UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANIMAL LEGAL DEFENSE FUND, **IOWA CITIZENS FOR COMMUNITY IMPROVEMENT**, **BAILING OUT BENJI, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.**, and **CENTER FOR FOOD SAFETY** Plaintiffs, v. **KIMBERLY K. REYNOLDS**, in her official capacity as Governor of Iowa, **TOM MILLER**, in his official capacity as Attorney General of Iowa, and **BRUCE E. SWANSON**, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	**CASE NO. 4:17-cv-362** **RESISTANCE TO 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"), by and through their undersigned attorneys, and hereby resist 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 Bruce Swanson, in his official capacity as Montgomery County, Iowa County Attorney (collectively, "the State"). In support thereof, Plaintiffs state as follows:

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Factual Background

In 1904, author and investigative journalist Upton Sinclair obtained work at Chicago's slaughterhouses under the false pretense of being a traditional employee and with the purpose of exposing the conditions within. THE JUNGLE, Sinclair's account of the six months he worked in those slaughterhouses, became a national sensation, detailing rampant unfair labor practices, cruelty to animals, and unsanitary conditions. Public pressure generated in response to THE JUNGLE led to the enactment of the Federal Meat Inspection Act and the Pure Food and Drug Act, as well as the establishment of the agency that became the modern-day Food and Drug Administration. In the century since Sinclair published THE JUNGLE, exposés of industrial animal agriculture have continued to spur enforcement, legislative reform, and debate. In response, the animal agriculture industry began to push legislative efforts to criminalize such investigations.

I. Undercover Investigations of Animal Agriculture Expose Inhumane and Unsafe Practices.

In recent years, journalists and animal protection advocates have continued Sinclair's legacy, conducting more than 80 undercover investigations at factory farms in the United States. Compl. ¶ 3. These undercover investigations of animal agriculture facilities have exposed horrific animal suffering and led to major enforcement actions and legal reforms, including food safety recalls, citations for environmental and labor violations, plant closures, and criminal animal cruelty convictions. *Id*. Using an undercover, employment-based investigation, Plaintiff PETA exposed workers at a Hormel Foods supplier in Iowa beating pigs with metal rods and workers sticking clothespins into pigs' eyes and faces, and a supervisor 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." Compl. ¶ 4. Another investigation by Plaintiff PETA revealed horrific treatment of cows at an Iowa slaughterhouse, some of whom remained conscious for as long as two minutes after their throats had been slit. Compl. ¶ 5. These and other investigations have led to thousands of news stories and the subsequent economic effects that follow such negative publicity. Compl. ¶ 3.

II. The Animal Agriculture Industry Responded by Pushing Legislation to Criminalize Investigations.

The animal agriculture industry's response to this negative publicity has been to seek government protection from adverse publicity by pushing legislation that criminalizes such undercover investigations. Compl. ¶ 1. 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). In addition to Iowa, eight other states—Kansas, Montana, North Dakota, Utah, Missouri, Idaho, North Carolina, and Arkansas—passed similar laws.

Iowa enacted its Ag-Gag law in response to a major factory farm investigation at Iowa Select Farms, which revealed workers hurling piglets onto a concrete floor and pigs with open sores who received no treatment, along with other horrors. Compl. ¶ 62; Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC News, June 29, 2011, http://abcn.ws/2luiOsP. The Iowa legislators who passed the law were clear that the law was intended to protect the commercial agricultural industry from critical speech and "make producers feel more comfortable." Compl. ¶ 51 (then-State Senate President Jack Kibbie). Then-Senator Tom Rielly defended the law by stating that animal activists "want to hurt an important

part of our economy . . . . These people don't want us to have eggs; they don't want people to eat meat . . . . What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name." Compl. ¶ 52. The late Senator Joe Seng stated that the law was passed to "protect agriculture .. [and] not have any subversive acts to bring down an industry," Compl. ¶ 54, that the law was "passed mainly for protection of an industry that is dedicated to actually feeding the world in the next 25 years," Compl. ¶ 55, and that it is his "job as Ag Chair to support agriculture," Compl. ¶ 56. A spokesman for the Governor told a newspaper that the governor "believes undercover filming is a problem that should be addressed." Compl. ¶ 53.

As enacted, the Ag-Gag statute, codified at Iowa Code § 717A.3A, criminalizes "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 has the effect of criminalizing undercover investigative activities targeting agricultural operations. Compl. ¶ 9. It requires journalists and investigators to disclose that they seek to engage in an undercover investigation as part of the employment process, eliminating any possibility that they will be permitted access to these facilities. *Id*.

The Ag-Gag statute silences Plaintiffs by effectively criminalizing any investigation strategy that would reveal the conditions inside an animal production facility. ALDF, CCI, Bailing out Benji, and PETA each conduct investigations in furtherance of their missions. Compl. ¶¶ 26-29. PETA regularly conducts these investigations at factory farms and slaughtering facilities nationwide and has conducted numerous investigations in Iowa. Compl. ¶ 29. Similarly,

ALDF has conducted such investigations nationwide and seeks to conduct such an investigation in Iowa. Compl. ¶ 26. CCI engages thousands of members, many of whom work at agricultural facilities, but CCI refrains from engaging in undercover investigation tactics out of fear of criminal exposure under the law. Compl. ¶ 27. Bailing Out Benji previously conduct numerous investigations in Iowa's puppy mill industry, but now refrains out of fear of the Ag-Gag statute. Compl. ¶ 28.

III. Federal Courts Struck Down or Severely Limited Similar State Statutes.

A. The Idaho Ag-Gag Statute.

In 2014, in response to an employment-based undercover investigation of a large-scale Idaho dairy, Idaho enacted its Ag-Gag law, codified at Idaho Code Ann. § 18-7042. The Idaho law applies only to "agricultural production facilit[ies]," Idaho Code Ann. § 18-7042(2)(b), and criminalized non-employees "enter[ing] an agricultural production facility by . . . misrepresentation," *id.* § (a), or "obtain[ing] employment with an agricultural production facility by . . . misrepresentation with the intent to cause economic or other injury to the facility's operations[.]" *Id.* § (1)(c). Like the Iowa law, a violation of the Idaho Ag-Gag was a misdemeanor. *Id.* § (3); Iowa Code § 717A.3A(2).

ALDF, PETA, and CFS, along with a coalition of other plaintiffs, brought a pre-enforcement challenge to the Idaho law, alleging the statute violated the First and Fourteenth Amendments. Idaho moved to dismiss the lawsuit based on an alleged failure to state First Amendment or Equal Protection claims. The court denied the motion on all relevant aspects. *Animal Legal Def. Fund v. Otter*, 44 F.Supp.3d 1009 (D. Idaho 2014). The district court subsequently found that the Idaho Ag-Gag law violated the First and Fourteenth Amendments,

granted summary judgment to the plaintiffs, and enjoined the law's enforcement. *Animal Legal Def. Fund v. Otter*, 118 F.Supp.3d 1195, 1200 (D. Idaho 2015).

On appeal, the Ninth Circuit affirmed in part and reversed in part. *Animal Legal Def. Fund v. Wasden*, -- F.3d --, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018) ("*Wasden*"). Specifically, the Ninth Circuit found that the statute's prohibition on gaining access to an agricultural facility through misrepresentation criminalized constitutionally protected speech. *Id*. at *6. Relying on the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709, 722-23 (2012) (plurality opinion), invalidating the Stolen Valor Act, 18 U.S.C. § 704—which criminalized false claims that the speaker had received a Congressional Medal of Honor without any element requiring the government to show the lie was made for the purpose of achieving any material gain—the Ninth Circuit held that lies are constitutionally protected, so long as they do not cause an otherwise legally cognizable harm. *Wasden*, 2018 WL 280905 at *6. "The hazard" of a prohibition on gaining access by misrepresentation "is that it criminalizes innocent behavior, that the overbreadth of [that prohibition] is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists." *Id*. An entry by misrepresentation "alone does not constitute a material gain, and without more, the lie is pure speech." *Id*. at *7.

Because the access provision restricted pure speech, the Ninth Circuit subjected it to strict scrutiny under the First Amendment, which it did not survive. *Id*. at *8-*9. Addressing Idaho's asserted interest in protecting against trespasses, the Ninth Circuit noted that trespassing was already a crime in Idaho and "as a number of the legislators made clear and the [animal agriculture] lobby underscored, the statute was intended to quash investigative reporting on agricultural production facilities," making the statute "even more problematic." *Id*. at *9. "The focus of the statute to avoid the 'court of public opinion' and treatment of investigative videos as

'blackmail' cannot be squared with a content-neutral trespass law." *Id*. "It is troubling that criminalization of these misrepresentations opens the door to selective prosecutions—for example, pursuing the case of a journalist who produces a 60 Minutes segment about animal cruelty versus letting the misrepresentation go unchecked in the case of [a] teenager [who obtains a restaurant reservation in his mother's name]." *Id*. The court found that the breadth of the prohibition on access by misrepresentation "is so broad that it gives rise to suspicion that it may have been enacted with an impermissible purpose." *Id*. (citing Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 455 (1996)). While the Ninth Circuit determined that strict scrutiny was appropriate under *Alvarez*, it noted that the prohibition on access by misrepresentation would fail intermediate scrutiny as well. *Id*.

Reviewing the Idaho Ag-Gag statute's section prohibiting gaining employment by misrepresentation with the intent to cause economic injury, the Ninth Circuit upheld the provision, but only after applying an important narrowing construction. *Id*. at *12-*13. The court found that the section's additional element requiring an intent to injure provides a "clear limitation" that "cabins the prohibition's scope" and takes the prohibition outside of the scope of lies protected by *Alvarez*. *Id*. at *12. Thus, for example, 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 under Idaho's employment misrepresentation provision. But in construing the employment provision's "economic injury" requirement, Idaho Code Ann. § 18-7042(1)(c), together with the statute's provision for restitution for "economic loss," *id*. § (4) (providing for restitution pursuant to Idaho Code § 19-5304); Idaho Code § 19-5304, the Court found that the injury a potential employee intends to cause must be direct, tangible harms—such

as the value of destroyed property or medical expenses—and not the type of "reputational damages" that flow from the exposés typical of employment-based undercover investigations. *Wasden*, 2018 WL 280905 at *12. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" the Ninth Circuit construed the employment subsection to exclude those who misrepresent themselves to gain employment who only intend to cause "reputational and publication" injuries. *Id*. (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc)).

Addressing the Equal Protection Clause challenge, the Ninth Circuit found that "animus toward particular speech by reporters and activists" triggered "searching scrutiny," *id*. at *11, but the employment prohibition's intent-to-injure requirement still saved that section of the law because the state had "a legitimate government purpose" in prohibiting access "that may lead to *destruction* or *serious harm*. *Id*. at *13 (emphasis added).[1]

B. The Utah Ag-Gag Statute.

Utah introduced its own Ag-Gag statute less than month after Iowa passed its version. Utah Code § 76-6-112. Like both Iowa and Idaho's Ag-Gags, the Utah law criminalized "obtain[ing] access to an agricultural operation under false pretenses." *Id*. § (2)(b).[2]

ALDF and PETA, along with a coalition of other plaintiffs, brought a pre-enforcement challenge to the Utah law, alleging the statute violated the First and Fourteenth Amendments. As

[1] The court also recognized that Idaho's prohibition on recording the operation of an animal agriculture facility was a prohibition on speech, *Wasden*, 2018 WL 280905 at *13, that the prohibition was content-based, *id*. at *14, both under- and over-inclusive, and failed strict scrutiny. *Id*. at *15.

[2] Like Idaho's (but not Iowa's) law, the Utah Ag-Gag also prohibited the type of audiovisual recording that is typical of undercover investigations at agricultural facilities. *Id*. § (2)(a), (c), (d).

Iowa does here, the State moved to dismiss, claiming that the plaintiffs failed to allege standing or an Equal Protection violation. *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1199 (D. Utah 2017) ("*Herbert*"). The court denied the motion in a single-page order. See *Animal Legal Def. Fund v. Herbert*, 13-cv-00679-RJS, Dkt. #53 (Aug. 8, 2014).

On cross-motions for summary judgment, the district court found that the plaintiffs had standing to bring their challenge and that the Utah Ag-Gag law failed strict scrutiny under a First Amendment analysis. *Herbert*, 263 F.Supp.3d at 1199-213. As to standing, that Court noted that ALDF and PETA "wish to conduct operations at agricultural facilities in Utah . . . [b]ut they presently have no intention to do so because they fear Utah may prosecute them." *Id*. at 1200. Much like Iowa's standing arguments in this action, Utah argued that the plaintiffs did not have standing because they did "not show[] they have any concrete plans to actually violate the law." *Id*. But, the district court found, "that is not what the law requires." *Id*. Instead, the court found, "to establish standing to sue based on a chilling effect on speech, a plaintiff must demonstrate only 'a present desire, though no specific plans, to engage in such speech,'" which the plaintiffs had done. *Id*. (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006)).

As to the First Amendment arguments, the court found that the First Amendment applied to the Utah's Ag-Gag statute's lying provision because the lies prohibited by the statute did not cause legally cognizable harm, required under *Alvarez*. Conducting a detailed survey of the caselaw, the court found that not every lie used to obtain access to private property results in a trespassory harm: "the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has

occurred)." *Id*. at 1203 (internal citations omitted). "In other words, … lying to gain entry, without more, does not itself constitute trespass." *Id*.

The court recognized that even in the context of obtaining employment, a variety of lies do not result in any cognizable harm to the employer, including "for example, an applicant's false statement during a job interview that he is a born-again Christian, that he is married with kids, that he is a fan of the local sports team … [, and] putting a local address on a resume when the applicant is actually applying from out of town." *Id*.

After determining that the First Amendment applied, the court surveyed the caselaw to demonstrate that "in the wake of *Alvarez*, lower courts have generally applied strict scrutiny to laws implicating lies" and determined that "[t]his approach makes sense." *Id*. at 1210. Because "enforcement authorities [must] examine the content of the message that is conveyed to determine whether a violation has occurred,'" the lying prohibition was content-based, making strict scrutiny appropriate. *Id*. (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014)).

The court concluded that the Utah Ag-Gag statute failed strict scrutiny. *Id*. at 1211-13. The court first noted that "it is not clear that [the state's asserted interests] were the actual reasons motivating the Act," noting the legislators' statements of purpose and animus against animal protection advocates. *Id*. at 1212. But even assuming the interests the state defended the law on were the actual interests that motivated the law's passage, that Ag-Gag law was not narrowly tailored to those interests. *Id*. at 1212-13. The law was both over-inclusive, leaving untouched "the employee who lies on her job application but otherwise performs her job admirably, [while] it criminalizes the most diligent well-trained undercover employees." *Id*. at 1212-13. The law was also under-inclusive, doing nothing to address "the exact same allegedly

harmful conduct when undertaken by anyone other than an undercover investigator." *Id.* at 1213.[3]

Because the Utah Ag-Gag law failed strict scrutiny under the First Amendment analysis, the Court found no need to address the plaintiffs' Equal Protection claim, granted summary judgment for the plaintiffs, and enjoined the law. *Id.* The state did not appeal.

Legal Standard

In reviewing a motion to dismiss, the Court should accept "well-pleaded allegations in the Complaint as true" and draw "all reasonable inferences in [Plaintiffs'] favor." *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014). Moreover, in assessing the State's facial Fed. R. Civ. P. 12(b)(1) standing attack, the Court should accept the material allegations in the Complaint as true and draw all inferences in Plaintiffs' favor. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).

Argument

I. Plaintiffs Allege Sufficient Injuries for Standing Purposes.

As discussed in detail below, each of the Plaintiffs has standing: they have refrained from engaging in constitutionally-protected expressive activity because of a credible threat of prosecution under the statute; and have also suffered economic injuries by diverting organizational resources on account of the Ag-Gag statute. Each of these injuries is directly caused by the Ag-Gag statute, and were the law struck down, each of these injuries would be redressed.

[3] Like the Ninth Circuit in the Idaho Ag-Gag case, the Utah district court also struck down the Utah Ag-Gag's prohibition on certain forms of audiovisual recording, finding that recording receives First Amendment protection and the prohibition failed strict scrutiny. *Id.* at 1206-13.

A. Plaintiffs Adequately Allege Pre-Enforcement Standing Based on a Credible Threat of Prosecution.

1. The Chill from a Credible Threat of Prosecution Is an Injury.

To establish standing, Plaintiffs need only demonstrate a credible threat of prosecution under Iowa's Ag-Gag law. The Supreme Court has long held that "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Rather than require plaintiffs to risk arrest to challenge a statute that encumbers their constitutional rights, the Supreme Court has established a "credible threat of prosecution" standard. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). Under this standard, plaintiffs have standing when they have (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute," and (2) that "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("*SBA List*"); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 625-30 (8th Cir. 2011) ("*281 Care Comm. I*"); *281 Care Comm. v. Arneson*, 766 F.3d 774, 781 (8th Cir. 2014) ("*281 Care Comm. II*").

Eighth Circuit precedent is in accord, particularly when the plaintiffs' First Amendment rights are at stake. In *International Association of Firefighters of St. Louis v. City of Ferguson*, the Eighth Circuit explained that "certainty of injury is not necessary [to show an injury in fact], at least in the First Amendment context." 283 F.3d 969, 975 (8th Cir. 2002). The Court explained that one is not required to "undertake a prohibited activity, and risk the subsequent [consequences], in order to test the validity of the threatened application of [a law]." *Id.* Rather, a person can be "injured by having to give up, or hesitating to exercise, [their] First Amendment

rights. . . ." *Id.* at 973. *See also 281 Care Comm. I*, 638 F.3d at 627-28 (holding that an individual only needs to demonstrate an intent to engage in protected speech and a "credible threat of prosecution sufficient to support a claim of objectively reasonable chill" to establish an injury in fact for purposes of a First Amendment challenge to a state statute).

Plaintiffs' allegations establish a credible threat of prosecution that chills their speech. Applying the First Amendment pre-enforcement test to the Complaint's allegations leaves no doubt that Plaintiffs have standing: they allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute," and (2) that "there exists a credible threat of prosecution thereunder." *SBA List*, 134 S. Ct. at 2342.

First, Plaintiffs' Complaint alleges their intention to conduct investigations that would violate the Ag-Gag statute. ALDF alleges that it "has a concrete desire to engage in speech and expressive conduct that violate the Ag-Gag statute," Compl. ¶ 29, "a specific interest in agricultural investigations in Iowa," Compl. ¶ 84, and "would like to conduct an investigation at an agricultural production facility in Iowa, has conducted animal welfare investigations in Iowa before, and has a professional working relationship with a licensed private investigator in Iowa." Compl. ¶ 26. Specifically, "ALDF has identified agricultural production facilities where it would seek to conduct undercover, employment-based investigations, but it has not pursued employment at those facilities due to its reasonable fear of prosecution under the Ag-Gag law." Compl. ¶ 91. ALDF has not done so only "due to its reasonable fear of prosecution under the Ag-Gag law." Compl. ¶ 91. The Complaint also details Iowa's unique role in animal agriculture, underscoring the injury to ALDF and other Plaintiffs in stifling their ability to investigate such

facilities. Compl. ¶¶ 84-88 (detailing Iowa's role as the country's largest producer of eggs as well as pigs raised for meat).[4]

Likewise, PETA "has a concrete desire to engage in speech and expressive conduct that violate the Ag-Gag statute," Compl. ¶ 19, and "is also interested and willing to conduct an investigation in Iowa but for the threat of criminal prosecution under" the Ag-Gag statute. Compl. ¶ 29. "[A]t least 15 whistle-blowers who have contacted PETA alleging cruel or inhumane treatment of animals at Iowa agricultural facilities, including pig farms, chicken farms, egg farms, dairy farms, fur farms, and cow slaughterhouses" since the passage of the Ag-Gag statute. Compl. ¶ 92. "Because of the threat of criminal liability under the Ag-Gag law, PETA was unable to conduct an employment-based investigation at any of these facilities." Compl. ¶ 92. "Specifically, PETA has conducted such investigations in Iowa before the passage of the Ag-Gag and is interested in conducting an employment-based undercover investigation in Montgomery County following PETA's receipt of a whistleblower report of animal mistreatment at a Montgomery-based egg farm. PETA would attempt to conduct an employment-based undercover investigation at the Montgomery County facility *but for the Ag-Gag statute*." Compl. ¶ 29 (emphasis added).

Iowa Citizens for Community Improvement (CCI) has more than 4,000 members in addition to 17,000 supporters, many of whom "are workers in agricultural facilities, through

[4] Because ALDF has standing to challenge the Ag-Gag statute based on its First Amendment pre-enforcement injury, this Court need not determine whether ALDF has standing under other theories or whether the remaining Plaintiffs have also established standing individually. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (determining that because one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs"); *Sierra Club v. United States Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011) ("only one plaintiff need show standing to support our subject matter jurisdiction"). Nevertheless, Plaintiffs address both other standing theories and the standing of the other Plaintiffs out of an abundance of caution.

which CCI would be able to engage in undercover investigations and engage in evidence collection through false pretenses in order to support its advocacy mission, were it not for the Ag-Gag law." Compl. ¶ 27. CCI refrained from engaging in undercover investigations as part of its advocacy around environmental, labor, racial, and immigrant justice "and did not collect footage of conditions for workers inside that facility, out of fear of criminal liability imposed by Iowa's Ag- Gag law." Compl. ¶ 27. CCI engaged in these types of investigations prior to passage of the Ag-Gag statute, some of which were key components of an OSHA complaint that lead to citations and notifications of penalty. Compl. ¶ 27.

Like the other organizations, Bailing Out Benji, "conducted its own investigations into puppy mills, including on an undercover basis by using false pretenses to gain access to facilities" prior to the passage of the Ag-Gag statute. Compl. ¶ 28. "Since the Ag-Gag law was signed into law, however, they no longer engage in undercover activities for fear of prosecution." Compl. ¶ 28. It also reasonably fears liability under Iowa Ag-Gag's harboring/aiding/concealing liability for using undercover "images and video obtained by them and by others in their public presentations." Comp. ¶ 28.

Plaintiffs' intention to engage in prohibited speech could not be any more manifest. These allegations of "an intention to engage in a course of conduct" are sufficiently pleaded and more than meet the requirements of the Supreme Court's recent pronouncement on First Amendment pre-enforcement standing in *SBA List* and the Eighth Circuit's decisions in *International Association of Firefighters*, and *281 Care Committee I* and *II*. *SBA List*, 134 S. Ct. at 2342; *Int'l Ass'n of Firefighters*, 283 F.3d at 975; *281 Care Comm. I*, 638 F.3d at 625-30; *281 Care Comm. II*, 766 F.3d at 781.

Plaintiffs' interest in obtaining access to agricultural facilities by false pretenses or making false statements is, at the very least, "arguably affected with a constitutional interest." *SBA List*, 134 S. Ct. at 2342. For one, the law works a criminal prohibition on pure speech. To that end, Defendants concede that the standing analysis must assume a constitutional interest "so as to avoid putting the merits cart before the standing horse." State's Brief in Support of Motion to Dismiss of Defendants Kimberley Reynolds, Tom Miller, and Bruce Swanson (Dkt. #24) (hereinafter, State's MTD) at 7 fn. 1 (cleaned up)[5].

Second, Plaintiffs face a credible threat of prosecution under the Ag-Gag statute—the law was passed specially to criminalize the types of investigations that Plaintiffs intend to conduct. Further, in determining whether a credible threat exists, courts presume that statutes will be enforced, and this presumption is even stronger for recently enacted statutes. *See, e.g.*, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (in pre-enforcement challenges to recently enacted statutes, courts "assume a credible threat of prosecution in the absence of compelling contrary evidence"). Courts may find no standing where a statute is completely moribund, *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (statute languished unenforced for 81 years), "but only in extreme cases approaching desuetude." *281 Care Comm. I*, 638 F.3d at 628 (citing *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 486 (8th Cir. 2006)).

[5] The parenthetical "cleaned up" indicates that internal quotations marks, alternations, or citations have been omitted from the quoted passage. Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935374; *e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

In *281 Care Comm. I*, the Eighth Circuit reversed a district court's reliance on *Poe v. Ullman* to find a 21-year-old statute was moribund. Unlike the complete lack of enforcement of the statute its over-80-years history in *Poe*, the Eighth Circuit found the 21-year-old statute at issue in *281 Care Committee I* was "adopted comparatively recently and was amended fewer than five years before [plaintiffs'] suit was filed." *281 Care Committee I*, 638 F.3d at 628. The burden is on the state to show that a statute is moribund "via official policy or a long history of disuse." *Id*.

Here, Plaintiffs allege an intention to engage in the exact acts that the statute was designed to criminalize. The law is less than six years old. The state has not disclaimed any intention to enforce the law. Because Plaintiffs intend to directly violate a recently-enacted statute, they face a credible threat of prosecution.

2. The State Does Not Engage with the Proper Standards for Pre-Enforcement Standing.

The State fails to meaningfully engage with First Amendment pre-enforcement standing precedent and instead attempts to build a tower of hypotheticals that it claims undermine Plaintiffs' injuries. The State argues that Plaintiffs may be unable to obtain employment at an Iowa factory farm because they could possibly fail to locate a candidate who is willing to lie about his or her employment history, or locate a candidate who is willing to violate the statute, or locate a candidate who will engage in prohibited conduct at the facility. State's MTD at 9. Putting aside that what the State tries to construct as three "contingencies" are just three ways of saying that an investigator might not be willing to violate the statute, Supreme Court and Eighth Circuit precedent repeatedly emphasize that a willingness to violate the criminal law is not

required for a First Amendment pre-enforcement challenge. *Steffel*, 415 U.S. at 459; *SBA List*, 134 S. Ct. at 2342; *281 Care Comm. I*, 638 F.3d at 627; *281 Care Comm. II*, 766 F.3d at 781-82.

The State's other invented contingencies fare no better. According to the State, Plaintiffs might be unable to locate a qualified candidate for low-skilled factory farm labor, or the farms may never hire anyone at all, or may never hire Plaintiffs' investigators. State's MTD at 9. Plaintiffs provide detailed allegations that they have previously and in some cases regularly conducted these investigations, both nation-wide and in Iowa before the state enacted the Ag-Gag statute. Compl. ¶¶ 26-29. These allegations must be accepted as true at this stage of the litigation and are sufficient to establish that Plaintiffs have candidates who are qualified for these types of jobs, that these jobs are regularly open, and that Plaintiffs' candidates regularly obtain them. If the State seeks to contends that, as a factual matter, Iowa's agricultural production facilities are at full capacity, have no turnover, and no longer hire, it can assert that factual defense a latter proceeding.

Furthermore, the house of cards the State seeks to construct around gaining employment at an Iowa factory farm addresses only one subsection of the Ag-Gag statute. Iowa Code § 17A.3A(1)(b). The law's other substantive subsection prohibits *mere access* of any kind to agricultural facilities "by false pretenses," divorced from the employment context. Iowa Code § 717A.3A(1)(a). Plaintiffs also allege injuries based on non-employment based access. *See, e.g.*, Compl. ¶ 28 (alleging injuries related to false pretenses to gain access to puppy mill auctions). Because establishing standing under any one theory for any one Plaintiff is sufficient for Article III purposes. *Watt*, 454 U.S. at 160. Plaintiffs' allegations survive the State's Motion to Dismiss even if the Court accepted that the State's invented contingencies were credible.

The State's argument also ignores the Ag-Gag statute's conspiracy provision, Iowa Code § 717A.3A(3)(a), which criminalizes simply conspiring to gain access to agricultural production facilities. Plaintiffs would violate the conspiracy provision of the statute with the simplest overt act, well before the point of any of the State's elaborate contingencies.

The State's primary support for its too-many-contingencies argument is *People for the Ethical Treatment of Animals, Inc. v. Stein*, 259 F.Supp.3d 369 (M.D.N.C. 2017) (appeal docketed, No. 17-1669 (4th Cir. May 26, 2017)). But *Stein* involved a challenge to a *civil cause of action* against employees who capture or remove documents in violation of the employee's duty of loyalty to the employer. N.C. Gen. Stat. § 99A-2; *Stein*, 259 F.Supp.3d at 372. The court found that it was speculative that the defendants in that case would institute a *civil tort action* against the plaintiffs, and repeatedly stressed the difference between standing to bring a pre-enforcement challenge to a civil cause of action and a criminal prohibition. *Stein*, 259 F.Supp.2d at 378 (distinguishing pre-enforcement challenges in the context of "the threat of criminal prosecution" and stressing that "[h]ere, of course, the [law] provides a civil cause of action" (emphases in original)); *id*. at 384 (distinguishing criminal pre-enforcement challenges and stressing that "[h]ere, there is no criminal law imposing a criminal penalty").

Iowa chose to take a different route. Because, like Idaho and Utah, it elected to create a criminal prohibition, it cannot seek refuge in a case challenging a civil tort cause of action.

B. Plaintiffs Adequately Allege Organizational Resource Injuries.

1. Organizational Resource Injuries are Economic Injuries Sufficient for Article III Standing.

Plaintiff also allege a sufficient, independent basis for standing—the Ag-Gag statute frustrates Plaintiffs' missions and causes them to divert organizational resources as a direct result

of the State's unconstitutional law. It is firmly established that, where a defendant's challenged conduct perceptibly impairs an organization's ability to fulfill its mission, "there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This is textbook law. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL 3D § 3535.9.5.

The Eighth Circuit has recognized that, under *Havens*, "[an issue-based] organization satisfies this [injury-in-fact] requirement where it 'devotes significant resources to identify and counteract' a defendant's unlawful practices." *Arkansas ACORN Fair Housing, Inc. v. Greystone Dev. Co.*, 160 F.3d 433, 434 (8th Cir. 1998) (quoting *Havens*, 455 U.S. at 379) (internal brackets omitted). The Eighth Circuit also recognizes that these injuries can arise from unconstitutional or otherwise illegal government conduct. *Granville House, Inc. v. Dep't of Health & Human Servs*., 715 F.2d 1292 (8th Cir. 1983) (holding agency's action "perceptibly impaired" organization's "ability to provide its services to indigent patients, just as the realty company's practices in [*Havens*] impaired the ability of the nonprofit corporation in that case to provide its services" creating "harm to the organization [that] involved 'constitutes far more than simply a setback to the organization's abstract social interests.'" (citing *Havens*, 455 U.S. at 379)).

Courts have recognized that animal protection organizations, like other non-profit organizations, establish *Havens* standing when they expend resources to combat illegal activity. *See People for the Ethical Treatment of Animals v. U.S. Dep't of Agric*., 797 F.3d 1087, 1097 (D.C. Cir. 2015) (finding PETA's injuries resulting from government's alleged unlawful conduct "fit comfortably within [the Circuit's] organizational-standing jurisprudence"); *People for the*

Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F.Supp.3d 1327, 1341 (S.D. Fla. 2016) (finding that PETA had *Havens* standing to challenge ESA violations); *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1281–82 (2015) (applying federal *Havens* standard to hold that ALDF had standing in state court).

2. The State Misreads the Out-of-Circuit Precedent It Relies On.

The State fails to meaningfully engage with either Supreme Court or Eighth Circuit precedent addressing *Havens* standing in its Motion to Dismiss. Instead, it relies on a dissent in the D.C. Circuit and misreadings of cases from the D.C. and Fifth Circuits. State's MTD at 10-11 (citing *Americans for Safe Access v. Drug Enforcement Admin*., 706 F.3d 438, 458 (D.C. Cir. 2013) (LeCraft Henderson, J., dissenting); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Center Bd. of Tr*., 19 F.3d 241, 244 (5th Cir. 1994)); 12 (same); 13 (same); 14 (same); 15-16 (same).

Suffice it to say that a dissenting opinion in the D.C. Circuit is not precedent in the Eighth Circuit (or anywhere).

The State's reliance on *Abigail Alliance for Better Access to Developmental Drugs* fares no better. The rule from *Abigail* that the State relies on—"an organization is not injured by expending resources to challenge the regulation itself; we do not recognize such self-inflicted harm"—simply stands for the fact that a plaintiff cannot claim *the litigation expenses from a lawsuit itself* as the alleged resource diversion. In fact, the D.C. Circuit found that the plaintiffs in *Abigail Alliance* established standing by relying on resource diversion separate from the costs of their legal challenge. 469 F.3d at 134.

Even though the State's Motion appears to argue that *Abigail* advanced a conclusion that an organization's budget choices could not constitute an injury, in actuality, the D.C. Circuit has explicitly rejected that notion. *Equal Rights Ctr. v. Post Props., Inc*., 633 F.3d 1136, 1140 (D.C. Cir. 2011). As explained in *Equal Rights Center*, the proper question for standing purposes is not "the voluntariness or involuntariness of the plaintiffs' expenditures" but whether the organization "undertook the expenditures in response to, and to counteract, the effects of the defendants' allegedly [unlawful activity]." *Id*.

This is as it must be: every organizational expenditure of resources is 'voluntary' in the strictest sense, as it was for the housing-rights plaintiffs in *Havens*. If the test was as strict as the State suggests, *Havens* would be a dead letter.

The State similarly misreads *Association for Retarded Citizens of Dallas* from the Fifth Circuit. As with *Abigail Alliance*, that case stands only for the rule that an organization cannot "bootstrap standing" where "the only resources 'lost' are the legal costs of the particular advocacy lawsuit." 19 F.3d at 244. None of the Plaintiffs in this lawsuit claim the costs of this lawsuit as the diversion of their resources. The cases the State relies would not undercut the Plaintiffs' *Havens* standing even if they were the law of the Eighth Circuit.

3. Plaintiffs Have Standing Because the Ag-Gag Statute Causes Them Injuries in Fact.

Here, Plaintiffs have standing because they diverted significant resources to identifying and counteracting the State's unconstitutional law. The Complaint spells out each Plaintiff's mission, how the unconstitutional Ag-Gag statutes frustrates each mission, and the diversion of resources that each Plaintiff suffers to counteract the effects of the State's unconstitutional act.

Compl. ¶¶ 26 (ALDF), 27 (CCI), 28 (Bailing out Benji) 29 (PETA), 30 (CFS), 107-114 (all Plaintiffs).

Each Plaintiff is "forced to divert money or organizational resources away from their core educational and outreach programs to focus on the social harms" of Iowa's Ag-Gag law. Compl. ¶ 107. As a result, they each "have less money and time to devote to outreach on topics that are central to their missions, such as animal rescues, educating the public about the harms of industrial farming, and other forms of abuse, neglect, and cruelty to animals." Compl. ¶ 107. The law creates "an information vacuum that directly undermines" ALDF and PETA's well-pleaded "litigation, legislation, outreach, and educational programs." Compl. ¶ 109. Similarly, the Ag-Gag statute prevents CFS's "legal, policy, advocacy, and educational and outreach work," resulting in "difficulty fulfilling its mission and providing information to the public about food production at agricultural operations." Compl. ¶ 110. Bailing Out Benji "is unable to utilize information, images, video obtained through undercover investigations of puppy mills in Iowa in their public education activities, because the chilling effect of Ag-Gag has led the cessation of the gathering of those materials by" other organizations, frustrating the organization's core mission. Compl. ¶ 112. CCI "is unable to acquire and use in its advocacy efforts information or documentary evidence which was obtained in an undercover manner due to the chill of Ag-Gag," resulting in "a direct injury [to CCI] because it is hindered in its mission to educate the public about the harms of factory farming to workers and the environment." Compl. ¶ 113

Plaintiffs have suffered and continue to suffer classic *Havens* injuries—"injury to [their] activities" and the "consequent drain on [its] resources." *Havens*, 455 U.S. at 379. These are concrete organizational injuries. *See, e.g.*, *id.* at 379 ("frustrat[ion]" and "impair[ment]" of plaintiff organization's "efforts to assist equal access to housing through counseling and other

referral services" was a "concrete and demonstrable injury"); *Granville House*, 715 F.2d at 1298 (frustration of organization's "primary mission of treating the poor," forcing organization to "forego treating the poor in favor of individuals of the middle and upper class"); *Abigail Alliance*, 469 F.3d at 132 (allegation that challenged Food and Drug Administration action had "frustrated" plaintiff's "efforts to assist its members and the public in accessing potentially life-saving drugs and its other activities" resulting in a "drain on [plaintiff's] resources and time" sufficed for standing).

II. Plaintiffs Adequately Allege a First Amendment Violation.

The State's motion to dismiss Plaintiffs' First Amendment claims relies entirely on one theory—that the false pretenses, false statements, and false representations proscribed by the law fall entirely outside of the First Amendment's coverage. State's MTD at 17-22. Both precedent and a plain reading of those terms demonstrate otherwise. Furthermore, the State does not even contend that the Ag-Gag law survives any level of heightened First Amendment scrutiny.

A. Obtaining Access to an Agricultural Facility Under False Pretenses is Protected by the First Amendment.

The Ag-Gag statute criminalizes the use of "false pretenses" or a "false statement or representation as part of an [employment] application" to gain access to agricultural facilities, including the sort of journalistic misrepresentations (by act or omission) used by investigators attempting to expose matters of public concern, such as concealing their journalistic purpose, failing to announce political or journalistic affiliations, using a pseudonym, or understating credentials and experience. By directly criminalizing the use of "false pretenses" and "false statement[s] or representation[s]" to gain access to agricultural operations, the Ag-Gag statute regulates pure speech in the form of investigators' affirmative misrepresentations and failures to

disclose affiliations with animal rights groups or investigative motives. Such lies fall squarely within the existing protections of First Amendment doctrine. *Alvarez*, 567 U.S. at 718; *id*. at 730 (Breyer, J., concurring in the judgment); *281 Care Committee I*, 628 F.3d at 636; *281 Care Comm. II*, 766 F.3d at 782-84.

The State makes two primary arguments in support of the law. First, it claims that the Ag-Gag statute regulates conduct rather than speech, and thus the misrepresentations at issue are entirely outside the First Amendment. State's MTD at 17-22. Second, it argues that the courts that have found otherwise as to similar prohibitions, whether on summary judgment or motions to dismiss, were wrong—so wrong that Plaintiffs should not be permitted to proceed past the pleading stage here. State's MTD at 22-28. These arguments are in direct conflict with well-established constitutional doctrine.

1. The Ag-Gag Statute Criminalizes Speech, Not Conduct.

Contrary to the State's repeated claims that the Ag-Gag statute only regulates "conduct," the statute plainly criminalizes pure speech. As the Ninth Circuit found in addressing the Idaho Ag-Gag's prohibition on gaining access to an agricultural facility through misrepresentation—a nearly identical prohibition to the Iowa's Ag-Gag's prohibition on gaining access through false pretenses, Iowa Code § 17A.3A(1)(a)—that prohibition could not "be characterized as simply proscribing conduct . . . because it 'seeks to control and suppress all false statements [related to access] in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.'" *Wasden*, 2018 WL 280905 at *6 (quoting *Alvarez*, 567 U.S. at 722-23).

What triggers liability under Iowa's Ag-Gag law is not the conduct of gaining access to private property, but the use of false pretenses, which involves pure speech. The statute makes

plain that the key is the speech attendant to undercover investigative techniques itself. Subsection (1)(a) criminalizes the speech of using false pretenses in order to enter an agricultural production facility. Similarly, subsection (1)(b) prohibits "a false statement or representation" used to obtain employment at an agricultural production facility without requiring any type of intent to injure or actual injury arising from the false statement or misrepresentation. This distinguishes the Ag-Gag statute from laws regulating physical access to or acquisition of property, such as laws prohibiting breaking and entering, trespass, or theft of records.[6] The linchpin for criminal liability is pure speech in the form of a misrepresentation to facilitate access to a facility.

2. *United States v. Alvarez* Supports Plaintiffs, Not the State.

The State contends that the leading Supreme Court case concerning false statements and the First Amendment supports the Ag-Gag law. State's MTD at 19-20. It does not.

In *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; however, all six justices concurring in the result 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). Notably, the lie at issue in *Alvarez* was indisputably valueless to society—"a pathetic

[6] Moreover, the investigative misrepresentations at issue in this case promote, rather than detract from, First Amendment values. The rationale for the notion that some lies are not protected by the First Amendment is that lies generally distort rather than facilitate the search for truth. It has generally been assumed that lies are protected as a means to an end, as a way of providing "breathing space" for speech that actually serves a valuable role in society. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). However, lies used to reveal and disclose information of great public concern—high-value lies—warrant rigorous First Amendment protection. These lies facilitate rather than impede truthful discourse and transparency on matters of public concern. *See generally*, Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015).

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 legally cognizable harm to the deceived party. *Id*. at 719; *id*. at 730 (Breyer, J., concurring in the judgment).

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 a "legally cognizable harm." *Id*. at 719. On this point both the concurrence and the plurality opinion are in agreement. Not every psychic or nominal harm is sufficient to justify a restriction on the constitutionally protected category of pure speech known as lies.

The State hangs greats weight on dicta from the *Alvarez* plurality opinion that false claims "made to . . . secure moneys or other valuable considerations, say offers of employment," may be restricted without violating the First Amendment. 567 U.S. at 723. But the State appears to misread the scope of its own law. Section (1)(a) prohibits any type of access by false pretense; only subsection (1)(b) deals with offers of employment. Each of Plaintiffs' claims goes to both subsections, so even if the State's arguments were correct, the argument is appropriate at a later proceeding, but not on a motion to dismiss. *See, e.g.*, WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL 3D § 1357 (explaining a motion to dismiss must be denied if "the allegations provide any possible legal theory").[7]

[7] Even if the speech proscribed by the Ag-Gag Statute were wholly unprotected speech, the law is content-based it is still invalid under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (noting that an ordinance, even when limiting only unprotected "fighting words," would be struck down if it was a content-based proscription).

Even if procedurally the State's argument as to one of the challenged sections of the Act could carry the day on a motion to dismiss as to all of Plaintiffs' claims, which it cannot, it is wrong on the merits of that argument. Obtaining access by false pretenses, even in the "employment context" does not result in "cognizable harm," including "moneys or other valuable considerations" as *Alvarez* uses those terms. *See Herbert*, 263 F.Supp.3d at 1205 ("something more than access by misrepresentation seems necessary to cause trespass-related harm"). The only "harm" flowing from the prohibited false pretenses under the Ag-Gag statute derive not from the false speech itself, but rather from subsequent publication of truthful information on matters of public concern. These lies do not cause any injury to the agricultural operations. Plaintiffs allege that investigators are able to complete the work assigned to them the same as any other employee. Compl. ¶¶ 98-100.

This distinction was crucial to the Ninth Circuit's ruling upholding the Idaho's Ag-Gag statute's employment provision against a facial challenge—the fact that the statute required an intent to cause *direct and tangible* injuries, not the reputational and publication damages that flow from the types of exposés typical of employment-based undercover investigations, provided the "'narrowing construction'" to the "'unconstitutionally broad statute'" that "'eliminate[d] its constitutional deficiencies.'" *Wasden*, 2018 WL 280905 at *12 (quoting *Berger*, 569 F.3d at 1046); *see also Wasden*, 2018 WL 280905 at *9 (noting that by "requiring specific intent" to injure, the employment-by-misrepresentation provision of the Idaho Ag-Gag was uniquely tailored in a way that the access-by-misrepresentation provision was not).[8]

[8] In upholding the Idaho Ag-Gag statute's prohibition on gaining employment by representation with intent to injure the facility, the Ninth Circuit noted that it was "[a]lmost as though the Idaho legislature drafted this provision with *Alvarez* by its side." *Wasden*, 2018 WL 280905 at *12. The Iowa legislators, who enacted the Iowa Ag-Gag statute three months before the Supreme

In contrast, here, as the legislative history confirms, the primary harm that Iowa sought to avoid was, as then-Senator Rielly put it, animal protection "groups that go out and gin up campaigns … by trying to give agriculture a bad name." Compl. ¶ 52. The harm to be avoided is exclusively reputational. The ultimate consequence of Plaintiffs' investigations will be publication that may lead to boycotts, public scrutiny or other economic injury. However, such harm—non-defamatory reputational injuries—is not the type of cognizable harm that *Alvarez* contemplates. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (holding that harm from reputational injury is not cognizable outside of the limits imposed by defamation).

What is more, the Ag-Gag statute seeks to create a *criminal* prohibition for causing reputational injuries for harm that the First Amendment prohibits even in the civil damages context. In the civil context, "[t]ruth is a complete defense to defamation." *Delaney v. Int'l Union UAW Local No. 94 of John Deere Mfg. Co. & Daniel White*, 675 N.W.2d 832, 843 (Iowa 2004). Liability for defamation is also precluded where (at least for a quasi-public figure like a large agricultural operation) the speaker does not act with "a knowing or reckless disregard of the truth." *Id*. at 844. The Ag-Gag statute contains none of these built-in First Amendment protections and punishes by imposing imprisonment, not simply tort damages.

In sum, *Alvarez* recognizes that most lies enjoy First Amendment protection. Only those lies that cause direct, cognizable harm may fall outside the First Amendment. It would make little sense to protect one's gratuitous and valueless lies about winning the Medal of Honor, while leaving unprotected the sort of lie that made the muckraking journalism tradition famous and socially valuable, and which has spurred food and animal welfare reforms repeatedly in the

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Court's decision in *Alvarez*, did not similarly benefit from drafting the law with the decision by their side.

past century. The First Amendment's guarantee of free speech does not protect a person who lies about military service more than it protects Upton Sinclair. In the context of a highly regulated, federally subsidized industry that produces food for the nation at large, false pretenses for gaining employment as an undercover investigator necessarily fall within the ambit of *Alvarez*'s protection.

3. The State's Other Cases Do Not Immunize the Ag-Gag Statute from First Amendment Scrutiny.

The State attempts to diminish the speech protections afforded misrepresentations by arguing that the Ag-Gag law is merely an incidental or general restriction on speech. State's MTD 17-18. The State argues that the Ag-Gag law does not implicate free speech concerns because the law merely safeguards general "rights attending ownership or control of their private property" that affect "conduct" and not speech. State's MTD at 20. The State arrives at this conclusion through a misreading of a variety of cases discussed in turn below.

First, the State relies on *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972), to support the unremarkable proposition that information-gatherers are not entitled to a First Amendment exemption to otherwise valid, content-neutral laws that apply equally to the press and others. As an initial matter, as elaborated below, *infra* Section II.B, the Ag-Gag law is not content-neutral, and thus the cases regarding generally applicable laws are wholly inapplicable. *See Bartnicki v. Vopper*, 532 U.S. 524, 526 (2001) (distinguishing content-based laws from generally applicable laws). The cases cited by the State merely stand for the uncontroversial proposition that so long as a law is content-neutral, the First Amendment does not bar its general application to the press and the public on equal terms. The Ag-Gag law is neither content-neutral nor is it merely an indirect or incidental limit on speech–the law directly targets speech activities, including lying.

It is equally well established that generally applicable laws such as tortious interference with business relations, intentional infliction of emotional distress, and breach of the peace can offend the First Amendment. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 920–21 (1982) (tortious interference); *Hustler Magazine*, 485 U.S. 46 (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15 (1971) (breach of the peace). The fact that a law applies to all persons and not just the press is a prerequisite to constitutionality, but not the end of the inquiry.

Second, and closely related, the State attempts to characterize this litigation as a "right of access" case, such that the issue before the Court is whether journalists are entitled to a constitutional right of special access to newsworthy matters. State's MTD at 17 (quoting *Branzburg* for the proposition that the press does not enjoy a "right of special access to information that is not available to the public"); *id* at 18 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) for the proposition that "the First Amendment … do[es] not provide a shield to intrusions upon private property or the right to privacy, even for information gatherers."). Moreover, unlike the parties in *Hudgens* and *Lloyd Corp.*, Plaintiffs here seek access to agricultural operations to acquire information, not to engage in unwelcome speech on that property.

The problem with the State's characterization is patent: the Ag-Gag law directly limits speech to gain access, not simply access. The Ag-Gag law prohibits pure speech—false statements and representations. It is true that the lie or omission in question is used to gain access, but the person is lawfully present when he employs the false pretense. The question, then, is whether the lie may be told, not whether he is permitted to access the location where the lie is told.

Plaintiffs do not assert immunity, for instance, from traffic laws so that they could drive faster to gather information, or a right to do undercover investigations without wearing legally-mandated safety equipment, or a right to ignore biosecurity, trade secret, or general trespassing laws. The Supreme Court and Eighth Circuit both recognize lies as a form of pure speech that are entitled to First Amendment protection. *Alvarez*, 567 U.S. at 721-22; *281 Care Committee I*, 628 F.3d at 636; *281 Care Comm. II*, 766 F.3d at 7832-84. Accordingly, an outright ban on lies used to gain access is a limitation on pure speech. This is not to suggest that every lie used to gain entry to every facility will be protected. But it means that the First Amendment applies, the Plaintiffs' have pleaded First Amendment claims, and that a content-based restriction on such lies must satisfy strict scrutiny.

In sum, the effort to analogize the Ag-Gag law to the general restriction on access cases is unpersuasive. Silencing speech may be the "path of least resistance," for curing certain harms related to "ownership or control of their private property" harms, State's MTD at 20, but "sacrificing speech for efficiency" is not permissible. *McCullen*, 134 S. Ct. at 2534.

Third, the State relies on a nearly five-decade-old Ninth Circuit decision, *Dietemann v. Time, Inc*., 449 F.2d 245 (9th Cir. 1971), to support a claim that the Ag-Gag statute does not implicate the First Amendment. The thrust of the State's argument in this regard is that there is no constitutional right to "gain access to private places through deceit for the purposes of … information gathering." State's MTD at 20.

Dietemann's limited value as precedent is demonstrated by the Ninth Circuit's recent decision in *Wasden*. In *Wasden*, the Ninth Circuit struck down the Idaho Ag-Gag statute's prohibition on using deceit to gain access to private places for the purposes of information gathering (or for any other purpose). *Wasden*, 2018 WL 280905 at *6-*10. If *Dietemann* was the

precedent that the State holds it out as, the Ninth Circuit would have been bound to follow it in *Wasden*.

The Ninth Circuit was not bound by *Dietemann* because it provides no support for the proposition that deception used to gain access to conduct an unauthorized act falls outside the protection of the First Amendment. Despite the journalists' lies in inducing Mr. Dietemann to invite them into his home for them to conduct their undercover investigation, the Ninth Circuit held that Time Magazine's detailed written account of everything that was observed by the reporters received full speech protection. 449 F.2d at 249 ("He invited two of defendant's employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves."). Thus, far from holding that deception-based entries are unlawful, *Dietemann* actually supports the Plaintiffs' position that persons assume the risk that an invited guest may be a false-friend and publish an account of what he observes.

Instead, *Dietemann* held that the surreptitious audiovisual recording by the investigators inside Dietemann's home after they gained access was actionable. *Id.* at 249. *Dietemann* might arguably supports the State if, like Utah and Idaho, Iowa's Ag-Gag statute explicitly prohibited undercover recording. But Iowa did not choose to include such a prohibition. Even on that point, however, *Dietemann* is a limited and damaged precedent, applying only as a limit on recording activities within the intimacy of one's home. *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies*, 306 F.3d 806, 818, n.6 (9th Cir. 2002) (recognizing *Dietemann* as a decision of limited application); *Desnick v. American Broadcasting Co. Inc.*, 44 F.3d 1345, 1353 (7th Cir.

1995) (same). The highly-regulated slaughterhouse production line is a far cry from the intimate details of one's home.[9]

The holding of *Dietemann*, even limited to home intrusions, is largely explained by the dated context of the case. In the 1970s, video recording seemed like an exotic and novel intrusion that allowed for "living color" recordings. *Dietemann*, 449 F.2d at 249. Today, however, recording is an accepted (and expected) part of human interaction generally and whistleblowing in particular. In this sense, *Dietemann* reflects a 47-year-old view of recording technology, not a modern one. In the same way that a state law criminalizing using one's memory and notes from an event to publish an account of events surely would have violated the First Amendment half a century ago, contemporary bans on recordings by persons who are lawfully present—which are likely to be more accurate and reliable than handwritten notes—are recognized as a violation of free speech rights today. *See, e.g.*, *Wasden*, 2018 WL 280905 at *13 ("'[w]e live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private'" (quoting Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (Jan. 2011))); *Herbert*, 263 F.Supp.3d at 1206-13.

Fourth, the State also errs by reading *Food Lion, Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4th Cir. 1999), as providing support for its strained misreading of the protections for employment-based whistleblowing provided by the First Amendment. State's MTD at 18-28. According to the State, *Food Lion* stands for the rule that "the First Amendment does not protect undercover, employment-based investigations, including the use of hidden recording devices."

[9] Again, if *Dietemann* were controlling on the right to record issue, it would have been incumbent on the *Wasden* court to at least engage or distinguish it from the context of Ag-Gag laws.

State's MTD at 18. However, *Food Lion*, relying on the First Amendment, refused to permit damages, even for wages paid to persons who accepted employment under false pretenses to conduct their investigation. 194 F.3d at 514 (holding that the undercover employees' use of deceit to gain employment did not "cause" them to be paid; instead they were "paid because they showed up for work and performed their assigned tasks as Food Lion employees, [and] [t]heir performance was at a level suitable to their status as new, entry-level employees").

The most that can be said of *Food Lion* for the State is that, like the other cases discussed above, the Court recognized that "generally applicable" common law torts, such as an action for breach of the "duty of loyalty," did not violate the First Amendment. *Id*. at 521. The court's reasoning cannot be used to uphold a new statute like the Ag-Gag law—and certainly not at the motion to dismiss stage—where the text and legislative history establish it is targeted at certain types of speech (such as recording and deception at agricultural facilities), because this text and purpose demonstrate the law is not generally applicable and thus mandates the application of strict scrutiny. The nominal damages of a few dollars that were awarded against the investigator-defendants in *Food Lion* were purely and exclusively the result of a breach of a contractual term, and thus gave rise to a cause of action for a breach of the employees' duty of loyalty. *Id*. at 518 ("the reporters committed trespass by breaching their duty of loyalty"). To put a finer point on the matter, the "trespass" the State posits occurs when Plaintiffs use false pretenses to gain entry, is not actionable as a trespass under the only (non-Ag-Gag) case that addresses trespass in this general context of investigative journalism. *Id.*[10]

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

Far from supporting the State's view that the Ag-Gag law is constitutional, *Food Lion* compels the opposite conclusion. In fact, Plaintiffs are aware of no court upholding criminal penalties for undercover investigations like those provided for in the Ag-Gag law. *See, e.g.*, *Desnick v. Am. Broad. Cos*., 44 F.3d 1345, 1353 (7th Cir. 1995) (analogizing undercover investigators to "testers" in discrimination cases); *PETA v. Bobby Berosini, Ltd*., 895 P.2d 1269, 1281-83 (Nev. 1995); *Ouderkirk v. PETA*, No. 05-10111, 2007 WL 1035093 (E.D. Mich. Mar. 29, 2007); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc*., 609 N.W.2d 607, 613-14 (Mich. App. 2000) (noting misrepresentation did not defeat consent to enter on trespass claim).

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

Wyoming then amended the laws by increasing their penalties and removing the prohibition on collecting data from public lands, unless the data collector crossed private land to reach the public land. *Id*. at 1238. The plaintiffs amended to challenge the new laws and the state moved to dismiss again. *Id*. Finding that "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data," the district court granted the motion. *Id*. at 1242.

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

The district court's decision in *Western Watersheds Project* cannot support the State here. Unlike the Ag-Gag statute's criminalization of words (lies and misrepresentations), the statutes at issue in *Western Watersheds Project* simply prohibited all access to collect resource data. Even if the decision had not been overturned by the Tenth Circuit, it would not support the State's prohibition on pure speech here. But, as the Tenth Circuit found, dressing up the criminalization of a certain type of speech activity in the cloak of "trespass" cannot immunize the law from First Amendment scrutiny. As with Wyoming, Iowa's "characteriz[ing] plaintiffs' argument as asserting a right to trespass . . . misstates the issue," *id*. at 1195, and the Ag-Gag law

criminalizes not only "the protected *creation* of speech," *id*. at 1195-96 (emphasis added), but speech itself.

4. *Wasden* and *Herbert* Support Recognizing a First Amendment Claim Here.

The State attempts to distinguish decisions finding that the Idaho and Utah Ag-Gag statutes violated the First Amendment by claiming that "the statutes are markedly different," State's MTD at 23, because both the Utah and Idaho laws have separate subsections that prohibit audiovisual recordings of agricultural facilities. State's MTD at 23, 26-26. While the courts held that the Idaho and Utah recording provisions, in addition to misrepresentation provisions, violated the First Amendment, each court scrutinized each subsection separately. *Otter*, 118 F.Supp.3d at 1203-05 (Idaho's access by misrepresentation provision on summary judgment); *id*. at 1204-07 (Idaho's recording provision on summary judgment); *Wasden*, 2018 WL 280905 at *6-*10 (Idaho's access by misrepresentation provision on appeal); *Wasden*, 2018 WL 280905 at *13-*15 (Idaho's recording provision on appeal); *Herbert*, 263 F.Supp.3d at 1201-06; 1209-10 (Utah's misrepresentation provision); *id*. at 1206-11 (Utah's misrepresentation provision). It is no defense for Iowa to claim that it is only violating the First Amendment in one way instead of two.

The similarity of the access-by-misrepresentation provisions of the three statutes is striking. Idaho's law prohibited not being employed "by an agricultural production facility" and "enter[ing] … the facility by … misrepresentation." Idaho Code § 18-7042(1)(a). Utah's prohibited "obtain[ing] access to an agricultural operation under false pretenses." Utah Code § 76-6-112(2)(b). And Iowa's prohibits "[o]btaining access to an agricultural production facility by

false pretenses." Iowa Code § 717A.3A. The substance of the three prohibition is the same. Even the wording of the Iowa and Utah prohibitions are *virtually identical*.

The State also attempts to distinguish the Iowa Ag-Gag law from the Utah law because "Utah's statute specifically prohibits certain types of audiovisual recordings, whereas Iowa's [law] is silent on audiovisual recording—it simply prohibits unauthorized actions." State's MTD at 26. Audiovisual recordings are, of course, one type of unauthorized activity. Iowa cannot distinguish the decision striking down Utah's law on the basis that Iowa's law prohibits the same conduct *and more*.

Finally, the State claims that other courts just got it wrong (apparently both in not dismissing the cases on the states' motions and on the merits). For the reasons detailed above, and taking into the account the early procedural stage of this case, as well as the detailed reasoning in both decisions striking down the laws, Plaintiffs respectfully submit that the decisions are constitutionally sound and at minimum, guard against dismissal.

B. The Ag-Gag Statute Restricts Speech Based on its Content and Viewpoint.

Nowhere in its 39-page brief does the State address Plaintiffs' first cause of action: that the Ag-Gag statute violates the First Amendment because it is a content- and viewpoint-based prohibition.

"Content based regulations are presumptively invalid," *even as to unprotected speech*, *R.A.V.*, 505 U.S. at 382, and must meet strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *R.A.V.*, 505 U.S. at 395. Because content based regulations are presumptively invalid even as to unprotected speech, the State's entire premise for dismissing Plaintiffs' First Amendment claims—that the lies at issue are allegedly unprotected—is faulty, and Plaintiffs' first cause of action would survive even if everything the State contends were correct.

The "mere assertion of a content neutral purpose" is not "enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-43. Rather, in assessing whether a law is content-based, the Supreme Court recently reiterated a two-tiered approach. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015). The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *Id*. at 2228. The second step, if necessary, requires a court to examine the legislative justifications for the law. *Id*. at 2228 ("[W]e have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose.").

"[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645; *see also Reed*, 135 S. Ct. at 2222 ("[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based . . . ." (emphasis added)); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (noting that even if a law "on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443-502 (1996).

In determining whether a regulation is content-neutral or content-based, "'[t]he government's purpose is the controlling consideration.'" *Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995) (quoting *Ward*, 491 U.S. at 791); *see also United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression and concerned with the content

of such expression.") (citation omitted). "[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *Whitton*, 54 F.3d at 1406.

1. The Ag-Gag Statute Facially Discriminates Based on Content.

The Ag-Gag statute is facially content-based in two distinct ways. First, it discriminates between truthful and false speech, thus imposing a limit applicable only to a specific category of speech based on its content. *See Herbert* 263 F.Supp.3d at 1210 (determining that the Utah Ag-Gag misrepresentation prohibition was content-based because "whether someone violates the Act depends on what they say"). Second, it discriminates based on subject matter because it criminalizes misrepresentations only in the context of a single industry: agriculture. Moreover, it is also viewpoint-based because it singles out speech critical of a single industry for special, disfavored treatment. Such discrimination among the content and viewpoint of speech places the restrictions within the category of facially content-based laws. *See, e.g.*, *Sorrell*, 564 U.S. at 563-66 (law that, on its face, was content- and speaker-based restriction is subject to strict scrutiny).

The *Alvarez* plurality applied strict scrutiny to the Stolen Valor Act, and strict scrutiny is also warranted here because the lies at issue in this case involve a long history of undercover investigative techniques aimed at informing the public and are uniquely valuable to free speech. The Eighth Circuit has applied strict scrutiny to lies that were political in nature both before *Alvarez*, *see 281 Care Comm. I*, 638 F.3d at 636, and since. *See 281 Care Comm. II*, 766 F.3d at 783. Insofar as a law criminalizing a worthless lie of self-promotion that impedes truth is subject to strict scrutiny, then certainly the prohibition of a lie of political or truth-seeking value is entitled to strict scrutiny because of its ties to core First Amendment values of promoting public discourse and facilitating self-governance. *See id*. ("target[ing] falsity, as opposed to the legally

cognizable harms associated with a false statement, … is no free pass around the First Amendment"); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth*., No. 14-5335, 2014 WL 6676517, at *3-4 (E.D. Pa. Nov. 25, 2014); *O'Neill v. Crawford*, 970 N.E.2d 973, 973 (Ohio 2012) ("The *Alvarez* court . . . recognized that not only must the restriction meet the 'compelling interest test,' but the restriction must be 'actually necessary' to achieve its interest."); *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 517 (W. Va. 2012) (quoting the plurality opinion from *Alvarez* for the view that "when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives"); *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114, 1123 (Ohio 2014) (assuming the application of strict scrutiny and observing "*Alvarez* does not consider whether the state can ever have a compelling interest in restricting false speech solely on the basis that it is false so that such prohibition could withstand strict scrutiny").

The State appears to argue that it can criminalize pure speech here because the speech takes place in (or protects the rights of owners of) "private property not open to the public." State's MTD at 17, 20, 24, 27, 28, 29 (six instances of this assertion). This argument conflates a private property owner's right to exclude speech (by request or by contract, for example) with the government power to punish speech (by legislation) because it happens to occur on private land. For example, a business like Walmart might prohibit protests or disparaging statements within its stores without implicating the First Amendment. But if the State criminalizes speech criticizing Walmart on store property, the First Amendment applies with full force. The content-based nature of the Ag-Gag statute subjects it to heightened First Amendment scrutiny.[11]

[11] The Ag-Gag law also discriminates based on viewpoint because it silences critics of certain agricultural practices while permitting speech that promotes the same agricultural practices.

2. The State's Legislative Purpose was Content-Based.

The Ag-Gag statute is also content-based because it was enacted with a content-based legislative purpose, as Plaintiffs allege. *See* Compl. ¶¶ 6, 18, 48, 61-63. Plaintiffs also detail statements from Iowa legislators evidencing the content-based legislative purpose. *Id*. ¶¶ 50-56. Then-State Senate President Kibbie told the New York Times that he backed the Ag-Gag statute to "make producers feel more comfortable." Compl. ¶ 51. Then-Senator Rielly defended the law by stating that animal activists "want to hurt an important part of our economy . . . . These people don't want us to have eggs; they don't want people to eat meat . . . . What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name." Compl. ¶ 52. The late Senator Seng unfortunately stated that the law was passed to "protect agriculture . . . [and] not have any subversive acts to bring down and industry," Compl. ¶ 54, that the law was "passed mainly for protection of an industry that is dedicated to actually feeding the world in the next 25 years," Compl. ¶ 55, and that it his "job as Ag Chair to support agriculture," Compl. ¶ 56, and protect the state from "extremist vegans." Compl. ¶ 135. A spokesman for Governor Branstad, who signed the legislation into law, told the Sioux City Journal that the governor "believe undercover filming is a problem that should be addressed." Compl. ¶ 53.

The State's Motion to Dismiss should be denied as to Plaintiffs' content discrimination claim because the Ag-Gag statute is neither neutral on its face nor in its transparent justification and motive. The law is content discriminatory because on its face it singles out speech in the

Similarly, viewpoint-based speech restrictions are unconstitutional on private land just as on public land. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

context of agricultural production, and was passed with the purpose of stifling viewpoints that are critical of methods of modern animal agricultural production.

C. Plaintiffs Adequately Allege That the 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. *New York v. Ferber*, 458 U.S. 747, 769, 772-73 (1982); *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. *United States v. Stevens*, 559 U.S. 460, 474 (2010). 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).

Plaintiffs alleged that the Ag-Gag statute is facially unconstitutional because it criminalizes a substantial amount of speech protected by the First Amendment. The law prohibits obtaining access to an agricultural operation under false pretenses, statements, or representations criminalizes a substantial amount of speech and conduct as any lie or misrepresentation that amounts to a false pretense or representation is prohibited. While First Amendment doctrine permits the regulation of some classes of lies, those that cause a legally cognizable harm, the Ag-Gag statute sweeps well beyond that range of permissible regulation to criminalize investigative lies that not only do not cause cognizable harm, but also promote public discourse by leading to the disclosure of information of great public concern. For example, if a reporter states that he or

she wants to do a story on a specific agricultural worker, but actually intends to document animal abuse, the reporter is violating the Ag-Gag statute regardless of what the reporter actually does or reports on. Similarly, if that reporter fails to correct an owner or employee's understanding of why he or she was at the agricultural operation, the reporter is subject to prosecution under the law.

In addition to advocates and investigators who might work with or for the Plaintiffs, even journalists who forthrightly state their purpose for entry will fear prosecution. If a journalist enters a facility covered by the statute for one purpose but sees something at the facility that is even more deserving of press coverage, the journalist will be at risk of prosecution if they write the new story. Certainly gaining entry for one explicit purpose, and then writing about another matter will oftentimes rise to the level of probable cause that one was using false pretenses to gain access.

The same reporter, like the Plaintiffs, will also fear harboring, aiding, and abetting liability under Iowa's Ag-Gag statute for protecting a source's identity, if the source obtained material or information in violation of Ag-Gag, regardless of whether the reporter ever sets foot on the facility's property herself. In this manner, Ag-Gag also sets the publication of the information directly in its cross-hairs, in addition to the initial gathering of that information.

The substantial amount of speech and conduct criminalized by the Ag-Gag statute is protected by the First Amendment as elaborated on above in Sections II.A. Because the 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 as the Plaintiffs' second cause of action should be denied.

D. Defendants Make No Attempt to Meet Their Burden of Showing the Law Meets Strict or Intermediate Scrutiny.

The State does not argue that the Ag-Gag statute survives any level of First Amendment scrutiny. Because the law criminalizes pure speech, *Bartnicki*, 532 U.S. at 532, and discriminates based on content, *Turner*, 512 U.S. at 642, the Court must apply strict scrutiny. Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (internal quotation marks omitted).

The State fails to meet its burden. It makes no attempt to show that the Ag-Gag statute was motivated by a compelling government interest and they make no argument that the law is narrowly tailored. The State's only characterization of their interests in the law—in the Equal Protection section of their argument—is that they are merely "legitimate." State's MTD at 29-31. So long as there is some First Amendment analysis applicable to the Ag-Gag law's prohibition on pure speech, the State's Motion to Dismiss the First Amendment claims fails.

Even if strict scrutiny were not warranted here, the State fails to meet its burden of showing the Ag-Gag statute survives intermediate scrutiny. Even incidental, content-neutral burdens on expressive conduct still require the government to bear the burden of showing that the law "furthers an important or substantial government interest . . . unrelated to the suppression of free expression, and . . . [with a burden] no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The States does not argue that it has important government interests, or that the law meets the tailoring requirements, and thus fail to meet their burden of showing that the law passes even intermediate scrutiny. For these reasons, the State's Motion to Dismiss Plaintiff's First Amendment claims (Counts 1 & 2) should be denied.

III. Plaintiffs Adequately Allege an Equal Protection Violation.

Plaintiffs adequately alleged that the Ag-Gag violates the Equal Protection Clause of the Fourteenth Amendment under two separate, independent theories: because it discriminatorily burdens the fundamental right of free speech, and because it was motivated by unconstitutional animus against animal protection advocates.

A. The Ag Gag Law Discriminatorily Interferes with the Exercise of a Fundamental Right.

A law that discriminatorily burdens a fundamental right violates the Equal Protection Clause. Fundamental rights are those "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted). The right to freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *McDonald v. City of Chicago*, 561 U.S. 742, 810 (2010) (Thomas J., concurring) (citing the First Amendment as emblematic of the sort of right recognized as fundamental). Laws that discriminatorily burden First Amendment rights to freedom of speech and press are thus subject to strict scrutiny under the Equal Protection Clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("[S]tatutes affecting First Amendment interests [must] be narrowly tailored to their legitimate objective"); *see also Carey v. Brown*, 477 U.S. 455, 471 (1980).

As stated in detail above, the Ag-Gag statute infringes on an individual's right to free speech and press by essentially chilling all undercover investigations recording that are unflattering to agricultural operations. For the same reasons that Plaintiffs have alleged that the

Ag-Gag statute violates the First Amendment, they also allege that it violates the Equal Protection Clause.

Because Plaintiffs state a claim for an Equal Protection violation under a fundamental rights theory, it is unnecessary for the Court to determine whether their animus theory is cognizable. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL 3D § 1357 (explaining a motion to dismiss must be denied if "the allegations provide any possible legal theory"). A motion to dismiss tests whether Plaintiffs assert a claim, not each individual theory underlying that claim. *Id*.; *Nichols v. MMIC Ins. Inc*., 68 F.Supp.3d 1067, 1082 (D.S.D. 2014) ("The question before the court, however, is whether plaintiffs have failed 'to state a *claim* upon which relief can be granted.'" (quoting Fed. R. Civ. P. 12(b)(6) (emphasis in opinion)); *Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1334 (8th Cir. 1975) (cautioning against granting motion to dismiss a claim on one theory when "the allegations provide for relief on any possible theory").

Nevertheless, Plaintiffs also adequately allege that the Ag-Gag Law was motivated by animus and violates Equal Protection Clause.

B. Plaintiffs Adequately State an Equal Protection Violation Because the Law Is Motivated by Animus.

Laws premised on animus violate the Equal Protection Clause. The most basic definition of animus is "a bare . . . desire to harm a politically unpopular group." *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Legislation motivated by animus triggers heightened review—that is, "careful consideration." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

Plaintiffs sufficiently allege that the Utah legislators acted with animus in passing the Ag-Gag statute law, in violation of the Equal Protection Clause. *See* Compl. ¶¶ 6, 18, 48, 50-56, 61-63. At this stage of the litigation, Plaintiffs' allegations of animus must be taken as true and such allegations, for the reasons set forth below, require that the motion to dismiss be denied as to this claim.

1. Laws Motivated by Animus Fail Rational Basis Review.

"[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. When animus is present, "courts apply a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); *see also Windsor*, 133 S. Ct. at 2692 (2013) (recognizing the need for "careful consideration" of laws motivated in part by animus); *Moreno*, 413 U.S. at 534, 538; *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (compiling authorities).

Under this heightened form of rational basis review, a law must be invalidated if the State cannot prove both that the law would have passed even in the absence of such animus, and that the fit between the enacted law and the government interest is sufficiently strong. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985). Stated differently, once animus is established through the legislative record or impact of the law, the classification must uniquely serve the proffered government interest.

Impermissible animus need not take the form of repeated statements of overt bias or malice to the disadvantaged group—although Plaintiff's Complaint alleges facts which demonstrate such bias against animal rights organizations by Iowa lawmakers. S*ee Vill. of*

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The Supreme Court's animus cases actually reflect very little actual evidence of malice towards the group in question. *See, e.g.*, *Moreno*, 413 U.S. at 534 (treating a single legislator's comment about "hippies" as tainting the legislation and triggering heightened rational basis review). Indeed, in *Windsor*, the Court found animus sufficient to invalidate the Defense of Marriage Act based on just three statements in a House Report. *See* 133 S. Ct. at 2693.

2. Plaintiffs Allege the Ag-Gag Statute is Substantially Based on Animus Against Animal Welfare Activists.

The evidence of animus in this case is considerably more extensive than required to survive a motion to dismiss. As detailed above, *see* Section II.B.2, Iowa legislators announced that there were "aiming [the law at] stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name" and declared that they had to stop "extremist vegans" who "don't want us to have eggs [and] don't want people to eat meat" and "want to hurt an important part of our economy." Compl. ¶¶ 52, 135. Another legislator declared that he supported the law because it was his "job as Ag Chair to support agriculture," Compl. ¶ 56, and the Governor's spokesman even declared that the law was passed to prevent undercover investigative footage of animal agriculture from seeing the light of day. Compl. ¶ 53.

The core of the State's Equal Protection argument is its conclusion that animus does not have any independent meaning; as the State puts it, "where a rational basis exists for a law, there is no need to address claims of animus." State's MTD at 34. The State fails to acknowledge the existence of heightened, non-traditional rational basis scrutiny in the face of decades of precedent and in the wake of *Windsor*.

To support its assertion that animus has relevance only if it is the *exclusive* motivation for a law, the State relies on the traditional rational basis line of cases and almost entirely ignores the animus line of precedent with one exception. State's MTD at 34-36 (compiling cases predating *Windsor*). The notable exception is *Moreno*, an animus-based analysis which, as the State repeatedly notes, says that if the animus doctrine is to mean anything, it means a law based upon "a bare congressional desire to harm a politically unpopular group," 413 U.S. at 534, might violate Equal Protection, but that there is still "no independent animus analysis of a statute." State's MTD at 34.

In the State's erroneous view, "bare" is synonymous with unanimous or exclusive. State's MTD at 34-36. This misreads the sentence, as illustrated by every Supreme Court decision to consider animus, including *Moreno* itself. In *Moreno*, an amendment to the Food Stamp Act prevented unrelated cohabitators from receiving food stamps. 413 U.S. at 529. The Court invalidated the provision as unconstitutional, noting that the legislative history "indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id*. at 534. Concluding that such animus could not be a legitimate government purpose, the Court invalidated the law. *Id*.

The state contends that "[t]his case is a far cry from *Moreno*," State's MTD at 35, but both cases the legislative history reveals animus towards a politically unpopular group. In fact, this case presents a much stronger case of animus than *Moreno*. In *Moreno*, the Court noted "[r]egrettably, there is little legislative history to illuminate the purposes of the 1971 amendment [to the Food Stamp Law]." *Id*. And in fact, the Court cited just one instance of a legislator referring to "hippies." *Id*. (citing H.R. Conf. Rep. No. 91—1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland)). *Moreno* rebuts rather than confirms the State's contention that the

language "bare desire to harm" somehow requires that animus be the unanimous or sole motivation for a law.

Windsor, the Supreme Court's most recent animus decision, confirms this conclusion. While some members of Congress sought to justify the Defense of Marriage Act (DOMA) as a means of "protecting state sovereignty and democratic self-governance," of "preserving scarce government resources," and as a method of ensuring "consistency in citizens' eligibility for federal benefits," *Windsor v. United States*, 833 F.Supp.2d 394, 405 (S.D.N.Y. 2012), the Supreme Court looked past those assertions and properly found animus sufficient to invalidate DOMA. *Windsor*, 133 S. Ct. at 2693 (finding the "avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.") The Court made this determination based on just three statements in a House Report. *Windsor*, 133 S. Ct. at 2693; *see also id*. at 2693 (refusing to even consider the state's proffered rationales for the law in question, but instead limiting its analysis to "determining whether a law is motivated by an improper animus or purpose").

Following a familiar pattern of other states with Ag-Gag statutes, the Iowa legislators displayed far more animus toward animal protection advocates than the quantity of evidence of animus required to invalidate a statute under the framework set forth in in *Moreno* and *Windsor*. *See Wasden*, 2018 WL 280905 at *4, *11 ("invoke[ing] searching scrutiny" of Idaho Ag-Gag statute in light of legislators' statements comparing animal rights groups to "terrorists" who "use media and sensationalism to attempt to steal the integrity of the producer and their reputation").

The State also appears to contend that animus, if it means anything, means only that legislators cannot pass laws to disadvantage "a class of persons based on their status," and cite to

Windsor and *Romer*. State's MTD at 37. But in so doing, the state muddles two separate legal doctrines simply because they both fall under the umbrella of Equal Protection. *Moreno* belies the State's argument that the animus against "a politically unpopular group," *Moreno*, 413 U.S. at 534, must involve some sort of quasi-suspect classification and not "conduct." State's MTD at 37. *Moreno* involved animus against hippies and hippie communes. 413 U.S. at 534. Obviously, while sexual orientation is an immutable characteristic, a suspect classification demanding heightened scrutiny, being a "hippy" as in *Moreno* is not. Rather, in that case, as in this one, the politically unpopular group obtain their disfavored status by engaging in particular types of conduct rather than by an immutable characteristic.

The reasoning in cases like *Moreno* and *Windsor* is clear. The presence of animus toward a politically unpopular group leads to a heightened form of rational basis review, where the law must be invalidated if the State cannot prove both that the law would have passed even in the absence of such animus, and that the fit between the enacted law and the government interest is sufficiently strong. *Cleburne*, 473 U.S. at 448-50. Whereas the state relies on traditional rational basis cases, State's MTD at 28-33, to argue that the presence of any conceivable rational basis renders a law constitutional, this line of cases is entirely inapplicable where, as here, animus is a motivating factor for the law.

3. The State's Proffered Purposes for the Law Are Not Well-Served by the Classification at Issue.

Under even the most minimal form of rational basis review, there must be an ascertainable link between the stated government interest and the means chosen. *See, e.g.*, *Moreno*, 413 U.S. at 534-35. The State's proffered interests of "protection of private property from unwanted intrusion or unauthorized access," State's MTD at 30, is insufficient to overcome

the animus motivating the law. Instead, the proffered reasons for secreting "agricultural operations" from scrutiny lack a concrete relationship to the chosen means, and thus betray the animus against animal protection groups that so clearly motivated the Ag-Gag statute. *See Cleburne*, 473 U.S. at 448-50 (concluding the challenged ordinance was based on prejudice after considering the poor fit between the law and the purported government interests).

First, the State's assertion that the law protects property rights misses the mark because the Ag-Gag statute provides no additional protections for private property; it merely punishes people who criticize the use of that property. Landowners can refuse to invite or terminate the invitation of anyone they want at any time, for any reason, or even for no reason at all. Likewise, a landowner can invite and employ anyone he or she chooses, and the right to terminate this invitation is similarly absolute. Accordingly, this law does not further protect the ability of landowners to control what persons do on their property; it simply codifies the animus of the landowners by making criminal the actions of certain invitees. *See id*. at 448 (the government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))). If the Iowa legislature truly intended to protect property rights and not to restrict speech of a particular type, then it would not enact a law that criminalizes actions only in a single industry. The law creates a distinction between those who seek to expose corruption or crimes in meat or dairy industries, and those who seek to do the same in any other industry, for example, restaurants or childcare facilities. This radical under-inclusivity in protecting property rights exposes the law's true motive: to silence critics of animal agriculture. *Moreno*, 413 U.S. at 536.

Moreover, the goal of protecting private property is not served by this legislation. Undercover investigations, ranging from national network news programs such as Dateline to those planned by Plaintiffs, need not and will not result in any non-reputational harm—no theft, no defacement, no contamination, and no damage. If an investigation were to cause damage to property, the persons responsible could be prosecuted for generally-applicable crimes or sued in tort. The notion that there is a property right that insulates an industry from whistle-blowing regarding criminal conduct or other wrongdoing is a notion unknown in the law of property or whistle- blowing. No tangible or legitimate property interest is protected by the law in question.

The State's admission that it enacted the Ag-Gag law because it found that Iowa's existing, generally-applicable trespass statute, Iowa Code § 716.7, was insufficient to protect the animal agricultural industry from whistleblowers simply reveals that the law is impermissibly content- and viewpoint-based and not related to a legitimate, generally-applicable government purpose. State's MTD at 31-32; *see also Moreno*, 413 U.S. at 536 (explaining that it was "important to note" that fraud was already illegal, thus undermining the claim that fraud was a legitimate government interest served by the challenged statute). Given the prior existence of trespass and other property protection laws in Iowa, the Ag-Gag statute has no other purpose. *See Wasden*, 2018 WL 280905 at *8 ("If, as Idaho argues, its real concern is trespass, then Idaho already has a prohibition against trespass that does not implicate speech in any way.").

In sum, the Ag-Gag statute is not rationally related to any legitimate government interests. The law, instead, is motivated by the legislature's animus towards animal protection groups. When the interest and intent is to marginalize, stigmatize, and criminalize a particular group, even a law perfectly tailored to that interest, fails rational basis review. *See Moreno*, 413 U.S. at 535 ("desire to harm a politically unpopular group cannot constitute a legitimate

governmental interest"). Moreover, at this stage of the litigation, it suffices that Plaintiffs allege that the Ag-Gag statute has no other purpose than to harm a politically unpopular group and shelter a single industry from political discourse and criticism—an allegation that must be accepted as true for the purposes of the motion to dismiss. This allegation alone requires that the motion to dismiss be denied as to this claim.

Conclusion

Plaintiffs allege injuries sufficient to establish standing and should therefore survive a motion to dismiss. In fact, the Ag-Gag statute was aimed at criminalizing the exact type of investigation that Plaintiffs regularly conduct.

Plaintiffs allege a First Amendment violation. The law is a content-based prohibition on pure speech that cannot withstand review under any form of heightened scrutiny.

And Plaintiffs allege an Equal Protection Clause violation. The Ag-Gag statute burdens a fundamental right and was passed with animus against Plaintiffs and other animal protection advocates.

The Court should deny the State's Motion to Dismiss in its entirety.

Dated this 16th day of January, 2018

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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: January 16, 2018

/s/Matthew Strugar
Matthew Strugar