No. 19-1364

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, ET AL.,

Plaintiffs-Appellees,

v.

KIMBERLEY K. REYNOLDS, in her official capacity as Governor of Iowa, ET AL.,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Iowa,
Case No. 4:17-cv-362-JEG-HCA

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Summary of the Case and Request for Oral Argument

Plaintiffs challenged an Iowa law that criminalized undercover investigations at factory farms and slaughterhouses. Specifically, this statute (the Ag-Gag law) made it a crime to gain access to, or employment at, such a facility under false pretenses—that is, through speech. The district court struck down the law as facially violative of the First Amendment because the law penalizes and thereby chills First Amendment-protected activities based on the content of speech, and because it is not narrowly tailored to serve the State's asserted interests. The district court was correct.

Plaintiffs request that the Court hold oral argument and allot 30 minutes per side because this case involves complex First Amendment questions related to the validity of a state criminal statute.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Plaintiffs-Appellees 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 hereby certify that they have no parent corporations, and that no publicly held corporation owns more than ten percent of any of the Plaintiff-Appellee organizations.

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Statement of the Issue

Did the district court correctly apply binding Supreme Court precedent in striking down Iowa Code § 717A.3A as an unconstitutional content-based criminalization of speech?

Authorities:

U.S. Const. amend. I

Iowa Code § 717A.3A (2012)

Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018)

Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017)

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McCullen v. Coakley, 573 U.S. 464 (2014)

Statement of the Case

I. Undercover Investigations of Agricultural Facilities Expose Inhumane and Unsafe Practices That Are of Widespread Public Concern.

Undercover investigations in the agricultural industry are typically undertaken by whistleblowers who have obtained a job through the usual channels. These individuals document activities in factory farms and slaughterhouses with a hidden camera while performing the tasks required of them as employees. Joint Appendix (JA) 107-08, 112 (¶¶ 6-8, 32-34). When applying for these jobs, investigators actively or passively conceal their investigatory motive, as well as their affiliations with news-gathering or advocacy groups. JA 108-09, 112 (¶¶ 12, 13, 32). These investigators document violations of laws and regulations, unsanitary conditions, cruelty to livestock and pets, dangerous work conditions and other labor violations, water pollution and other environmental violations, sexual misconduct, and other matters of public importance—all while performing the tasks assigned by the employer in the same manner as any other employee. JA 107, 111, 114-17 (¶¶ 7, 30, 47, 55-56).

Undercover investigations in industrial agricultural facilities are of tremendous political and public concern. They have garnered widespread media coverage and prompted a wave of reforms. 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 the animals with electric prods, jabbing them in the eyes, prodding them with a forklift, and spraying water up their noses.[1] In 2009, undercover investigators at a Vermont slaughterhouse operated by Bushway Packing obtained footage of newborn calves being kicked, dragged, and skinned alive.[2] A few years later, an undercover investigator at the E6 Cattle Company in Texas filmed workers beating cows on the head with hammers and pickaxes and leaving them to die.[3]

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[1] 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.

[2] *Vermont Slaughterhouse Closed Amid Animal Cruelty Allegations*, L.A. TIMES (Nov. 3, 2009, 4:12 PM), https://latimesblogs.latimes.com/unleashed/2009/11/vermont-slaughterhouse-closed-amid-animal-cruelty-allegations.html.

[3] 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 agricultural facilities have been subject to numerous investigations. In 2011, undercover investigators at Iowa's Sparboe Farms documented hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses.[4] 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." JA 112 (¶ 33).

Another PETA investigation revealed horrific treatment of cows at an Iowa slaughterhouse, some of whom remained conscious long after their throats had been slit. JA 112 (¶ 34).

[4] *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.

Other investigations have generated widespread public concern about the industrial, inhumane breeding of companion animals, many of which become family pets. Plaintiff Bailing Out Benji has conducted undercover investigations into puppy mills, which have exposed Iowa pet stores who profit from the sale of these puppies. JA 118 (¶ 62).

These and similar investigations have also documented improper food safety practices and violations of labor and environmental law. JA 107, 11 (¶¶ 7, 30). These violations endanger an economically precarious agricultural workforce. For example, when Plaintiff Iowa Citizens for Community Improvement conducted an undercover investigation into a pork facility in Angola, Iowa, it revealed numerous poor and unsafe working conditions, which resulted in an OSHA complaint, citations, and notifications of penalty by the agency. JA 114-15 (¶ 47). Similarly, Plaintiff Animal Legal Defense Fund (ALDF) conducted a 2015 investigation of a Texas-based Tyson chicken slaughter plant that revealed horrendous working conditions, resulting in four legal complaints. JA 129-30 (¶¶ 6, 10).

II. Iowa Joins a Coordinated Effort to Criminalize Undercover Investigations.

In 2012, Iowa enacted the Ag-Gag law, which created the crime of "agricultural production facility fraud."

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(1).

An "agricultural production facility" is "an animal facility" 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." *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). A "crop

operation" is any "commercial enterprise where a crop is maintained on the property of [a] commercial enterprise." *Id.* § 717A.1(8).

The Iowa legislature was forthright in its intention to restrict speech: the Ag-Gag law was a deliberate attempt to shield the commercial agricultural industry from critical speech and "make producers feel more comfortable." JA 121 (¶ 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." JA 121 (¶ 79). The late Senator Joe Seng, a sponsor of the bill that became the Ag-Gag law, stated that the law was passed to "protect agriculture . . . [and] not have any subversive acts to bring down an industry," JA 121 (¶ 80), and that Iowa "passed [the law] mainly for protection of an industry. . ." JA 121 (¶ 81). A spokesman for then-Governor Terry Branstad told a newspaper that the Governor "believes undercover filming is a problem that should be addressed." JA 121-22 (¶ 82).

The Iowa Ag-Gag law is part of a coordinated campaign to insulate a single industry—animal agriculture—from criticism and transparency by criminalizing investigative and whistleblowing conduct that has a long and storied history. In 1904, author and investigative journalist Upton Sinclair, by his manner of dress and by telling some lies, posed as a worker in Chicago's slaughterhouses. THE JUNGLE, Sinclair's account of the six months he worked in those slaughterhouses, became a national sensation, detailing rampant unfair labor practices, animal cruelty, and filthy conditions. The public outcry in response to THE JUNGLE led to the enactment of the Federal Meat Inspection Act and the Pure Food and Drug Act, as well as the establishment of the agency that became the modern-day Food and Drug Administration. In the century since, exposés of industrial animal agriculture have continued to spur enforcement, reform, and public debate. But rather than responding to this public pressure, the Ag-Gag laws passed by Iowa and other states operate as a secrecy subsidy for the special interests exposed by these investigations.

III. Plaintiffs Succeed in Enjoining the Law.

Plaintiffs—a coalition of animal rights organizations, a food safety organization, and a grassroots advocacy organization whose work includes protecting worker's rights and Iowa's water quality—brought suit against the Governor, the Attorney General, and the Montgomery County Attorney (collectively, the State) challenging the law under the First and Fourteenth Amendments of the United States Constitution. On the State's motion to dismiss, the district court allowed Plaintiffs' First Amendment and Due Process claims to proceed and dismissed Plaintiffs' Equal Protection Clause claim. JA 62-83.

Upon cross-motions for summary judgment, the district court ruled that Iowa Code § 717A.3A is a content-based restriction on speech. The court held that the law necessarily implicates speech because "one cannot violate § 717A.3A *without* engaging in speech." JA 206 (emphasis in original). Furthermore, the law is content-based because "Iowa's 'enforcement authorities must necessarily examine the content' of an individual's statement to determine whether the individual violates the statute." JA 208 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

Analyzing the law under both strict and intermediate scrutiny, the Court held that the entire statute was unconstitutional under the First Amendment and granted Plaintiffs' motion for summary judgment. JA 210-17. Because the First Amendment ruling provided Plaintiffs all the relief they sought, the Court did not reach Plaintiffs' claim under the Due Process Clause. JA 216-17.

Standard of Review

This Court "review[s] de novo a district court's grant of summary judgment . . . ." *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1157 (8th Cir. 2017).

Summary of the Argument

The question presented by this case is straightforward, but its implications are far-reaching: May a State criminalize speech used to facilitate undercover investigations into issues of significant public concern regarding a single industry?

Other federal courts addressing the same question have said no, and invalidated or substantially narrowed strikingly similar laws to the one at issue here. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017).

The district court correctly applied well-established First Amendment principles and case law in striking down Iowa Code § 717A.3A.

First, the Ag-Gag law is a direct limitation on speech, and not, as the State argues, a generally-applicable law that incidentally restricts speech. Unlike a generally-applicable trespassing statute, the Ag-Gag law aims its prohibition directly at speech—"statement[s]" and "pretenses." *Id.* §§ 717A.3A(1)(a)-(b).

Second, the law is not beyond First Amendment scrutiny simply because it forbids false statements and pretenses. In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court ruled that there is no "general exception to the First Amendment for false statements." *Id.* U.S. at 718. In that case, the Supreme Court struck down the Stolen Valor Act, 18 U.S.C. § 704 (2005), because it criminalized false statements related to receiving military honors without requiring that any "legally cognizable harm" result from the lie. *Id.* at 719. Both subsections of the Ag-Gag law contain the same fatal flaw—they create criminal liability for statements based solely on their falsity without any requirement that the statements cause legally cognizable harm.

Third, the law is not exempt from First Amendment scrutiny simply because it concerns speech on "private property not open to the public." Appellants' Opening Brief (AOB) at 9, 32, 33. The State cannot criminalize protected speech in a boardroom or bedroom any more than it can on a public sidewalk. Moreover, the Ag-Gag law reaches far beyond "private property not open to the public" to reach anywhere crops are grown or agricultural animals are maintained, including county fairs and public grazing lands.

Fourth, the law is content- and viewpoint-based. It is content-based because it distinguishes between the form of speech (truth or falsity) and topic (agriculture production versus any other industry). And it is viewpoint-based because the law was enacted "'because of disagreement with the message' [the speech] convey[s]." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)).

Fifth, the law is subject to strict scrutiny. Laws that discriminate based on content or viewpoint are subject to strict scrutiny, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), and strict scrutiny is

thus the standard applied to regulations of false statements, *Alvarez*, 567 U.S. at 715 (plurality opinion).

Sixth, the law fails constitutional scrutiny whether this Court applies strict or intermediate scrutiny. The State's actual motive in passing the law was to prohibit speech that is critical of industrial agriculture, which is neither a compelling nor important government interest. But even accepting the State's asserted interests in protection of private property and ensuring the biosecurity of factory farms, the Ag-Gag law lacks any close fit between those interests and Iowa's means to achieve them.

Argument

Defendants attempt to place the Ag-Gag statute outside the First Amendment's reach, arguing in an internally inconsistent manner that the statute: (1) criminalizes conduct not speech; (2) criminalizes speech, but only false speech that is outside the First Amendment; and (3) only regulates activities on private land not open to the public, so the First Amendment does not even apply. These arguments fail as both a matter of law and fact. By its plain terms the statute regulates speech, which is covered by the First Amendment no matter where it occurs.

I. The Ag-Gag Law is Not a Generally-Applicable, Incidental Restriction on Speech.

The State's characterization of the scope of the Ag-Gag law as governing conduct rather than speech is unpersuasive, because the law explicitly prohibits using "false pretenses" and making a "false statement." AOB at iii, 9, 10, 11, 26, 34, 40, 45, 46. As the district court observed, the law "on its face regulates what persons 'may or may not say' and thus is a restriction on speech." JA 64 (citing *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 47, 60 (2006)).

The Ninth Circuit rejected a similar conduct-not-speech argument in declaring Idaho's nearly identical prohibition on gaining access to agricultural facilities through false pretenses to be unconstitutional. It explained that one cannot characterize a statute that "'seeks to control and suppress all false statements'" "as simply proscribing conduct." *Wasden*, 878 F.3d at 1194 (quoting *Alvarez*, 567 U.S. at 722-23). As in *Wasden*, "the statute depends not just on 'where they say' the message but also—critically—'on what they say.'" 878 F.3d at 1204 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)).

Because the Ag-Gag law expressly limits expressions connected with action, rather than just actions, it is entirely unlike the "generally

applicable" laws that solely regulate conduct on which the State relies. The State cites *Branzburg v. Hayes*, 408 U.S. 665 (1972), in support of its position, but that case—to the extent that it is relevant at all—cuts against it. The law at issue in *Branzburg* was not "aimed at the exercise of speech or press rights as such." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 601 (7th Cir. 2012) (citing *Branzburg*, 408 U.S. 665). In *Branzburg*, the government sought enforcement of a grand jury subpoena, the application of which has the same force whether the person is carrying out a First Amendment protected activity or not. *Id.* at 601-02 (citing *Branzburg*, 408 U.S. 665).[5]

So too with regard to the State's reliance on *Special Force Ministries v. WCCO Tel.*, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998). AOB at 14. There the Court of Appeals of Minnesota analyzed generally-applicable torts regulating conduct and uncontroversially held that "[t]here is no inherent conflict or tension with the First

[5] The State attempts to bolster its authority by citing *Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) in conjunction with *Brazenburg*, AOB at 13, but that footnote in *Bartnicki* simply describes *Branzburg*.

Amendment in holding media representatives liable for the tort of fraud or trespass."[6]

Likewise, in *State v. Lacey*, 465 N.W.2d 537 (Iowa 1991), the court upheld a charge against the defendants for violating a generic trespass law after they were asked to leave and refused. *Id.* at 539-40. True, the defendants did engage in speech that caused them to be asked to leave. But crucially, the action being regulated was not their speech; it was their failure to leave, and the regulation occurred under a law that made reference not to speech, but to the conduct in which they engaged.

The State's attempt to analogize the Ag-Gag law to *Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), leads it even further afield. As the Supreme Court explained this term, those cases involved the question of state action, not the applicability of the First Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-1702, 2019 U.S. LEXIS 4178, at *14 (June 17, 2019). In

[6] The State's citation to *Sanders v. Am. Broad. Companies, Inc.*, AOB at 14, is irrelevant, as that court expressly did not address any First Amendment issues. 928 P.2d 67, 77 (Cal. 1999) ("As for possible First Amendment defenses, any discussion must await a later case, as no constitutional issue was decided by the lower courts or presented for our review here.").

each, a generally-applicable law was used by private actors, shopping malls, to exclude people who engaged in speech. The plaintiffs did not argue the government targeted their speech either through the text of the generally-applicable statute or its enforcement. Therefore, there was no state action allowing to the Court to even consider the First Amendment's restrictions on generally-applicable laws. *Lloyd*, 407 U.S. at 556.

The three district court cases on which the State relies, *Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109 (D.D.C. 2018), *Planned Parenthood Fed'n of Am., Inc., v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808 (N.D. Cal. 2016); and *Council on Am.-Islamic Relations Action Network, Inc., v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011), AOB at 30-33, just combine the two inapposite lines of cases discussed above. Each involved private civil litigants bringing generally-applicable trespass torts that did not turn on whether there was speech. *See Democracy Partners*, 285 F. Supp. 3d at 118; *Planned Parenthood Fed'n of Am.*, 214 F. Supp. 3d at 833-36; *Council on Am.-Islamic Relations Action Network*, 793 F. Supp. 2d at 344-35. In fact, in a case filed as related to *Planned Parenthood Fed'n*, the court

distinguished *Wasden*'s holding, explaining *Wasden*'s discussion of the First Amendment's protections was irrelevant "because the laws being applied in this case are 'generally' applicable laws, not laws criminalizing speech." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-cv-03522-WHO, 2018 U.S. Dist. LEXIS 190887, at *19 (N.D. Cal. Nov. 7, 2018).[7]

Criminal liability under the Iowa Ag-Gag law turns solely on whether one makes false statements or assumes false pretenses; conduct alone, disconnected from speech, cannot support a charge. *See* Iowa Code § 717A.3A(1)(a)-(b). Speech is the integral component of the criminal offense. This distinguishes the Ag-Gag statute from generally-applicable laws regulating physical access to or protecting property, such as laws prohibiting breaking and entering, trespass, or theft.

Analogously, a state could not make it a separate crime to drive above the speed limit on the way to a political rally without triggering

[7] The State also presents a page of argument related to the Iowa Constitution, AOB at 24. The Iowa Constitution's protection for free speech is irrelevant in this case, because Plaintiffs brought their free speech claims, and the district court struck down the law, solely under the First Amendment to the U.S. Constitution. Obviously, the Iowa Constitution cannot save a law that violates the U.S. Constitution. *See* U.S. Const. art. VI, cl. 2.

First Amendment scrutiny because that law targets the conduct only when done in relation to speech. Similarly, in this case, the First Amendment's application is equally clear because the law targets gaining access to an agricultural facility only by using expression (In contrast, a generally applicable law would involve a prohibition on speeding for any reason and a law prohibiting trespass on agricultural property).

The State further blurs these important distinctions in its reliance on *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). The State claims *Dietemann* holds that "the First Amendment did not protect defendants [who] obtained access to the plaintiff's home—where plaintiff was operating his business—under false pretenses and secretly recorded [him]." AOB at 30. But *Dietemann* does not support the proposition that deception used to gain access falls outside the protection of the First Amendment. Like the State's other cases, *Dietemann* held that generally-applicable prohibitions on "surreptitious electronic recording" could support a generally-applicable invasion of privacy tort. 449 F.2d at 247-49. Despite the journalists' deception in inducing Mr. Dietemann to invite them into his home, the Ninth Circuit

held that Time Magazine's detailed written account of everything that was observed by the reporters received full speech protection. *Id.* at 249 ("He invited two of defendant's employees to the den. 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."). Thus, far from holding that deception-based entries are unlawful intrusions into private places, *Dietemann* first, is just another case holding that the First Amendment is not an automatic defense to generally-applicable torts and second, actually supports Plaintiffs' position that persons assume the risk that an invited guest may be a false-friend and publish an account of what he observes.

The State's attempt to portray the Ag-Gag law as a generally-applicable trespass statute is a red herring. First, the law is clearly *not* generally-applicable in that it is limited to (1) false statements, *see Alvarez,* 567 U.S. at 718; that are (2) intended to gain access to agricultural production facilities, *see* Iowa Code § 717A.3A. Second, even if the Ag-Gag law were generally-applicable, that is the starting point for determining the necessary level of First Amendment scrutiny, not the end of the analysis. For the reasons discussed below, the Iowa

Ag-Gag law is subject to strict scrutiny because it regulates particular types of speech. But it also cannot survive the intermediate scrutiny that would be applied to a generally-applicable law that incidentally restricts speech.

II. The Ag-Gag Law's Regulation of False Speech Is Governed by The First Amendment.

Arguing in the alternative to its characterization of the Ag-Gag law as a generally-applicable statute that simply regulates conduct, the State next argues that its restriction of speech does not implicate the First Amendment. AOB 24-38. Not so. As the district court correctly explained, the manner in which the Ag-Gag law regulates "false statements" and pretenses does not just mean that the statute targets speech, but that it targets speech protected by the First Amendment. "False statements, without more, are not unprotected speech." JA 69-70 (citing *Alvarez*, 567 U.S. at 718); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 633-35 (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*) (holding lies are protected by First Amendment).[8]

[8] Even if the lies at issue in this case were deemed unprotected speech, the Ag-Gag law would still be unconstitutional because the law is

In *Alvarez*, the Supreme Court relied on the First Amendment to invalidate the conviction of a local official who lied about having been awarded the Medal of Honor, striking down the Stolen Valor Act. Six justices agreed there is no "general exception to the First Amendment for false statements." 567 U.S. at 718. *See also id.* ("[S]ome false statements are inevitable if there is to be an open and vigorous expression of views"); *id.* at 730-39 (Breyer, J., concurring in the judgment).

The Court reached this conclusion even though the lie at issue in *Alvarez* was valueless to society—"a pathetic attempt to gain respect that eluded [Alvarez]," *id.* at 714—and the government had identified a variety of harms to the morale of the military community by the lies, *id.* at 726. The six Justices recognized that even a worthless, harmful lie is protected by the First Amendment unless it causes legally cognizable harm to the deceived party. *Id.* at 719; *id.* at 730-36 (Breyer, J., concurring in the judgment).

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content-based. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *see infra* Section IV; JA 208. 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.

This "legally cognizable harm" standard for limiting or prohibiting false statements forms the limiting principle of *Alvarez*. *Id.* at 719. *Compare* Stolen Valor Act of 2013, 18 U.S.C. § 704 (2013) (amending law to require speaker have an "intent to obtain money, property, or other tangible benefit"). That exception is not applicable here.

A. The Ag-Gag Law's Prohibition on Lies to Gain Entry Is Governed by the First Amendment.

1. Entry by Deception Does Not Cause a Cognizable Harm to the Landowner.

The State insists subsection (a) of the Ag-Gag law—criminalizing "obtain[ing] access to an agricultural production facility by false pretenses"—falls within *Alvarez*'s exception to the First Amendment because gaining access through deception produces a harm akin to trespass. Iowa Code § 717A.3A(1)(a); AOB at 24-32. This contention has been universally rejected and is inconsistent with *Alvarez* itself.

Idaho's Ag-Gag law contained a nearly identical restriction on obtaining access by misrepresentation. *Compare* Iowa Code § 717A.3A(1)(a) *with* Idaho Code § 18-7042(1)(a). The U.S. District Court for the District of Idaho, examining the exact same speech Plaintiffs contend is chilled by Iowa's Ag-Gag law, explained "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).

Upholding that decision on appeal, the Ninth Circuit continued that allowing the state to restrict false speech to gain entry will "criminalize[] innocent behavior," *Wasden*, 878 F.3d at 1195, particularly speech that will cause *"no harm to the property*," *id.* at 1195 n.9 (emphasis added). Such a restriction, the Ninth Circuit held, evinces an intent and effect to restrict "speech and investigative journalists" rather than trespassing. *Id.* at 1195. In directly rejecting Idaho's asserted interest in preventing trespassing, 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.* at 1197.

Likewise, in *Herbert*, the U.S. District Court for the District of Utah assessed a provision that criminalized "obtaining access to an agricultural operation under false pretenses"—another prohibition virtually identical to subsection (a) here. 263 F. Supp. 3d at 1201-06 (alterations omitted). Conducting a detailed survey of the case law, the court found that not every lie used to obtain access to private property results in a harm to property: "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" because no harm to property necessarily results. *Id.*

The State attempts to shoehorn the Ag-Gag law into the *Alvarez* exception for cognizable harm because trespass-type harms can support an award of nominal damages. AOB at 27-29. But as the decision below recognized, "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 . . . ." JA 71.

These holdings, and the decision below, are entirely consistent with every other court in the country to address First Amendment protections for deceptive entry. *See, e.g.*, *Desnick v. Am. Broad. Cos.*, 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."). If such deception-based entries were held unlawful, it would hamstring virtually every undercover journalist in the country.

2. Entry by Deception Does Not Cause Material Gain to the Speaker.

Borrowing from the dissent in *Wasden*, the State also argues that even if deception to gain entry may not result in injury to the property, the deception is outside the First Amendment because it could result in

"material gain" to the speaker—although the State fails to define that "material gain" or the extent of the "gain" required to fall outside the First Amendment. AOB at 32-34. However, this argument was rejected by the *Wasden* majority, which disagreed that "entry onto the property and *material* gain are coextensive" and explained 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 (emphasis in original).

Perhaps more importantly, the notion that a lie that results in "material gain" will be exempt from the First Amendment if it does not also do "cognizable harm" is not supported by *Alvarez*. Read in context, *Alvarez*'s discussion of exempting lies that result in "material gain" from the First Amendment only relates to its discussion of exempting lies that produce "cognizable harm." *Alvarez*, 567 U.S. at 723. "Cognizable harm" and "material gain" are not different tests; rather, they are different ways of articulating the types of harm-causing (and gain-inducing) lies that are unprotected.[9]

[9] *See* Alan K. Chen & Justin Marceau, *Developing A Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 670 (2018) ("As a practical matter, it is difficult to conceive of a benefit that one could

By contrast, the State's view is that any minute change in behavior or iota of benefit derived from a lie, however immaterial, renders the law outside of First Amendment protection. But *Wasden* 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." 878 F.3d at 1195. Deriving "some" benefit is not enough to take a law beyond constitutional protection under *Alvarez*.

Moreover, the investigative misrepresentations at issue in this case have positive social value, which underscores the importance of extending First Amendment protection to them. *Alvarez*'s rationale that harm-causing lies are not protected by the First Amendment was that lies generally distort rather than facilitate the search for truth. However, lies used to obtain and disclose information of great public concern that would otherwise be hidden, as occurs with investigators lying to gain access—high-value lies—warrant rigorous First Amendment protection. Investigative lies facilitate rather than impede

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obtain that would be improper in the absence of such cognizable harm to another . . . . Harm and benefit are likely inextricably linked in the context of misrepresentations.").

discourse and transparency on matters of public concern. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015).

Furthermore, *Alvarez* itself demonstrates that access to private property alone is not the type of material 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.* (citing *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539-40 (1987)). But the Court distinguished any benefit gained from Alvarez's lies from the type of material gain—typically a monetary or commercial gain through fraud—that the Court held can be criminalized. *Id.* 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. Gleaning a rule from the "material gain" dicta in *Alvarez*, and finding that it justifies the Ag-Gag statute's

prohibition on access by false pretenses, 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 permit the criminalization of that speech.

Even if this Court were to disagree with the Ninth Circuit, subsection (a) of Iowa Code § 717A.3A allows for prosecution even if the speaker obtains no material gain. The U.S. District Court for the District of Idaho rejected the argument that undercover investigators' lies to gain access "are made for the purpose of material gain." *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1204 (D. Idaho 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.

Likewise, the U.S. District Court for the District of Utah rejected the argument that gaining access alone constituted a material gain sufficient for criminal liability. *Herbert*, 263 F. Supp. 3d at 1202-04. If a misrepresentation about whether a person is a journalist, used to gain

access, is unprotected by the First Amendment, then so is a lie about enjoying a friend's cooking as a means of securing an invitation, or feigning interest in a shop's merchandise as means of securing access to its restrooms. To accept the State's reading of *Alvarez* would result in a dramatic narrowing of free speech.

To be clear, not all lies are categorically protected by the First Amendment. Plaintiffs do not contend, for example, that it violates free speech when a state prohibits lies that directly cause concrete financial losses (as in cases of fraud), or injury to the court's truth-seeking function (as with perjury). *Alvarez*, 567 U.S. at 720 ("Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'"). It is this type of harm that the State refers to in its repeated reliance on *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003), where the Supreme Court allowed a fraud claim to proceed against fundraisers who deceived donors about how their donations would be used. *See* AOB at 12-13, 25, 27. But as the district court recognized, access by false pretenses does not by itself result in any such financial or otherwise cognizable harm. JA 71-73.

B. 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 Iowa Code § 717A.3A(a) is unconstitutional, subsection (b)'s prohibition on obtaining employment by false pretenses is constitutional, because it also requires the person who makes the statement to do so with the "intent to commit an unauthorized act." AOB at 34-38. The State's argument fails because, like subsection (a), the employment provision covers conduct from which no harm necessarily results, placing it outside *Alvarez*'s "cognizable harm" exception.

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 because the statute required the false pretenses be accompanied by a specific intent to injure the facility—to cause direct and tangible harm. 878 F.3d at 1201. Thus, for example, a person who lied to gain employment with the intent to engage in physical destruction could legitimately be prosecuted, while one who merely intended to cause "reputational damages" would not, because, the court said, the intangible damages

that typically flow from the exposés resulting from undercover investigations would not constitute "economic injury" or give rise to "economic loss" under the Idaho statute's restitution provision. Idaho Code Ann. §§ 18-7042(1)(c); 18-7042(4) (providing for restitution pursuant to Idaho Code § 19-5304). The statute defined "economic loss" to include "the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct" but excluded "less tangible damage such as pain and suffering, wrongful death or emotional distress." Idaho Code § 19-5304(1)(a). The *Wasden* court specifically cited this definition in finding that the "reputational and publication" injuries plaintiffs' investigations could be construed as intending to cause would not fall under the statute's prohibitions. 878 F.3d at 1201. Critically, Iowa Code § 717A.3A(b) is not so limited. It contains no such saving definition of "unauthorized act" that could cabin it to acts that cause direct and tangible losses such as property damage.

Herbert tracks *Wasden*'s reasoning. The *Herbert* court found the First Amendment covered prohibitions against obtaining employment

at agricultural facilities under false pretenses and obtaining employment with the intent to make unauthorized recordings. 263 F. Supp. 3d at 1201-09; Utah Code §§ 76-6-112(1)(b)-(c). The court recognized that 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.* at 1203. Iowa's Ag-Gag law has a similar reach. Iowa Code § 717A.3A(b).

Subsection (b) "on its face requires no likelihood of actual, tangible injury on the part of the recipient of false speech." JA 75. "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 cognizable harms contemplated in the *Alvarez* plurality opinion." *Id.* (emphasis omitted). An employer could choose not to "authorize" any variety of acts that do not harm the facility in any way, from the silly to the draconian, including wearing a Cornhuskers t-

shirt 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. None of these activities would result in any physical or material harm to the employer, but they are criminalized by the Ag-Gag statute if the employer does not "authorize" it.

For this same reason, subsection (b) cannot be saved by analogy to an employee's duty of loyalty to an employer. AOB at 37-38. As the examples above illustrate, the law sweeps far more broadly than activity that is hostile to the employer's interest. The Iowa Supreme Court has warned that "even in those jurisdictions which recognize a cause of action for breach of loyalty, the action is limited in scope" because "[a] broad cause of action would give employers more protection than needed and could create an unfair advantage." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 600 (Iowa 1999). Further, the

Iowa Supreme Court requires "evidence [the employer] was damaged by [the disloyal] activities" to sustain a cause of action for breach of loyalty, an element that is absent from the Ag-Gag law. *Id.*

Subsection (b) does not require that false pretenses be material. *See* JA 75 (citing *Alvarez*, 567 U.S. at 734-35 (Breyer, J., concurring) for the proposition that proscribable lies require materiality). The undisputed factual record demonstrates the false pretenses Plaintiffs' investigators use relate to their affiliation with animal protection organizations or their status as licensed private investigators (where applicable), or are simply innocuous white lies. JA 107-09, 112-13 (¶¶ 8, 12-15, 32, 38). They do not lie about their job qualifications, their relevant experience, or their willingness to comport with safety and security protocols.

Indeed, the law's legislative history demonstrates that not only does subsection (b) cover reputational harms impermissible under *Alvarez*, but also that this overbreadth is the statute's primary goal. *See* JA 121-22 (¶¶ 78-82). As just one example, a state Senator told the news media that he supported the Ag-Gag law because animal rights activists "want to hurt an important part of our economy" and he

intended to "stop[] 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." JA 121 (¶ 79).

Recording or other information-gathering for whistleblowing does not materially injure an employer in any way *Alvarez* contemplated, because those activities, without more, cause no tangible damages to the employer. *See Wasden*, 878 F.3d at 1201. Indeed, to accept that falsehoods that lead to disclosure of information that causes reputational harm are the type of speech *Alvarez* exempts from the First Amendment would paradoxically allow prosecutions of falsehoods that reveal horrific criminality and abuse, while potentially allowing deception that results in a puff piece or investigations of lesser significance. An investigator whose deception leads only to a story showing minor animal abuse or environmental damage might not rise to the level of "cognizable harm" because the reputational injury would be de minimis, but an investigation documenting graphic violence, workplace safety issues, and environmental dangers would be unprotected because the reputation injury would be real. That absurd result cannot be the law. Whistleblowing, even when it is not explicitly

authorized by company officials, results in the exposure of truth on a matter of public concern.

Even assuming the Court accepts the State's argument that lies that result in "material gain" can fall within *Alvarez* even if they do not produce an injury, the lies covered by subsection (b) need not produce such a gain. Although *Alvarez* used lies to gain "offers of employment" as an example of a lie that might be regulated, 567 U.S. at 723, the context of that illustration unquestionably contemplates someone who lies to get a job that they are not qualified to do. *Id.* ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.") The majority was merely illustrating its broader point that a lie that defrauds another, producing a cognizable harm, falls outside the First Amendment. The undercover investigations in this case, however, illustrate that not every fib or falsehood made to secure an offer of employment—"I like your tie"; "I love the Hawkeyes"; "I'm not affiliated with PETA"—results in such a fraud because those falsehoods do not relate to their ability to do the job just as well as other

employees. As the undisputed record makes clear, the investigators perform their jobs identically to other employees, following all biosecurity and other protocols, while also wearing hidden recording equipment or making observations that they subsequently share with the media. *See, e.g.*, JA 107-09, 111-112, (¶¶ 7, 12, 13, 15, 30, 32).

Appellants contend that *Wasden* should be read as holding that *all* employment-seeking misrepresentations confer a "material gain" that removes such statements from First Amendment protection under *Alvarez*. AOB at 35, citing *Wasden*, 878 F.3d at 1202. This misreading first, ignores the *Wasden* court's reliance on the Idaho statute's specifically defined "intent to harm" provision; and second, erroneously misconstrues *Alvarez*'s point about offers of employment. The investigative employees here are not unqualified fraudsters of the type *Alvarez* alluded to. They receive compensation from their employer not because of their having made a misrepresentation to secure the position, but as a result of the *work* they perform, just like any other employee. *Id.*; *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505, 514 (4th Cir. 1999) ("[The undercover investigators] were paid because they showed up for work and performed their assigned tasks as Food Lion

employees."). The false pretenses under which they gain employment, then, do not relate to the investigators' willingness or ability to carry out their duties, and thus does not cause material harm as contemplated by *Alvarez*. *See* JA 75-76.

III. There Is No Exception to the First Amendment for Speech That Occurs on Private Property.

In their last-ditch effort to avoid First Amendment scrutiny, the State attempts to conjure a rule no one has ever endorsed: that if the state regulates speech on private property, the First Amendment no longer applies. *See* AOB at 13-14; 29-31. Yet, a lie in a Taco Bell is no less protected than a lie on the public sidewalk outside of Taco Bell. As the U.S. District Court for the District of Utah explained in responding to similar arguments in defense of that state's Ag-Gag law: "If a person's First Amendment rights were extinguished the moment she stepped foot on private property, the State could, for example, criminalize any criticism of the Governor, or any discussion about the opposition party, or any talk of politics whatsoever, if done on private property." *Herbert*, 263 F. Supp. 3d at 1209.

Far from supporting the State in this contention, its authority directly rejects it. The State relies on the district court decision in

Western Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wy. 2016) (*Western Watersheds I*), which was *reversed* by the Tenth Circuit, *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017) (*Western Watersheds II*). The Tenth Circuit, in overturning the district court's conclusion that private property boundaries limit the reach of the First Amendment, held "that the statutes [at issue there] 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.

The Tenth Circuit relied on the Supreme Court's decision in *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002), which invalidated a regulation prohibiting "going in and upon private residential property" without permission, because that restriction was coupled with a second, separate requirement, that the entrant also had to have the "purpose of promoting a[] cause" when he or she entered. 536 U.S. at 154-55. The Court acknowledged the statute at issue in *Watchtower* "protect[ed] . . . residents' privacy," but because the law "cover[ed] so much speech" it attacked "the very notion of a free society" and could not stand. *Id.* at 165-66.

The Tenth Circuit detailed that the district court there erred in holding the First Amendment did not apply on private property by incorrectly extending the case law on generally-applicable statutes. *See supra* Section I. It explained that while a person has no "right to trespass[,]" that "misstates the issue." *Western Watersheds II*, 869 F.3d at 1194. The state's "differential treatment of individuals who create speech" implicated the First Amendment no matter where the speech occurred. *Id.* at 1197. In fact, because *Western Watersheds II* addressed a statute chilling the "creation of speech," *id.* at 1196, rather than a statute directly criminalizing speech like the Ag-Gag law, the First Amendment interests and protections here are even stronger.

The State asks this Court to make the same error as the district court in *Western Watersheds I* by pointing to *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4th Cir. 1999). AOB at 14, 20, 29, 33. *Food Lion* held undercover investigators can be liable under generally-applicable common law rules, such as for breaching the "duty of loyalty." *Id.* at 521.[10] The nominal damages that were upheld against

[10] Moreover, *Food Lion* was an attempt to construe state common law by a federal court of appeals. The decision has subsequently been undermined by a state supreme court decision explicitly holding that

the investigator-defendants in *Food Lion* were exclusively the result of a breach of a contractual term, which gave rise to a cause of action for a breach of the employees' duty of loyalty. *Id.* at 518 ("the reporters committed trespass by breaching their duty of loyalty"). Relying on the First Amendment, the Fourth Circuit refused to permit further damages, even for wages paid to persons who accepted employment under false pretenses to conduct their investigation. *Id.* 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").

In other words, contrary to the State's argument, *Food Lion* hardly stands for the proposition that "the First Amendment does not protect undercover, employment-based investigations, including the use of hidden recording devices, against tort claims." AOB at 14. Plaintiffs are aware of no court upholding criminal penalties for undercover investigations like those provided for in the Ag-Gag law. At most, *Food*

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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).

Lion provides that the State can pass a generally-applicable law that may incidentally regulate some investigators, which, as explained above, Iowa did not. *See supra* Section I. Even then, as also explained above, that law would still need to survive First Amendment scrutiny. There is no basis to hold that the state can criminalize speech without the First Amendment coming into play.

Finally, the State's argument is built on another textual fallacy: that the Ag-Gag law narrowly applies to "private property not open to the public." AOB at 9, 32, 33. The statute's plain text forecloses that reading. *See generally* Iowa Code § 717A.3A. It 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, puppy mill auctions, and public lands used for grazing, to name a few. The law even makes a criminal out of a 14-year-old who lies about her age to enter a farm's 15-and-up haunted hayride. It sweeps broadly.

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

Each subsection of the Ag-Gag law is both facially content-based and content-based by reference to the justification and purpose of the law.

In assessing whether a law is content-based, the Supreme Court recently reiterated a two-tiered approach: "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." *Reed* , 135 S. Ct. at 2222 (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."). Here, the law is plainly content-based on its face, and the legislative history also confirms a content-based purpose.

It is also viewpoint-based. "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.'" *Id.* at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). 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). Viewpoint discrimination also looks to whether government enacts a law with the purpose of suppressing a particular viewpoint. *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)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)). The text and history of the Ag-Gag law also demonstrate the government's purpose in silencing animal rights perspectives.

A. The Ag-Gag Law Is Content-Based on Its Face and in Its Purpose.

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 law's misrepresentation

prohibition was content-based because "whether someone violates the Act depends on what they say").

As the decision below held, "[b]oth regulations contained within § 717A.3A are content-based on their face." JA 66.

> 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." 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. 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.

The Ag-Gag law 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 agricultural facilities and only agricultural facilities. *See* Iowa Code §§ 717A.3A(1)(a)-(b). The law does not apply to 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. It is uniquely drafted to protect only the animal agriculture industry from scrutiny.

Consistent with the plain text of the statute, the contemporaneous statements by legislators and the spokesman for the Governor further evince this intent. JA 121-22 (¶¶ 78-82). These comments reveal the true purpose of the law: to protect an entire industry from a specific type of critical speech on an issue of public importance.

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

The Ag-Gag law is also viewpoint-based because it singles out speech critical of a single industry for special, disfavored treatment.[11] The decision below correctly concluded that "[w]here the government enacts a law with the purpose of suppressing a particular viewpoint, it

[11] The State contends that while the parties briefed viewpoint discrimination below, because the district court invalidated the statute as content-based and did not need to reach viewpoint discrimination, Plaintiffs were required to cross-appeal to preserve viewpoint arguments on appeal. AOB at 41, n.15. Not so. "[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924).

is a viewpoint-based restriction on speech." JA 78 (citing *Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring in the judgment), *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment); *Cornelius*, 473 U.S. at 811).

The Ag-Gag law is a viewpoint-based restriction on speech because 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*, 512 U.S. at 645; *see also Reed*, 135 S. Ct. at 2222 ("[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)). "[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995).

Iowa legislators were candid with the media regarding the viewpoint-based legislative purpose underlying the Ag-Gag law. JA 121-22 (¶¶ 78-82). They stated that they passed the law to "make producers

feel more comfortable," JA 121 (¶ 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] 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," JA 121 (¶ 79). These statements expose the Ag-Gag law's viewpoint-based legislative purpose to suppress the speech of groups like Plaintiffs.

The State argues that the legislators also couched their motivations in the language of protecting private property and biosecurity. AOB 3-4. 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."). And while traditional rational-basis review permits the State to proffer any conceivable, hypothetical, post-

hoc justification for a law, *see, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), the heightened scrutiny appropriate here requires that the proffered interest be the "actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n. 4 (1996). If simply asserting an additional, content-neutral justification could immunize law with a content-based purpose from review, the First Amendment could be so easily avoided that it would be meaningless.

V. The Ag-Gag Law is Subject to Strict Scrutiny.

Strict scrutiny is warranted here because, as demonstrated above, the statute discriminates based on content and viewpoint, triggering strict scrutiny. *Turner*, 512 U.S. at 642.

Strict scrutiny is also 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 this Circuit has applied strict scrutiny to lies that are political in nature both before *Alvarez*, *281 Care Comm. I*, 638 F.3d at 636, and since, *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"). *See also Wasden*, 878 F.3d at 1196

(subjecting Idaho Ag-Gag law's prohibition on gaining access to an animal agriculture facility by misrepresentation to strict scrutiny); *Herbert*, 263 F. Supp. 3d at 1210 (analyzing post-*Alvarez* precedent on level of scrutiny to apply to false statements and determining strict scrutiny applied to Utah Ag-Gag law).[12]

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

The State does not even contend that Ag-Gag could withstand strict scrutiny, arguing only that intermediate scrutiny applies. AOB at

[12] *Accord Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472 (6th Cir. 2016) (applying strict scrutiny to state law criminalizing false statements about political candidates); *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1139-41 (D. Mont. 2016) (applying strict scrutiny to professional rules of conduct prohibiting false statements in judicial elections); *Winter v. Wolnitzek*, 186 F. Supp. 3d 673, 696-97 (E.D. Ky. 2016) (applying strict scrutiny to false speech provision of judicial canons), *aff'd in part, vacated and rev'd in part on other grounds*, 834 F.3d 681 (6th Cir. 2018); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 586 (E.D. Ky. 2015) (applying strict scrutiny to regulatory board regulation prohibiting, in part, false representations); *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."); *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 828 (Wash. 2007) (applying strict scrutiny to Washington false-statement law).

38-46. While strict scrutiny is warranted here, the Ag-Gag Law fails both intermediate and strict scrutiny.

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

1. The Ag-Gag Law Does Not Advance Compelling State Interests.

a. The Actual Government Motive Was Prohibiting Speech Critical of Industrial Animal Agriculture.

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.*

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 explained above, the State's actual legislative interests were clear. *See supra* Section VI.A. Repeatedly, the bill's sponsors and supporters expressed a concern for protecting the agriculture industry

from the sunlight of undercover investigations. JA 121-22 (¶¶ 78-82). These statements reveal that the desire to protect the agricultural industry from critical speech was a "motivating factor" of the law. *Vill. of Arlington Heights*, 429 U.S. at 265-66. Because the Ag-Gag law was motivated, at least in substantial part, by illegitimate motives, it cannot survive the compelling-interest test. *Id.*

b. Any Government Interests Related to Biosecurity or Protecting Private Property Were Incidental to the Speech-Suppressing Motives.

The State's attempt to invoke additional motives involving protecting private property and ensuring biosecurity is a smokescreen. The stray comments supposedly articulating these additional motives, JA 181-83 (¶¶ 1-7), do not mean the State's asserted interests were therefore the *actual* government motives. It simply means that at some point, someone articulated another putative justification. Strict scrutiny demands the actual purposes behind legislation. *Shaw*, 517 U.S. at 908 n. 4.

But even accepting the State's purported interests, they are not compelling in this instance. Other statutory provisions that do not criminalize protected speech already advance those interests. First,

Iowa has a prohibition against trespass that does not implicate speech in any way. *See* Iowa Code § 716.7 (defining trespass). As the district court noted:

> an already existing section of … the Iowa Code provides that persons "shall not, without the consent of the owner" do various acts, including entering the facility to disrupt or otherwise harm the operation. Iowa Code § 717A.2. With similar interests in mind, the state could also rely upon Iowa's existing trespass law, Iowa Code § 716.7(2), to protect its proffered interests without chilling speech.

JA 213. Thus the State's repeated reliance on cases rejecting a First Amendment defense to both civil and criminal trespass claims only highlights that the State did not have any pressing need for a new law, especially not one aimed squarely at critics of animal agriculture. *See* AOB 13-15, 20, 27-33. The existence of other laws accomplishing the State's purported interest further suggests that the statute was intended to quash investigative reporting on agricultural production facilities.

So too with biosecurity. The district court correctly noted that "[b]iosecurity is effectively and appropriately protected by the last section of Chapter 717A, which prohibits the willful possession,

transportation, or transfer of 'a pathogen with an intent to threaten the health of an animal or crop.'" JA 213-14 (citing Iowa Code § 717A.4).

Since strict scrutiny exists to uncover disguised, illegitimate governmental motives, accepting the State at its word that the law was passed to protect broad private property and biosecurity interests would water down strict scrutiny into rational-basis review, requiring the Court to ignore evidence of improper purpose simply because the State is also able to manufacture a different, arguably proper motive. That is not the law.

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

Even if the State's interests underlying the Ag-Gag law could be characterized as "compelling," the law fails strict scrutiny because it is not narrowly tailored to serve those interests nor is it the least restrictive means available to meet them.

The law is both radically over-inclusive and under-inclusive to the interests the State asserts it is designed to protect. As the district court noted, numerous other laws already exist that protect private property and biosecurity interests without impinging on free-speech rights or singling out a single industry for protection (or its critics for

prosecution). "'The existence of content neutral alternatives to' protect property rights and biosecurity, 'undercut[s] significantly' the defenses raised to the statutory content.'" JA 213 (quoting *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 793-94 (8th Cir. 2015) (alteration in original)).

The Ag-Gag law enjoys no 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 video-record, but who subsequently do record some wrongdoing. Such employees would presumably have the same (negligible) effect on private property as the employee who had such an intent at the time of application, 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.

And although the State acknowledges that the district court held that the law was both over- and under-inclusive, AOB at 8, any sort of under-and-over inclusivity analysis is absent from the State's brief, essentially conceding that the law is not tailored to its asserted

interests. 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.

The State's "duty of loyalty" argument also demonstrates the Ag-Gag law's overinclusivity because the law criminalizes a broader swath of activity than would breach the "duty of loyalty." Although the State argues that "Iowa's law simply codifies the common law 'duty of loyalty' implied in employment relationships, which provides that a 'servant must do nothing hostile to the master's interest,'" AOB at 38 (quoting *Condon*, 604 N.W.2d at 599), it does nothing to engage with the district court's analysis rejecting that argument below. As the district court held, while subsection (b) of the statute prohibits misrepresentations in the employment context "with an intent to commit an act not authorized by the owner," Iowa Code § 717A.3A(1)(b), "something *not authorized* is not necessarily something *hostile* to the master's interest." JA 215 (emphases in original). "An employer can choose not to authorize a wide variety of conduct, none of which may actually result in a breach of the employee's duty of loyalty (or cause harm). Here, Defendants seek

to greatly expand the reach of the duty of loyalty." *Id*. In fact, the State's own authority demonstrates that the Iowa Supreme Court cautions that even civil causes of action based on the breach of the duty of loyalty must be limited in scope, *Condon*, 604 N.W.2d at 600, and requires "evidence" that the employer "was damaged" by the breach. *I*d. As the district court recognized, to the extent the employment provision of the Ag-Gag law "can be likened to the common law breach of a duty of loyalty, to criminalize such a breach goes far beyond what is necessary to protect the state's interests and allows for expansive prosecution." JA 215.

The law criminalizes even the most cautious and diligent undercover employee, and is thus over-inclusive to the purposes of protecting property and biosecurity; 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-inclusivity 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) (internal citation

omitted). This law is not remotely tailored, much less narrowly tailored, to protecting private property generally or ensuring a biosecure workplace.

It comes as no surprise, however, that the law is perfectly suited to criminalizing undercover investigations and stifling the speech of animal-welfare activists. And this is the exact purpose reflected in the legislative history. Occam's razor once again proves its value: a law impeccably designed to thwart undercover investigations and criminalize speech was in fact passed with that intent. The Court should reject the State's effort to make attenuated connections to manufactured purposes that, in any event, would not justify the reach of this law. *See Herbert*, 263 F. Supp. 3d at 1213 (finding the Utah Ag-Gag law "appears perfectly tailored toward . . . preventing undercover investigators from exposing abuses at agricultural facilities"); *Wasden*, 878 F.3d at 1196 ("Even 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.").

The State does not have a compelling interest in silencing whistleblowers in animal agriculture. Even if the State's true interest were protecting private property or biosecurity, 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 and the State does not even argue otherwise.

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

Even if this Court determines that intermediate scrutiny is the appropriate standard, the district court was correct to decide that the Ag-Gag law still fails that level of scrutiny. JA 215-16.

To meet intermediate scrutiny, the State must demonstrate that the law "furthers 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), and "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798-99. Like strict scrutiny, 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).

As demonstrated above, the State's actual interests in passing the Ag-Gag law were not substantial because they were "[related] to the suppression of free expression," *O'Brien*, 391 U.S. at 377. The law criminalizes speech directly and was motivated by a desire to prohibit speech that is critical of animal agriculture. *See supra* Section VI.A.1.a.

Even under intermediate 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*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799). *See also Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2375 (assuming the existence of a "substantial state interest" but holding that the law was "not sufficiently drawn to achieve it").

In *McCullen*, the Supreme Court applied intermediate scrutiny to a Massachusetts law that prohibited standing within 35 feet of the entrance to or driveway of an abortion clinic. 573 U.S. at 469, 486. The Court held that the law was not narrowly tailored to the state's asserted interest in protecting public safety from the risk created by protestors

outside of abortion clinics because "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like" already satisfied that interest. *Id*. at 492. The Court also held that the law was not tailored to the state's interest in "interest in preventing congestion in front of abortion clinics." *Id*. at 493. Massachusetts could have enacted a law that "that require[s] crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period." *Id*. Such alternatives would have been more tailored to the problem than the blunt prohibition the state enacted. *Id*. Finally, the Court rejected the state's contention that existing, generally-applicable laws or alternative tools had failed. *Id*. at 494. The state could not identify "a single prosecution brought under [existing, generally-applicable] laws within at least the last 17 years." *Id*. And while the state claimed they "tried injunctions," "the last injunctions they cite date to the 1990s." *Id*. "In short, the Commonwealth ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id*.

As in *McCullen*, "a substantial portion of the burden on speech" imposed by the Ag-Gag law "does not serve to advance [the State's] goals." *Id.* at 486 (quoting *Ward*, 491 U.S. at 799). The State has provided no evidence of attempted or failed prosecutions under these already-existing laws against trespass or protecting biosecurity, or evidence of *any* attempt to employ any narrower restrictions before resorting to the blunt force of the Ag-Gag law. As in *McCullen*, the State here has made no attempt to demonstrate "that it seriously undertook to address the problem with less intrusive tools readily available to it." 573 U.S. at 494. 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.'" *Wasden,* 878 F.3d at 1198 (quoting *Alvarez*, 567 U.S. at 737).

The Iowa Ag-Gag law fails intermediate scrutiny first, because there is simply no fit between the State's alleged interests and the means by which the Ag-Gag law supposedly goes about protecting them; and second, because there is ample evidence that Iowa's "actual state purpose[]," *Virginia*, 518 U.S. at 535, was not "unrelated to the

suppression of free expression," *O'Brien*, 391 U.S. at 377. Even under the State's (incorrect) argument that intermediate scrutiny controls, the Ag-Gag law must fall.

Conclusion

Because the Iowa Ag-Gag law is a content-based and viewpoint-based restriction on protected speech that cannot survive strict or intermediate scrutiny, it violates the First Amendment.

This Court should affirm the district court.

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Respectfully submitted,

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/s/ Matthew Strugar
Matthew Strugar

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I, Matthew Strugar, hereby certify that on June 20, 2019, I electronically filed the foregoing Plaintiffs-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Matthew Strugar
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