Case No. 19-1364

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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/Appellees,

vs.

KIMBERLY REYNOLDS, GOVERNOR OF IOWA; TOM MILLER, ATTORNEY GENERAL OF IOWA; and BRUCE SWANSON, MONTGOMERY COUNTY ATTORNEY,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
NO. 4:17-CV-00362-JEG-HCA

BRIEF OF *AMICUS CURIAE* ERWIN CHEMERINSKY IN SUPPORT OF APPELLEES

Dated: June 27, 2019

FOLEY & MANSFIELD, PLLP

By: */s/Elena D. Harvey*

Elena D. Harvey (#0392433)
Donald Zheng (#0400306)
Cha Xiong (#0398253)
250 Marquette Avenue
Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788

Counsel for *Amicus Curiae*
Erwin Chemerinsky

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE AND AUTHORITY[1]

Undercover investigative reporting is a hallmark of the venerable history of the First Amendment. In facilitating the free flow of information and ideas, the First Amendment has protected the nation's finest journalists who uncover and expose fraud and abuse. The latest chapter of this long tradition drew widespread national attention in 2011 to Iowa's agricultural industry. Investigators at three separate Iowa facilities identified workers mistreating hens and chicks, hurling small piglets onto a concrete floor, and beating, gouging, and kicking young pigs. But rather than crack down on animal abuse at factory farms, the Iowa Legislature reacted swiftly to obstruct the type of undercover investigation that exposed the abuse in the first place. Iowa's "Ag Gag" law creates a new crime, "agricultural production facility fraud," under which journalists, investigators, and animal-welfare advocates may face up to one year in jail for conducting undercover investigations at various types of agricultural facilities.

Amicus Erwin Chemerinsky files this brief to assist the Court with two questions arising from this constitutional challenge to Iowa's Ag Gag law. Iowa Code § 717A.3A (2012) criminalizes misrepresentations to facilitate undercover

[1] Appellees consent to the requested leave. Appellants have not consented. No counsel for any party authored the brief in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the preparation and submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

investigations and expose abusive or unsafe conditions at private agricultural operations. The First Amendment protects false speech unless that speech causes some legally cognizable harm or provides a material gain to the speaker. The first question raised by Appellants is whether the false speech criminalized by Iowa Code § 717A.3A is entitled to First Amendment protection. This brief explores why the district court was correct in holding that the statements made by these undercover investigators are subject to protection under decades of First Amendment jurisprudence. Second, Appellants raise the issue of whether the prohibition is subject to and can survive intermediate scrutiny. This brief explains why the district court was correct in holding that Iowa's Ag Gag law cannot withstand either a strict or intermediate scrutiny analysis as articulated in *United States v. Alvarez*. 567 U.S. 709 (2012).

Amicus Erwin Chemerinsky is well positioned to assist the Court in these matters. He is the founding Dean and Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. He previously taught at Duke Law School for four years and at the University of Southern California for 21 years. Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of eight books—including his treatise CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES and the casebook CONSTITUTIONAL LAW—and

more than 200 articles in top law reviews. He frequently argues cases before the nation's highest courts, including the United States Supreme Court, and also serves as a commentator on legal issues for national and local media. In January 2014, *National Jurist* magazine named Dean Chemerinsky the most influential person in legal education in the United States.

Amicus Erwin Chemerinsky files this brief by leave of Court pursuant to Federal Rule of Appellate Procedure 29(a)(2).

ARGUMENT

In January 2019, the district court struck down Iowa's Ag Gag law, concluding that the law's misrepresentation prohibition was a content-based restriction on false speech, subject to and failing to withstand judicial scrutiny. *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) ("*ALDF II*"). As the district court noted, not only is Iowa's Ag Gag law unnecessary to protect perceived harms to property and biosecurity, it is so broad in scope that "it is already discouraging the telling of a lie in contexts where harm is unlikely and the need for prohibition is small." *Id.* at 826–27. This Court should affirm the decision below.

I. THE SPEECH PROHIBITED BY IOWA'S AG GAG LAW IS ENTITLED TO FIRST AMENDMENT PROTECTION.

There should be no question that the speech at issue here, though false, is fully entitled to First Amendment protection. In *United States v. Alvarez*, six

justices—that is, both the four-Justice plurality and the two-Justice concurrence—rejected the notion that there is "any general exception to the First Amendment for false statements." 567 U.S. 709, 718 (2012). Instead, as the plurality explained, First Amendment protection for false statements gives way only where there is "defamation, fraud, or some other legally cognizable harm associated with a false statement, such as invasion of privacy or the costs of vexatious litigation." *Id.* at 719. Absent such "legally cognizable harm," a statute "that targets falsity and nothing more" is subject to exacting First Amendment scrutiny. *Id.* The six Justices "were clear that speech cannot be punished just because it is false." Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA JOURNAL, Sept. 5, 2012.

As the district court correctly pointed out, the speech implicated in Iowa's Ag Gag law is false statements and misrepresentations. *ALDF II*, 353 F. Supp. 3d at 821. Mirroring the language in *Alvarez*, the court determined that "[u]ltimately, in assessing falsehoods in this context, the Court engages in a legal, not moral, analysis. . . . [F]alse statements will be protected by the First Amendment only if they do not cause a legally cognizable harm or provide material gain to the speaker." *Id.* at 821–22 (internal citations and quotations marks omitted). The court concluded that the speech implicated by Iowa's Ag Gag law does not cause either. *Id.* It is true that the *Alvarez* plurality at one point described as unprotected those

false claims "made to effect a fraud or secure moneys or other valuable considerations, say offers of employment." 567 U.S. at 723. But the proposed speech at issue here does not fit that description—it would not be "used to gain a material advantage," *id.*, but rather to find evidence of animal abuse and truthfully publicize that evidence. *See State v. Melchert-Dinkle*, 844 N.W.2d 13, 21 (Minn. 2014) (holding that *Alvarez*'s fraud exception is not met where the speaker does not gain "a material advantage or valuable consideration" for the false speech). The misrepresentations, in other words, are made solely for the purpose of newsgathering.

In the district court, the ALDF and other plaintiffs argued that these laws are a byproduct of "an on-going tension between members of the news media and the agricultural industry," and that in that context, lawmakers "have attempted to suppress information from reaching the press by prosecuting newsgathering activities that serve as the foundation of investigative journalism." *ALDF II*, 353 F. Supp. 3d at 818–19 (internal citation and quotations marks omitted). The Supreme Court has held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). The Iowa Legislature, however, is not simply attempting to subject newsgathering to a body of "generally applicable" law, such as tort law, which

applies to the "daily transactions of the citizens." *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999). Rather, the Iowa Ag Gag law effectively criminalizes undercover investigations of a variety of agricultural facilities, including "those of interest to the general public, such as puppy mills." *ALDF II*, 353 F. Supp. 3d at 818. The direct criminalization of such investigations is far from "incidental."

Even if the speech here were assessed under the standards applicable to tort suits, the outcome would still be the same: misrepresentations are not actionable unless they cause cognizable harm in their own right. In the famous *Food Lion* case, for example, ABC News reporters falsified their resumes to get jobs solely for the purpose of exposing unsanitary food-handling practices. *Food Lion*, 194 F.3d at 512–13. Even though the reporters in that case had "knowingly made misrepresentations with the aim that Food Lion rely on them," the Fourth Circuit held that there was no actionable fraud, and hence reversed a jury verdict for punitive damages because there was no legally cognizable harm caused by reliance on the misrepresentations. *Id.* Similarly, in *Desnick v. American Broadcasting Companies, Inc.*, an ABC News program sent in seven undercover "test patients" to expose an eye-care center that was providing vulnerable elderly patients with unnecessary cataract surgery to collect on Medicare reimbursements. 44 F.3d 1345, 1348 (7th Cir. 1995). The Seventh Circuit saw no scheme to defraud on these facts:

"[T]he only scheme here," wrote Judge Posner, "was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme." *Id.* at 1355.

The Supreme Court has long recognized that "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby chilling a kind of speech that lies at the First Amendment's heart." *Alvarez*, 567 U.S. at 733 (internal citation and quotation marks omitted). The district court articulated this very concern when it considered a motion to dismiss in this case in 2018: "To categorically deny protection for false speech that may cause the nominal invasion of a legal right but that does not result in actual, material harm would result in overbroad restrictions on speech, creating undue chilling of valued First Amendment expression." *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 923 (S.D. Iowa 2018) ("*ALDF I*"). It is a longstanding principle that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (internal citations omitted).

Other courts throughout the country have recognized that the harm in these undercover cases does not necessarily come from the false statements themselves. "[I]f an undercover investigator omits certain facts . . . and then publishes a *false*

story, the harm would stem from the publication of the *false story*, not the lies told to gain access to the facility." *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1022 (D. Idaho 2014) (emphasis added). In that scenario, the facility owner's remedy would lie in the law of defamation, not fraud. "Conversely, if an undercover investigator lies to get a job at an industrial agricultural facility and then publishes a *true story* revealing the conditions present at the facility without causing any other harm to the facility, there is no compensable harm for fraud." *Id.* (emphasis added). Additionally, not all lies are created equal:

> It is certainly conceivable that some lies used to gain access to a facility will necessarily harm animals or employees. It is certainly conceivable that some lies used to gain access to a facility might result in such harm—the job applicant, for example, who lies about being trained to use heavy equipment, or who represents that he has a safety certification he does not actually possess. But plenty of lies that fall within the purview of the Act would cause no harm at all to animals or workers—the applicant who says he has always dreamed of working at a slaughterhouse, that he doesn't mind commuting, that the hiring manager has a nice tie.

Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1202 (D. Utah 2017).

The appellants in this case have emphasized the harm caused by the speaker's trespass when conducting these undercover investigations. However, as the district court recognized, "[a] trespasser may enter a property unauthorized and interfere with a property owner's right to control who enters his property without causing any actual or material injuries to the property owner." *ALDF I*, 297 F. Supp. 3d at 922. This harm, alone, is not necessarily legally cognizable. Both the

Fourth and Seventh Circuits have concluded that "it depends on the type of harm (if any) the liar causes." *Herbert*, 263 F. Supp. 3d at 1202 (citing *Am. Broad. Cos., Inc.*, 44 F.3d at 1352, and *Food Lion*, 194 F.3d at 517). "Specifically, if the person causes harm of the type the tort of trespass seeks to protect—interference with ownership or possession of the land—then her consent to enter becomes invalid, and from that point on she is not merely a liar, but a trespasser as well." *Id.* at 1203. However, someone who is "in fact just a busybody looking to snoop around" is not a trespasser because no interference has occurred. *Id.*

This long tradition of constitutionally protected misrepresentation extends well beyond discrimination cases. Going undercover—which by its nature entails a certain degree of deception—is a practice with a long and venerable history in the finest traditions of the First Amendment. Perhaps the most famous example, and the most relevant here is that of the muckraker Upton Sinclair, who engaged in misrepresentation so he could get a job at a meat-packing plant in Chicago to gather material for his influential novel, *The Jungle*. *See* WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977). The fruit of Sinclair's investigations—a vivid exposé of horrifying unsanitary conditions in the meat industry—spurred both President Theodore Roosevelt and Congress to take action on the Meat Inspection Act and the Pure Food and Drugs Act, which paved the way for the creation of the Food and Drug Administration. *See Nat'l Meat Ass'n v.*

Harris, 565 U.S. 452, 455–56 (2012); *Meat Inspection Bill Passes The Senate*, N.Y. TIMES, May 26, 1906, at 1 (reporting how the Senate's action was "the direct consequence of the disclosures made in Upton Sinclair's novel, 'The Jungle'"). The question here, a century later, is whether the government may brand any would-be Upton Sinclairs as criminals.

II. THE DISTRICT COURT DID NOT ERR WHEN IT CONCLUDED THAT IOWA'S AG GAG STATUTE FAILED TO SURVIVE EITHER STRICT SCRUTINY OR INTERMEDIATE SCRUTINY UNDER THE FIRST AMENDMENT.

The four-justice plurality in *Alvarez* invalidated the Stolen Valor Act under "exacting scrutiny," finding that the statute was not "actually necessary to achieve the Government's stated interest," as exacting, or strict, scrutiny requires. 567 U.S. at 726. The concurring opinion authored by Justice Breyer, however, suggested an intermediate scrutiny, or "proportionality," approach. *Id.* at 730. The district court acknowledged the fragmented decision and that it has left us with a somewhat uncertain framework in which to analyze these regulations that proscribe false speech. *ALDF II*, 353 F. Supp. 3d at 822–24. However, the court went on to correctly conclude that Iowa's Ag Gag law cannot withstand either the strict or intermediate scrutiny analysis.

Some content-based laws that burden highly-protected, pure speech can, in very limited situations, be permissible. The Supreme Court has long held that there are exceptions for fraud, defamation, fighting words, and other "historic and

traditional categories of expression long familiar to the bar." *Alvarez*, 567 U.S. at 717 (internal citations omitted). Because the speech at issue here does not fall into any such exception, strict scrutiny should apply. *See id.* Under this analysis, the district court concluded that the Iowa Ag Gag law is not narrowly-tailored to serve a compelling state interest.

The district court noted that interests in private property and biosecurity are the actual interests that the State purports are protected by Iowa's Ag Gag law. While the court was persuaded that these interests are compelling, "they are not compelling in the First Amendment sense." *ALDF II*, 353 F. Supp. 3d at 824. These interests are not compelling because there is no indication that they are actually threatened by people who lied to gain access to the agricultural facilities. *See, e.g.*, *Herbert*, 263 F. Supp. 3d at 1211–12. The harm alleged by the law is entirely speculative. And the harm that is "[m]ere[ly] speculat[ive] . . . does not constitute a compelling state interest." *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 (1980).

Even if we assume that the State had demonstrated that the interests of private property and biosecurity are compelling, the State has not shown that the Iowa Ag Gag law is narrowly tailored to address the problem. If the State is going to use the content-based law to restrict protected speech, the restriction must be "actually necessary" to achieve the State's purported interests. *Brown v. Entm't*

Merchants Ass'n, 564 U.S. 786, 799–804 (2011). The district court correctly held that there is no evidence that Iowa's Ag Gag law is necessary to protect the perceived harms to property and biosecurity. *ALDF II*, 353 F. Supp. 3d at 825. Not only is there no connection between the making of a false statement and the perceived harms, but there are alternative measures available to achieve these interests. *See McCullen v. Coakley*, 573 U.S. 464, 467 (2014).

Under the strict scrutiny analysis, the law must also not be over- or under-inclusive. *Brown*, 564 U.S. at 799–804. Again, the district court correctly found that the law at issue in this case is both. It is underinclusive because it does nothing to address the exact same allegedly harmful conduct that would cause biosecurity problem when undertaken by someone who simply sneaks into the facilities without false pretense. *ALDF II*, 353 F. Supp. 3d at 826. It is also overinclusive because it lacks sufficient limitations. *Id.* For example, it criminalizes those employees who lied on their job applications just to get the job and performed well but are not undercover investigators/journalists. *See id.*

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

Republican Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005). As the district court's analysis shows, Iowa's Ag Gag law fails on each of these points.

The State did not provide a direct argument to support that the Iowa Ag Gag law can withstand strict scrutiny. Instead, it argued that the statute is subject to intermediate scrutiny as articulated in Justice Breyer's concurring opinion in *Alvarez*. This "proportionality" approach is "puzzling" because "the law is clearly settled that content-based restrictions on speech must meet strict scrutiny and will be upheld only if they are proven necessary to achieve a compelling interest." Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA Journal, Sept. 5, 2012. "'Proportionality' review—the label Justice Breyer uses to describe his analysis—never has been part of First Amendment analysis." *Id.* And a majority of the Supreme Court has recently rejected this type of "free-floating test for First Amendment coverage" as both "startling and dangerous." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Even if intermediate scrutiny is the standard applied, the Iowa Ag Gag law would fail. Justice Breyer's "proportionality" approach "take[s] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so." *Alvarez*, 567 U.S. at 730 (Breyer, J., concurring). The Court then must decide whether the speech-related harm purported by the statute "is out of proportion to its justifications." *Id.* Here, "the checking function

served by investigative reporting involving some deception" is weighed against the "government's interest in protecting against invasions of the listener's autonomy," the balance favors the speaker who exposed the truth. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1125–26 (2006). At the end of the day, the First Amendment favors truth-seeking over truth suppression.

The Iowa Ag Gag law criminalizes speech that inflicts "no specific harm" on property owners, "ranges very broadly," and risks significantly chilling speech that is not covered under the statute. *ALDF II*, 353 F. Supp. 3d at 827 (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1198 (9th Cir. 2018)). Although First Amendment jurisprudence permits the restriction on some categories of speech that cause legally cognizable harm or material gain, it does not permit laws like the Iowa Ag Gag law, which is so broad in scope that it discourages the speech where the "harm is unlikely and the need for prohibition is small." *ALDF II*, 353 F. Supp. 3d at 827. Additionally, it is "possible substantially to achieve the Government's objective in less burdensome ways" with "a more finely tailored statute." *Wasden*, 878 F.3d at 1198 (internal citation and quotation marks omitted). Even under intermediate scrutiny, then, the subsection "works disproportionate constitutional harm." *Id.*

CONCLUSION

The judgment of the district court should be affirmed.

FOLEY & MANSFIELD, PLLP

Dated: June 27, 2019

By: */s/Elena D. Harvey*

Elena D. Harvey (#0392433)
Donald Zheng (#0400306)
Cha Xiong (#0398253)
250 Marquette Avenue
Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788
E-mail:
eharvey@foleymansfield.com
dzheng@foleymansfield.com
cxiong@foleymansfield.com

Counsel for *Amicus Curiae*
Erwin Chemerinsky

CERTIFICATE OF COMPLIANCE

Amicus Curiae hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) and 32(a)(7)(B) which permit 6,500 words, because it contains 3,565 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface, Times New Roman, and fourteen (14) point font size. Finally, Amicus Curiae certifies that this brief has been scanned for and is free of viruses and therefore complies with Local Rule 28A(h).

Dated: June 27, 2019

By: */s/Elena D. Harvey*
Elena D. Harvey
Foley & Mansfield, PLLP