UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. **KIMBERLY K. REYNOLDS**, et al. Defendants.	**Case No. 4:17-cv-362–SMR-HCA** **Plaintiffs' Reply in Support of Their Supplemental Brief in Response to Court's Order for Briefing [ECF No. 111]**
ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. **KIMBERLY K. REYNOLDS**, et al. Defendants.	**Case No. 4:19-cv-124–SMR-HCA** **Plaintiffs' Reply in Support of Their Supplemental Brief in Response to Court's Order for Briefing [ECF No. 80]**

The State's defense of § 717A.3B asks this Court to adopt the defeated arguments of a dissent. To sustain § 717A.3A(1)(a), the State rewrites the law of the case and asks the Court to nullify *Reed v. Town of Gilbert*, which holds a law can be "facially content neutral" but subject to the strictest First Amendment scrutiny if it was "adopted by the government because of disagreement with the message." 576 U.S. 155, 164 (2015). The State's contentions are untenable. The challenged provisions are viewpoint discriminatory and unconstitutional.

The State's response on § 717A.3B begins with the irrelevant assertion that § 717A.3B does not restrict false "speech protected by the First Amendment." State Br. 13–14. Assuming that is right, the State does not dispute a law still "'may not regulate [the] use' of unprotected speech 'based on hostility—or favoritism—towards the underlying message expressed.'" *ALDF v. Kelly*, 9 F.4th 1219, 1229 (10th Cir. 2021) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)). That is, even if § 717A.3B's prohibition on false speech protects against that speech's "*constitutionally proscribable content*," *i.e.*, to prevent the false speech from generating "a legally cognizable harm," Iowa cannot enact § 717A.3B to punish that speech because it produces consequences "distinct from … any legally cognizable harm." *Id.* at 1229, 1239. The latter is the unconstitutional viewpoint discrimination Plaintiffs claim here.

When the State turns to the viewpoint analysis, it relies on several decisions that considered statutes textually distinct from § 717A.3B. It insists holding § 717A.3B viewpoint discriminatory would conflict with *ALDF v. Wasden*, State Br. 3, but *Wasden* addressed a statute that punished all falsehoods "inten[ded] to cause economic" harm. 878 F.3d 1184, 1101–02 (9th Cir. 2018). Section 717A.3B prohibits falsity if the speaker separately intends to harm the enterprise's "business interests." It limits its reach not based on the nature of the falsity, but the speaker's other goals, such as engaging in truthful whistleblowing. Plfs.' Br. 13. *Wasden* did not consider whether

such a law would be viewpoint discriminatory because that law identified and regulated all falsehoods defined by their cognizable harm, without regard to the speaker's broader agenda. For these same reasons, the State asking the Court to apply to § 717A.3B opinions suggesting § 717A.3A's text does not differentiate between viewpoints—without considering that law's legislative history—is illogical. State Br. 3, 14–15. Section 717A.3A focuses on false speech and its consequences. It lacks the element Plaintiffs rely on to challenge § 717A.3B. *E.g.*, Plfs.' Br. 10, 21.

With these distractions peeled away, the State is left requesting that this Court uphold § 717A.3B based on the debunked "reasons … in Circuit Judge Hartz's dissent" in *Kelly*. State Br. 14. Mimicking Judge Hartz, the State claims § 717A.3B regulates "the intent or motivation of the speaker," not its speech, and thus is lawful. *Id.* at 15. This is both legally and factually incorrect.

The Supreme Court held laws can restrict "discriminatory motive[s]" without violating the First Amendment, if they proceed in the same way Title VII prohibits discrimination. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). That is, the government can target pure conduct (discrimination) motivated by a particular "idea or philosophy," *e.g.* racial animus. *R.A.V.*, 505 U.S. at 390. But the Court distinguished lawful statutes that regulate conduct prompted by an objectionable mental state from laws that single out speech the government finds "particularly offensive." *Mitchell*, 508 U.S. at 487. "A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*," which is what renders obscenity unprotected, but it cannot condition the restriction of even unprotected speech on "the sovereign's agreement with what [that] speaker may intend to say." *R.A.V.*, 505 U.S. at 388, 390. In the words of the *Kelly* majority studying this same case law, what separates lawful regulations from unconstitutional viewpoint discrimination is that the latter "(1) targets speech and (2) contains an intent requirement that covers an intent to engage in protected speech advancing a specific viewpoint." 9 F.4th at 1242. *Mitchell*

and *R.A.V.* disprove the State's claim there is a safe harbor for "motive or intent requirement[s]," and instead instruct courts to consider what those requirements are "aimed at," to assess whether they lead the law to punish only certain speakers, which is unconstitutional. *Id.* at 1241.

Section 717A.3B fails this test. It does not merely prohibit false speech or false speech that produces a special harm because of its falsity, but a subset of false speech that Iowa sees as harmful because the speaker wishes to engage in *subsequent expressions* that damage the facility's "business interests." Under *Mitchell* and *R.A.V.*, the government could "gradate" its punishment for falsehoods because the motivations for the false statements cause distinct harms, as that is what makes false speech "proscribable." *Kelly*, 9 F.4th at 1245 & n.24. That is not what Iowa did. Rather, it eliminated all consequences for some falsehood and only punished others because of "subsequent protected speech" the State disliked. *Id.* Section 717A.3B "criminalize[s] the inchoate desire to express a view where [the government] cannot criminalize the expression" directly to suppress that speech. *Id.* at 1242. This objective is confirmed by the legislative history, Plfs. Br. 12–13, and the State's own brief, 15. That is unconstitutional viewpoint discrimination.[1]

The State's procedural defense of § 717A.3A(1)(a) is equally erroneous. It claims that, although Plaintiffs raised their viewpoint discrimination argument before the district and appellate courts, Plaintiffs waived the issue because they failed to cross-appeal. State Br. 5. However, the district court stated it did not reach the viewpoint argument because it had already provided Plaintiffs complete relief. *ALDF v. Reynolds*, 353 F. Supp. 3d 812, 822 n.13 (S.D. Iowa 2019). "[T]he

[1] The State also cites *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), presumably because it is cited in Judge Hartz's dissent. But *Dinwiddie* is inapplicable. The statute there prohibited threats "because the victim" sought "reproductive health services." *Id.* at 922–23 (brackets removed). As the *Kelly* majority explained, it was only "aimed at conduct unprotected by the First Amendment" (threats, not threats and subsequent speech) and thus the "intent requirement" did not target the law against "protected, but disfavored speech." 9 F.4th at 1245 n.26. It is unlike § 717A.3B.

party that prevailed in the district court need not file a cross-appeal to raise alternative grounds for affirmance." *Transcon. Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 758 (8th Cir. 2004) (citing *Johnson v. Enron Corp.*, 906 F.2d 1234, 1238 (8th Cir. 1990)).

Moreover, contrary to the State's pretentions, the Eighth Circuit did not resolve this issue in its favor. State Br. 6. The majority never uses the word viewpoint. As a result, the State cherry-picks a single clause from the majority—that § 717A.3A(1)(a) "is consistent with the First Amendment"—omitting the remaining parts of the same sentence and paragraph, which state the majority reached its conclusion only because it determined the falsities regulated by § 717A.3A(1)(a) produce "legally cognizable harms." *ALDF v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021). The majority upheld § 717A.3A(1)(a) because it regulated unprotected speech. Again, that is distinct from whether the law is viewpoint discriminatory. Indeed, the State recognizes Judge Grasz's concurrence conflicts with its reading of the majority he helped create. He stated the "'application of this'" statute should be subject to viewpoint analysis because the law should not be allowed to "criminaliz[e] [] false speech by those with political or ideological messages," as that would be unconstitutional. State Br. 6–7 (citing *Reynolds*, 8 F.4th at 789 (Grasz, concurring)). This is precisely what Plaintiffs contend occurs under § 717A.3A(1)(a), because it prevents false speech to stop Plaintiffs from engaging in their campaigns against factory farms. To the extent the Eighth Circuit spoke to the issue here, it is to suggest it needs to be addressed.

The State is also incorrect that this issue—presented to and left open by the Court of Appeals—cannot be considered under the "mandate rule." *See* State Br. 4. "[T]he appellate mandate commonly leaves the trial court free to decide matters that were not resolved." 18B Charles Allen Wright, et al., *Federal Practice and Procedure* § 4478.3 (West 2022) (State's authority). "The court of appeals may facilitate application of this rule by expressly stating that a particular question

is left open," but a remand "directing further proceedings" allows the lower courts to decide any issue "left open." *Id.* In the words of the Eighth Circuit, "When we remand a case, the district court may consider and decide any matters left open." *Sprint Commc'ns Co., L.P. v. Lozier*, 860 F.3d 1052, 1056 (8th Cir. 2017). Directly rejecting the State's magic words test—that the remand must contain "specific directions to consider" arguments, State Br. 4—the Eighth Circuit has stated the lower courts' may consider unresolved issues whenever it remands for "further proceedings consistent with our opinion," even if it does not "expressly order[]" what those proceedings should contain. *United States v. Wisecarver*, 644 F.3d 764, 771 (8th Cir. 2011).

Finally, the State's claim that this Court must ignore § 717A.3A(1)(a)'s legislative history, establishing the provision was enacted to suppress specific viewpoints, because no legislator's sentiments can establish a law's purpose, State Br. 9–11, is just as inconsistent with governing law. In decisions post-dating the authority on which the State relies to critique reliance on legislator's statements, the Supreme Court held a law's sponsors' statements, like those Plaintiffs produced, are the authoritative guide to its purpose, when, as here, the legislature declines to issue reports. *Rice v. Rehner*, 463 U.S. 713, 728 (1983); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982). Moreover, Justice Kagan explains, "notwithstanding the Court's protestations in *O'Brien*," First Amendment law involves "motive-hunting." *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). *Reed* confirmed the reason the government enacted a law is relevant, and while this can be resolved "based on [the law's] face," courts need not limit themselves to the text and can consider the law's "purpose." 576 U.S. at 165. There must be a way to conduct that analysis.

The text and history of § 717A.3A(1)(a) and § 717A.3B establish they were passed to stop truthful advocacy Iowa disliked. They are viewpoint discriminatory and cannot stand.

Respectfully submitted this 4th day of March, 2022.

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Date: March 4, 2022

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