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–JEG-HCA

Combined Reply Brief on Plaintiffs' Motion for Summary Judgment and Resistance to Defendants' Cross-Motion for Summary Judgment

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 Combined Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and Resistance to Defendants' Cross-Motion for Summary Judgment:

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Introduction and Procedural Background

The facts and background of this litigation are fully set forth in Plaintiffs' brief in support of summary judgment. After this Court enjoined enforcement of Iowa Code § 717A.3A on a challenge from these same Plaintiffs, Iowa passed § 717A.3B, which, like its predecessor, criminalizes the types of investigations at animal agricultural facilities that Plaintiffs either carry out or rely on in their advocacy.

Late last year, this Court preliminarily enjoined enforcement of the law, finding Plaintiffs were likely to prevail on their argument that the law fails First Amendment scrutiny. *See Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-124–JEG-HCA, ECF No. 41 (S.D. Iowa Dec. 2, 2019) ("*Reynolds III*").

Plaintiffs moved for summary judgment on their First Amendment and overbreadth claims. ECF No. 55. The State resisted Plaintiffs' motion for summary judgment and filed its own cross-motion for summary judgment. ECF No. 62.

The State does not dispute the facts on which Plaintiffs' motion is based and Plaintiffs do not dispute any facts on which the State relies. ECF No. 64-1. Nor does the State seriously contest that a straightforward application of this Court's Order on the State's Motion to Dismiss and Plaintiffs' Motion for a Preliminary Injunction would compel the conclusion that summary judgment is warranted in favor of Plaintiffs. Rather, the State's brief largely rehashes the legal claims it advanced in support of § 717A.3A and earlier in this litigation "in the hope that the Court will view the arguments in a new light." Defendants' Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment ("State's MSJ Br."), ECF No. 66, at 13.

This Court accurately articulated and applied the law in preliminarily enjoining § 717A.3B. Because these motions present pure legal issues on an undisputed record, that all parties agree precedent resolves in Plaintiffs' favor, summary judgment for Plaintiffs is appropriate. Fed. R. Civ. P. 56(a).

Argument

The State seeks to place § 717A.3B 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. This Court rightly rejected each of these arguments both in this case and the prior litigation over § 717A.3A.

By its plain terms, § 717A.3B regulates speech that is covered by the First Amendment, is a content- and viewpoint-based regulation, and fails both strict and intermediate scrutiny. It is also facially overbroad in violation of the First Amendment.

I. Section 717A.3B Violates the First Amendment

A. As This Court Has Already Found, Section 717A.3B Criminalizes Speech, Not Conduct

As it did both in the challenge to § 717A.3A and on its motion to dismiss in this challenge, the State argues that § 717A.3B does not implicate the First Amendment because it regulates conduct ("the act of entering or obtaining employment at a particular type of property . . . by a particular means . . . and with a particular motive"), not speech. State's MSJ Br. at 25. As Plaintiffs' opening brief emphasizes and as this Court has already ruled, § 717A.3B regulates speech "'because a person can only violate § 717A.3B by engaging in deception, which requires

either speech or expressive conduct—such as nodding one's head instead of saying 'yes' in response to a question.'" Brief in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Opening MSJ Br."), ECF No. 58, at 11 (quoting *Reynolds III* at 7).

The State, relying on *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 620 (2003), tries to recast this argument by asserting that § 717A.3B should be shielded from First Amendment scrutiny because it pairs its speech prohibition with certain conduct. State's MSJ Br. at 26. But there is no speech-plus workaround rule under the First Amendment. If there were, governments could prohibit speakers from holding a sign while also marching. This Court already rejected this speech-plus argument. *Reynolds III* at 7.

Contrary to the State's reading, *Telemarketing Associates* did not create a broad speech-plus exception, but simply allowed a fraud claim to proceed against fundraisers who deceived donors about how their donations would be used. 538 U.S. at 620. This is consistent with subsequent Supreme Court precedent. False statements that produce a financial harm such as fraud are subject to restriction because they are outside the First Amendment, but false statements of fact that do not by themselves create any actual, material harm—such financial harm or otherwise cognizable harm—are protected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *id*. at 730–36 (Breyer, J., concurring in the judgment). That the Court allowed unprotected false statements to be regulated in *Telemarketing Associates* does nothing to suggest a state can regulate protected speech if it combines that regulation with any other restriction. As discussed more below, the Court correctly concluded the false statements prohibited by § 717A.3B are First Amendment protected speech as they do not produce a legally cognizable harm like fraud. *Reynolds III* at 12–20 (finding § 717A.3B regulates speech without requiring cognizable harm).

B. As This Court Has Already Found, Section 717A.3B's Regulation of False Speech Is Governed by the First Amendment

The State contends that *United States v. Alvarez*, the leading Supreme Court case on false statements and the First Amendment, supports upholding § 717A.3B against Plaintiffs' First Amendment challenge. State's MSJ Br. at 23–33. It does not.

The parties have trod this ground before. In the earlier challenge to § 717A.3A, the parties sparred over *Alvarez*'s applicability to that law's prohibition on false statements at both the motion to dismiss and summary judgment phases, with this Court ultimately finding that *Alvarez* precluded § 717A.3A's false statements prohibition. *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821–22 (S.D. Iowa 2019) ("*Reynold II*"); *see also Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 920–25 (S.D. Iowa 2018) ("*Reynolds I*") (finding *Alvarez* did not protect § 717A.3A from First Amendment challenge on a motion to dismiss). The parties also briefed *Alvarez*'s application to § 717A.3B on the State's motion to dismiss and Plaintiffs' motion for a preliminary injunction, with this Court preliminarily finding that *Alvarez* did not shield § 717A.3B from First Amendment scrutiny. *Reynolds III* at 11–22. And Plaintiffs briefed *Alvarez* again in their opening brief in support of their motion for summary judgment. Plaintiffs' MSJ Br. at 12–15.

The State's primary argument is that § 717A.3B prohibits false statements that cause "legally cognizable harm," *Alvarez*, 567 U.S. at 719, and therefore does not violate the First Amendment because to violate § 717A.3B one must speak and commit a civil trespass and trespass results in at least nominal damages. State's MSJ Br. at 26–32. But as this Court has repeatedly held, the First Amendment requires prohibitions on false speech cause more than a "*nominal* invasion of a legal right" but an "actual, material harm." *Reynolds III* at 10 (quoting

Reynolds I, 297 F. Supp. 3d at 923) (emphasis in *Reynolds III*). And, as this Court elaborated, "Section 717A.3B appears to place no meaningful limit on the harm that would satisfy its elements—that is, it does not require the harm to be legally cognizable, specific, tangible, actual, or material. On its face, an intent to cause *any* injury, no matter how trivial or subjective, would suffice to establish the harm element of the statute." *Reynolds III* at 12.

The State does rewrite its prior arguments on the issue of cognizable harm in one way. It contends that one particular dictionary's definition of injury—"violation of another's rights for which the law allows an action to recover damages"—takes § 717A.3B outside First Amendment protection. State's MSJ Br. at 28. But this is the same nominal damages argument with a different gloss—that if false speech leads to any harm whatsoever, "no matter how trivial or subjective," *Reynolds III* at 12, then it is not protected by the First Amendment. If accepted, this argument would hollow out *Alvarez*'s protection afforded to false statements. Nearly every misrepresentation causes at least some nominal harm, such as the embarrassment from being deceived, but that alone does not preclude First Amendment protection. These are not the types of cognizable harms that *Alvarez* recognizes as justifying a prohibition on speech. The specific examples that the *Alvarez* plurality identified as unprotected lies involve damage that is more than nominal or symbolic: defamation involves concrete injury to reputation and fraud causes its victims to part with money because of the lie. *See Alvarez*, 567 U.S. at 719. Even some false statements that cause more than nominal injury enjoy a degree of constitutional protection. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (holding that published false statements that cause reputational injury are entitled to constitutional protection, except in certain cases); *Hustler Magazine v. Falwell*, 485 U.S. 46, 49–50 (1988) (overturning jury award of a

quarter-million dollars in compensatory and punitive damages for intentional infliction of emotional distress claim arising from parody of public figure).

The State also reiterates its arguments that § 717A.3B(1)(b)'s prohibition on being employed through deception is constitutional because it reaches only false statements that result in a material gain to the speaker. State's MSJ Br. at 32–33. The State again hangs on dicta in *Alvarez* that generally "false claims . . . made to effect a fraud or secure moneys or other valuable considerations [such as] offers of employment" do not enjoy First Amendment protection. *Id*. at 32 (citing *Alvarez*, 567 U.S. at 723). But as this Court has already recognized, "when read in context, the *Alvarez* plurality uses 'an offer of employment' as *an example* of a material gain in stating that a fraudulent false statement, such as overstating qualifications, would not receive First Amendment protection if it were meant to procure a material gain, such as an offer of employment." *Reynolds III* at 19 (quoting *Alvarez*, 567 U.S. at 723) (emphasis in original). "The plurality did not say that any false statement associated with an offer of employment falls outside the protection of the First Amendment" and did not "create a blanket First Amendment exception relating to offers of employment." *Id*. at 19–20.

As the undisputed facts make clear, when Plaintiffs' investigators employ deception to obtain employment, they act as would any other employee, and do not use deception in a manner that would cause direct harm to their employer—for example, by exaggerating their skills or qualifications in a way that would implicate safety or their fitness for the position. Plaintiffs' Undisputed Statement of Material Facts, ECF No. 55-1 ("Plaintiffs' SUMF"), ¶ 6; *see also Reynolds I*, 297 F. Supp. 3d at 924 (recognizing the lies Plaintiffs' "undercover investigators tell relate to their affiliation with animal protection organizations, their status as licensed private

investigators (where applicable), and innocuous white lies," not "their job qualifications and relevant experience (e.g., forklift experience).").

The State also seeks to defend § 717A.3B(1)(b) based on the Idaho district court's post-remand decision denying the plaintiffs' motion for a declaratory judgment in the Idaho Ag-Gag litigation. State's MSJ Br. at 31 (citing *Animal Legal Def. Fund v. Wasden*, 312 F. Supp. 3d 939 (D. Idaho 2018)). This, too, the Court has addressed before, noting it "need not resolve" the apparent conflicts between the Ninth Circuit opinion and the post-remand decision because they are "persuasive, not binding authority" and finding that the Ninth Circuit opinion is consistent with striking both versions of the Iowa statute: "the Ninth Circuit was concerned with imposing liability for reputational and publication harm rather than harm that is more tangible and legally cognizable." *Reynolds III* at 19. Thus, the Ninth Circuit's approach tracked both *Alvarez* and "this Court's prior decision in *Reynolds I*." *Id*.

The State also fights the Court's reading of § 717A.3B(1)(b) as applying to both job applicants and existing employees acting as whistleblowers, arguing that the "denial of an opportunity to be employed" language in § 717A.3B(1)(b) limits the law's reach only to job applicants "because the intent of the statute is to punish those with nefarious motives." State's MSJ Br. at 33. But the first source of a statute's meaning must be its plain text. *Doe v. State*, No. 19-1402, 2020 Iowa Sup. LEXIS 56, at *4 (Iowa May 22, 2020) ("If the 'text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.' (quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)). As this Court has already noted, "an opportunity to be employed" connotes both remaining employed and obtaining employment. *Reynolds III* at 14. The definition of "deny" that the State relies on—"to refuse to grant"—might help the State if the statute's text were instead

"deny an opportunity to *become* employed," but the State chose to adopt the infinitive clause "opportunity to be employed," whose plain meaning determines how the statute must be construed. Because "§ 717A.3B does not state that the deception must have occurred during the job application process . . . an omission by an existing employee (such as failing to inform management of an intent to whistleblow) would constitute deception under the statute." *Id.*

C. As This Court Has Already Held, There Is No Exception to the First Amendment for Speech on Private Property

The State also repeats word-for-word its arguments from the motion to dismiss asserting that lesser First Amendment scrutiny should apply here because the law applies to speech on private property. *Compare* State's MSJ Br. at 33–37 *with* State's Brief in Support of Motion to Dismiss, ECF No. 22 ("State's MTD Br."), at 20–23.

This Court has also already rejected these arguments, first in the litigation over § 717A.3A. In *Reynolds I*, this Court found, "[t]he cases cited by Defendants to support their argument that false statements to gain access to private property constitute unprotected speech fail to support that point." 297 F. Supp. 3d. at 920. It addressed each of the State's cases: "*Food Lion*[*, Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4th Cir. 1999)] and *Dietmann* [*v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971)] . . . stand for the proposition that journalists may commit generally applicable trespass and invasion of privacy torts and cannot use the First Amendment as a defense simply because the torts were committed while engaging in journalism." *Id.* And *Bartnicki v. Vopper*, 532 U.S. 514 (2001), *Branzburg v. Hayes*, 408 U.S. 655 (1972), *Hudgens v. NLRB*, 424 U.S. 507 (1976), *State v. Lacey*, 465 N.W.2d 537 (Iowa 1991), and *Special Force Ministries v. WCCO Tel.*, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998) "similarly stand for the point that generally applicable laws apply with full force to individuals who wish to engage in

speech or expressive activity." *Reynolds I*, 297 F. Supp. 3d. at 920–21 (citing *Bartnicki*, 532 U.S. at 532 n.19; *Branzburg*, 408 U.S. at 691; *Hudgens*, 424 U.S. at 521; *Lacey*, 465 N.W.2d at 539–40; *Special Force Ministries*, 584 N.W.2d at 793).

This Court again rejected these arguments when the State moved to dismiss this lawsuit. *Reynolds III* at 21.

As with the previous challenge, "Plaintiffs are not demanding a blanket entitlement to enter others' property without permission simply because they are engaging in advocacy." *Id.* at 921. Cases that refuse to create an exemption from other, general laws for First Amendment activities are simply inapposite because § 717A.3B directly targets speech.

The State, presenting the same argument for the third time, provides no principled reason for this Court to depart from the settled law of these cases.[1]

II. Section 717A.3B Is Content- and Viewpoint-Based

A. Section 717A.3B Is Content-Based

Section 717A.3B is a content-based restriction on protected speech because it singles speech out for punishment based on its content: whether it is true or false. *See Reynolds I*, 297 F. Supp. 3d at 919 (finding § 717A.3A discriminated between true and false speech); *Animal Legal*

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[1] The State also reasserts pages of arguments on the district court decision in *Western Watersheds Project v. Michael*, 196 F. Supp. 3d 1231 (D. Wyo. 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*"). State's MSJ Br. at 22–25; 34. This argument also repeats word-for-word the State's arguments in its motion to dismiss. *Compare* State's MTD Br. at 13–15; 20–21 *with* State's MSJ Br. at 22–25; 34. As Plaintiffs pointed out in opposition to the motion to dismiss, the Tenth Circuit decision in that case directly rejects the State's reading of the district court decision. 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." *Western Watersheds II*, 869 F.3d at 1192; *see also* Plaintiffs' Resistance to Defendants' Motion to Dismiss, ECF No. 27, at 25–26.

Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1210 (D. Utah 2017) (determining that the Utah Ag-Gag law's misrepresentation prohibition was content-based because "whether someone violates the Act depends on what they say"). And this Court has also determined that § 717A.3B is also content-based because "enforcement authorities would have to evaluate the content of what a person said to determine whether they engaged in deception." *Reynolds III* at 8; *see also Animal Legal Def. Fund v. Kelly*, No. CV 18-2657-KHV, 2020 WL 362626, at *17 (D. Kan. Jan. 22, 2020) (noting that under the Kansas Ag-Gag statute, "defendants would have to review what the individual communicated to the animal facility owner" and statute is therefore "plainly a content-based restriction on speech").

The State's argument that § 717A.3B is only as content-based as generally applicable criminal fraud prohibitions, State's MSJ Br. at 42, confuses content-neutrality with the issue of whether the First Amendment applies. In *Alvarez*, the Supreme Court held that fraud was a category of speech that was outside of the First Amendment's reach. 567 U.S. at 717 ("content-based restrictions on speech have been permitted, as a general matter, . . . [for, among other categories,] fraud"). *Alvarez* rejected the government's proposed rule that all false statements of fact were outside of the First Amendment, instead distinguishing unprotected speech that defrauds from other false statements of fact by creating the limiting principle that false statements that do not cause cognizable harm to the deceived party are protected by the First Amendment. *Id*. at 719; *id*. at 730-36 (Breyer, J., concurring in the judgment). As Plaintiffs demonstrated above and as this Court has already held, § 717A.3B does not prohibit only speech that causes a cognizable harm, so it is not one of the "content-based restrictions on speech [that the First Amendment] permit[s]." *Id*. at 717. If anything, this conclusion supports that § 717A.3B

is content-based, which is truly a distinct inquiry once the Court determines the First Amendment applies.

As this Court has also held, § 717A.3B is content-based because it is limited to the subject matter of commercial agricultural industry practices. *Reynolds III* at 23 ("Like § 717A.3A, § 717A.3B only targets the agricultural industry."). The State's argument that § 717A.3B is only as content-based as a law that targets trespass on military bases in addition to a general trespass prohibition confuses prohibitions on speech with prohibitions on conduct. State's MSJ Br. at 43. Governments can enact such targeted trespass statutes without violating the First Amendment's proscription against content-based statutes for the same reasons that they can enact laws making it a crime to set fire to a federal building in addition to generally applicable arson laws: unlike § 717A.3B, they both regulate *conduct*, not speech. But § 717A.3B regulates speech, not trespass.

The State makes a similar mistake in referencing cases on buffer zones around abortion providers. State's MSJ Br. at 43 (citing *McCullen v. Coakley*, 573 U.S. 464, 479–81 (2014), *Hill v. Colorado*, 530 U.S. 703, 724–25 (2000)). In both cases the State relies on, the Supreme Court found the prohibitions were content-neutral because they were location-based proscriptions, not speech-based proscriptions. *McCullen*, 573 U.S. at 479; *Hill*, 530 U.S. at 723. Section 717.3B, however, operates based on the content of what someone says, not that they have said anything at all in a certain location. As a result, it is a content-based restriction on speech.

B. Section 717A.3B Is Viewpoint-Based

Section 717A.3B is also viewpoint-based both because it was passed with viewpoint-discriminatory motive and because it singles out speech leading to critiques of a single industry for special, disfavored treatment. Plaintiffs' Opening MSJ Br. at 17–19; Plaintiffs' SUMF ¶¶ 81–

85. This intent to target critics of the animal agriculture industry is apparent from the plain language of the statute, the fact that the legislature did not seek to prevent undercover investigations of other industries, and statements made by the Iowa legislators during the discussion of the bill. Plaintiffs' SUMF ¶¶ 81–85.

The State responds that legislators who passed § 717A.3B also couched their motivations in the language of protecting private property and biosecurity. State's MSJ Br. at 45–46. But even if the Court were to accept these arguments as anything other than a smokescreen, it does not wipe away the improper motive Plaintiffs have established. And such an improper motive need not be the sole purpose for a law 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 additional justifications could immunize law with a viewpoint-based purpose from review, the First Amendment could be so easily avoided that it would be meaningless.

Relying on two out of circuit cases from 2013, the State argues that a court should never look behind the text of the statute to assess what motivated the legislation. State's MSJ Br. at 46 (citing *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 649–50 (7th Cir. 2013)). Both cases predate the Supreme Court's clear

pronouncement in 2015 that "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 v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015) (emphasis added). *Reed* was not a radical departure, either. Just two years earlier the Supreme Court found an impermissible government motive sufficient to invalidate the Defense of Marriage Act based on just three statements in a House Report. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

Plaintiffs stressed in their opening brief that § 717A.3B's requirement that one act with an "intent" to cause harm also makes it viewpoint discriminatory. Plaintiffs' MSJ Br. at 17–18. As the District of Kansas recently found with that state's Ag-Gag law, which, like § 717A.3B, required a person to act with an "intent" to cause harm, "[t]he law does not prohibit [the targeted] conduct if the person has the *intent to benefit the enterprise* conducted at the animal facility, and in this respect it impermissibly discriminates based on the speaker's views about animal facilities." *Kelly*, 2020 WL 362626, at *17 (emphasis added). "For example, if a journalist ignored posted keep-out notices and lied to an animal facility owner to gain access and exercise control over the animal facility with the intent to write a positive article about the enterprise, he or she would not violate" the law. *Id*. The State does not provide any argument explaining how, from its perspective, the intent requirement works in a viewpoint-neutral manner, but simply asks the Court to find that "*Kelly* is erroneous as a matter of law." State's MSJ Br. at 44. Because § 717A.3B, like the Kansas law, "plainly targets negative views about animal facilities, . . . [it] discriminates based on viewpoint." *Kelly*, 2020 WL 362626, at *17.

III. Section 717A.3B Does Not Survive Heightened Scrutiny

A. Strict Scrutiny Is Appropriate

This Court has twice recognized that the Supreme Court's decision in *Alvarez* left some confusion about whether strict or intermediate scrutiny is appropriate to prohibitions on false statements. *Reynolds II*, 353 F. Supp. 3d at 823; *Reynolds III* at 30. In both instances, the Court found it unnecessary to resolve the dispute because the law either failed or was likely to fail either level of scrutiny. *Reynolds II*, 353 F. Supp. 3d at 824; *Reynolds III* at 30.

Plaintiffs believe that strict security is appropriate. Content-based and viewpoint-based speech restrictions receive strict scrutiny. *Reed*, 135 S. Ct. at 2222. Section 717A.3B is content-based and viewpoint-based. *See infra* Section II; *see also*, *Kelly*, 2020 WL 362626, at *18 ("Because [the challenged sections of the Kansas Ag-Gag statute] restrict speech based on its content, the Court must apply strict scrutiny.").

Apart from a footnote incorporating its intermediate scrutiny arguments, the State has not even sought to meet its burden of showing that the Ag-Gag law survives strict scrutiny—essentially conceding that § 717A.3B is unconstitutional if strict scrutiny is the applicable standard. State's MSJ Br. at 54 n. 24; *see also id.* at 49–54 (seeking to justify the law only under intermediate scrutiny).

The State has proffered no evidence to support finding a compelling interest motivating § 717A.3B or that such an interest could not be served by numerous alternatives that are less restrictive of speech. For these reasons, the State cannot possibly meet the high burden of strict scrutiny.

B. Even Under Intermediate Scrutiny, Section 717A.3B Fails

Even if this Court applies intermediate scrutiny, § 717A3B fails because it is not narrowly tailored to a serve a significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As it did with both § 717A.3A and § 717A.3B in its resistance to Plaintiffs' motion for a preliminary injunction, the State asserts that § 717A.3B serves significant interests related to ensuring biosecurity and protecting trade secrets, proprietary information, and private property. State's MSJ Br. at 50–51. On its face, § 717A.3B reveals that the State's "proffered interests are entirely speculative," *Reynolds III* at 31, in two ways. First, the law does not limit its application to biosecurity or trade secrets.[2] 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.

Moreover, the State put forward no evidence that the harms the law is supposedly designed protect have ever materialized.[3] If this law and the last were motivated by a need to

[2] In a footnote in its section on viewpoint-neutrality, the State cites *Rembrandt Enterprises, Inc. v. Illinois Insurance Company*, 129 F. Supp. 3d 782, 783 (D. Minn. 2015), and *Farris v. Department of Employment Security*, 8 N.E.3d 49 (Ill. Ct. App. 2014) in support of its position that biosecurity is an important state interest. This Court already explained in detail that the State's "reliance on these cited cases is misplaced" because "[w]hile they demonstrate that biosecurity breaches occur, they do not provide any record that such breaches are the result of outsiders using deception to gain access to or employment at an agricultural production facility with the intention of harming the facility." *Reynolds III* at 33. That is, they do not support the State's purported objective here to narrowly target biosecurity concerns through solely regulated false speech at agricultural facilities.

[3] The State cites a U.S. Department of Justice press release detailing the federal conviction for theft of trade secrets from agricultural companies' facilities in Iowa, but that press release says nothing about the defendant gaining access to the facilities by false statements or obtaining employment with the facilities at all. State's MSJ Br. at 50 (citing *Chinese National Sentenced to Prison for Conspiracy to Steal Trade Secrets*, Department of Justice (Oct. 6, 2016), available at

protect biosecurity and trade secrets, surely 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 several investigations. *Reynolds II*, 353 F. Supp. 3d at 816–17. And § 717A.3B arose from this Court striking down the last law and allowing those investigations to resume. The threat both § 717A.3A and § 717A.3B were supposedly designed to protect against were invented post-hoc, but even intermediate scrutiny requires the Court to assess the actual motive or purpose behind the law. *United States v. Virginia*, 518 U.S. 515, 535–36 (1996).

The State also points to the fact that the Ninth Circuit found these to be legitimate interests in its analysis of the plaintiffs' *equal protection* challenge to the Idaho Ag-Gag law's prohibition on obtaining records by misrepresentation. State's MSJ Br. at 50–51 (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018)). But the Ninth Circuit applied rational basis review because it held that provision protected against a legally cognizable harm, so the First Amendment did not apply. *Wasden*, 878 F.3d at 1200–01. Rational basis review permits government to justify a law with any conceivable, hypothetical, post-hoc interest. *Beach Commc'ns*, 508 U.S. at 315. Because the First Amendment applies to all of § 717A.3B (and Plaintiffs do not assert an equal protection claim), heightened scrutiny applies. And, again, heightened scrutiny does not allow the State to conjure such post-hoc justifications.

Even if the Court finds that the State's actual interests are significant, the law is not narrowly tailored to serve those interests. The State has not shown that § 717A.3B is "actually

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https://www.justice.gov/usao-sdia/pr/chinese-national-sentenced-prison-conspiracy-steal-trade-secrets). The press release instead suggests the defendant simply entered the facilities surreptitiously and stole seeds. Moreover, the State's reliance on this prosecution furthers Plaintiffs' position, not the State's—this prosecution shows that existing laws already serve the State's interest in protecting trade secrets.

necessary to protect perceived harms to property and biosecurity." *Reynolds III* at 34 (quoting *Reynolds II*, 353 F. Supp. 3d at 825). As with the motion for a preliminary injunction, the State has "made no record as to how biosecurity is threatened by a person making a false statement to get access to, or employment in, an agricultural production facility." *Id*. (quoting *Reynolds II*, 353 F. Supp. 3d at 825). "A prohibition against intentional, material interference with biosecurity protocols, without the requirement that the interference be preceded by deception, would not burden speech" and, based on this record, would be just as effective in achieving the State's claimed end. *Id*. Because the State has not provided a record showing otherwise, the Court should not "assume that biological harm turns on a human vector making a false statement unrelated to such harm in order to gain access to the facility." *Id*. (quoting *Reynolds II*, 353 F. Supp. 3d at 825).

The same is true for the State's justification related to trade secrets: "Iowa law already prohibits the theft of trade secrets, [and while] it does not contain a deception requirement, . . . [it] could be amended to explicitly prohibit the use of deception with an intent to steal trade secrets." *Id*. at 34–35 (citing Iowa Code Ch. 550). The State argues that because the existing law does not cover "false friend" employees, it supports upholding § 717A.3B, but never responds to this Court's prior conclusion that a less restrictive means of doing so would be to amend the existing law. Rather than pass such an amendment, the State passed a law not remotely tailored to protecting those interests—a blunt tool that sweeps wide enough to criminalize undercover investigations that result in only reputational harm.

Not only is § 717A.3B 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." *Herbert*, 263 F. Supp. 3d at 1213.

Furthermore, there is no evidence that the State even considered any meaningful alternatives to address its purported interests. As the Supreme Court has indicated, under intermediate scrutiny, the State must 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*, 573 U.S. at 467. 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. *See* Plaintiffs' Opening MSJ 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 Massachusetts claimed they "tried injunctions," "the last injunctions they cite[d] date[d] 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*.

The State asserts that § 717A.3B *is* its attempt at a narrower law. State's MSJ Br. at 54. But this gets *McCullen*'s command exactly backward. Before the State can impose restrictions on speech that satisfy heightened scrutiny, it must first attempt to use generally applicable restrictions that do not restrict speech and find those restrictions lacking. It cannot—as the State has done here—go from one restriction on speech to another purportedly less onerous restriction on speech and then claim it has done all that it can.

Section § 717A.3B fails heightened scrutiny.

IV. Section 717A.3B Is Unconstitutionally Overbroad

As Plaintiffs demonstrated in their opening brief, § 717A.3B is unconstitutionally overbroad because even if some things it prohibits regulate unprotected conduct, it criminalizes a substantial amount of speech protected by the First Amendment. Plaintiffs' MSJ Br. at 26–27. On top of chilling the speech of animal protection advocates like some of the Plaintiffs, § 717A.3B also criminalizes speech by other Plaintiffs and others engaging in worker safety, food safety, and environmental advocacy, union workers seeking to organize a labor force, and journalists. *Id*. (citing *Reynolds III* at 37).

The State responds by claiming that all of the speech regulated by the statute is of the same kind and that this Court should lump all of these very distinct types of undercover investigations into one category.[4] State's MSJ Br. at 40. First, there is no support under the law for this admittedly creative interpretation of the overbreadth doctrine. The sole case on which the State relies supports no such argument. *See Gerlich v. Leath*, 152 F. Supp. 3d 1152, 1177 (S.D. Iowa 2016). Rather, that decision was simply restating the requirement that a statute's overbreadth must be substantial. *Id*. (citing *New York v. Ferber*, 458 U.S. 747, 772 (1982)). Second, the underlying concern of the overbreadth doctrine is that the reach of a statute may not only affect the parties involved in a constitutional challenge, but may also chill the speech of other parties not before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If a law has a substantial number of unconstitutional applications in relation to its legitimate ones, it is simply immaterial if those unconstitutional applications reach a lot of speakers who engage in speech similar in kind to the plaintiffs' speech.

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[4] The State also argues the law is not overbroad because it regulates conduct, not speech. State's MSJ Br. at 38–40. Plaintiffs have addressed this argument above (*see supra* Section I.A), as well as repeatedly in other briefing. This Court has rejected this assertion. *Reynolds III* at 7.

The State's argument that the speech prohibited by § 717A.3B should be considered as only one type of speech under the overbreadth doctrine fails on its face, too. That different actors with different motivations would engage in similar types of speech, all of which are prohibited by a law, does not save a law from overbreadth. A law that prohibited all political endorsements would apply to similar types of speech from every political perspective. Under the State's framing, such a law would be spared from overbreadth because it applies to one "type[] of protected speech." State's Br. at 40. But the law would be undoubtedly overbroad.

Further, the State contends that § 717A.3B reaches substantial conduct not protected by the First Amendment, including using deceit to cause physical damage to a facility, to steal trade secrets, to release animals, and to interfere with a facility's bio-security protocols. Here again, the State presents no evidence that any of these fanciful uses of the law address things that have ever happened in Iowa (or anywhere else)—there is no evidence false speech is associated with such misconduct. The one example the State provides (in another section of its brief) involving the theft of agricultural trade secrets involved a common thief (not a thief using deception), who was prosecuted as one. State's MSJ Br. at 50 (citing *Chinese National Sentenced to Prison for Conspiracy to Steal Trade Secrets*, Department of Justice (Oct. 6, 2016), available at https://www.justice.gov/usao-sdia/pr/chinese-national-sentenced-prison-conspiracy-steal-trade-secrets). The overbreadth doctrine requires assessing a law's "'application to real-world conduct, not fanciful hypotheticals.'" *United States v. Brune*, 767 F.3d 1009, 1021 (10th Cir. 2014) (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting)).

Plaintiffs have shown that using false statements to gain access to agricultural facilities for undercover investigative purposes is not just hypothetical, but that it has happened repeatedly in Iowa by Plaintiffs and others. Plaintiffs' Opening MSJ Br. at 2–4. These investigations

motivated the passage of both § 717A.3A and § 717A.3B. *See Reynolds II*, 353 F. Supp. 3d at 817 (noting legislature considered Iowa's first Ag-Gag bill while news of Iowa undercover investigations of animal agricultural facilities "were being circulated by news media"); *id*. at 824 (detailing statements "illustrat[ing] that § 717A.3A serves the interest of protecting Iowa's agricultural industry from perceived harms flowing from undercover investigations of its facilities"); *Reynolds III* at 4 (describing the legislative motive behind § 717A.3B).

Because the impermissible applications of § 717A.3B are real and substantial and outweigh any hypothetical permissible applications put forward by the State, § 717A.3B is unconstitutionally overbroad.

V. The Court Should Reject the State's Invitation to Invent and Impose a Limiting Construction to Save Section 717A.3B

The Court should reject the State's invitation to offer a limiting construction to § 717A.3B to save it from its unconstitutionality.

"A limiting construction cannot be supplied unless [a state law] is readily susceptible to such an interpretation, because federal courts lack jurisdiction authoritatively to construe state legislation." *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001) (cleaned up). Courts should not rewrite laws to conform them to constitutional requirements because doing so "constitute[s] a serious invasion of the legislative domain" and "sharply diminish[es]" the legislative body's "incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481.

Three separate times in its brief (each time in a footnote), the State suggests the Court could apply a limiting construction to § 717A.3B to save it from its own unconstitutionality, but the State never proposes what those limiting constructions could or should be. State's MSJ Br. at

32 n.15, 33 n.16, 39 n. 20. Instead, each time the State simply suggests the Court apply a limiting construction "as it sees fit." *Id*.

Section 717A.3B is not readily susceptible to any limiting construction that would save it from its constitutional defects, as is evident from the State's failure to propose one and suggestion that the Court do so instead.

Similarly, Plaintiffs cannot meaningfully assess or present argument addressing a construction the State does not even define.

Because the State fails to meaningfully propose any limiting construction that would save § 717A.3B, this Court should refuse the State's ambiguous invitation to impose one.

Conclusion

Because § 717A.3B is a content- and viewpoint- based restriction on protected speech that cannot survive strict or intermediate scrutiny, it violates the First Amendment. The law is also facially overbroad in violation of the First Amendment.

This Court should grant summary judgment for Plaintiffs, declare § 717A.3B unconstitutional, and permanently enjoin its enforcement.

Dated this 1st day of June, 2020

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Certificate of Service

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

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

Date: June 1, 2020

/s/_Matthew Strugar_____________
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