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 **DREW SWANSON**, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	**Case No. 4:19-cv-124** **Plaintiffs' Reply in Support of Motion for Preliminary Injunction**

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 submit the following Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction.

Argument

I. Plaintiffs Suffer Ongoing Injury to Their Constitutional Rights

Plaintiffs' continuing, irreparable harm is manifest. After successfully challenging the first Iowa Ag Gag law, Plaintiffs stood ready to exercise their First Amendment rights to conduct investigations, but the Iowa legislature quickly enacted its new Ag Gag statute. *See* Opening Br. at 18 (citing Plaintiffs' declarations).

The State offers two arguments against Plaintiffs' irreparable injury. The first argument,

rehashed from the State's defense of the first law, is that the loss of Plaintiffs' "preferred investigatory method" is not irreparable harm.[1] This Court has rejected that argument before. *Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362- JEG-HCA, Order Denying Motion to Stay, ECF No. 101 at 5 (finding "Plaintiffs would be irreparably harmed by a stay"). And for good reason: if accepted, it would apply to virtually every First Amendment restriction. A prohibition on all political demonstrations does not prohibit people from organizing through telephone calls, lobbying, or leafletting, but that does not change the fact that such a law would be unconstitutional.

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[1] *See, e.g.*, *Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362- JEG-HCA, State's Motion to Stay, ECF No. 89 at 9 ("the loss of one's preferred investigatory method is not an irreparable injury"); State's Brief in Support of Motion for Summary Judgment, ECF No. 63 at 6 ("Plaintiffs' Complaint and MSJ makes it clear that they are asking this Court to enshrine their preferred investigatory method—undercover, employment-based investigations—with the protections of the First Amendment.").

In addition, the State's assertion that Plaintiffs can rely on "interviews and public records requests", Resistance Br. at 21, to obtain information about conditions inside agricultural facilities is unsupported. Plaintiffs employ undercover methods because they are otherwise unable to obtain this information directly from the facilities. *See* Walden Aff. ¶¶ 8-9; Kerr Aff. ¶ 13; Callison Aff. ¶ 13; Mason Aff. ¶¶ 8-14. Private agricultural facilities are not required to comply with public information requests, and government inspection reports themselves do not provide sufficient information or are withheld from the public by the government. *See, e.g.*, Clark Kauffman, *Iowa has some of the nation's worst puppy mills. But the federal government is hiding their identities*, DES MOINES REGISTER (May. 17, 2018), https://www.desmoinesregister.com/story/news/investigations/2018/05/17/iowa-some-nations-worst-puppy-mills-humane-society-says/617166002/.

The State also argues that employees who engage in surreptitious recording would not be subject to prosecution, Resistance Br. at 17, but the law does not reflect any such assurance. The statute itself refers to "the opportunity to *be* employed", which connotes both *remaining* employed and *obtaining* employment. Iowa Code § 717A.3B(1)(b) (emphasis added). The State's argued distinction between "good faith" employees who "engage in legitimate whistle-blowing" and "false friend" ones who have "nefarious motives", Resistance Br. at 17, is not reflected in the statute it attempts to save, which makes no exception for the reporting or recording of truthful information by employees that is intended to, and does, cause economic harm to an employer. *Id.*

Even assuming, *arguendo*, the State is correct that the statute is intended to exclude employees who only *after* obtaining employment acquire an intent to harm the economic interests of their employer by surreptitiously recording and exposing abuses within a facility, Plaintiffs have demonstrated that those activities are reasonably chilled because the law gives employers an effective tool of retaliation against reluctant and fearful workers, who in agricultural facilities are likely to be comprised of marginalized immigrant communities. *See* Mason Aff. ¶ 8, 13.

The State's second argument is that the four months between the law's enactment and Plaintiffs' motion defeats their irreparable injury. The State builds this argument from a series of cases involving intellectual property disputes. *See* Resistance to Plaintiffs' Cross-Motion for a Preliminary Injunction (Resistance Br.) at 22-23. Trademark, copyright, and trade dress cases carve out an exception to the rule that legal damages are not irreparable and presume a threat of future irreparable harm because lost profits "are often difficult to determine." *Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 968 (2nd Cir. 1995). Delay can destroy that presumption in trademark, copyright, and trade dress cases. *Id*.; *see also Kuklachev v. Gelfman*, 629 F. Supp. 2d 236, 250 (E.D.N.Y. 2008).

These rules specific to the intellectual property context are not applicable in the First Amendment context. For one, First Amendment harms do not involve legal damages where there is a *threat of future* irreparable harm because First Amendment harms are typically existing and ongoing. *See, e.g., Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347, 1362 (S.D. Fla. 2000) ("This rationale [from trademark cases] is not applicable in the context of an alleged First Amendment violation where 'each passing day may constitute a separate and cognizable infringement on the First Amendment'" (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319 (1975) (Blackmun, J., in chambers)). The violation of First Amendment rights "is not in any way similar to one in which a potential trademark infringer relies on the trademark holder's inaction while investing resources and effort in building a business." *Id.*

The Eighth Circuit recognizes as much. In *Powell*, the Plaintiff waited eight months after the initial violation of his First Amendment rights to bring suit. 798 F.3d 694-96. But the delay did not defeat Powell's irreparable injury. *Id*. at 702 ("'The loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod*, 427 U.S. at 373)).

Plaintiffs filed this suit five weeks after Iowa enacted its new law. In an effort to conserve judicial and party resources, they waited for the State's motion to dismiss before moving for a preliminary injunction to see if the State proposed a materially different defense to this Ag-Gag law than it did to the last one. It didn't, so Plaintiffs sought preliminary relief by cross-motion with its resistance to the State's motion to dismiss.

II. The State Relies on the Wrong Standard to Determine Content Neutrality

Relying on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the State argues that Iowa's new Ag-Gag law should be "deemed content neutral" because "the statute serves purposes unrelated to the content of the speech." Resistance Br. at 9. The Supreme Court rejected exactly this reading of *Ward* in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015). *Reed* involved a challenge to restrictions on "signs directing the public to a meeting of a nonprofit group." *Id.* at 2224. The Ninth Circuit, relying on *Ward*, held the restriction was content neutral because the town's justifications for the code were unrelated to the content of the sign's message. *Id.* at 2227-28. The Supreme Court rejected the Ninth Circuit's approach because it "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Id.* at 2228. The Court stressed that it has "repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose." *Id.* (compiling cases). Like the State here, the Ninth Circuit in *Reed* "misunderst[oo]d [the] decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face." *Id.* "*Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided

by the city." *Id.* As the Court made clear in *Reed*, *Ward*'s framework "applies only if a statute is content neutral." *Id.* at 2229 (quoting *Hill v. Colorado*, 530 U.S. 703, 766 (2000) (Kennedy, J., dissenting)).

Exactly like Iowa's first Ag-Gag law, enforcement authorities must review the nature of the speech to determine whether the new Ag-Gag law is violated. *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 919 (S.D. Iowa 2018). This makes the new Ag-Gag law a content-based restriction on speech.

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

Whether the Court determines the law is subject to strict or intermediate scrutiny, Plaintiffs are likely to succeed on the merits.

The State asserts that the Ag-Gag law serves compelling and important interests related to ensuring biosecurity and protecting trade secrets, proprietary information, and private property. Resistance Br. at 16–17. But both strict and intermediate scrutiny require the Court to assess the *actual* motive or purpose behind the law. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (strict scrutiny); *United States v. Virginia*, 518 U.S. 515, 535–36 (1996) (intermediate scrutiny). If the State could conjure any post hoc purpose to justify a law under intermediate and strict scrutiny, those tests would essentially be watered down to a rational basis test.

On its face, the law demonstrates that the State's asserted interests are not the actual purpose of the law. First, the law does not limit its application to biosecurity or trade secrets. Indeed, it says nothing at all about those interests, but like its predecessor is instead laser-focused on false speech made to gain access or employment at agricultural facilities. Second, the law does not apply to any other industry that might require protection of trade secrets or threats to biosecurity. The State asks this Court to find that the law is narrowly tailored to imaginary harms.

Plaintiffs have already identified a number of statements by Iowa legislators evincing a purpose of prohibiting undercover investigations of animal agriculture facilities (which pose no biosecurity or trade secret theft concerns). Opening Br. at 8–9. The State counters that "it is not clear from those legislators' statement that they harbored an intent to suppress the viewpoints of animals activists" because "there are no disparaging remarks from the legislators about said activists." Resistance at 11. It should come as no surprise the legislators refrained from singling out animal rights activists for opprobrium this time around, given that Iowa's second Ag-Gag law came on the heels of the first law's demise, struck down in part due to legislators' disparaging statements about animal rights activists in passing that law.[2] *Reynolds*, 297 F.Supp.3d at 926. Both the text of the law and the timing of its passage demonstrate it was aimed at preventing undercover investigations and the bad press that flows from them. *See, e.g., U.S. v. Kinsley*, 518 F.2d 665, 669 (8th Cir. 1975) ("Ambiguous statutory language may, of course, be clarified through an examination of legislative history."); *Premachandra v. Mitts*, 727 F.2d 717, 727 (8th Cir. 1984) (court may discern intent of remedial statute where "opaque and susceptible to more than one interpretation . . . . by resorting to the legislative history and purpose").

Even if the Court finds that the State's actual interests are compelling or important, the law is not narrowly tailored to serve those interests. As Plaintiffs have argued, the new law enjoys no close fit between the actions criminalized and the State's asserted interests. Opening Br. at 13-14. Numerous existing laws protect the State's asserted interests in biosecurity and protecting trade secrets and private property. If, as the State contends, these laws are inadequate (Resistance Br. at

[2] Even so, some legislators *still* revealed their true motives. Even one of the quotes the State relies on to try to show that there was no impressible motive speaks of supporting the law to prevent "harm" from "social media"—i.e., the publicity harms that flow from undercover investigation. Resistance Br. at 11 n. 3.

16-17), the legislature could have enacted tougher biosecurity measures or penalties on trade secret theft. It did not. Instead, it passed a law not remotely tailored to protecting those interests—a blunt tool that unsurprisingly sweeps wide enough to criminalize undercover investigations that result in only reputational harm.

The State attempts to deflect this obvious under-inclusiveness of the law by arguing the law does not apply to an employee who records wrongdoing but did not apply with an investigatory motive "because the intent of the statute is to punish those with nefarious motives—not those who engage in legitimate whistle-blowing." Resistance Br. at 17. But the State fails to show how harms to trade secrets, biosecurity, or even private property by recording are lessened depending upon the motive (formed possibly months or years prior) of the recorder. Moreover, the motive *is the same*: to expose wrongdoing. The only difference is at what point in the process the motive develops.[3]

Notably, neither in response to this motion nor in the litigation over the first Ag-Gag law, has the State put forward a shred of evidence that the harms the law is supposedly designed protect have ever materialized. The State would have it that the law protects against people who would lie to gain access or employment in facilities in order to steal trade secrets or compromise the biosecurity of factory farms. But the State *does not show those acts have ever happened*. If this law and the last were motivated by a need to protect biosecurity and protect trade secrets, there would be some evidence that someone at some time had lied to gain access to an Iowa agricultural facility to wreak a biological harm or steal a trade secret. Instead, as this Court recognized, the first law arose from bad press surrounding a number of investigations. *Animal Legal Def. Fund v.*

[3] The motive distinction also distinguishes the State's reliance on consumer fraud, theft by fraud, and other fraud statutes. Resistance Br. at 18. Those statutes are not under-inclusive because they apply regardless of when the requisite intent is formed.

Reynolds, 353 F. Supp. 3d 812, 816–17 (S.D. Iowa 2019). And the new law arose from this Court striking down the last law and allowing those investigations to resume. The threat the Iowa Ag-Gag laws are supposedly designed to protect against were invented post-hoc.

And the State fails to show "that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 467 (2014). As Plaintiffs previously argued, the Supreme Court found that the challenged buffer zone in *McCullen* was not narrowly tailored in part because Massachusetts had not showed it attempted alternatives such as enforcing existing criminal laws or enacting narrower laws that proved to be inadequate. Opening Br. at 14–15 (citing *McCullen*, 573 U.S. at 494–95). Massachusetts could not identify "a single prosecution brought under [existing, generally-applicable] laws within at least the last 17 years." *McCullen*, 573 U.S. at 494. 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*. Here, there is no evidence that the State even considered any meaningful alternatives to address its purported interests. Not only is the new Iowa Ag Gag law not tailored to serve the State's putative interests, but like the Utah Ag-Gag statute before it, it "appears perfectly tailored toward . . . preventing undercover investigators from exposing abuses at agricultural facilities." *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1213 (D. Utah 2017).

The Court should grant Plaintiffs' motion and preliminary enjoin enforcement of the new Ag-Gag law.

Dated this 9th day of August, 2019

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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.

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Date: August 9, 2019 /s/ Matthew Strugar
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