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' Resistance to Defendants' Motion to Dismiss**

COME NOW Plaintiffs Animal Legal Defense Fund ("ALDF"), Iowa Citizens for Community Improvement ("ICCI"), Bailing Out Benji, People for the Ethical Treatment of Animals ("PETA"), and Center for Food Safety ("CFS"), and submit the following brief resisting the Motion to Dismiss filed by Defendants Kimberly 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 (collectively, "the State"). In support, Plaintiffs state as follows:

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Factual Background

This case arises out of Iowa's second attempt to criminalize undercover investigations at agricultural facilities. Last year, this Court struck down the State's first attempt, codified at Iowa Code § 717A.3A, as facially unconstitutional. *See Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) ("*Reynolds II*"). Less than three weeks after this Court enjoined enforcement of that law, the legislature introduced a substantially similar bill. And on March 14, 2019, Defendant Governor Reynolds signed into law Senate File 519, now codified at Iowa Code § 717A.3B.

These statutes are commonly known as "Ag-Gag" laws because they gag speech that is critical of industrial agriculture. *See* Rita-Marie Cain Reid & Amber L. Kingery, *Putting A Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL'Y 31, 36 (2015). Numerous states—Kansas, Montana, North Dakota, Utah, Missouri, Idaho, North Carolina, and Arkansas—have enacted similar laws to Iowa's.

Like Iowa's old Ag-Gag law, § 717A.3B criminalizes undercover investigations at factory farms and slaughterhouses. The new law, like the old, targets speech that is integral to investigations, even if the speech is of a slightly different form.

Plaintiffs are organizations that (a) would carry out these types of investigations were it not for the law; and/or (b) rely on information collected through such investigations to advance their mission-driven, public advocacy. Investigations of industrial animal agriculture facilities have revealed systematic and horrific animal abuse to authorities and to the public, and this information has led to food safety recalls, citations for environmental and labor violations, plant closures, and criminal convictions. Such investigations and the public conversation they ignite

are an integral part of the discussion surrounding animal rights and welfare and the nature, safety, and integrity of American food production.

Iowa's new Ag-Gag law is unconstitutional for many of the same reasons its first Ag-Gag law was unconstitutional: it criminalizes speech that is protected by the First Amendment; it is content- and viewpoint-discriminatory; and it is unconstitutionally overbroad. In addition, unlike the first law, the new law includes vague prohibitions that make it impossible for a person of reasonable intelligence to know what permitted and what is prohibited.

The State's defense of its new Ag-Gag law rests largely on its supposed distinctions from the original, unconstitutional Ag-Gag law: the revised intent and "materiality" requirements, which, according to the State, prevent the statute from infringing on First Amendment protections. State's Brief in Support of Motion to Dismiss, ECF No. 22, at 6–23 ("MTD Br."). But, with the same speech-suppressing purposes, the new statute criminalizes the very same lies, made with the same intent, that the first unconstitutional statute criminalized. Such false statements intend only to cause injury by releasing truthful information to the public, which is at the core of the First Amendment's protections.

Plaintiffs thus urge this Court to deny the State's motion to dismiss and preliminarily enjoin the State from enforcing Iowa Code § 717A.3B.[1]

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

Undercover investigations of 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

[1] Plaintiffs concurrently file a Motion for a Preliminary Injunction with this Resistance.

required of them as employees. Complaint, ECF No. 1, ¶¶ 66–76. When applying for these jobs, investigators actively or passively conceal their investigatory motive, as well as their affiliations with news-gathering or advocacy groups. *Id.* ¶ 11. 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. *Id.* ¶¶ 66–76.

Undercover investigations in industrial agricultural facilities produce information 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.[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] Just last month, an undercover investigation showing rampant abuse of dairy cows and calves at Fair Oaks Farm in Indiana led to animal cruelty prosecutions, civil fraud lawsuits, intense national media coverage, milk being pulled from grocery store shelves, and a major milk company altering its supply lines and changing its audit practices.[4]

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[2] 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.

[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.

[4] Olivia Heersink, *UPDATE: Criminal Probe Launched Into Fair Oaks Farms Employees; companies pull products*, THE TIMES (June 5, 2019),

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 Sparboe Farms documented hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses. Complaint ¶ 8. An employment-based investigation conducted by Plaintiff PETA exposed workers at a Hormel Foods supplier beating pigs with metal rods, sticking clothespins into pigs' eyes and faces, and kicking 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." *Id.*

Other investigations have generated widespread public concern about the industrial, inhumane breeding of companion animals, such as lack of veterinary care, and exposure to rain, snow, extreme heat, and extreme cold. *Id.* ¶¶ 12, 26. Plaintiff Bailing Out Benji has conducted undercover investigations into puppy mills, which have exposed Iowa pet stores that profit from the sale of these puppies. *Id.*¶ 26.

These and similar investigations have also documented improper food safety practices and violations of labor and environmental law. *Id.* ¶ 6. These violations endanger an economically precarious agricultural workforce. For example, when Plaintiff ICCI conducted an undercover investigation into a pork facility in Algona, Iowa, it revealed numerous poor and unsafe working conditions, which resulted in an OSHA complaint, citations, and notifications of penalty by the agency. *Id.* ¶ 23. Similarly, Plaintiff ALDF conducted a 2015 investigation of a

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https://www.nwitimes.com/news/local/newton/update-criminal-probe-launched-into-fair-oaks-farms-employees-companies/article_1c1eb1db-4b9e-5e88-a88a-30713dae0826.html; *Fairlife Statement on Animal Care*, FAIRLIFE (June 12, 2019), https://fairlife.com/news/fairlife-statement-regarding-arm-video/.

Texas-based Tyson chicken slaughter plant that revealed horrendous working conditions, resulting in four legal complaints. *Id.* ¶ 76.

II. Iowa's First Ag-Gag Law Is Struck Down as Unconstitutional.

"While the results of [some of] these investigations were being circulated by news media, the Iowa legislature considered H.F. 589, § 2 (Iowa 2012), which would eventually become § 717A.3A"—Iowa's original Ag-Gag law. *Reynolds II*, 353 F. Supp. 3d at 817. "Lawmakers described the bill as being responsive to two primary concerns of the agricultural industry: facility security (both in terms of biosecurity and security of private property) and harms that accompany investigative reporting." *Id.*

That law criminalized "obtain[ing] access to an agricultural production facility by false pretenses," Iowa Code § 717A.3A(1)(a), as well as "mak[ing] a [knowingly] false statement or representation" on an employment application "with an intent to commit an act not authorized by the owner" of the facility. Iowa Code § 717A.3A(1)(b).

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

In 2017, the same Plaintiffs that bring this case filed suit challenging Iowa Code § 717A.3A on its face and in full as violating of the First and Fourteenth Amendments. *See Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA (S.D. Iowa).

In January of this year, this Court granted summary judgment to the Plaintiffs. *Reynolds II*, 353 F. Supp. 3d 812. The Court first ruled that the law implicated free speech, rejecting the State's argument that the statute regulated conduct. "Speech is necessarily implicated by

§ 717A.3A because 'one cannot violate § 717A.3A *without* engaging in speech.' The speech implicated is false statements and misrepresentations." *Reynolds II*, 353 F. Supp. 3d at 821 (quoting *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018)) ("*Reynolds I*") (emphasis in original). Because "false statements will be protected by the First Amendment only if they *do not* cause a 'legally cognizable harm' or provide 'material gain' to the speaker," *id*. at 821–22 (quoting *United States v. Alvarez*, 567 U.S. 709, 718, 723 (2012)), and "the false statements implicated by § 717A.3A … d[id] not cause either," the statute implicated protected speech. *Id*. at 822 (citing *Reynolds I*, 297 F. Supp. 3d at 920–24).

The Court next ruled that both substantive provisions "'contained within § 717A.3A [were] content-based on their face.'" *Id*. (quoting *Reynolds I*, 297 F. Supp. 3d at 919). Not only must a prosecutor "'necessarily examine the content' of an individual's statement to determine whether the individual violate[d] the statute," but he or she must also "know the content's veracity." *Id*. (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

The Court then found that the statute failed both strict and intermediate scrutiny. The State's asserted interests of protecting private property and biosecurity were "not compelling in the First Amendment sense" because "the targeted harms 'were entirely speculative.'" *Id*. at 824 (quoting *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017) and citing *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1207–08 (D. Idaho 2014)). But even if the interests were compelling, "§ 717A.3A's prohibitions [were] not narrowly tailored to serve either interest." *Id*. The State failed to demonstrate how biosecurity or property rights were served by the Ag-Gag law, or "'that alternative measures that burden substantially less speech would fail to achieve the government's interest.'" *Id*. at 825 (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)). The State had (and still has) numerous other laws at its disposal to 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.'" *Reynolds II*, 353 F. Supp. 3d at 825 (quoting *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 793–94 (8th Cir. 2015) (alteration in original)).

The Court entered judgment for Plaintiffs, declaring the statute unconstitutional and enjoining the state from enforcing it. *Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA, ECF Nos. 86 (Feb. 14, 2019) (granting declaratory and injunctive relief), 87 (Feb. 15, 2019) (judgment).

III. In Response to the First Ag-Gag Law Being Struck Down, Iowa Passes Another.

The Iowa legislature wasted little time responding to this Court's ruling. Less than three weeks after the Court enjoined enforcement of Iowa Code § 717A.3A, the legislature introduced new Ag-Gag legislation. The legislation sped through subcommittees, committees, and both chambers in eleven days.

Sponsors of the bills in both the House (Rep. Klein) and the Senate (Sen. Rozenboom) were clear that the new bills were a response to this Court striking down Iowa's first Ag-Gag law. Complaint ¶ 58.[5] Representative Klein, speaking in support of the bill he introduced, said he "will not stand by and allow [Iowa farmers] to be disparaged in the way they have been." *Id.* ¶ 56. Representative Bearinger stated that the law was necessary due to "extremism" and that it

[5] The Supreme Court has observed that in interpreting statutory language, where "no committee report discusses the provisions," contemporaneous statements made by a bill's sponsors may be "the only authoritative indications of [the legislature's] intent." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 527 (1982).

was "an important bill to protect our agricultural entities across the state of Iowa." *Id.* ¶ 60. Senator Rozenboom noted that agriculture contributes $38 million in economic output in Iowa and that "agriculture in Iowa deserves protection from those who would intentionally use deceptive practices to distort public perception of best practices to safely and responsibly produce food." *Id.* ¶ 61.

On March 14, 2019—one month after being enjoined from enforcing Iowa Code § 717A.3A and one day after the legislature sent the bill to her desk—Defendant Governor Reynolds signed into law Senate File 519, now codified at Iowa Code § 717A.3B. The bill, "deemed of immediate importance," took effect upon the Governor's signature.

IV. Like the First Law, the New Ag-Gag Law Prohibits Undercover Investigations that Cast Animal Agriculture and Puppy Mills in a Bad Light.

Iowa's original Ag-Gag law created two forms of agricultural production facility fraud: (1) "Obtain[ing] access to an agricultural production facility through false pretenses," Iowa Code § 717A.3A(1)(a); and (2) "Mak[ing] 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)(b).

The new Ag-Gag law follows the same structure but provides a slightly different gloss. It, too, contains an access prohibition, criminalizing "Us[ing] deception . . . on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gain[ing] access to the agricultural production facility, with the intent to cause physical or economic harm or other injury to the agricultural production

facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer." Iowa Code § 717A.3B(1)(a).

It also contains a provision prohibiting gaining (or arguably even maintaining) employment through deception. A person violates the statute when he or she "[u]ses deception . . . on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer." Iowa Code § 717A.3B(1)(b).

The primary difference between the old law and the new one is the added requirement in both subsections that the investigator act with the "intent to cause physical or economic harm or other injury to the agricultural production facility's operations . . . [and] business interest." The old law prohibited access by misrepresentation regardless of intent, Iowa Code § 717A.3A(1)(a), and it prohibited gaining employment by misrepresentation with an intent to conduct an "unauthorized act." *Id*. § 717A.3A(1)(b).

While the new applies a revised "intent" requirement to both the access and employment provisions, it does not truly narrow the law or save it from constitutional scrutiny. By criminalizing deception to gain access and employment whenever there is any intent to cause "*economic harm or other injury* to the agricultural production facility's . . . business interest" the law sweeps in those who would engage in undercover investigations intending to expose or document wrongdoing, which would result in reputational and economic damages from the public directing its business elsewhere. Iowa Code § 717A.3B(1)(a), (b) (emphasis added). Indeed, as explained in detail below, the types of investigations Plaintiffs ALDF, PETA, and

Bailing Out Benji conduct and on which all Plaintiffs rely are designed to inform the public about agricultural facilities' unethical and illegal conduct—thereby shaping the marketplace of ideas—which will foreseeably result in economic damage to the facility through boycotts and the like.

Another important difference between the old Ag-Gag law and the new one is the new law defines deception to include not only affirmative misstatements ("Creating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true," Iowa Code § 702.9(1)), but also omissions ("Failing to correct a false belief or impression as to the existence or nonexistence of a fact or condition which the actor previously has created or confirmed," Iowa Code § 702.9(2)). This addition further targets both undercover investigators, who can only carry out investigations by concealing or misrepresenting their affiliation with the investigating organization, and worker-whistleblowers, who fail to correct their employer's previously-true belief that the employee is not documenting conditions inside the facility.

The new statute's definition of "agricultural production facility" is unchanged, and includes not only factory farms and slaughterhouses, but also any "crop operation property" or any location "agricultural animals" are maintained, including exhibitions, markets, and even vehicles. Iowa Code § 717A.1(2)–(4), (5)(a). The law defines "agricultural animal" to include "[a]n animal that is maintained for its parts or products having commercial value," as are dogs bred for the commercial pet trade. *Id.* § 717A.1(1)(a); *see also id.* § 162.8 (vesting regulatory authority over commercial dog breeders in Iowa with the Iowa Department of Agriculture and Land Stewardship). Thus, like the old Ag-Gag law, the new law applies not only to factory farms, but also to "puppy mills," facilities that breed large numbers of dogs in inhumane

conditions for the pet trade. The new Ag-Gag law thus also targets Bailing Out Benji's undercover investigations into puppy mills.

As with the old law, in its intent and operation, the new Ag-Gag law prohibits undercover investigations at agricultural facilities because the use of "deception" (i.e., false pretenses, misrepresentations, and material omissions) is essential to conducting undercover journalism, labor organizing, and public interest investigations.

Argument

I. Plaintiffs Adequately Allege a First Amendment Violation.

A. The First Amendment Applies to the New Ag-Gag Law.

The State's primary argument distinguishing the new Ag-Gag law from the original, unconstitutional Ag-Gag law is that by requiring that a person use deception with the "intent to cause physical or economic harm or other injury," and that the deception pertain to a matter that would result in the facility denying the speaker access or employment, the law falls outside of the concerns of the First Amendment. State's Brief in Support of Motion to Dismiss, ECF No. 22, at 6–23 ("MTD Br."). The State might have a point if the statute were limited to those who act with an intent to cause "physical harm" such as property damage or physical sabotage, or if "economic harm" were properly cabined to theft of animals or trade secrets from the factory farm. But the new statute criminalizes the very same lies, made with the same intent, as the first unconstitutional statute—ones made with an intent to promote public discourse through the acquisition and publication of *truthful* information, which foreseeably causes economic injury in the form of boycotts or other business losses due to the exposure of an agricultural facility's practices. In this way, like its predecessor, the new Ag-Gag law directly criminalizes speech that lies at the core of the First Amendment's protections and that neither causes legally cognizable

harm to the listener nor produces material gain for the speaker. Moreover, the addition of what the State characterizes as a "materiality" requirement (the deception must be "of a material nature" (i.e., on a matter that "would reasonably result in a denial of access to" an agricultural facility)), does not place the law beyond the First Amendment's scrutiny.

1. *Alvarez* and *Wasden* Provide the Roadmap Defining Legally Cognizable Harm and Material Gain.

As in the prior Ag-Gag challenge, the key question is "whether false statements made in furtherance of undercover investigations, employment-based or otherwise, fit within one of the historic and traditional exceptions for protection from content-based restrictions" so as to place the speech outside the First Amendment. *Reynolds I*, 297 F. Supp. 3d at 921 (citing *Alvarez*, 567 U.S. at 718, 132 S.Ct. 2537). They do not, as *Alvarez* and *Animal Legal Defense Fund v. Wasden* illustrate, because the new Ag-Gag law's requirement that deception be made with an "intent to cause physical or economic harm or other injury" does not transform the lies proscribed by the statute into ones causing legally cognizable harm and conferring material gain to the investigator.

In *United States v. Alvarez*, the Supreme Court relied on the First Amendment to invalidate the conviction of a man who lied about having been awarded the Medal of Honor. 567 U.S. at 729–30. In striking down the Stolen Valor Act, the majority fractured into a plurality and concurrence; however, all six justices voting to invalidate the law agreed that there is no "general exception to the First Amendment for false statements." 567 U.S. at 718; *id*. at 730 (Breyer, J., concurring in the judgment). The lie at issue in *Alvarez* was indisputably 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 military community when its honors are diluted by those who falsely claim to hold them, *id*. at 716. Nonetheless, six Justices in *Alvarez* recognized that even a worthless, truth-impeding lie is protected by the First Amendment unless it causes an actual

harm to the deceived party. *Id*. at 719 (using the phrase "legally cognizable harm"); *id*. at 730 (Breyer, J., concurring in the judgment) (defining these as "speech-related harms").

Alvarez thus articulated a limiting principle for prohibiting lies—the government may substantially limit or perhaps prohibit false statements of fact only when those statements cause "legally cognizable harm[s]" such as "an invasion of privacy or the costs of vexatious litigation," *id*. at 719, that are "made for the purpose of material gain," such as when someone engages in fraud and secures a victim's money (similar to an unjust enrichment). *Id*. On this point both the concurrence and the plurality opinion are in agreement. Not every psychological or nominal harm is sufficient to justify a restriction on the constitutionally protected category of pure speech known as lies.

Though the *Alvarez* opinions did not further elaborate on the terms "legally cognizable harm," "speech-related harm," or "material gain," the Court's illustrations clarify their meaning. "Legally cognizable" contemplates injuries that would be recognized under the civil or criminal law. Thus, invasion of privacy is legally cognizable because other legal provisions protect privacy. Not all harms, however, are legally cognizable. A fraud victim may have a legally cognizable harm that a damages award can compensate, but she may not recover for the embarrassment from having been duped. The idea of "speech-related" harms suggests that the injury must be directly or proximately caused by the words themselves, as when a private person defames another. Finally, the concept of "material gain" seems to contemplate some form of undeserved, unjust enrichment, most probably referring to financial rewards.

Building on *Alvarez*, the Ninth Circuit struck down a provision of the Idaho Ag-Gag law that criminalized obtaining access to agricultural facilities by misrepresentation. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). Although the court upheld a provision that

prohibited obtaining employment at an animal agricultural facility through false pretenses with a specific intent to "cause economic or other injury" to the facility's operations—i.e., to cause direct and tangible harm—it applied an important and substantial narrowing construction. *Id.* at 1201. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" *id.* at 1202 (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc)), the court made it clear that it was construing the statute's provisions to exclude those who misrepresent themselves to gain employment and only intend to cause "reputational and publication" injuries. *Id.* Specifically, as the court explained, the fact that the statute "excludes 'less tangible damage' such as emotional distress indicates that reputational damages would not be considered 'an economic loss.'" *Id.*

Thus, for example, under *Wasden*, a person who lied to gain employment with the intent to engage in *physical* destruction of the agricultural operation's property could legitimately be prosecuted. *Id*. at 1202. In contrast, someone who lied to gain employment and merely intended to cause "reputational damages" would not because, according to the court, 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 Ann. § 19-5304). The statute broadly 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 Ann. § 19-5304(1)(a). The *Wasden* Court specifically cited this definition in finding that

the "reputational and publication" injuries that could flow from the plaintiffs' investigations would not result in liability under the Idaho law, salvaging it from First Amendment scrutiny. 878 F.3d at 1201. In the words of the Ninth Circuit, this statute's definition of "economic loss," "eliminate[d] its constitutional deficiencies." *Id.*

This narrowing construction is sensible insofar as it retains criminal penalties for persons who intend to gain employment in order to steal trade secrets, cause property damage, or otherwise engage in physical sabotage, while at the same time recognizing that misrepresentations to secure employment that are made in order to expose or document wrongdoing and that do not cause direct, tangible harms fall outside the scope of what the statute can constitutionally regulate.

Synthesizing *Alvarez* and *Wasden*, this Court previously observed that only those false statements "that cause 'specific or tangible' injuries" can constitutionally be proscribed, and that "the common thread through all these [constitutional] sanctions is the centrality of actual harm suffered by the recipient of the false speech." *Reynolds I*, 297 F. Supp. 3d at 921 (citing *Wasden,* 878 F.3d at 1194). The Court found Iowa's first Ag-Gag statute markedly distinct because its criminalization of lies "require[d] no likelihood of actual, tangible injury on the part of the recipient of false speech." *Id.* at 924. As for the prior Ag-Gag law's prohibition on lies facilitating employment, the Court highlighted the important limiting principles discussed above in *Wasden*: "Th[e] intent provision cabined the application of the Idaho statute so that it only criminalized the sort of false statements that the plurality in *Alvarez* recognized the government may target with content-based restrictions: those likely to cause material harm to others." *Id.* By contrast, to find that the first Ag-Gag law's employment provision "prohibits *no* speech protected by the First Amendment," the Court said it "would have to conclude that the reference

in *Alvarez* to offers of employment means that the First Amendment allows for government prosecution of all misrepresentations made to secure employment, whether material or not, and irrespective of any actual damage suffered by the employer." *Id.* at 925. This Court refused, because doing so would be antithetical to the "remainder of the Supreme Court's jurisprudence caution[ing] against the assumption of any such 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'" *Id.* (quoting *Alvarez*, 567 U.S. at 722). The same is true here.

2. The New Ag-Gag Law Criminalizes First Amendment Protected Speech.

i. The Intent Requirement Does Not Convert the Targeted Deception to Lies That Fall Outside the First Amendment.

Critically, despite Defendants' assertions to the contrary, Iowa Code § 717A.3B is not nearly as limited as the employment prohibition in the Idaho Ag-Gag law or as envisioned by *Alvarez*. It contains no such saving limitation that could cabin it to an intent to cause direct and tangible losses such as property damage. In fact, it explicitly does the opposite, going beyond intent to cause "physical" harm to include intent to cause "economic harm or other injury"—terms left undefined—to a facility's "business interest," among numerous other things.

Despite the Complaint detailing at length that the problem with the new law's intent requirement is the inclusion of reputational and publication harms that result from investigative exposés, Complaint ¶¶ 16, 69, 102, the State's motion to dismiss avoids the issue entirely. The State instead tries to divert attention, arguing that the law prohibits those who seek to "cause physical or economic damage;" "steal trade secrets or other business/operation information;" "obtain client or producer contact information in order to intimidate or persuade . . . clients [or] producers from contracting with the facility;" "interfere with the facility's bio-security protocols

in order to injure the facility;" and "release or remove any animals from the facility." MTD Br. at 27. If the statute was limited to these types of harms, there would be no need for this lawsuit. But it sweeps much more broadly, criminalizing precisely the speech necessary to carry out undercover investigations that shed a negative light on animal agricultural facilities and foreseeably result in reputational injuries to the investigated facility.

In fact, as with the first Ag-Gag law, criminalizing such undercover investigations that provide truthful information to the public was *the point* of the new law. All of the examples given by the State are garden variety theft and property crimes already addressed by existing criminal prohibitions.[6] But despite already having ample tools to deter fraud and property crime (including at agriculture facilities), after this Court struck down the first Ag-Gag law, Iowa lawmakers rushed to pass this law, deemed of immediate importance and taking effect upon the Governor's signature. Despite the clear legislative intent and the Complaint's focus on the statute's criminalization of an intent to cause economic and other injury to business interests, the State's brief is silent as to this aspect of the law. The silence is revealing.

Recording or other information-gathering for whistleblowing, even when done with the knowledge and intent that such whistleblowing could harm a facility's reputation or bottom line, does not materially injure an employer in any way *Alvarez* contemplated because those activities, without more, cause no direct, concrete damages to the employer. *See Wasden*, 878 F.3d at 1201; *Reynolds I*, 297 F. Supp. 3d at 922–23. Indeed, to accept that falsehoods that lead to disclosure of

[6] *See, e.g.*, Iowa Code §§ 717A.2 (prohibiting disrupting, destroying, or damaging property at an animal facility or exercising control over an animal at an animal facility); 717A.3 (prohibiting disrupting, destroying, or damaging property at a crop operation property); 717A.4 (prohibiting the use of pathogens to threaten animals or crops); 18 U.S. Code §§ 1832 (prohibiting theft of trade secrets); 43 (prohibiting damaging or causing the loss of any real or personal property, including animals or records, used by an animal enterprise).

information causing 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 report of less public import. The investigator whose deception leads to a story showing minimal environmental damage would likely escape prosecution (because the reputational injury would be *de minimis*), but the investigator who made the same misrepresentation and then went on to document graphic violence, a dangerous workplace, or environmental degradation inside the facility would face a serious threat of prosecution because the expansive public discourse it would bring about would produce more substantial reputational injury and economic blowback. That absurd result cannot be the law and is certainly inconsistent with the First Amendment's values.

When faced with the same scenario in the first Ag-Gag challenge, this Court observed that "an animal rights organization member could violate . . . the statute by obtaining access to a puppy mill auction by stating or implying that he or she was a breeder or pet broker, . . . surreptitiously take photographs or audio or video recordings," and then "subsequently make *true* statements, protected by the First Amendment, regarding what that individual saw or recorded, for example, in disclosure to the facility's customers, or in advocating legislation against puppy mills." *Reynolds I*, 297 F. Supp. 3d at 922–23. Assuming the investigator in this scenario intended to expose the puppy mill's conduct to the public and encourage customers not to patronize such an establishment, she would be liable under the new Ag-Gag law because she had "the intent to cause . . . economic harm or other injury." As the Court found then, this unjust

result illustrates why "[t]he First Amendment requires that [courts] protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).[7]

ii. Neither Does the Law's "Materiality" Requirement Erase Constitutional Protection.

Defendants further contend that the new Ag-Gag law's inclusion of what they characterize as a materiality requirement keeps the law's prohibition on speech from First Amendment review. MTD Br. at 17–18. Not so. The Court's reasonable focus on materiality, in the prior Ag-Gag challenge, was merely a recognition that constitutionally permissible sanctions on lies, like classic fraud statutes, typically include a materiality requirement. But this does not mean the converse is true: that whenever a statute criminalizes lies that could be characterized as material, the speech is akin to fraud and causes legally cognizable harm.

In other words, the fact that, if the agriculture facility knew that a job applicant was sent by PETA the employer would tell the applicant to take a hike, does not mean that the applicant's misrepresentation as to who sent him gives rise to the types of harms that place lies outside the First Amendment, particularly when the investigator intends only to release accurate information that has the foreseeable result of producing warranted reputational harms. As this Court previously acknowledged, 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)." *Reynolds I*, 297 F. Supp. 3d at 924. As Plaintiffs "allege

[7] The State also argues that cognizable harms flow from gaining access through deception because trespass claims can result in nominal damages. MTD Br. at 18, n. 8 & 9. This argument, too, was rejected in the last case. This Court found nominal damages are not the type of cognizable harm contemplated by *Alvarez* because "nominal damage is just that—damage in name only." *Reynolds I*, 297 F. Supp. 3d at 922.

that their investigators perform their jobs identically to 'bona fide' employees while also wearing hidden recording equipment," the Court found, "Defendants do not explain how the misrepresentations offered by such employees could effect a fraud, absent actual damages suffered by the employer." *Id.* (internal quotations and citations omitted). The investigators' intentions and behavior have not changed since Plaintiffs challenged the first law. 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. Complaint ¶¶ 11, 66–76.

In sum, while the new Ag-Gag statute is dressed up with intent and materiality requirements, the lies it targets, with laser focus, are the same ones that the first Ag-Gag statute unconstitutionally criminalized. The analysis should thus be no different.

iii. The New Ag-Gag Law Criminalizes Speech that Does Not Result in the Type of Material Gain Required by *Alvarez*.

The State also contends that the new Ag-Gag law is outside of First Amendment scrutiny because the false speech it prohibits result in a "material gain" to the speaker. MTD Br. At 19. Relying on the statement in *Alvarez* that "where false claims are made to effect a fraud or secure . . . offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment," *id*. (quoting *Alvarez*, 567 U.S. at 723), the State argues that the speech criminalized by both prohibitions of the new law "confers a material gain because the opportunity for a trespasser or 'false friend' employee to harm the agricultural production facility's interests is arguably increased substantially where the trespasser/employee obtains access to or employment with the facility[.]" *Id.*

First, this argument conflates the statute's separate prohibitions on deception to gain access and employment. The provision prohibiting deception to gain access contains no

requirement that the deceiver obtain an "offer of employment." If securing an "offer of employment" categorically placed deceptive speech outside the First Amendment (it does not), this argument would only work to save the statute's second prohibition, not the access prohibition. This Court rejected the State's same attempt at this conflation in the challenge to the first law. *Reynolds I*, 297 F. Supp. 3d at 923–24.

Second, in arguing that any deception that results in employment is outside the First Amendment, the State over-reads this language from *Alvarez*, repeating the failed argument it raised in seeking to defend Iowa's first Ag-Gag law. Although *Alvarez* used lies to gain "offers of employment" as an example of lies 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, using the lie to produce direct personal gain to the liar. *Id*. The plurality was merely illustrating its broader point that a lie that defrauds another, resulting in an undeserved material gain to the employee in the form of a job he is unqualified to perform, falls outside the First Amendment. As we have described above, the material gain requirement suggests a form of unjust enrichment.

By contrast, as this Court recognized in *Reynolds I* and as explained above, the undercover investigations in this case illustrate that not every fib or falsehood made to secure an offer of employment results in such a fraud. *Reynolds I*, 297 F. Supp. 3d at 924. This is true even if the investigator's lies are made with the intent to conduct an undercover investigation that could result in harm to the facility's reputation.

The investigative employees here are not unqualified fraudsters of the type *Alvarez* contemplated. They receive compensation from their employer not because of they made a misrepresentation to secure the position, but as a result of the work they perform, just like any

other employee. *See 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 result in material gain to the speaker as contemplated by *Alvarez*, as this Court already recognized. *Reynolds I*, 297 F. Supp. 3d at 925. Nothing about the new Ag-Gag law changes this conclusion.

B. Like the Old Law, the New Ag-Gag Law Criminalizes Speech, Not Conduct.

As it argued with the first Ag-Gag law, the State attempts to characterize the scope of the new law as prohibiting "conduct," not speech. MTD Br. at 19–20. The Court rejected this identical argument as to the old law: "Speech is necessarily implicated by § 717A.3A because 'one cannot violate § 717A.3A without engaging in speech.'" *Reynolds II*, 353 F. Supp. 3d at 821 (quoting *Reynolds I*, 297 F. Supp. 3d at 918). As with the first law, "[t]he speech implicated is false statements and misrepresentations." *Id*. This distinguishes the Ag-Gag laws from laws regulating physical access to or acquisition of property, such as those prohibiting breaking and entering, trespass, or theft of records. Just as with the first statute, "one cannot violate" § 717A.3B "without engaging in speech." *Reynolds I*, 297 F. Supp. 3d 901. The new law "thus implicates the First Amendment." *Id*.

C. There Is No Exemption to the First Amendment for Speech That Occurs on Private Property.

The State also attempts to resurrect two interrelated arguments from its defense of the original Ag-Gag law: that the law is one of general applicability and that First Amendment scrutiny is diminished because the law applies to speech on private property. The State presents these arguments by relying on the same stack of cases it relied on in defense of the original law—including, among others, *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Branzburg v. Hayes*,

408 U.S. 665 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Food Lion, Inc., v. Capital Cities/ABC, Inc*., 194 F.3d 505 (4th Cir. 1999); *Dietemann v. Time, Inc*., 449 F.2d 245 (9th Cir. 1971); *State v. Lacey*, 465 N.W.2d 537 (Iowa 1991); *Sanders v. Am. Broad Cos.*, 978 P.2d 67 (Cal. 1999); *Special Force Ministries v. WCCO Tel*., 584 N.W.2d 789 (Minn. Ct. App. 1998); and *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 598–99 (Iowa 1999).

This Court rejected these arguments when presented in the defense of the original law. There is no reason to treat them differently here. In denying the State's motion to dismiss the Plaintiffs' first challenge, 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." *Reynolds I*, 297 F. Supp at 920. It then knocked down the State's cases one by one: "*Food Lion* and *Dietmann* . . . 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*. *Barnicki*, *Branzburg*, *Hudgens*, *Lacey*, and *Special Force Ministries* "similarly stand for the point that generally applicable laws apply with full force to individuals who wish to engage in speech or expressive activity." *Id*. 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 537; *Special Force Ministries*, 584 N.W.2d at 793). As with the last 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 the Ag-Gag law directly targets speech.[8]

The State also briefs three district court cases that it did not present in the last challenge: *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). But they suffer the same flaws as the State's other cases; each involved a generally-applicable trespass tort that did not specifically target speech, not a criminal statute that cannot be violated unless one engages in speech (deception). *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 Federation*, the Court distinguished generally-applicable torts from Ag-Gag laws, 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) (citing *Wasden*, 878 F.3d at 1190).[9]

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[8] The Court's orders on the challenge to the original Ag-Gag law did not explicitly address the State's reliance on *Sanders v. Am. Broad. Companies, Inc.*, 978 P.2d 67—presumably because it is irrelevant. *Sanders* 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.").

[9] The State also presents an argument related to the protections of the Iowa Constitution. MTD Br. At 21. The Iowa Constitution's protection of property rights is irrelevant in this case because Plaintiffs bring their claims speech claims under 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.

Finally, the State spends five pages of briefing 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*"). MTD Br. at 13–15; 20–21. Far from supporting the State's contention, the Tenth Circuit decision the State ignores directly rejects it. 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. *Western Watersheds II*, 869 F.3d at 165–66.

The Court went on to hold that the district court erred in holding the First Amendment did not apply on private property by incorrectly extending the case law on generally-applicable statutes. 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 § 717A.3B, the First Amendment interests and protections here are even stronger.

There is nothing different in the structure of the new law or the State's presentation of its argument on these points to differentiate the new Ag-Gag law from the prior one. As before, criminal liability under the new 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.3B(1)(a)–(b). Speech is the integral component of the criminal offense. This distinguishes the statute from generally-applicable laws regulating physical access to or protecting property, such as laws prohibiting breaking and entering, trespass, or theft. Thus, the Court should treat these same arguments, now made in support of the second Ag-Gag law, no differently than it did when they were made in support of the first.

D. The State Does Not Contend the New Ag-Gag Law is Content-Neutral.

The State argues that the statute is not viewpoint-based but says nothing about content-discrimination. MTD Br. at 31–34. Plaintiff's second cause of action is based on both content- and viewpoint-discrimination. Complaint ¶¶ 130–141. Here, because the State declined to address content discrimination, a dismissal of the second cause of action on the merits is not appropriate at this stage of litigation. *See* Fed. R. Civ. P. 12(g)(2) (barring successive motions to dismiss except in certain enumerated circumstances). Stated differently, this Court need not address the viewpoint discrimination theory raised in the State's motion at this time because the content-based claim survives a motion to dismiss on independent grounds.[10]

[10] Plaintiffs do address the merits of their content and viewpoint discrimination claims in connection with their motion for a preliminary injunction.

E. The State Does Not Contend That the New Ag-Gag Law Satisfies Strict or Intermediate Scrutiny.

As with its attempt to dismiss Plaintiffs' challenge to the first Ag-Gag law, the State does not "move to dismiss on the grounds that § 717A.3[B] satisfies the appropriate level of constitutional scrutiny for content-based restrictions or is not unconstitutionally overbroad." *Reynolds I*, 297 F. Supp. at 925. As a result, Plaintiffs need not demonstrate that the statute fails constitutional scrutiny to defeat the State's motion to dismiss as they have already adequately pled that the law fails such scrutiny. Plaintiffs do address scrutiny in connection with their motion for a preliminary injunction.

II. Plaintiffs Adequately Allege That the New Ag-Gag Law Violates Their First Amendment Rights Because It Is Unconstitutionally Overbroad.

The overbreadth doctrine requires that laws be invalidated when they restrict significantly more speech than the First Amendment allows. *United States v. Stevens*, 559 U.S. 460, 473 (2010); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002). Criminal statutes are especially dangerous from a First Amendment perspective because of their potential to chill important expression and must be examined particularly carefully for overbreadth. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

The first step in overbreadth analysis is to assess the breadth of the challenged statute. *Stevens*, 559 U.S. at 474. The second step is to determine whether the statute, as construed by the Court, prohibits a substantial amount of conduct or speech protected by the First Amendment. *United States v. Williams*, 553 U.S. 285, 297 (2008).

The State's argument against overbreadth rehashes its assertions that the statute does not implicate the First Amendment at all and prohibits only conduct, not speech. MTD Br. at 25–26. If the State is correct that the Ag-Gag law reaches conduct, not speech, or that the law does not

implicate the First Amendment at all, then of course the law is not overbroad. But if investigative lies are pure speech, or if acts of whistleblowing like those engaged in by journalists and activists are speech-related activities implicating the First Amendment, then the law is necessarily overbroad.

The State also argues that even if the law does criminalize protected speech, that criminalization is not substantial in relation to the law's plainly legitimate sweep. *Id*. at 26–27. The State presents the statute's legitimate sweep as criminalizing lies made to, among other things, physically damage a facility, steal trade secrets, interfere with the bio-security of a facility, or release animals from the facility. *Id*. at 27.

But this misframes the issue in two different ways. First, the State presents no evidence that any of its examples are actual problems that Iowa faces—that they are anything but imagined, post-hoc attempts to defend the law. Instead, the "problem" Iowa faced was that of undercover investigations of animal agricultural facilities that resulted in harm to facilities' reputations and business interests. *See*, *e.g.*, Complaint ¶¶ 8, 12, 23, 26. These were what the State was trying to criminalize with the first Ag-Gag law. *See Reynolds II*, 353 F. Supp. 3d at 817 (noting legislature considered 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"). The timing of the new Ag-Gag law—introduced less than three weeks after this Court enjoined the first law, and rushed to the Governor's desk in less than two weeks—demonstrates that the State's interests in passing the new law were unchanged: to criminalize undercover investigations.

Second, each of the examples the State presents as the plainly legitimate sweep of the new law are already criminalized under Iowa law. *See, e.g.*, Iowa Code §§ 717A.2 (prohibiting disrupting, destroying, or damaging property at an animal facility or exercising control over an animal at an animal facility); 717A.3 (prohibiting disrupting, destroying, or damaging property at a crop operation property); 717A.4 (prohibiting the use of pathogens to threaten animals or crops); 18 U.S. Code §§ 1832 (prohibiting theft of trade secrets); 43 (prohibiting damaging or causing the loss of any real or personal property, including animals or records, used by an animal enterprise).

Moreover, while designed to target and chill the speech of animal-protection activists, the new Ag-Gag law also chills and criminalizes a plethora of protected speech that is not even related to animal welfare, including that concerning worker safety, food safety, labor laws, and other types of agricultural industry misconduct. It also chills the speech of any person or group that would seek to investigate an agricultural facility in a similar manner, including journalists, union workers seeking to organize a workforce, or any person merely concerned about the conditions under which food is processed.

The State defends against one of these examples by arguing that "it is not clear that [the law] would apply to labor organizing activities because it is unlikely that an intent to engage in statutorily authorized conduct will satisfy the intent to harm element under the statutes," MTD Br. at 25, but presents no further explanation or case law to support this twice-hedged contention.

Based on a plain text reading of Iowa Code § 717A.3B, prospective employees who apply for a job with the intent to promote unionization or to document unsafe working conditions are targets for prosecution. Unionization may directly result in an "economic harm or other injury" to the facility's "operations" and "business interest" because the worker protections and

increased wages that unions seek to provide come at the expense of a facility's bottom line. Complaints to state and federal regulators are the same: defending against them or addressing potential violations cost the facility money, i.e., cause "economic harm or other injury" to the facility's "operations" and "business interest."

The State's final argument against Plaintiffs' overbreadth claim is to assert that the new Ag-Gag law's inclusion of "other injury," *in addition to* "physical or economic harm," does not render the statute overbroad. MTD Br. at 28–29. The State attempts to define "other injury" but only cryptically offers that it refers "to a person's intent to cause some 'damage' or 'violat[e] another's rights' apart from a specific intent to cause 'physical or economic harm.''" *Id*. at 28 (citing *Injury Definition*, Merriam-Webster). This definition hardly provides clarity.

The State contends that an example of an intent to cause "other injury" would be an intent to release livestock from an agricultural facility. *Id*. But for better or worse, animals are considered property under the law. *Hamby v. Samson*, 105 Iowa 112, 115 (Iowa 1898). If someone makes a misrepresentation to gain access to or employment at an animal agricultural facility to steal its machinery, a court would uncontroversially find that the person intended "economic harm" to the facility. The same reasoning applies to an intent to release animals from a facility. It is an economic harm because it deprives the owner of valuable property.

The State's tortured example is an attempt to avoid the obvious: that "other injury" is included to provide a muddy means of capturing the types of reputational and publication injuries that result from undercover investigations without making it obvious to the courts. The State seeks to punish investigators who have no intent to cause property damages, no intent to release animals, and no intent to steal trade secrets, but who simply seek to expose animal abuse,

dangerous workplaces, unsafe food production, labor misconduct, and other types of agricultural industry misdeeds. Therein lies the overbreadth.

Because the new Ag-Gag statute criminalizes a substantial amount of protected speech and conduct, Plaintiffs' have stated a viable claim that the law is overbroad and the State's motion to dismiss the Plaintiffs' first cause of action should be denied.

III. Plaintiffs Adequately Allege That the Ag-Gag Law Is Void for Vagueness.

Plaintiffs have adequately alleged that the new Ag-Gag law is void for vagueness. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (2000)). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306.

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Courts demand greater clarity from criminal prohibitions than law providing civil penalties. *See Reno v. ACLU*, 521 U.S. 844, 873 (1997) (criminal penalties provide "increased deterrent effect, coupled with the 'risk of discriminatory enforcement' . . . [than do] civil regulation[s]"); *Vill. of Hoffman Estates*, 455 U.S. at 498–99 ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." (footnote omitted)).

The purpose of facial challenges for vagueness is to prevent any chilling effect that imprecise or overly inclusive prohibitions may have on the exercise of protected speech by non-parties. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). In addition, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (footnotes omitted). That concern is exacerbated where, as here, the government has demonstrated acute hostility to the Plaintiffs' views and their attempts to inform the public.

The new Ag-Gag law's prohibition on using deception to gain access or employment with an intent to cause "other injury," as distinct from physical or economic harm, fails to provide adequate notice to individuals of what is speech or conduct is prohibited. The State does not offer any guidance as to what "other injury" is meant to include, apart from the example of releasing animals. *See* State's MTD Br. at 27. But as discussed above, releasing animals would already constitute an economic injury. *See supra*, Section II.

What is an "other injury" that is separate and apart from physical or economic harm? Would harm to a facility's reputation caused by a damning exposé be an "other injury?" Would the nominal damage of having an invited guest or employee turn out to be a 'false friend' qualify as "other injury?" Would a facility owner's psychological distress of knowing an undercover employee filmed workers abusing animals at a facility constitute "other injury?" The statute offers no clarity. And the fact that there is not an immediately obvious answer to any of these questions demonstrates the vagueness of the "other injury" provision.

The legislature appears to have included the "other injury" as a catchall to sweep in any type of arguable "harm" that might result from an undercover investigation. But the provision is

so unclear that persons of common intelligence must necessarily guess as to its meaning. It gives government officials unfettered discretion in its enforcement. That vagueness chills speech: unclear as to the scope of the imprecise prohibition, potential speakers will avoid speaking at all out of fear of prosecution.

IV. Severability and Narrowing Constructions Are Ultimate Merits Issues and Do Not Defeat Plaintiffs' Pleading.

The State repeatedly asks the Court to sever any unconstitutional applications of the new Iowa Ag-Gag law and leave what remains intact, or to apply narrowing constructions to save it from its constitutional infirmities. State's MTD Br. at 23 n. 12, 25, 29, 31. This request might be well-taken. For example, if the statute only covered misrepresentations made with the intent to cause physical damage to an animal agricultural facility, it would present far fewer constitutional problems.

But severability and narrowing constructions are merits issues. Whether some portion of the new Ag-Gag law might survive if divorced from other provisions says nothing about whether Plaintiffs have stated a claim that the currently-unsevered and -unnarrowed law violates the First and Fourteenth Amendments. Questions of severability and narrowing constructions can and should wait. *See Covenant Media of Ill., L.L.C. v. City of Des Plaines*, 391 F. Supp. 2d 682, 694 (N.D. Ill. 2005) (declining to address city's severability arguments on a motion to dismiss and "defer[ing] any decision regarding severability until there is a final determination as to the constitutionality of all the challenged provisions").

Conclusion

Plaintiffs alleged that the new Iowa Ag-Gag law violates the First Amendment because it criminalizes false speech that is entitled to First Amendment protection. Plaintiffs also allege that the statute is overbroad and impermissibly vague.

Therefore, this Court should deny the State's Motion to Dismiss in its entirety and, for the reasons stated in support of Plaintiffs' Cross-Motion for a Preliminary Injunction, preliminarily enjoin the Iowa Ag-Gag law's enforcement.

Dated this 19th day of July, 2019

/s/ *Matthew Strugar*
Matthew Strugar (*Pro Hac Vice)*
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com

Rita Bettis Austen, AT0011558
ACLU OF IOWA FOUNDATION, INC.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515.243.3988
Fax: 515.243.8506
Email: Rita.Bettis@aclu-ia.org

Matthew Liebman (*Pro Hac Vice*)
Kelsey Eberly (*Pro Hac Vice*)
Cristina Stella (*Pro Hac Vice*)
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533, ext. 1028
mliebman@aldf.org
keberly@aldf.org
cstella@aldf.org

Professor Alan Chen (*Pro Hac Vice*)
University of Denver
Sturm College of Law
2255 E. Evans Avenue Denver, CO 80208
(303) 871-66283
achen@law.du.edu

Professor Justin Marceau, (*Pro Hac Vice*)
Of Counsel, Animal Legal Defense Fund
University of Denver

Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

David S. Muraskin (*Pro Hac Vice)*
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net

Attorneys for Plaintiffs

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: July 19, 2019

/s/_Matthew Strugar____________
Matthew Strugar