IN THE 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' COMBINED MOTION FOR SUMMARY JUDGMENT AND RESISTANCE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs Animal Legal Defense Fund, Iowa Citizens for Community Improvement, Bailing Out Benji, People for the Ethical Treatment of Animals, and Center for Food Safety, by and through their undersigned attorneys, and hereby submit the following Combined Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and in Support of Resistance to Defendants' Cross-Motion for Summary Judgment. In support thereof, Plaintiffs state as follows:

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Introduction and Statement of Facts

In response to numerous undercover investigations showing horrific cruelty to animals and dangerous working conditions, the likes of which have resulted in criminal prosecutions, legal reforms, and major food recalls, the State of Iowa capitulated to the agricultural industry's desire for secrecy by criminalizing the time-tested tools used by undercover investigators to expose hidden abuse. With the passage of the "Ag-Gag" law, Iowa Code § 717A.3A, Iowa's commercial agriculture industry now enjoys its own subject matter-specific immunity against media exposés and undercover investigations. The law protects only a single industry from investigative journalism and exposure of misconduct. Contrary to the State's after-the-fact attempts to paint the law as a benign response to trespassers or vague, undocumented threats to biosecurity, the Ag-Gag law was specifically designed to suppress whistle-blowing in the agricultural industry. As the sponsor of the bill put it, the law is designed to "crack down on activists who" portray the agricultural industry in a "negative light."

Plaintiffs—a coalition of animal rights, human rights, civil rights, environmental, and food safety organizations—challenged this law on the ground that it violates constitutional guarantees of freedom of speech, freedom of the press, and equal protection. The Defendants—Governor Kimberly Reynolds, Attorney General Tom Miller, and Montgomery County Attorney Bruce Swanson (collectively, "the State")—moved to dismiss arguing that Plaintiffs lacked standing and failed to state a claim under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. This Court granted the State's motion to dismiss Plaintiffs' Equal Protection Clause claim but denied the motion in all other respects. Order, Dkt. No. 39 ("MTD Order").

Plaintiffs moved for summary judgment. Dkt. No. 49. The State resisted Plaintiffs' motion for summary judgment and filed its own cross-motion for summary judgment. Dkt. Nos. 57, 63.

The State does not dispute a single fact on which Plaintiffs' Motion is based, and Plaintiffs do not dispute any facts on which the State relies. Nor does the State seriously contest that a straightforward application of this Court's Order denying the State's Motion to Dismiss would compel the conclusion that summary judgment is warranted in favor of the Plaintiffs. Rather, the State's brief rehashes its earlier legal claims, urging this Court to reconsider its analysis in light of "additional jurisprudence" and a handful of statements from Iowa lawmakers that purport to rebut the Plaintiffs' arguments about the legislation's purpose. This Court accurately and thoroughly applied the existing law in denying the Motion to Dismiss, and because these Motions present pure legal issues on an undisputed factual record, summary judgment is appropriate. FED. R. CIV. P. 56(a).

The State continues to claim erroneously that the Ag-Gag law raises no issues under the First Amendment. This argument has no more merit now than it did when the State made it in its Motion to Dismiss. As detailed below, the State's Motion for Summary Judgment rests on mistaken characterizations of the controlling law. Because the Ag-Gag law is a content- and viewpoint-based restraint on pure speech, this Court must apply strict scrutiny.

Iowa's Ag-Gag law fails under strict scrutiny. With respect to strict scrutiny, the State proffers not a single argument that its purported interests in protecting private property or promoting bio-security are compelling. Even assuming they were, the law is not narrowly tailored to advance those interests, as direct prohibitions on trespass and on conduct directly interfering with biosecurity would both be less restrictive alternatives. Indeed, the clumsy manner in which the Ag-Gag law addresses either of those purported interests belies the true speech-suppressing motive underlying the law.

Rather than address the rigorous strict scrutiny standard, the State instead implies that the law is subject to *intermediate* scrutiny and then suggests that the narrow tailoring required for

intermediate scrutiny is so lacking in rigor as to be satisfied whenever a government interest is remotely connected to any hypothetical interest offered in support of a challenged law. Indeed, the gravamen of the State's erroneous intermediate scrutiny analysis seems to be that traditional rational basis and intermediate scrutiny are functionally indistinguishable. This is error; the law does not recognize this conflation of these tiers of scrutiny.

The State cannot meet the actual intermediate scrutiny standard in this case. First, the only basis for its asserted interests in property protection and biosecurity are passing statements by legislators. The State provides no evidence at all that undercover investigations interfere with either of these interests. Such unsubstantiated interests cannot be sufficiently "significant" to justify the burden on speech that the Ag-Gag law imposes. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that under intermediate scrutiny, "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975))); *Califano v. Goldfarb*, 430 U.S. 199, 223–224 (1977) (Stevens, J., concurring in the judgment)). Furthermore, while the State correctly points out that the narrow tailoring requirement under intermediate scrutiny does not require that its laws be the "least restrictive means" to advance its goals, that does not mean no scrutiny at all. This is particularly clear in light of a recent U.S. Supreme Court decision that reiterates the onerous burden imposed on a State seeking to overcome intermediate scrutiny. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (applying a rigorous narrow tailoring standard under intermediate scrutiny).

Because the Ag-Gag law restricts speech, and because it does not survive strict or even intermediate scrutiny, this Court should grant Plaintiffs' Motion for Summary Judgment and deny the State's Motion.

Argument

I. Iowa's Ag-Gag Law Implicates the First Amendment Because It Regulates Speech.

As it did in its motion to dismiss this lawsuit, the State argues that the Ag-Gag law does not even implicate the First Amendment because it "does not prohibit protected speech, but rather prohibits conduct." Defendants' Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (State's MSJ Br.), Dkt. No. 63, at 7. As Plaintiffs' opening brief emphasizes, the First Amendment's coverage is not nearly as limited as the State pretends. Brief in Support of Plaintiffs' Motion for Summary Judgment (Plaintiffs' MSJ Br.), Dkt. No. 53, at 21-22. False speech that results in neither tangible harm nor unjustified material gain for the speaker is still speech within the First Amendment's protection.

This Court has already held as much in this case, finding that while the 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—pure speech. 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.*[1]

II. The Ag-Gag Law's Prohibition on Misrepresentations to Gain Access Implicates the First Amendment.

Subsection (a) of the Ag-Gag law criminalizes misrepresentations made to gain access to

[1] In any event, as Justice Breyer recently explained, "it is often wiser not to try to distinguish between "speech" and "conduct." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) ("Instead, we can, and normally do, simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects. If, for example, a challenged government regulation negatively affects the processes through which political discourse or public opinion is formed or expressed (interests close to the First Amendment's protective core), courts normally scrutinize that regulation with great care," regardless of whether the law targets conduct or pure speech.).

agriculture facilities. Contrary to the State's argument, these misrepresentations are protected speech because they cause no legally cognizable harm and result in no material gain.

As the State concedes, this Court already recognized this in its Order denying the State's Motion to Dismiss. MTD Order at 22-29. The State asks the Court, however, to reconsider its prior ruling and hold that the utterance of false speech to gain access is not protected by the First Amendment. State's MSJ Br. at 5-6. The Court's conclusion was correct then and it remains correct now.

As this Court previously held, "[f]alse statements, without more, are not unprotected speech." MTD Order at 24-25 (citing *United State v. Alvarez*, 567 U.S. 709, 718 (2012)). To fall outside of the First Amendment, lies must cause a "legally cognizable harm" or provide a "material gain" for the speaker. *Alvarez*, 567 U.S. at 718, 723. Subsection (a)'s prohibition on using false pretenses to gain access to an agricultural production facility criminalizes misrepresentations that do neither. *See* MTD Order at 22-29. The State nonetheless contends that an invitee who obtains access by false pretenses (1) causes a cognizable harm in the form of a trespass and (2) obtains a material gain in the form of access that might not have been obtained but for the false pretense. As explained below, this is wrong on both counts.

A. The Ag-Gag Law's Prohibition on Misrepresentations to Gain Access Violates the First Amendment Because it Criminalizes False Statements That Do Not Cause Material Harm.

1. This Case Does Not Involve a Generally Applicable Law Prohibiting Access to Private Property

The State first rests its argument on the principle that landowners enjoy a right to exclude others, and that the Ag-Gag law is a valid prohibition against trespass. State's MSJ Br. at 13-15. But subsection (a) goes far beyond a generally applicable trespass law and does not in fact promote a private owner's ability to control her property. A private land owner can exclude persons because she does not trust them, or she does not like their attitude, or even if she simply finds their speech

disagreeable, annoying, or boring. Iowa's law prohibits speech used to gain access to property. It does not affect a property owner's ability to exclude others from her property (or, for that matter, to conduct background checks or even administer polygraphs of potential employees).[2]

Because it misconstrues Plaintiffs' legal claim, the State relies on cases that are inapposite to the present controversy. Those cases involve individual speakers who attempted to gain access to private property to engage in speech contrary to the landowners' views. *See*, *e.g.*, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (cited in State's MSJ Br. at 8).

It is one thing for a property owner to have control of her property; it is another matter altogether for a State to *criminalize* pure speech. Misrepresentations that are made by persons who are *lawfully* present at the time they make the misrepresentation (as when an investigator with a political or journalistic purpose shows up at an agricultural operation posing as a job applicant or a feed salesperson) are pure speech. Accordingly, the State errs in equating deceptions used to shed light on matters of public concern with a deprivation of one's ability to control his or her property. To put the matter differently, the law at issue in this case regulates whether the lie may

[2] The State treats private property as a talisman that precludes First Amendment relief in this case. But the Supreme Court has repeatedly recognized that restrictions on speech will be struck down when they are content-based, even when the regulated speech occurs entirely on private property. *See, e.g., R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 379 (1992) (striking down a city ordinance criminalizing speech that "one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as facially invalid content-discrimination, which petitioner challenged after being charged for his repugnant speech act in that case, consisting of burning a cross "inside the fenced yard of a [B]lack family"). The Court distinguished the impermissible restriction of speech at issue in the case from any number of legitimate criminal laws, pointing out that the state could have charged the teenager criminally for arson or destruction of property, for example. *R.A.V.*, 505 U.S. at 379-80.

be told, not, as the state attempts to conflate, whether one is permitted to access the location where the lie is told.

Critically, then, Plaintiffs are not asserting an immunity from generally applicable, content-neutral laws.[3] For instance, Plaintiffs are not arguing for immunity from traffic laws so that they could drive faster to gather information, or a right to do undercover investigations without wearing legally-mandated safety equipment or conducting legally-required training, nor are they asserting a right to ignore biosecurity, trade secret, or general trespassing laws.

The Supreme Court and Eighth Circuit Court of Appeal both recognize lies as a form of pure speech that are entitled to First Amendment protection. *Alvarez*, 567 U.S. at 721-22; *281 Care Committee v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2010) (*281 Care Comm. I*); *281 Care Comm. v. Arneson*, 766 F.3d 774, 782-84 (8th Cir. 2014) (*281 Care Comm. II*). Accordingly, an outright ban on lies used to gain access is a limitation on pure speech, and not merely an impediment to

[3] The State cannot save the Ag-Gag law by analogizing it to cases that upheld laws of generally applicability against First Amendment challenges. State's MSJ Br. at 8 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972); and *Branzburg v. Hayes*, 408 U.S. 655, 682-83 (1972), for the proposition that "[i]nformation gatherers must obey laws of general applicability"). All these cases merely stand for the uncontroversial proposition that so long as a law is content-neutral, the First Amendment does not bar its general application to the press and the public on equal terms. The cases do not establish that any law that is generally applicable is inoculated from First Amendment scrutiny. If it did, a state could pass a law prohibiting all demonstrations, or even a law banning only war protests, because it would apply to everyone. *See* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 66 (2003) ("nothing could be less discriminatory than a complete ban on all speech."). Likewise, a ban on defacing the U.S. flag is a generally applicable law. But each of these examples violates the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 400 (1989). It is equally well established that generally applicable laws such as tortious interference with business relations, intentional infliction of emotional distress, and breach of the peace can offend the First Amendment. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 920-21 (1982) (tortious interference); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15 (1971) (breach of the peace). The fact that a law is generally applicable is a prerequisite to constitutionality, but not the end of the inquiry.

one's ability to protect their privacy or enforce trespass laws. An agricultural facility could allow everyone to enter, as some do through public tours; no one to enter, as do some private family farms; or it can choose to limit entry in any means it deems appropriate. But just as a State may not permissibly bar one from criticizing an industry, neither may it criminalize lies merely because the lies are told while those persons are present in a single industry, nor criminalize lies in the absence of the element of material harm.

This is not to suggest that every lie used to gain entry to every facility will be protected. But it means that the First Amendment applies and that a content-based restriction on such lies must satisfy strict scrutiny. Silencing speech may be the "path of least resistance," *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014), for curing certain harms related to "ownership or control of their private property" harms, State's MTD at 20, but "sacrificing speech for efficiency" is not permissible. *McCullen*, 134 S. Ct. at 2534.

2. Entry by Deception Does Not Cause a Material Harm to the Landowner.

The State attempts to shoehorn subsection (a) into the prohibitions on false statements that the Supreme Court sanctioned in *Alvarez* by arguing (1) that gaining access by false pretenses is a trespass and (2) that the mere act of access through deception is itself a sufficient material harm to trigger criminal liability.[4] State's MSJ Br. at 12-17. But by this logic any deception that may result in changed behavior, no matter how de minimis or nominal, can be criminalized.

The State's argument fails because entry gained by false pretenses, whether affirmative statements or by omission, is not a trespass and does not result in a legally cognizable harm to the

[4] Even if the State's logic were accepted and the lies at issue in this case were deemed unprotected speech, because the law is content-based it would still be unconstitutional. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992). Even a law that merely criminalized trespass would be unconstitutional if it limited the application of trespass liability in a manner that was content-based by, for example, prohibiting trespassing in support of animal rights causes.

property owner or a material gain to the speakers. The State cites no authority to suggest otherwise. Numerous other courts that have addressed this same issue have reached the same conclusion.

In *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1201-06 (D. Utah 2017), the court assessed a provision of the Utah Ag-Gag law that criminalized "obtaini[ing] access to an agricultural operation under false pretenses"—a virtually identical provision to subsection (a) here. 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 found that the First Amendment applied to Utah's Ag-Gag statute's lying provision because the lies prohibited by the statute did not cause legally cognizable harm, which would be required under *Alvarez* to render the speech unprotected.

Similarly, the courts that assessed a nearly identical provision of the Idaho Ag-Gag statute, which criminalized nonemployees "enter[ing] an agricultural production facility by … misrepresentation," Idaho Code § 18-7042(1)(a), have rejected the claim that entry on private property by deception materially affects any property interest. The district court rejected Idaho's argument that such misrepresentations were outside of the First Amendment on account of the allegedly trespassory harm to the property owner, finding that "the limited misrepresentations ALDF says it intends to make—affirmatively misrepresenting or omitting political or journalistic affiliations, or affirmatively misrepresenting or omitting certain educational backgrounds—will most likely not

cause any material harm to the deceived party." *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1022 (D. Idaho 2014).

The Ninth Circuit affirmed, rejecting Idaho's argument that "entry onto the property and material gain are coextensive." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 (9th Cir. 2018). "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*. In directly addressing Idaho's asserted interest in protecting against trespasses, the Ninth Circuit noted that trespassing was already a crime and "that criminalization of these misrepresentations 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 Ninth Circuit found that 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)).

This Court reached the same conclusion in its ruling rejecting the State's attempt to dismiss this action. In its Motion to Dismiss, the State had argued "that trespass-type harms are legally cognizable and significant for First Amendment purposes because such harms can support nominal damages." MTD Order at 26. In rejecting that argument, this Court properly found that "nominal damage is just that—damage in name only. A trespasser may enter a property unauthorized and interfere with a property owner's right to control who enters his property without causing any actual or material injuries to the property owner." *Id*. This Court's reasoning on the constitutional

status of deceptive entry is entirely consistent with every federal case to have considered a similar issue. *See*, *e.g.*, *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) ("[T]he defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.")

3. The Decisions Cited by the State to Dispute This Court's Reasoning Do Not Support Treating Deception Used to Gain Entry as Unprotected Speech.

The State relies on several cases to argue that deceptions in service of entry are unprotected speech. First, the State invokes a nearly five-decade-old Ninth Circuit decision, *Dietemann v. Time, Inc*., 449 F.2d 245 (9th Cir. 1971), to argue that the there is no constitutional right to use "false pretense to obtain access to … private property not open to the public." State's MSJ Br. at 17. *Dietemann*'s limited value as precedent is demonstrated by the Ninth Circuit's decision in *Wasden*. In *Wasden*, the Ninth Circuit struck down the Idaho Ag-Gag statute's prohibition on using deceit to gain access to private places for the purposes of information gathering (or for any other purpose). *Wasden*, 878 F.3d at 1194-99. If *Dietemann* was the precedent that the State purports that it is, the Ninth Circuit would have been bound to follow it in *Wasden*. The Ninth Circuit did not follow the State's reading of its precedent, and neither should this Court. Moreover, *Dietemann* involved a deception used to gain access to the plaintiff's private home, where he conducted his practice—not, as here, to a highly regulated commercial property. Indeed, *Dietemann* stands for the proposition that an entry by deception, without more, violates no trespassory interest. 449 F.2d at 249 ("One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves.").

Second, the State also errs by offering *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4th Cir. 1999), as support for its strained misreading of the protections for employment-based whistleblowing provided by the First Amendment. State's MSJ Br. at 8, 16-18. According to the State, *Food Lion* stands for the rule that "the public or consumers have no right to access agricultural production facilities, and consequently, no right to obtain access by false pretenses in order to surreptitiously record conduct at said facilities." State's MSJ Br. at 17. However, *Food Lion*, relying on the First Amendment, refused to permit damages, *even for wages paid* to persons who accepted employment under false pretenses to conduct their investigation. 194 F.3d at 514 (holding that the undercover employees' use of deceit to gain employment did not "cause" them to be paid; instead they were "paid because they showed up for work and performed their assigned tasks as Food Lion employees, [and] [t]heir performance was at a level suitable to their status as new, entry-level employees").

The most that can be said of *Food Lion* for the State is that, like the other cases discussed above, the Court recognized that "generally applicable" common law torts, such as an action for breach of the "duty of loyalty," did not violate the First Amendment. *Id*. at 521. The court's reasoning cannot be used to uphold a new statute like the Ag-Gag law where the text and legislative history establish it is targeted at certain types of speech (such as deception at agricultural facilities), because these factors demonstrate the law is not generally applicable and thus mandate the application of strict scrutiny. The nominal damages of a few dollars that were awarded against the investigator-defendants in *Food Lion* were purely and exclusively the result of a breach of the employees' duty of loyalty. *Id*. at 518 ("the reporters committed trespass by breaching their duty of loyalty"). To put a finer point on the matter, the "trespass" the State posits occurs when Plaintiffs

use false pretenses to gain entry is not actionable as a trespass under the only (non-Ag-Gag) case that addresses trespass in this general context of investigative journalism. *Id*.[5]

Far from supporting the State's view that the Ag-Gag law is constitutional, *Food Lion* compels the opposite conclusion. In fact, Plaintiffs are aware of no court upholding criminal penalties for undercover investigations like those provided for in the Ag-Gag law. *See, e.g.*, *Desnick*, 44 F.3d at 1353 (7th Cir. 1995) (analogizing undercover investigators to "testers" in discrimination cases); *PETA v. Bobby Berosini, Ltd*., 895 P.2d 1269, 1281-83 (Nev. 1995); *Ouderkirk v. PETA*, No. 05-10111, 2007 WL 1035093 (E.D. Mich. Mar. 29, 2007); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc*., 609 N.W.2d 607, 613-14 (Mich. App. 2000) (noting misrepresentation did not defeat consent to enter on trespass claim).

The State also relies on *Western Watersheds Project v. Michael*, 196 F.Supp.3d 1231 (D. Wy. 2016), a district court decision in Wyoming that did not involve the regulation of lying, false pretenses, misrepresentations, or anything to do with employment. That case involved a challenge to two laws that originally prohibited unauthorized entrants on public or private land "from collecting or recording information relating to land and land use and then submitting that information to a governmental agency." *Id*. at 1235-36. The plaintiffs sued, the state moved to dismiss, and the court denied the motion, finding that the plaintiffs had standing and stated First Amendment and Equal Protection claims. *Id*. at 1237.

Wyoming then amended the laws by increasing their penalties and removing the prohibition on collecting data from public lands, unless the data collector crossed private land to reach

[5] Perhaps even more significantly, *Food Lion* was an attempt to construe state law by a federal court of appeals, and the decision has subsequently been overruled by the state Supreme Court, which has explicitly held that there is no common law cause of action for a breach of the duty of loyalty in such contexts. *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001).

the public land. *Id*. at 1238. The plaintiffs amended their complaint to challenge the new laws and the state moved to dismiss again. *Id*. Finding that "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data," the district court granted the motion. *Id*. at 1242.

The plaintiffs appealed the decision only as to the subsection of the laws that prohibited crossing private land to collect data on public land and the Tenth Circuit reversed. *W. Watersheds Project v. Michael*, 869 F.3d 1189 (2017). Rejecting the same type of private property argument that Iowa advances here, the Tenth Circuit "conclude[d] that the statutes regulate protected speech under the First Amendment and that they are not shielded from constitutional scrutiny merely because they touch upon access to private property." *Id*. at 1192. While the state "characterize[d the] plaintiffs' argument as asserting a right to trespass," the Tenth Circuit found "[t]hat framing misstates the issue," noting that the state already had a generally-applicable trespass statute and that the challenged statute provided heightened penalties specific to people who sought to collect data. *Id*. at 1195. The Tenth Circuit noted that Wyoming's arguments might have had merit if the plaintiffs had challenged Wyoming's general trespass statute, but "Wyoming's differential treatment of individuals who create speech" changed the calculus and the outcome. *Id*. at 1197. Surveying the case law nationwide, the Tenth Circuit found that the "plaintiffs' collection of resource data constitutes the protected creation of speech" and remanded the case back to the district court. *Id*. at 1195-98. Limitations on the collection of data on *private property* implicate free speech, and this Court recognized the nature of the Tenth Circuit's decision on its Order denying the State's motion to dismiss this lawsuit. MTD Order at 20.

The State's reliance on the reversed district court's decision in *Western Watersheds Project* is misplaced. The litigation in that case provides no support for holding that limits on private

property access are immune from First Amendment scrutiny. Unlike the Ag-Gag statute's criminalization of words (false pretenses), the statutes at issue in *Western Watersheds Project* prohibited actions (data collection), and the Tenth Circuit nonetheless held that the district court erred in concluding that free speech was not implicated. As the Tenth Circuit found, dressing up the criminalization of a certain type of speech activity in the cloak of "trespass" cannot immunize the law from First Amendment scrutiny. As with Wyoming, Iowa "characteriz[ing] plaintiffs' argument as asserting a right to trespass . . . misstates the issue." *Id*. at 1195. The Ag-Gag law criminalizes not only "the protected creation of speech," *id*. at 1195-96 (emphasis added), but speech itself.

B. The Ag-Gag Law's Prohibition on Lies to Gain Access Criminalizes False Statements That Do Not Cause Material Gain to the Speaker.

Nor is the Ag-Gag law outside the scope of First Amendment protection because the misrepresentations it criminalizes do not confer material gain on the speaker. The State's argument to the contrary is based on the dissenting opinion in *Wasden*, which would have found that the access obtained by the misrepresentation is sufficient to trigger criminal prohibitions. *See* State's MSJ Br. at 17-18. Of course, this argument was rejected by the majority, which found that an entry by misrepresentation "alone does not constitute a material gain, and without more, the lie is pure speech." *Wasden*, 878 F.3d at 1195.

The State's view is that any change in behavior or benefit derived from a lie, no matter how immaterial, renders the law outside of First Amendment protection. But this argument is misguided. The *Wasden* majority pointed out that a teenager who secures a reservation at an exclusive restaurant posing as his well-known mother "may have entered the restaurant with no permission," but "he gains little to nothing from his misrepresentation." *Id*. Deriving "some" benefit is not enough to take a law beyond constitutional protection under *Alvarez*. In his concurring opinion in that case, Justice Breyer specifically considered the problem of political frauds, for

example, and described their criminalization as "particularly dangerous" in spite of the fact that such lies are uniquely likely to alter behavior in a consequential manner. *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (Breyer, J., concurring) (emphasis added) ("In the political arena a false statement is *more likely to make a behavioral difference* (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous") (emphasis added).

The other courts that have addressed this issue have also rejected the idea that access to an agricultural facility under false pretenses is alone enough to avoid application of the First Amendment's protections. In the district court opinion that *Wasden* affirmed, the court rejected the argument that undercover investigators' lies made to gain access "are made for the purpose of material gain." *Otter*, 118 F. Supp. 3d at 2014. "Rather, undercover investigators tell such lies in order to find evidence of animal abuse and expose any abuse or other bad practices the investigator discovers. Thus, the proposed false pretenses at issue here do not fit the *Alvarez* plurality's description of unprotected lies because they would not be used to gain a material advantage." *Id*. And a Utah federal district court, in striking down that state's Ag-Gag's prohibition on access by misrepresentation, surveyed the case law and rejected the argument that access alone constituted a material gain sufficient for criminal liability. *Herbert*, 263 F. Supp. 3d at 1202-04.

Furthermore, *Alvarez* itself demonstrates that access to private property alone is not the type of material (typically monetary or commercial) gain it contemplated as sufficient to criminalize lies. In distinguishing the statute at issue in that case with lies "made for the purpose of material gain," *Alvarez*, 567 U.S. at 723, the Court cited to a case upholding a prohibition on "a nonprofit corporation from exploiting the 'commercial magnetism' of the word 'Olympic' when organizing an athletic competition." *Id*. (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic*

Comm., 483 U.S. 522, 539-540 (1987)). Alvarez himself made his lies as an elected board member of a water district, presumably to ingratiate himself to his electorate, which would fit within the State's unbounded conception of material gain here. *Id*. at 713. But the Court distinguished Alvarez's lies from the type of material gain—typically a monetary gain through fraud—that the Court found can be criminalized. *Id*. at 723. Gleaning a rule from the "material gain" dicta in *Alvarez*, and finding that it justifies the Ag-Gag statute's prohibition on access by misrepresentation here, would reduce the requirement of gain to a meaningless limiting principle; every trivial, psychological gain, including ingratiating the speaker to the listener (or even receiving a dinner invitation), would constitute a material gain.

In addition to relying on a dissenting opinion at odds with *Alvarez* itself and the unanimous precedent, the State's position that access alone is a material gain sufficient to trigger criminal liability is built on an additional error: that the Ag-Gag law narrowly applies to "private property not open to the public" that "[t]he public or consumers have no right to access." State's MSJ Br. at 17. The statute's application is not nearly as narrow as the State envisions. The statute defines agricultural production facilities to mean anywhere that agricultural crops are grown, or animals used in agriculture are maintained. Iowa Code §§ 717A.1(3), (5)(a). While this definition certainly includes factory farms and slaughterhouses, its broad sweep also includes pumpkin patches, 4H events, the state and county fairs, Future Farmers of America exhibitions, and puppy mill auctions, to name a few. The law sweeps broadly.

III. The Ag-Gag Law's Prohibition on Lies to Obtain Employment with an Intent to Conduct an Unauthorized Act Implicates the First Amendment.

The State contends that even if subsection (a)'s criminalization of access by false pretenses is unconstitutional, subsection (b)'s prohibition on obtaining employment by false pretenses is constitutional because it requires an intent to commit an unauthorized act. State's MSJ Br. at 18-

19. The State's argument fails to save subsection (b) because its prohibition is far broader than anything contemplated by *Alvarez* and is thus unconstitutional for the same reasons discussed above.[6]

In *Wasden*, the Ninth Circuit upheld a provision of the Idaho Ag-Gag law that prohibited obtaining employment at an animal agricultural facility through false pretenses when the false pretenses are accompanied by a specific intent to injure the facility. *Wasden*, 878 F.3d at 1201. The court found that the section's additional specific-intent element requiring an intent to injure provided a "clear limitation" that "cabins the prohibition's scope" and takes the prohibition outside of the scope of lies protected by *Alvarez*. *Id*. The Ninth Circuit's approach is sensible insofar as the Plaintiffs in that case (as in this case) have not pled a constitutional right to enter with the specific intent to cause tangible injury, such as vandalism; rather, they are investigators seeking to document and expose, among other things, the conditions on factory farms. Plaintiffs do not quarrel with the conclusion that one who tells lies to gain employment with the intent to cause physical damage or steal trade secrets could be constitutionally subjected to criminal penalties.

By contrast, subsection (b) of the Iowa Ag-Gag law "sweeps much more broadly and on its face requires no likelihood of actual, tangible injury on the part of the recipient of false speech." MTD Order at 24. "While the Iowa statute's intent requirement does inoculate against some 'innocent' or accidental misrepresentations, it is not clear that simply because an act is not authorized by an employer, commission of that act causes the sort of material harms contemplated in the *Alvarez* plurality opinion." *Id*. An employer could choose not to "authorize" any variety of acts

[6] Again, even if *all* deceptions told in this context are classified as non-speech, a content-based restriction on such deceptions, as in this case, runs afoul of the First Amendment. *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 379 (1992).

that do not harm the facility in any way, from the silly to the draconian, including wearing a Cornhuskers t-shirt to work or conversing with employees of the opposite sex. 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), *see Harman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1113 (7th Cir. 2002), or to document unsafe working conditions as part of an effort to make a complaint to state or federal regulators, or to conduct research for a political science book[7]—none of which result in any physical or material harm to the employer, but are criminalized by the Ag-Gag statute if the employer does not "authorize" it.

The law's legislative history suggests that the primary unauthorized act that legislators sought to protect agricultural facilities against was whistleblowing and undercover video-recording that leads to damning exposés. *See* Plaintiffs' SUMF ¶¶ 78-82. Recording or other forms of whistleblowing do not physically or materially injure an employer in any way that *Alvarez* or *Wasden* contemplate, which is underscored by the fact that *Wasden* explicitly struck down Idaho's prohibition on non-consensual filming of agricultural operations. *Wasden*, 878 F.3d at 1199-1201; *see also Herbert*, 263 F. Supp. 3d. 1206-08; 1210-13 (invalidating the Utah Ag-Gag law's prohibition on filming as a violation of the First Amendment).

The perceived harm flowing from the prohibited deceptions under the Ag-Gag statute derive not from the false speech itself, but from the assumed harm of entry by deception (discussed *infra* section II), or the subsequent publication of truthful information on matters of public concern. Whistleblowing when it is not explicitly authorized by company officials nonetheless results in

[7] *See* Timothy Pachirat, *Every Twelve Seconds* (Yale 2011) (firsthand account by a political scientist of his experience working undercover in a Midwest cattle slaughterhouse).

the exposure of truth on a matter of public concern that informs political and moral discourse; this is not the sort of material gain/harm that strips the expressive conduct of free speech protections.

Subsection (b) does not even require that false pretenses under that section be material, which further distinguishes it from the prohibitions on fraud that *Alvarez* contemplated. *See* MTD Order at 30 (citing *Alvarez*, 567 U.S. at 734-35 (Breyer, J., concurring)). The undisputed factual record on this motion demonstrates the false pretenses Plaintiffs' investigators use relate to their affiliation with animal protection organizations, their status as licensed private investigators (where applicable), and innocuous white lies. SUMF ¶¶ 8, 12-15, 32, 38. They do not lie about their job qualifications, their relevant experience, or their willingness to comport with all safety and security protocols. Furthermore, investigators who gain employment through misrepresentations are not, as the State argues, benefiting from a material gain simply because they are paid for their labor. Although *Alvarez* used lies to gain "offers of employment" as an example of a misrepresentation that might be regulated, *Alvarez*, 567 U.S. at 723, the clear context of that illustration concerns someone who lies to get a job that they are not qualified to do. Thus, the material harm is the defrauding the employer, and the corresponding material gain is a sort of unjust enrichment for the lying job applicant. That does not occur with the types of undercover investigations facilitated by the Plaintiffs. As the undisputed record makes clear, the investigators perform their jobs identically to "bona fide" employees, while also wearing hidden recording equipment or making observations that they subsequently share with the media. *See, e.g.*, SUMF ¶¶ 6, 12, 13, 15, 32, 55. These false pretenses do not cause actual damages to the animal production facility as contemplated by *Alvarez* or *Wasden*. *See* MTD Order at 30-31. To hold otherwise, as urged by the State, would be to hold that the famous muckrackers who spurred law reform and social change in this country were engaging in harmful, unprotected speech. Following the State's argument to its

logical extreme, the worse the criminality or abuse exposed by the whistleblower, the more aggravated the "harm," and therefore the greater the need for criminal penalties.[8] Surely this cannot be the law under the First Amendment.

IV. The Ag-Gag Law is Content-Based and Therefore Subject to Strict Scrutiny.

In assessing whether a law is content-based, the Supreme Court recently reiterated a two-tiered approach in *Reed v. Town of Gilbert, Arizona*: "strict scrutiny applies *either* when a law is content based on its face or when the purpose and justification for the law are content based." 135 S. Ct. 2218, 2222 (2015) (emphasis added). The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *Id*. at 2228. The second step, if necessary, requires a court to examine the legislative justifications for the law. *Id*. ("[W]e have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose.").

A. The Prohibitions on False Pretenses Are Facially Content- and Viewpoint-Based and Therefore Subject to Strict Scrutiny.

As established in Plaintiffs' opening brief, *see* Plaintiff's MSJ Br. at 22-25, the Ag-Gag law restricts speech based on both its content and the speakers' viewpoint. The law is content-based in multiple ways. First, it explicitly regulates only false speech, and not truthful speech. 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

[8] While the State argues that the law still permits current employees to engage in whistleblowing behavior, as this Court recognized in its decision denying the State's motion to dismiss, "existing employees are seemingly less suitable for undercover investigations compared to investigators working with Plaintiffs from the outset who do not depend on employment at the facility to make a living." MTD Order at 14 n.8.

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)).

In addition, the prohibition of lies is doubly content- and viewpoint-based because subsection (b) distinguishes between truth and falsity in the single context of seeking employment, and subsections (a) and (b) both criminalize false pretenses in a single industry, as opposed to in all commercial industries.[9] This reveals the true purpose of the law: to protect the agricultural industry, which has been subject to harsh public criticism as a result of information produced by past undercover investigations.

Finally, "[t]o 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*.; *see also Herbert*, 263 F.Supp.3d at 1210 (determining that the Utah Ag-Gag law's access-by-misrepresentation prohibition was content-based because "whether someone violates the Act depends on what they say").

[9] The State errs when it argues that the Supreme Court has held that laws are not content-based "simply because they target a particular industry or business for protection." MSJ Br. at 21. The primary case relied upon by the State on this point criminalized simply being present or standing within 35 feet of an abortion clinic. *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014). The Court took pains to emphasize that the abortion buffer-zone law, unlike the Ag-Gag statute at issue in this case, was content-neutral precisely because it did not require "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," because a violation of the law turned "not on what they say," but simply on whether they were in a certain location. Id. at 2531 (cleaned up) ("Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word."). No one can be convicted under the Iowa Ag-Gag law based solely on their presence; instead, the content of the speech must be reviewed. Equally important, the Court in *McCullen* emphasized that even a prohibition on simply being present at a location would not be content neutral if the law were targeting the undesirable effects of likely speech at that location, *id.*, as in this case.

B. The Entire Law Was Motivated by a Desire to Limit Speech Critical of the Commercial Agriculture Industry and is Therefore Viewpoint-Based and Subject to Strict Scrutiny.

Moreover, as demonstrated in the record, the entire law was motivated by a desire to limit speech critical of commercial agricultural practices and is therefore viewpoint-based. Even if the Court accepts that the law is facially content-neutral, the purpose and justifications for the law make clear that it was passed for a viewpoint-discriminatory purpose: to target critics of the agricultural industry. The State argues that the motive and justifications for a law are irrelevant to the content-neutrality analysis, State's MSJ Br. at 22-23, but *Reed* leaves no doubt that a law is also content-based "when the purpose and justification for the law are content based." 135 S. Ct. at 2228; *see also id*. at 2227 (recognizing as content-based laws adopted by the government "because of disagreement with the message [the speech] conveys" (internal quotation marks omitted) (alteration in original)). *See also McCullen v. Coakley*, 134 S. Ct. 2518, 2531–32 (2014) ("the Act would not be content neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech."). In other words, legislative motive matters. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267–68 (1977) ("The historical background of the decision is one evidentiary source [of legislative purpose] . . . . The specific sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker's purposes. . . . The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").[10]

[10] *See also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (examining legislative history that revealed "hostility to day laborer solicitation"); *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1378 (S.D. Fla. 2011) (finding legislative history, in which legislators expressed disagreement with health practitioners' firearm safety message, reinforced conclusion that law prohibiting licensed health care practitioners from asking patients about firearm ownership was content-

As Plaintiffs demonstrated in their opening brief, the Legislators were clear that their intentions were to silence undercover investigation in an agriculture. Plaintiff's MSJ Br. At 24-25; SUMF at ¶¶ 78-82. The State counters that, in addition to this intent, the legislators also couched their motivations in the language of protecting private property and bio-security. State's SUMF, Dkt. No. 57-1, ¶¶ 1-7. But an improper motive need not be the sole purpose for a law in order to trigger heightened scrutiny. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265–66 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," but heightened scrutiny is required when there is proof that an improper purpose was "a motivating factor in the decision."). If simply asserting an additional, content-neutral justification could immunize law with a content-based purpose from review, the protection could be so easily avoided that it would be meaningless.

V. The Ag-Gag Law is Overbroad

The State's overbreadth argument is necessarily a rehashing of its claim that false pretenses are conduct, not speech, and that even if they are speech, they are not protected by the First Amendment. State's MSJ Br. at 25-30. A law is overbroad for purposes of the First Amendment if a substantial number of the law's applications are unconstitutional. *United States v. Stevens*, 559 U.S. 460, 472-73 (2010). Thus, if the State is correct that the Ag-Gag law reached conduct, not speech, or that the law does not implicate the First Amendment at all, then of course the law is not overbroad. By contrast, if investigative lies are pure speech, or if acts of whistleblowing like those

based); *Jamal v. Kane*, 105 F. Supp. 3d 448, 457 (M.D. Pa. 2015) (rejecting state's argument that law authorizing civil suits against an "offender" for conduct that "perpetuates the continuing effect of the crime on the victim" was limitation on behavior rather a content-based regulation of speech where the law "was championed primarily as a device for suppressing offender speech").

engaged in by journalists and activists are speech-related activities implicating free speech, then the law is necessarily overbroad.

In short, unless this Court agrees with the State that investigative journalists who obtain access to businesses under false pretenses—from Nellie Bly's famous investigation of 1890s mental institutions[11], to Upton Sinclair's 1900s investigation of the meatpacking industry[12], to Barbara Ehrenreich's twenty-first century exposé of minimum wage jobs[13]—are never "legitimate whistleblowers," State's MSJ Br. at 26, then this law necessarily limits a substantial amount of speech in the form of lying and recording.

Because the law limits a substantial amount of protected speech, it is overbroad.

VI. The Ag-Gag Law Is Subject to Strict Scrutiny and Fails Both Strict and Intermediate Scrutiny.

The State's entire legal argument as to the level of review applicable to the Ag-Gag law is that intermediate scrutiny applies. And for good reason: this law cannot survive strict scrutiny, and the State does not even contend that it could. However, as argued above, this law is decidedly not content-neutral and strict scrutiny does apply. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based."). Even assuming intermediate scrutiny, the State cannot meet its burden. The Supreme Court has recognized time, place, and manner restrictions as valid only insofar as such restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they

[11] Nellie Bly, *Ten Days in a Mad-house*, Munro (1887).

[12] Upton Sinclair, *The Jungle*, Bantam Books (2003).

[13] Barbara Ehrenreich, *Nickel And Dimed: On (Not) Getting By in America*, Henry Holt (2002).

leave open ample alternative channels for communication of the information." *McCullen*, 134 S. Ct. at 2529. If Plaintiffs prevail on any of these questions, the law cannot even survive intermediate scrutiny.

A. The Ag-Gag Law Fails Strict Scrutiny and the State Does Not Contend Otherwise.

Content-based and viewpoint-based speech restrictions receive strict scrutiny. *See Reed*, 135 S. Ct. at 2222. The law is content-based on its face, *see infra* Section IV; *see also* Plaintiffs' MSJ Br. at 22-25, and this Court has recognized that the Plaintiffs have sufficiently alleged the legislation has a viewpoint-based motive. MTD Order at 21, 33. And both Supreme Court and the Eighth Circuit precedent confirm that strict scrutiny is the correct standard to apply to statutes that regulate false statements of fact. *Alvarez*, 567 U.S. at 715; *281 Care Comm. I*, 638 F.3d at 636; *281 Care Comm. II*, 766 F.3d at 783.

Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (internal quotation marks omitted). The State has not even attempted to meet its burden of showing, nor even made so much as a conclusory argument, that the Ag-Gag law survives strict scrutiny—essentially conceding that the law is unconstitutional if strict scrutiny is the applicable standard. *See* State's MSJ Br. at 23-25 (attempting to justify the law only under intermediate scrutiny).

Even if it had attempted to meet its burden, the State would have been unsuccessful. The State has proffered nothing to support its assertion that it has *any* interest in protecting property or biosecurity, much less a compelling one. And even if it could muster evidence of a compelling interest, such an interest could clearly be served by numerous alternatives that are less restrictive of speech. For example, the State could directly criminalize conduct that presents biosecurity risks

and could also punish behavior that harms tangible property interests. For these reasons, the State cannot possibly meet the high burden of strict scrutiny.

B. The Ag-Gag Law Fails Intermediate Scrutiny Because the Law is Not Narrowly Tailored.

Even if this Court reversed its determinations that the Ag-Gag law regulates speech instead of conduct and is content-based, the law could still not survive intermediate scrutiny. To meet 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'Brie*n, 391 U.S. 367, 377 (1968), and "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

In their opening brief, Plaintiffs established that the State's interests in passing the Ag-Gag law were not substantial, as they were 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. Plaintiffs' MSJ Br. at 33. The State counters that it had *additional* motives that included protecting private property and ensuring bio-security. But a few stray comments articulating additional motives for a law do not mean the State's interest is therefore "*unrelated* to the suppression of free expression." *O'Brien*, 391 U.S. at 377 (emphasis added). It simply means there was another putative justification articulated. While traditional rational basis review permits the State to proffer any conceivable, hypothetical, post-hoc justification for a law, *see, e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), intermediate scrutiny requires that the proffered interest be the "actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996); *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (looking beneath stated secular purpose to ensure no religious motivation).

Even if the State's interests were significant, the Ag-Gag law is not adequately tailored to serve the State's purported interest. Indeed, the notion of some sort of under-and-over inclusivity analysis is wholly absent from the State's brief. The Supreme Court's two most recent cases applying intermediate scrutiny in the First Amendment context to laws that were considerably more tailored to the state interests in question demonstrate the onerousness of overcoming intermediate scrutiny. *McCullen*, 134 S. Ct. at 2534-35; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (assuming the existence of a "substantial state interest" but holding that the law was "not sufficiently drawn to achieve it."). In *McCullen*, the Court struck down a Massachusetts abortion buffer zone despite the Court's explicit acknowledgement that the buffer zones "clearly serve [state] interests," which are remarkably similar to those proffered by the State in this case, including, among other things, the government's interests in "ensuring public safety and . . . protecting property rights." 134 S. Ct. at 2535. The fact that the law under review unquestionably served the government interests at issue was deemed insufficient to support a finding of narrow tailoring under intermediate scrutiny.[14] Instead, the Court explained intermediate scrutiny "demand[s] a close fit between ends and means," such that a law is narrowly tailored only if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id*. (quoting *Ward*, 491 U.S. at 799). Stated differently, intermediate scrutiny demands a "close fit between the ends and the means." *Id.* (emphasis added).

[14] The Court's explanation for requiring a rigorous form of narrow tailoring is also directly relevant to the present case. The Court noted that sometimes a state "may attempt to suppress speech not only because it disagrees with the message [thus making it content-based] being expressed, but also for mere convenience." *McCullen,* 134 S. Ct. at 2534. When the State deems certain "problems as likely to flow from particular forms of speech, "silencing the speech is sometimes the path of least resistance." *Id*. However the Court cautioned that "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *Id*. (internal quotation omitted).

The Ag-Gag law enjoys no such close fit between the actions criminalized and the State's asserted interests in protecting private property or biosecurity. For instance, the law does not apply to employees who do not apply for employment with an intent to record, but who subsequently seek to record some wrongdoing. Such employees would presumably have the same (minimal) effect on private property as the employee who had such an intent when applying, exposing the lack of fit between the supposed means and ends. And if the State's "real concern is trespass," then the existing laws already address that concern. *Wasden*, 878 F.3d at 1196. If the State wanted to protect trade secrets or other private matters, it could have drafted a narrow law that responded to those concerns rather than criminalizing a time-honored form of whistleblowing.

The State makes no attempt to show how someone who gains access or employment through a false pretense and then goes through the same biosecurity training as any other employee or invitee creates any greater biosecurity risk. Agricultural production facilities give all employees the same biosecurity training whether the employee secured employment through false pretenses (unbeknownst to the facility) or not. In fact, if Plaintiffs were to provide independent biosecurity training to their investigators, Plaintiffs would open themselves up to criticism to the extent that the curriculum departed in any way from that provided by the agricultural facilities themselves.

The law criminalizes even the most cautious and diligent undercover employee and is thus over-inclusive, and the law does not criminalize careless or deliberate violations of security or food safety rules by non-investigators, thus rendering it grossly under-inclusive. The over-and-under-inclusiveness of the law "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018). It is surely more efficient to

simply criminalize all undercover investigations, but the First Amendment does not tolerate expediency at the expense of speech. This law is not remotely tailored to ensuring a bio-secure workplace, much less narrowly tailored.

It comes as no surprise, however, that the law is perfectly suited to preventing undercover investigations and stifling the speech of animal welfare activists. And this is the exact purpose reflected in the legislative history. Occam's razor demonstrates that the simplest explanation is the right one: that a law impeccably designed to thwart undercover investigations, with that purpose expressed throughout the legislative history, was passed with the legislative intent of thwarting undercover investigations. The Court should reject the State's effort to make attenuated connections to invented purposes as incompatible with intermediate scrutiny. *See Herbert*, 263 F.Supp.3d at 1214 (finding the Utah Ag-Gag law "appears perfectly tailored toward . . . preventing undercover investigators from exposing abuses at agricultural facilities").

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

Conclusion

For all the foregoing reasons, this Court should deny State's motion for summary judgment, grant Plaintiffs' motion for summary judgment, declare the Ag-Gag law unconstitutional, and enjoin its enforcement.

Dated this 3rd day of August, 2018.

Respectfully submitted:

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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: August 3, 2018

/s/ Rita Bettis Austen
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