepresentations during the employment process with the intent of video recording the conduct of the facility, even where the facility does not authorize such recording. SUMF ¶ 13. ALDF has not undertaken such an investigation only because it fears of prosecution under the Ag-Gag law. SUMF ¶ 11.[4]

Likewise, PETA wishes to engage in speech and expressive conduct that would violate the Ag-Gag statute and would conduct investigations in Iowa but for the threat of criminal prosecution under the Ag-Gag statute. SUMF ¶¶ 35-39. A PETA investigator would apply for and obtain the job under false pretense (as defined in the statute) of being a typical applicant and would also withhold their animal protection affiliations while intending to video record what illegal conduct at the facility, even where the facility does not authorize such recording. SUMF ¶¶ 32, 38. "[A]t least 15 whistle-blowers have contacted PETA alleging cruel or inhumane treatment of animals at Iowa agricultural facilities, including pig farms, chicken farms, egg farms, dairy farms, fur farms, and cow slaughterhouses" since the passage of the Ag-Gag statute. SUMF ¶ 35. "Because of the threat of criminal liability under the Ag-Gag law, PETA was unable to conduct an employment-

[4] Because ALDF has standing to challenge the Ag-Gag statute based on its First Amendment pre-enforcement injury, this Court need not determine whether ALDF has standing under other theories or whether the remaining Plaintiffs have also established standing individually. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (determining that because one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs"); *Sierra Club v. United States Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011) ("only one plaintiff need show standing to support our subject matter jurisdiction"). Nevertheless, Plaintiffs address other standing theories and the standing of the other Plaintiffs out of an abundance of caution.

based investigation at any of these facilities." *Id*. PETA would have begun conducting such an investigation were it not for the threat of criminal prosecution under the Ag-Gag law. SUMF ¶ 37.

Iowa Citizens for Community Improvement (CCI) has more than 4,000 members in addition to 17,000 supporters, many of whom "are workers in agricultural facilities. SUMF ¶ 44-45. "Were it not for the Ag-Gag law, CCI and its members, including whistleblower employees, would be able to engage in undercover investigations and engage in evidence collection through surreptitious or undercover methods to support its mission." SUMF ¶¶ 45. CCI refrained from engaging in undercover investigations as part of its advocacy around environmental, labor, racial, and immigrant justice and does not collect footage of conditions for workers inside that facility, out of fear of criminal liability imposed by Iowa's Ag-Gag law. SUMF ¶¶ 46-48. CCI engaged in these types of investigative methods prior to passage of the Ag-Gag statute, including collection of photographic evidence by whistleblower employees, some of which were key components of an OSHA complaint that lead to citations and notifications of penalty. SUMF ¶ 47.

Like the other organizations, Bailing Out Benji, conducted its own investigations into puppy mills, including on an undercover basis, by using false pretenses to gain access to facilities prior to the passage of the Ag-Gag statute. SUMF ¶¶ 55-57. Since the Ag-Gag law was signed into law, however, it has largely ceased its undercover activities for fear of being discovered and facing prosecution, and has refrained from publicizing evidence gathered by volunteers using undercover methods. SUMF ¶¶ 58-61. It also reasonably fears liability under Iowa Ag-Gag's harboring/aiding/concealing liability for using undercover images and video obtained by it and by others in their public presentations. SUMF ¶ 62-64.

Plaintiffs' intention to engage in prohibited speech more than meet the requirements of the Supreme Court's recent pronouncement on First Amendment pre-enforcement standing in *SBA*

List and the Eighth Circuit's decisions in and *281 Care Committee I* and *II*. *SBA List*, 134 S. Ct. at 2342; 281 *Care Comm. I*, 638 F.3d at 625-30; *281 Care Comm. II*, 766 F.3d at 781.

Plaintiffs face a credible threat of prosecution under the Ag-Gag statute—the law was passed specially to criminalize the types of investigations that Plaintiffs intend to conduct.

Here, Plaintiffs allege an intention to engage in the exact acts that the statute was designed to criminalize. The law is less than six years old. The state has not disclaimed any intention to enforce the law.

The district courts that have considered recent challenges to similar state statutes have had little difficulty finding standing on similar showings for the plaintiffs in those cases, some of whom are also Plaintiffs here. *See Herbert*, 263 F. Supp. 3d at 1200 (finding standing for ALDF and PETA to challenge similar Utah Ag-Gag statute); *Otter*, 44 F. Supp. 3d at 1017-18 (finding standing for ALDF, PETA, and CFS to challenge similar Idaho Ag-Gag statute); *PETA, Inc. v. Stein*, No. 17-1669, 2018 U.S. App. LEXIS 15090, at *16-*21 (4th Cir. June 5, 2018) (finding complaint alleging injury to ALDF, PETA, and CFS sufficient to establish standing to challenge civil damages cause of action created by North Carolina Ag-Gag statute).

Because Plaintiffs seek to directly violate a recently-enacted statute, they face a credible threat of prosecution.

B. Plaintiffs Also Have Standing on Account of Their Diversion of Resources to Combat the Ag-Gag Law.

Plaintiffs also have standing as organizations that have deflected their financial and human resources to identify and combat an alleged unlawful practice. *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Ltd. Co*., 160 F.3d 433, 434-35 (8th Cir. 1998). "Self-inflicted" harms do not convey standing, but where an organization incurs expenditures to counter the effects of a

defendant's alleged unlawful conduct, an organization sustains an injury in fact. *People for the Ethical Treatment of Animals v. U.S. Dep't. of Agric*., 797 F.3d 1087, 1096-97 (D.C. Cir. 2015). By contrast, injuries that consist of merely "a setback to the organization's abstract social interests" do not suffice to convey standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The Eighth Circuit also recognizes that organizational resource injuries can arise from unconstitutional or otherwise illegal government conduct. *Granville House, Inc. v. Dep't of Health & Human Servs*., 715 F.2d 1292 (8th Cir. 1983) (holding agency's action "perceptibly impaired" organization's "ability to provide its services to indigent patients, just as the realty company's practices in [*Havens*] impaired the ability of the nonprofit corporation in that case to provide its services" creating "harm to the organization [that] involved 'constitutes far more than simply a setback to the organization's abstract social interests.'" (citing *Havens*, 455 U.S. at 379)).

Courts have recognized that animal protection organizations, like other non-profit organizations, establish *Havens* standing when they expend resources to combat illegal activity. *See People for the Ethical Treatment of Animals*, 797 F.3d at 1097 (finding PETA's injuries resulting from government's alleged unlawful conduct "fit comfortably within [the Circuit's] organizational-standing jurisprudence"); *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F.Supp.3d 1327, 1341 (S.D. Fla. 2016) (finding that PETA and ALDF had *Havens* standing to challenge ESA violations), *aff'd People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1146 (11th Cir. 2018); *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1281–82 (Cal. Ct. App. 2015) (applying federal *Havens* standard to hold that ALDF had standing in state court).

Each Plaintiff has a mission that is frustrated by the Ag-Gag law. ALDF's mission is use education, public outreach, investigations, and other means to protect the lives and advance the

interests of animals, including those raised for food. SUMF ¶ 1. PETA's mission is to protect animals from abuse, neglect, and cruelty through public education, undercover investigations, and other means. SUMF ¶ 23. CCI's mission is to enable Iowans, including workers in agricultural facilities, to make change in their communities through grassroots advocacy, with organizational priorities in fighting factory farms and protecting Iowa's clean water and environment, as well as advancing worker justice, racial justice, and immigrants' rights. SUMF ¶ 43. Bailing Out Benji's mission is to raise the public's awareness about various animal welfare issues impacting dogs, particular around the issue of puppy mills. SUMF ¶ 54. And CFS's mission is to empower people, supports farmers, and protect the earth from the harmful impact of industrial agriculture. SUMF ¶ 67. The Ag-Gag law frustrates Plaintiffs' missions by criminalizing the undercover investigations that each organization relies on to carry out their individual missions.

Each Plaintiff has suffered a consequent drain on its resources from the Ag-Gag law. Plaintiffs have each deflected financial and human resources away from their core educational and outreach programs to focus on the social harms of the law. SUMF ¶¶ 19-21, 40-41, 52-53, 65-66, 76-77. As a result, they each have less money and time to devote to outreach on topics that are central to their missions, such as animal rescues, educating the public about the harms of industrial farming, and other forms of abuse, neglect, and cruelty to animals. SUMF ¶¶ 21, 41, 53, 66, 77.

These injuries confer organizational standing. *See Havens*, 455 U.S. at 379 (holding that the allegation that an organization had to divert resources from providing counseling and referral services to low-income home seekers to countering alleged discriminatory housing practices constituted injury in fact, not "simply a setback to the organization's abstract social interest").

C. Center for Food Safety and Bailing Out Benji Have Standing Because the Ag-Gag Law Unconstitutionally Restricts Their Right to Receive Information and Ideas.

Plaintiffs Center for Food Safety and Bailing Out Benji have standing as listeners deprived of the pipeline of information that comes from those entities, like the other Plaintiffs, which conduct the undercover investigations that CFS and Bailing Out Benji use in their advocacy. A plaintiff "need not be subject to a speech restriction in order to have standing to advance a [First Amendment] challenge. First Amendment protections extend to both speakers and listeners, the latter having a right to receive information and ideas." *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1115 (10th Cir. 2008) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976)); *see also Penn. Family Inst., Inc. v. Black*, 489 F.3d 156, 165 (3d Cir. 2007) (per curiam); *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011).

Plaintiffs ALDF, PETA, and CCI, would each conduct investigations and disseminate that information to willing recipients, including CFS and Bailing Out Benji. SUMF ¶¶ 2-16, 25-38, 45-51. CFS and Bailing Out Benji use information derived from those investigations in their own advocacy. SUMF ¶¶ 61, 72-73. Because CFS and Bailing Out Benji are deprived of that information under the Ag-Gag law, they have standing to challenge the law.

II. The Ag-Gag Law Violates the First Amendment.

A. The Ag-Gag Statute Criminalizes Speech, Not Conduct.

This Court has already held that while the Ag Gag law "regulates conduct to some extent, it also restricts speech." MTD Order at 18. Indeed, what triggers criminal liability under the law is not the conduct of gaining access to private property, but the use of false pretenses or statements,

which involves pure speech. The statute makes plain that the key act that establishes liability is the speech used as a precursor to engaging in undercover investigative techniques. Subsection (1)(a) criminalizes the speech of using false pretenses in order to enter an agricultural production facility. Similarly, subsection (1)(b) prohibits "a false statement or representation" used to obtain employment at an agricultural production facility without requiring any type of intent to injure or actual injury arising from the false statement or misrepresentation. This distinguishes the Ag-Gag statute from traditional common law prohibitions regarding physical access to or acquisition of property, such as laws prohibiting breaking and entering, trespass, or theft of records. The linchpin for criminal liability is pure speech in the form of a misrepresentation to facilitate access to a facility.

Because "one cannot violate § 717A.3A without engaging in speech," MTD Order at 20, the Ag Gag law "restricts speech and thus implicates the First Amendment." *Id*.[5]

B. The Ag-Gag Law is Content- and Viewpoint-Based.

i. The Ag-Gag Law Is Content-Based Because It Discriminates Between Truthful and False Speech

Both subsections of the Ag-Gag law discriminate between truthful and false speech, thus imposing a limit applicable only to a specific category of speech based on its content. *See Herbert*, 263 F.Supp.3d at 1210 (determining that the Utah Ag- Gag misrepresentation prohibition was content-based because "whether someone violates the Act depends on what they say").

[5] If this Court were to find that the law applies to conduct or unprotected speech, the Ag-Gag law would still be unconstitutional. A regulation is subject to strict scrutiny even when the speech at issue falls under one of the exceptions to First Amendment protection (such as true threats, obscenity, or incitement) if it regulates based on viewpoint within that category. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992) ("[T]he power to proscribe [speech] on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.").

This Court has already held that "[b]oth regulations contained within § 717A.3A are content-based on their face." MTD Order at 21. "Subsection (a) explicitly distinguishes between a person who obtains access to an agricultural production facility by false pretenses and a person who obtains access by other means." *Id*. (citing Iowa Code § 717A.3A(1)(a)). "Subsection (b) distinguishes between a person who makes a true statement as part of an application for employment at an agricultural facility yet possesses an intent to commit an unauthorized act, and a person with the same intent who makes a false statement." *Id*. (citing Iowa Code § 717A.3A(1)(b)). "To determine if a person has violated either of these provisions, one must evaluate what the person has said. This makes § 717A.3A a content-based restriction on speech." *Id*.[6] The content-based nature of the Ag-Gag statute subjects it to heightened First Amendment scrutiny.

The Ag-Gag statute is also content-based because it is limited to the subject matter of commercial agricultural industry practices. The text of the law itself makes clear that it seeks to prohibit undercover investigations of animal agricultural facilities and only agricultural facilities. *See* Iowa Code § 717A.3A(1)(a), (b). The law does not apply any other industries that traditionally have been or might be subject to undercover investigations, including medical facilities, elder care facilities, day cares, automotive shops, or prepared food service businesses. *See id*. Consistent with the plain text of the statute, the contemporaneous statements by the legislators and the spokesman for the Governor evidence this intent. SUMF ¶¶ 78-83.

[6] After *Alvarez*, First Amendment doctrine makes clear that the only restrictions based on falsehoods that are beyond the scope of the free speech clause are those that regulate lies that either cause legally cognizable harms or generate unjust material gains for the speaker. *See Alvarez*, 567 U.S. at 719, 722-23 (plurality opinion); *id*. at 734 (Breyer J., concurring)). Neither of those is the case with the false pretenses that are criminalized by Iowa's Ag-Gag law because the statute criminalizes false pretenses without any requirement that they cause injury or that are intended to cause injury.

ii. The Ag-Gag Law Is Viewpoint-Based Because It Singles Out Speech Critical of a Single Industry for Special, Disfavored Treatment.

Moreover, the Ag-Gag law it is also viewpoint-based because it singles out speech critical of a single industry for special, disfavored treatment.

A statute discriminates based on viewpoint when the State "has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "Where the government enacts a law with the purpose of suppressing a particular viewpoint, it is a viewpoint-based restriction on speech." MTD Order at 33 (citing *Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring in the judgment); *Vieth v. Jubelirer*, 541 U.S. 267, 314-15 (2004) (Kennedy, J., concurring in the judgment); and *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)).

The Ag-Gag law is a viewpoint-based restriction on speech because it it was animated by disagreement with, and a desire to suppress expression of, the political viewpoint of the animal rights groups directly affected by the law. "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994); *see also Reed v. Town of Gilbert, Ariz*., 135 S. Ct. 2218, 2222 (2015) ("[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based . . . ." (emphasis added)).

In determining whether a regulation is content-neutral or content-based, the Court can also look beyond the face of the law to the government's purpose in enacting the regulation. *Whitton v.*

City of Gladstone, 54 F.3d 1400, 1406 (8th Cir. 1995) (quoting *Ward*, 491 U.S. at 791); *see also United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression and concerned with the content of such expression.") (citation omitted). "[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *Whitton*, 54 F.3d at 1406.

As detailed above, Iowa legislators were candid with the media regarding the content-based legislative purpose underlying the Ag-Gag law. SUMF ¶¶ 78-83. They state that they passed the law to "make producers feel more comfortable," SUMF ¶ 78, and that animal activists "want to hurt an important part of our economy . . . . [and] don't want us to have eggs; they don't want people to eat meat, ... [and that the law is aimed] at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name." SUMF ¶ 79. These statements expose the viewpoint-based legislative purpose motivating the Ag-Gag law's passage.

C. Prohibitions on False Statements Receive Strict Scrutiny.

Strict scrutiny is the appropriate review here. It is black letter law that statutes that discriminate based on content or viewpoint are subject to strict scrutiny. *Turner*, 512 U.S. at 642; *see also Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (laws that criminalize pure speech on the basis of the speaker's viewpoint or the speech's content are subject to strict scrutiny).

Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that

presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted).

Strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner*, 512 U.S. at 680. It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id*. Indeed, "[t]here must be some . . . essential value that has to be preserved," in order for the interest to be compelling. *Id*. The interest served by the law can never be one that injures primarily a private rather than a truly public good. *Id*.

Strict scrutiny is the correct standard to apply to statutes that regulate false statements of fact. The *Alvarez* plurality applied strict scrutiny to prohibitions on lies. 567 U.S. at 715. And the Eighth Circuit has applied strict scrutiny to lies that were political in nature both before *Alvarez*, *see 281 Care Comm. I*, 638 F.3d at 636, and since. *See 281 Care Comm. II*, 766 F.3d at 783 ("target[ing] falsity, as opposed to the legally cognizable harms associated with a false statement, ... is no free pass around the First Amendment"); *accord Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 828 (Wash. 2007) (applying strict scrutiny to Washington false-statement law); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth*., No. 14-5335, 2014 WL 6676517, at *3-4 (E.D. Pa. Nov. 25, 2014); *O'Neill v. Crawford*, 970 N.E.2d 973, 973 (Ohio 2012) ("The *Alvarez* court . . . recognized that not only must the restriction meet the 'compelling interest test,' but the restriction must be 'actually necessary' to achieve its interest."); *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 517 (W. Va. 2012) (quoting the plurality opinion from *Alvarez* for the view that "when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives"); *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114, 1123 (Ohio 2014) (assuming the application of strict scrutiny and observing "*Alvarez*

does not consider whether the state can ever have a compelling interest in restricting false speech solely on the basis that it is false so that such prohibition could withstand strict scrutiny").

Strict scrutiny is warranted here because, as demonstrated above, the statute discriminates on content and viewpoint and falls within the protection afforded to false statements under *Alvarez*. Subsection (a) criminalizes false speech to gain access to an agricultural facility that does not cause any material or tangible harm. Iowa Code § 717A.3A(1)(a). Subsection (b) similarly criminalized false speech to gain employment at an agricultural facility without any requirement of material or tangible or even an intent to cause such harm. *Id*. (1)(b).

Both substantive subsections run afoul of strict scrutiny because they criminalize speech that does not cause material harm and, at the same time, concerns issues of public import. *Cf. Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) (applying strict scrutiny where regulation, in effect, substantially inhibited individuals' ability to engage in "core political speech"). The lies at issue in this case are valuable to free speech because they promote truth telling and sunshine on an issue of intense political and social significance. Insofar as a law criminalizing a worthless lie of self-promotion that impedes truth is subject to strict scrutiny, then certainly the prohibition of a lie of political or truth-seeking value is entitled to strict scrutiny because of its ties to core First Amendment values of promoting public discourse and facilitating self-governance.

This approach has been followed by other courts reviewing similar measures in other states. The Ninth Circuit subjected Idaho Ag-Gag law's prohibition on gaining access to an animal agriculture facility by misrepresentation to strict scrutiny. *Wasden*, 878 F.3d at 1196. And the District of Utah similarly applied strict scrutiny to the Utah Ag-Gag law's prohibition on access by misrepresentation. *Herbert*, 263 F. Supp. 3d at 1210.

D. The Ag-Gag Law Does Not Survive Strict Scrutiny.

The Ag-Gag law cannot withstand strict scrutiny for two equally important reasons: (1) it does not advance a compelling state interest; and (2) even if the State's interest were compelling, the law is not narrowly tailored to advance that interest.

i. The Ag-Gag Law Does Not Advance a Compelling State Interest.

Strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner*, 512 U.S. at 680. It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id*. And the interest served by the law can never be one that inures primarily to a private rather than a truly public good. *Id*.

When assessing whether a law is justified by a compelling government interest, a court must look at the actual motive or purpose behind the law. "Indeed, the purpose of strict scrutiny is to 'smoke out'" illegitimate governmental classifications. *Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989)).

As stressed above, the State's legislative motives are clear. The sponsors and supporters of the Ag-Gag law made no effort to hide the fact that a substantial motivation for the law was to prevent "[t]hese people [who] don't want us to have eggs; [who] don't want people to eat meat" from "go[ing] out and gin[ning] up campaigns that they use to raise money by trying to give the agriculture industry a bad name." SUMF ¶ 79. Repeatedly, the bill's sponsors and supporters expressed a concern for protecting the agriculture industry from the sunlight of undercover investigations. SUMF ¶¶ 78-83.

These statements reveal that a desire to protect the entire agricultural industry from public speech and political debate was a "motivating factor," most likely the primary factor, behind the law. *Village of Arlington Heights v. Metro. Hous. Corp*., 429 U.S. 252, 265-66 (1977). Because

the Ag-Gag law was motivated, at least in substantial part, by illegitimate motives, it cannot pass the compelling-interest test. *Id*.

Arguing in support of its motion to dismiss, the State defended the Ag-Gag law on the ground that the State's interest was the "protection of private property from unwanted intrusions or unauthorized access" Brief in Support of Defendant's Motion to Dismiss (Dkt. No. 18-1) at 30; *see also id.* (describing law's purpose as "protecting[ing] agricultural production facilities—private property—from both unauthorized access to and conduct within said facilities"); *id*. at 24 (describing State's interest as "[p]rotecting private property"). But the State cannot simply invoke protecting private property as talisman when the true purpose of the statute—as evidenced by its context and legislators' statements—is simply the suppression of speech.

Even if the Court accepts the State's purported interest, that interest is not compelling in this instance. While protection of property rights in the abstract is certainly a legitimate state interest, in the context of Iowa's Ag-Gag law, that interest can hardly be understood to rise to the level of a most "pressing public necessity." *Turner*, 512 U.S. at 680. Other than making undifferentiated assertions that agricultural operations owners' property interests need to be protected, the State cannot establish that such interests are even important, much less compelling. This is especially the case when a vague and broad interest like "protecting private property" is weighed against the concrete public interests that the Ag-Gag law thwarts.

Iowa already has a prohibition against trespass that does not implicate speech in any way. *See, e.g.*, Iowa Code § 716.7 (defining trespass). The State's generally-applicable trespass law "do[es] not condition a violation on the creation of speech or other expressive activity." MTD Order at 20. "By contrast, one cannot violate § 717A.3A *without* engaging in speech." *Id*. (emphasis in original). If instead the statute was intended to quash investigative reporting on agricultural

production facilities, then the statute's focus on prohibiting misrepresentations in a single industry is even more problematic and cannot be squared with a content-neutral law.

Since strict scrutiny exists to smoke out disguised, illegitimate governmental motives, accepting the State at its word that the law was passed to protect a broad private property interest would convert strict scrutiny into a watered-down tool that requires the Court to ignore evidence of improper purpose simply because the State is also able to articulate a different, arguably proper motive. That is not, and cannot be, the law. A compelling government interest must be the actual legislative basis for the law and not some after the fact rationalization. *Compare Shaw v. Hunt*, 517 U.S. 899, 908 n. 4 (1996) (holding that a "classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose"") *with Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (distinguishing a legitimate government interest from a compelling interest and noting that an interest will be treated as legitimate if there is any conceivable basis for the law, "whether or not the basis has a foundation in the record").

ii. The Ag-Gag Law is Neither Narrowly Tailored nor the Least Restrictive Means Available.

Even if the State's interest underlying the Ag-Gag law could be characterized as "compelling" for strict scrutiny purposes, the law fails strict scrutiny because it is not narrowly tailored to serve that interest or the least restrictive means available to meet that interest.

To the extent the Ag-Gag law can be justified by a compelling government interest, such as some general protection of property rights, the law nonetheless fails strict scrutiny because it restricts vastly more speech than is necessary in order to protect tangible property interests and therefore is not the least restrictive means of addressing the interest. Numerous other criminal and

civil laws already exist that protect private property interests without impinging on free-speech rights or singling out a single industry for protection (or its critics for prosecution). Adding to those laws a statute that criminalizes undercover investigations on matters of great public importance does nothing to promote those interests.

Unsurprisingly, the Iowa law, like the Utah Ag-Gag statute, "appears perfectly tailored toward . . . preventing undercover investigators from exposing abuses at agricultural facilities." *Herbert*, 263 F.Supp.3d at 1214.

Similarly, the Ninth Circuit found in connection with Idaho's similar provision that criminalized gaining access to animal agricultural facilities by misrepresentation, "[e]ven assuming [the State] has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not 'actually necessary' to protect those rights." *Wasden*, 878 F.3d at 1196. If the State's "real concern is trespass," then the existing laws already address that concern. *Id*. As in Idaho, the Iowa legislators' statements that they sought to protect the animal agriculture industry from criticism by animal rights activists "cannot be squared with a content-neutral trespass law." *Id*. at 1197.

In addition to trespass, existing laws against theft, property damage, defamation, and fraud, as well as laws ensuring employers' right to hire and fire at will, are examples of less restrictive alternatives to the sweeping limitations on speech imposed by the Ag-Gag law. The Ag-Gag law criminalizes all misrepresentations and false pretenses made to gain access for any reason.

As Justice Breyer aptly noted in his *Alvarez* concurrence,

> the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a [politically unpopular individual who makes false claims], while ignoring members of other political groups who might make similar false claims.

567 U.S. at 734.

The Ag-Gag law's breadth is incompatible with strict scrutiny. While narrow tailoring requires legislators take a scalpel to excise a precise evil, the Iowa legislature took a hatchet to the First Amendment rights of whistleblowers in the agricultural industry. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 n.6 (1989) (recognizing strict scrutiny as "the most exacting scrutiny").

The State does not have a compelling interest in silencing whistleblowers in animal agriculture. Even if the State's true interest was protecting private property, the Ag-Gag law is in no way tailored to that end, and certainly is not the least restrictive means of achieving it. The law fails strict scrutiny.

E. The Ag-Gag Law Does Not Survive Intermediate Scrutiny.

Even if this Court determines that the Ag-Gag law is only subject to intermediate scrutiny because it regulates conduct or is content-neutral, the Ag Gag law is unconstitutional.

To survive intermediate scrutiny, a law must "further[] an important or substantial governmental interest" that is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also United States v. Windsor*, 570 U.S. 744, 812 (2013) (intermediate scrutiny requires that a restriction is "substantially related to the achievement of important governmental objectives" (internal citations, quotations, and alterations omitted)).

Additionally, the law "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798-99. Laws are narrowly tailored under intermediate scrutiny if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" *O'Brien*, 391 U.S. at 377 (1968).

Even where a law is subject to intermediate, rather than strict scrutiny, "the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 798). Essentially, laws will survive intermediate scrutiny only if they "are justified without reference to the content of the regulated speech . . . are narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791.

For the same reasons that the state's interests are not compelling, they are also not substantial under intermediate scrutiny. For one, the State's interest is not "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, because the law criminalizes speech directly and was motivated by a desire to prohibit speech that is critical of industrial animal agriculture. *See* SUMF ¶¶ 78-83. Therefore, for the same reasons elaborated above, the Ag-Gag law does not serve substantial government interests and is unconstitutional.

Even if the State's interests were significant, the Ag-Gag law is not adequately tailored to serve the State's purported interest because it burdens more speech than is necessary to further the governmental interests. Again, the rationale elaborated above is applicable here. As the Ninth Circuit found with Idaho's Ag-Gag statute, the Iowa law "criminalizes speech that inflicts no 'specific harm' on property owners, 'ranges very broadly,' and risks significantly chilling speech that is not covered under the statute." *Wasden*, 878 F.3d at 1198 (quoting *Alvarez*, 567 U.S. at 736-37 (Breyer J., concurring)).

And as with the Idaho statute, the Iowa law fails intermediate scrutiny because "it is 'possible substantially to achieve the Government's objective in less burdensome ways' with 'a more finely tailored statute.'" *Id*. (quoting *Alvarez*, 567 U.S. at 737); *see also, e.g., Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in

preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."); *Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets. . . . Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."). As explained above, there are a number of feasible, readily identifiable, and less-restrictive means of addressing the State's asserted interest in protecting private property than the Ag-Gag law.

Even under intermediate scrutiny, the Ag-Gag law "works disproportionate constitutional harm." *Alvarez*, 567 U.S. at 739.

F. The Ag Gag Law is Unconstitutionally Overbroad.

The overbreadth doctrine requires that laws be invalidated when they restrict significantly more speech than the First Amendment allows. *New York v. Ferber*, 458 U.S. 747, 769, 772-73 (1982); *see also Ashcroft v. Free Speech Coal*., 535 U.S. 234, 256 (2002). Criminal statutes are especially dangerous from a First Amendment perspective because of their potential to chill important expression and must be examined particularly carefully for overbreadth. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

The first step in overbreadth analysis is to assess the breadth of the challenged statute. *Stevens*, 559 U.S. at 474. The second step is to determine whether the statute, as construed by the court,

prohibits a substantial amount of conduct or speech protected by the First Amendment. *United States v. Williams*, 553 U.S. 285, 297 (2008).

The Ag-Gag statute is facially unconstitutional because it criminalizes a substantial amount of speech protected by the First Amendment. The criminalization is substantial because any lie that amounts to a false pretense is prohibited, as is any lie made in the employment process when done with an intent to commit an unauthorized act. While First Amendment doctrine permits the regulation of some classes of lies—those that cause a legally cognizable harm—the Ag-Gag statute sweeps well beyond that range of permissible regulation to criminalize investigative lies that not only do not cause cognizable harm, but also promote public discourse by leading to the disclosure of information of great public concern. For example, if a reporter states that he or she wants to do a story on a specific agricultural worker, but actually intends to document animal abuse, the reporter is violating the Ag-Gag statute regardless of what the reporter actually does or reports on. Similarly, if that reporter fails to correct an owner or employee's understanding of why he or she was at the agricultural operation, the reporter is subject to prosecution under the law. Prospective employees might also apply for a job with the intent to promote unionization (a practice known as salting and protected by federal labor law) or to document unsafe working conditions as part of an effort to make a complaint to state or federal regulators—each of which results in no physical or material harm to the employer but is criminalized by the Ag-Gag statute if the employer does not 'authorize' it.

In addition to advocates and investigators who might work with or for the Plaintiffs, even journalists who forthrightly state their purpose for entry will fear prosecution. If a journalist enters a facility covered by the statute, with consent, for one purpose but sees something at the facility that is even more deserving of press coverage, the journalist will be at risk of prosecution if he or

she writes the new story. Gaining entry for one explicit purpose, and then writing about another matter will oftentimes rise to the level of probable cause that one was using false pretenses to gain access.

The same reporter, like the Plaintiffs, will also fear harboring, aiding, and abetting liability under Iowa's Ag-Gag statute for protecting a source's identity, if the source obtained material or information in violation of Ag-Gag, regardless of whether the reporter ever sets foot on the facility's property herself. Iowa Code § 717A.3A(3)(a). In this manner, Ag-Gag law also sets the publication of the information directly in its cross-hairs, in addition to the initial gathering of that information.

The substantial amount of speech and conduct criminalized by the Ag-Gag statute is protected by the First Amendment. Because the Ag-Gag statute criminalizes a substantial amount of protected speech and conduct, the law is overbroad.

Conclusion

The Iowa Ag-Gag law violates the First Amendment because it is a content-based and viewpoint-based restriction on protected speech that cannot survive strict scrutiny. Even if it is subject to intermediate scrutiny, it cannot survive that level of scrutiny either. Additionally, the law is facially overbroad making it unconstitutional under the First Amendment. Therefore, this Court should rule that the Ag-Gag law is unconstitutional and should strike the law down.

Dated this 22nd day of June, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system.

All participants in this case are registered CM/ECF users and will served by the CM/ECF system.

Date: June 22, 2018

/s/Matthew Strugar
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