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–JEG-HCA** **Plaintiffs' 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–JEG-HCA** **Plaintiffs' Supplemental Brief in Response to Court's Order for Briefing [ECF No. 80]**

Introduction and Procedural Background

The Court requested a combined brief on the effect of the Eighth Circuit's decision in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021), and the Tenth Circuit's decision in *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1224 (10th Cir. 2021), on the remaining issues in each of these cases. Order for Briefing, ECF No. 111 in Case No. 4:17-cv-00362-JEG-HCA and ECF No. 80 in Case No. 4:19-cv-00124-JEG-HCA. As explained below, the *Kelly* decision provides more support for the arguments—left unaddressed by the Eighth Circuit's opinion—that Iowa Code § 717A.3A(1)(a) and both sections of § 717A.3B violate the First Amendment by impermissibly targeting speech on the basis of viewpoint.

Plaintiffs are organizations who seek to carry out the type of investigations at animal agricultural facilities that §§ 717A.3A and 717A.3B criminalize, or who rely on such investigations in their advocacy. These investigations, sponsored by Plaintiffs and others, have revealed to authorities and to the public systematic and horrific animal abuse in the commercial animal agriculture industry and puppy mills. They have also substantiated the need for food safety recalls, citations for environmental and worker safety violations, plant closures, criminal convictions, legislative and regulatory changes, and corporate reforms around the country.

"While the results of [some of] these investigations were being circulated by news media, the Iowa legislature considered H.F. 589, § 2 (Iowa 2012), which would eventually become § 717A.3A." *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 817 (S.D. Iowa 2019), *aff'd in part and rev'd in part*, *Reynolds*, 8 F.4th 781. Section 717A.3A contains two substantive provisions: a prohibition on gaining access to an agricultural production facility by false pretenses ("the access provision") and a prohibition on gaining employment at an agricultural production facility by making a false statement ("the employment provision"). Iowa Code § 717A.3(A)(1)(a)–(b).

Plaintiffs sued to enjoin § 717A.3A as violating the First and Fourteenth Amendments. The First Amendment claims consisted of three theories: content discrimination, viewpoint discrimination, and overbreadth. *See Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA (S.D. Iowa). This Court granted summary judgment to Plaintiffs on their content discrimination theory. *Reynolds*, 353 F. Supp. 3d at 821–27. The State appealed.

But the Iowa legislature didn't wait for the appeal to play out. Less than three weeks after the Court enjoined enforcement of Iowa Code § 717A.3A, lawmakers introduced new legislation in response. That legislation sped through subcommittees, committees, and both chambers in

eleven days. The law was signed quickly by the Governor, and took immediate effect. The new law, codified at Iowa Code § 717A.3B, again prohibits using deception to gain access to or employment at an agricultural production facility, but added new elements. The new law includes a requirement that the deception be material to gaining access or employment, and that the false speech or false pretenses used to gain access or employment be made "*with the intent to cause* physical or *economic harm* or other injury *to the agricultural production facility's operations*, agricultural animals, crop, owner, personnel, equipment, building, premises, *business interest*, or customer." Iowa Code § 717A.3B (emphasis added).

Plaintiffs sued to enjoin this law, too. *See Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124-JEG-HCA (S.D. Iowa). This Court preliminarily enjoined it. *Animal Legal Def. Fund v. Reynolds*, No. 4:19-cv-00124-JEG-HCA, 2019 WL 8301668, 2019 U.S. Dist. LEXIS 221912 (S.D. Iowa Dec. 2, 2019). The parties briefed cross-motions for summary judgment in 2020.

In August 2021, the Eighth Circuit affirmed in part and reversed in part this Court's order enjoining § 717A.3A. *Reynolds*, 8 F.4th 781. The Eighth Circuit affirmed this Court's determination that § 717A.3A's employment provision targeted protected speech, impermissibly discriminated against speech based on its content, and was not tailored to serve a compelling interest. *Id*. at 786–88. The Eighth Circuit reversed this Court's determination that § 717A.3A's access provision impermissibly discriminates against speech based on its content. It held that although the access provision directly regulates speech, that speech falls outside the First Amendment's scope because, the Court concluded, deception to secure a trespass constitutes a legally cognizable harm under *United States v. Alvarez*, 567 U.S. 709 (2012). *Reynolds*, 8 F.4th at 784–86.

Nine days later, the Tenth Circuit decided *Kelly*, affirming a district court judgment for

the plaintiffs in that case (which include Animal Legal Defense Fund and Center for Food Safety—Plaintiffs here) striking down a similar law in Kansas as viewpoint discriminatory. *Kelly*, 9 F.4th at 1224.

ARGUMENT

I. The Eighth Circuit's Opinion in *Reynolds* and the Tenth Circuit's Opinion in *Kelly* Take Different Analytical Approaches.

The Eighth and Tenth Circuit decisions answered different questions and used different analyses. The Eighth Circuit addressed whether the access provision and the employment provision constituted expression subject to First Amendment scrutiny under the Supreme Court's *Alvarez* decision. *Reynolds*, 8 F.4th at 785–87. Ultimately, the Eighth Circuit held that the access provision fell outside of the First Amendment's scope, *id*. at 785, but that because of its breadth, the employment provision regulated speech within the Constitution's scope, and that it was unconstitutional because it discriminated against speech because of its content. *Id*. at 787. In contrast, the Tenth Circuit focused on whether the statute was viewpoint discriminatory and therefore unconstitutional, *irrespective* of whether it reached protected or unprotected speech under *Alvarez*. *Kelly*, 9 F.4th at 1239 (stating the Tenth Circuit wasn't expressing an opinion about whether "trespass alone is a legally cognizable harm under *Alvarez*").

Taken together, *Reynolds* and *Kelly* illuminate the appropriate way forward in these cases. The Eighth Circuit's decision suggests that as a general matter § 717A.3B targets speech not covered by the First Amendment under the analysis in *Alvarez*. However, it does not address, let alone resolve, the viewpoint discrimination challenges to both laws. And because *Kelly* found the intent to damage element that also appears in § 717A.3B renders a law viewpoint discriminatory, its reasoning—supported by the Iowa law's legislative history referenced in

Plaintiffs' prior briefing—shows that § 717A.3B cannot stand regardless of whether it regulates speech covered by the First Amendment because it is nonetheless viewpoint discriminatory. And, though § 717A.3A's prohibition on access by false pretenses lacks an intent element, *Kelly*'s analysis suggests it too fails viewpoint neutrality and should be struck down.

A. The Eighth Circuit's Opinion in *Reynolds* Solely Answered the *Alvarez* Question.

Under a well hewn path of First Amendment jurisprudence, regulating some categories of speech, like obscenity or true threats, based on their content is outside the First Amendment's concern and therefore not subject to any constitutional scrutiny. That is, those categories of speech are not "covered" by the First Amendment. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773 (2004). On the other hand, for speech that does fall within the First Amendment's scope, the government may not regulate based on the speech's content unless it can withstand some form of heightened scrutiny.

In *Alvarez*, the Supreme Court held that lies do not presumptively fall within the first category of speech not covered by the First Amendment. 567 U.S. at 718-22 (plurality opinion). Rather, the Court explained, only lies that cause a legally cognizable harm, such as financial fraud, are exempt from First Amendment analysis. *Id*. at 719.

In enjoining § 717A.3A's access and employment provisions, this Court found the law to be an impermissible content-based regulation: "the false statements implicated by § 717A.3A are protected speech because" they "do not cause a legally cognizable harm' or provide 'material gain' to the speaker." *Reynolds*, 353 F. Supp. 3d 812, 821–22 (S.D. Iowa 2019) (cleaned up) (discussing *Alvarez*, 567 U.S. at 717–35). The Court then found § 717A.3A failed both strict and

intermediate scrutiny. *Id*. at 824–27. The Court did not reach Plaintiffs' viewpoint discrimination theory. *Id*. at 822 n.13.[1]

When the Eighth Circuit reversed in part and affirmed in part, it accordingly focused only on the issue on appeal: whether § 717A.3A criminalized speech that, under *Alvarez*, fell within First Amendment scrutiny. *Reynolds*, 8 F.4th at 784–88. Applying its understanding of *Alvarez*, the Eighth Circuit held the access provision permissible because, it concluded, gaining access to private property through deception is a trespass, and trespass is a legally cognizable harm. *Id*. at 786.

However, the Eighth Circuit affirmed this Court's invalidation of § 717A.3A's employment provision, explaining it "sweeps more broadly" than what *Alvarez* allows. *Id*. at 787. Because the employment provision "does not require that false statements made as part of an employment application be material to the employment decision," "it allows for prosecution of those who make false statements that are not capable of influencing an offer of employment" or producing a materially cognizable harm. *Id*. The Court applied strict scrutiny to the employment provision and concluded that it failed such scrutiny because there was an obvious less restrictive alternative: to "proscribe only false statements that are material to a hiring decision." *Id*.

B. In Contrast, the Tenth Circuit's Opinion in *Kelly* Turned on the Viewpoint Discrimination Question.

Just over a week after the Eighth Circuit's decision, the Tenth Circuit found unconstitutional a Kansas law that prohibits certain actions directed at an animal facility,

[1] This Court's prior decision also did not address Plaintiffs' claim that the Iowa law is unconstitutionally overbroad. *Id*. at 827 n.18. Plaintiffs rely on their previous briefing on this claim.

including gaining access, when done through deception and with the intent "to damage the enterprise conducted at the animal facility." *Kelly*, 9 F.4th at 1224 (analyzing Kan. Stat. §§ 47-1826, 47-1827). In doing so, however, the Court did not take on the *Alvarez* coverage question directly. First, with regard to the question of whether the Kansas law prohibited deceptions that cause a legally cognizable harm, the Court stated explicitly that it wasn't expressing an opinion about whether "trespass alone is a legally cognizable harm under *Alvarez*." *Id*. at 1239. Second, the Tenth Circuit held that the Kansas Ag Gag statute was focused not on the harm of trespass, but on the harm caused by truthful speech resulting from undercover investigations like the ones Plaintiffs seek to carry out or learn from. It stated that while "false speech that causes harm is not entitled to the full force of First Amendment protection" under *Alvarez*, "the intent to damage the enterprise requirement does not make the false speech here unprotected because not all intents to damage the enterprise of an animal facility are cognizable harms under *Alvarez*." *Id.* at 1234. In other words, *Alvarez* might permit a statute targeting harms ostensibly caused by gaining unauthorized access or control, such as physical damage, but not one restricting speech made to "damage the enterprise." That is not a cognizable harm because any injury to a facility's business may result exclusively from truthful speech, not the false speech *Alvarez* said may fall outside the First Amendment. *Id*. at 1234 ("Damage occurs only if the investigators uncover evidence of wrongdoing and share that information, resulting in other actors choosing to take further actions."). That's impermissible: "Whatever legally cognizable harm is, it cannot be harm from protected, true, speech." *Id*. at 1235; *see also id*. ("Simply put, the 'harm' Kansas seeks to avoid is the type of harm that is not only legally non-cognizable but legally protected: that arising out of true speech on a matter of public concern.").

Next, the Tenth Circuit held that without regard to whether any portion of the Kansas

statute restricted false speech beyond the First Amendment's scope, the Kansas statute was an unconstitutional viewpoint discrimination regulation. It based its conclusion on the legal principle that even types of speech that may "'be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.),' [still] are not 'categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.'" *Id*. at 1229 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992)) (emphasis in *R.A.V.*). That is, "'the government may not regulate use' of unprotected speech 'based on hostility—or favoritism—towards the underlying message expressed." *Id*. (quoting *R.A.V.*, 505 U.S. at 386). If the reason it is regulating speech—even speech that generally falls outside the First Amendment—is to restrict the opinions expressed by that speech rather than the harm that rendered the speech unprotected—the law is viewpoint discriminatory and cannot stand. "'Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.'" *Id*. (quoting *R.A.V.*, 505 U.S. at 384) (emphasis in *R.A.V.*). So, for the Kansas law, "[e]ven if trespass constituted a legally cognizable harm such that deception to trespass was not protected speech," the *R.A.V.* principle means Kansas may not prohibit deception to trespass in a viewpoint discriminatory way. *Id*. at 1239.

The Tenth Circuit found the Kansas law did just that. Here, the Court homed in on the fundamental problem with all Ag Gag legislation—it is targeted to disadvantage those critical of the commercial animal agriculture industry's mistreatment of farmed animals. The viewpoint discrimination was exhibited by the statute's intent to harm requirement. With that requirement, the law "treats differently trespassers who have negative intentions towards the enterprise carried on at an animal facility from those with positive or neutral intentions." *Id*. at 1229. "A person

who lies to acquire or exercise control over an animal facility intending to expose wrongdoing violates [the law]. But a person who tells the same lie to gain the same control intending to laud the facility or for neutral reasons does not." *Id*. at 1233. Similarly, a person who gains access through deception to make a recording and intends "to damage the enterprise, say by exposing animal cruelty or safety violations," breaks the law. *Id*. at 1236. "But neither a person who gains access through fraud to make a laudatory video nor a person who makes a video solely to demonstrate he was able to lie his way onto the premises would come within the Act's reach." *Id*.

As the Court explained, "The damage to the enterprise intended from ALDF's investigations does not flow directly from deceiving the animal facility owner into allowing entry. Damage occurs only if the investigators uncover evidence of wrongdoing and share that information, resulting in other actors choosing to take further actions." *Id*. at 1234. Unlike defamation, perjury, or fraud, where the false speech directly causes the harm, the Kansas statute proscribed speech despite the "numerous further causal links between the false speech and the animal facility suffering damage." *Id*. Its interpretation of the Kansas statute revealed that the State was not really restricting false speech because it supposedly caused a legally cognizable harm of trespass, but because the State wished to repress the truthful information produced by undercover investigations, which constitutes impermissible viewpoint discrimination.

The legislative history "confirm[ed] what the text of the law alone demonstrate[d]: the Act places pro-animal facility viewpoints above anti-animal facility viewpoints." *Id.* The Tenth Circuit quoted a Kansas legislator who warned of "animal rights activists with an anti-agriculture agenda . . . l[ying] on job applications in order to gain access to farms or ranches and take undercover video," in advocating for the law. *Id*.

Thus, on the viewpoint discrimination question, the Tenth Circuit found that the Kansas law did "just what the First Amendment prohibits: 'license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.'" *Id*. at 1245 (quoting *R.A.V.*, 505 U.S. at 391). On this basis it struck down the challenged provisions.

II. Section 717A.3B's Access Provision and Employment Provision Are Both Viewpoint-Based Regulations of Speech and are Therefore Unconstitutional.

In reversing this Court's invalidation of § 717A.3A's access provision, the Eighth Circuit concluded that deceptions used to gain access to private property constitute lies that cause the legally cognizable harm of trespass, and are therefore not subject to First Amendment scrutiny under *Alvarez*. Following that reasoning, § 717A.3B(1)(a)'s prohibition of deception to gain access would also not likely be covered by the First Amendment. And while the Eighth Circuit found § 717A.3A's employment provision unconstitutional because it lacked a materiality requirement, *Reynolds,* 8 F.4th at 797, § 717A.3B's employment provision seems to cure that defect. Iowa Code § 717A.3B(1)(b).

Nonetheless, § 717A.3B's access provision and employment provision are both unconstitutional because, like the Kansas law invalidated in *Kelly*, their common requirement that deception be undertaken with intent to cause economic harm to a facility's "business interest" make them impermissibly discriminatory based on the speaker's viewpoint. Thus, even if the Eighth Circuit is correct that lies to accomplish a trespass are not speech covered by the First Amendment, the Free Speech Clause nonetheless forbids viewpoint discrimination *within* that category of deceptions. *R.A.V.*, 505 U.S. at 383–84.

This impermissible approach to viewpoint discrimination is revealed by a close comparison of the statutes' plain language (for the Court's convenience, Plaintiffs submit

Appendix A to this brief, which compares the language of Iowa's § 717A.3A § 717A.3B, and Kansas's Ag Gag statute). Both § 717A.3B's access provision and its employment provision are materially indistinguishable in operation from the Kansas Ag Gag law. First, § 717A.3B's access provision forbids (1) "gaining access to [an] agricultural production facility"; (2) by "deception"; (3) "with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer." Iowa Code § 717A.3B(1)(a). Similarly, § 717A.3B's employment provision forbids (1) securing employment; (2) by "deception"; (3) "with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer." Iowa Code § 717A.3B(1)(b).[2] In comparison, as described by the Tenth Circuit, the Kansas law forbids "acquiring or exercising control over an animal facility without effective consent of the owner and with intent to damage the enterprise; . . . recording, attempting to record, or trespassing to record on an animal facility's property without effective consent of the owner and with intent to damage the enterprise; and trespassing on an animal facility without effective consent of the owner and with intent to damage the enterprise. *Kelly*, 9 F.4th at 1224 (describing Kan. Stat. Ann. § 47-1827(b), (c) (d)). Consent was not "effective" if it was obtained by deception. Kan. Stat. Ann. § 47-1826(e)(1).

Thus, both the access and employment provisions of § 717A.3B target speakers who

[2] The Kansas law at issue in *Kelly* did not include an express employment provision. *See* Kan. Stat. Ann. § 47-1827. On appeal, Kansas sought to defend its law as prohibiting employment by deception, but the Tenth Circuit found the state forfeited that argument by not raising it in the district court. *Kelly*, 9 F.4th at 1237 n.14. In any event, Kansas's attempt to defend on this basis went to the *Alvarez* question—i.e., whether employment by false pretenses constituted lies "'to effect a fraud or secure moneys or other valuable consideration,'" *id*. (quoting *Alvarez*, 567 U.S. at 723)—not the *R.A.V.* viewpoint discrimination question.

engage in deception to gain access to or employment at agricultural facilities only when they do so with the intent to cause, among other things, *economic harm to a facility's business interest*, indicating that the statute reaches even those whose only intent is to reveal the truth in ways that could result in harm to the facility operator's reputation. And Kansas's law prohibits deception to gain access only where the speaker has the intent to "*damage the enterprise* conducted at the animal facility." Indeed, the similarity between the intent provisions is striking. All three provisions target for criminal punishment only those "who have negative intentions towards the enterprise carried on at an animal facility from those with positive or neutral intentions," punishing the former while allowing the later and thereby manipulating the marketplace of ideas through viewpoint discrimination. *Kelly*, 9 F.4th at 1229. Moreover, all of these laws punish not those harms that flow directly from the deceptive speech, but rather are aimed at deterring deceptive speakers with critical objectives. As *Kelly* found, someone who gains access to an animal facility through deception and publishes information that merely neutrally reports on the facility, without the goal to alter its operations, would not be subject to criminal punishment, as they would not bear the requisite intent. *Kelly*, 9 F.4th at 1233.

In addition to focusing on the precise language of the intent requirement, the Tenth Circuit in *Kelly* also relied on the "express hostility" toward animal rights activists in the legislative record. *Id*. Iowa's legislative record reveals the same hostility. Iowa legislators stated that they passed § 717A.3A to "make producers feel more comfortable" and that animal activists "want to hurt an important part of our economy, . . . [and] don't want us to have eggs; they don't want people to eat meat." Plaintiffs' Statement of Undisputed Material Fact, ¶¶ 80–81, ECF No. 55-1 in Case No. 4:19-cv-00124-JEG-HCA. They stated what § 717A.3A is "aim[ed] 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." *Id.*, ¶ 81. After § 717A.3A was enjoined, sponsors of the legislation that became § 717A.3B admitted it resulted directly from a desire to get out from under that ruling. *Id.*, ¶ 82. In support of § 717A.3B, the House sponsor of the legislation said legislators "will not stand by and allow [Iowa farmers] to be disparaged in the way they have been." *Id.*, ¶ 83. Another said the law was necessary because of "extremism" and that it was "an important bill to protect our agricultural entities across the state of Iowa." *Id.*, ¶ 84. The Senate sponsor claims that "agriculture in Iowa deserves protection from those who would intentionally use deceptive practices to distort public perception of best practices to safely and responsibly produce food." *Id.*, ¶ 85. As in *Kelly* then, the legislative history here shows that the statute was expressly intended to target speech, and "confirms what the text of the law alone demonstrates: [the law] places pro-animal facility viewpoints above anti-animal facility viewpoints." *Kelly*, 9 F.4th at 1233.

Two minor distinctions exist between § 717A.3B and the Kansas law invalidated in *Kelly*, but neither affects the viewpoint discrimination analysis. The first distinction is that both the access and employment provisions of § 717A.3B proscribe gaining access with the intent to cause the reputational harm ("economic harm … to the agricultural production facility's … business interest") that is the intended and foreseeable result of Plaintiffs' investigations. The Kansas statute, which prohibits deception to gain access with the intent to "damage the enterprise" was a little less clear (or at least less transparent). However, the State conceded, and the Tenth Circuit found, that "damage" under the Kansas law included the same "'negative publicity, lost business[,] or boycotts,'" as is targeted by § 717A.3B. *Kelly*, 9 F.4th at 1235 (quoting Kansas's brief). The second distinction is that both provisions of § 717A.3B require that the deception be "material" while the Kansas provision lacks any materiality requirement. But

while materiality is relevant to the *Alvarez* question—the Eighth Circuit suggested a materiality element helped ensure the law only proscribed lies that cause a materially cognizable harm, *Reynolds*, 8 F.4th at 788–89—the materiality element fails to cure the viewpoint discrimination problem.

In summary judgment briefing, the State rejected the notion that it should have to treat all trespass by false pretenses the same, contending that it should be able to narrowly address the problem it seeks to address. *See, e.g.*, State's Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judge and Cross-Motion for Summary Judgment, ECF No. 66 at 43 in Case No. 4:19-cv-00124-JEG-HCA. But that argument actually concedes Plaintiffs' point: that the harm § 717A.3B is really trying to address is not *all* trespass or *all* résumé fraud at agricultural facilities, but solely that of individuals—like Plaintiffs and their investigators—who have an intent to accurately document and expose a facility's harmful practices in a manner that may cause economic injury to its business interests (the injury would flow from the public's understandably negative reaction to true speech about problems at agricultural facilities—a matter of profound public concern). The First Amendment does not permit uneven burdens on speech motivated by impermissible government motive. *Kelly*, 9 F.4th at 1244.

Plaintiffs' viewpoint discrimination argument is further elucidated in an article discussing content and viewpoint discrimination generally, and *R.A.V.* specifically, by then-professor Elena Kagan. She noted that every Justice in *R.A.V.* agreed that "St. Paul could have enacted a statute banning all fighting words—a statute, in other words, imposing a more expansive restriction on speech than did the ordinance in question." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 417–18 (1996) (citing *R.A.V.*, 505 U.S. at 383–84; *id.* at 401 (White, J., concurring); *id*. at 415–16

(Blackmun, J., concurring); *id*. at 418–18 (Stevens, concurring)). According to Kagan, *R.A.V.* and the prohibition on viewpoint discrimination generally are best understood as a way to ferret out impermissible government motive and providing a check against attempts to do indirectly what legislators can't do directly: privilege one side of the debate.

This explains the perhaps counter-intuitive conclusion that a law prohibiting all trespasses by deception, across industries and without regard to intent, might pass constitutional muster (at least in the Eighth Circuit) while a narrower prohibition on trespass by false pretenses only in one industry with only critical intent does not. To make this point, Kagan hypothesizes three laws: one that prohibits all billboards, a second that prohibits political advertisements on billboards, and a third that only prohibits Democrats advertising on billboards. *Id*. at 445. "[A] general ban on billboards will reduce speech more than a ban on billboards for political advertisements, which in turn will reduce speech more than a ban on billboards disabling only Democrats. Yet under current law, the Court will subject the first of these ordinances to the most relaxed form of review and the last to the strictest." *Id*. It is so because the viewpoint discrimination doctrine is best understood as focused not on "the extent of expressive opportunities" but on a way to stem impermissible government motive. *Id*.

The distinction is meaningful from a practical political perspective, too. Enacting a law that favors a major state industry and attacks only a politically marginal ideology is good and easy politics. Passing a viewpoint neutral law that covers far more speech—such as, for example, prohibiting investigative deception not only at animal agricultural facilities but also at nursing homes, VA hospitals, child-care facilities, and mechanics' garages—carries greater political risks. Making legislators shoulder that risk serves to guard against impermissible motives, even if a viewpoint-neutral restriction burdens more speech.

III. Section 717A.3A's Access Provision is Also Viewpoint-Based.

A. The Eighth Circuit Did Not Address the Viewpoint Discrimination Question for § 717A.3A.

The Eighth Circuit did not reach the viewpoint discrimination question in analyzing the access provision of § 717A.3A. Judge Colloton's First Amendment analysis in the majority opinion addressed only the *Alvarez* question. *Reynolds*, 8 F.4th at 784–88. It remanded for further proceedings and did not direct this Court to enter summary judgment for the State as to § 717A.3A's access provision. *Id*. at 788.

Judge Grasz's concurring opinion specifically noted the viewpoint discrimination issue was left to be decided, observing that "[g]oing forward, a key question will be whether access-by-deceit statutes will be applied to punish speech that has instrumental value or which is tied to political or ideological messages." *Id*. at 788 (Grasz, J., concurring). Judge Grasz found it significant that even the dissent in *Alvarez* "recognized the principle that false speech which does have intrinsic or instrumental value may fall within the ambit of the Free Speech Clause," although the lies at issue in *Alvarez* were "'highly unlikely to be tied to any particular political or ideological message.'" *Id*. at 789 (citing and quoting *Alvarez*, 567 U.S. at 740–41; 752 (Alito, J., dissenting)). The issue remains to be resolved on remand: "Whether that conclusion also holds true in the application *of this* or future access-by-deceit provisions remains to be seen." *Id.* (emphasis added).

Judge Gruender's dissenting opinion responded to Judge Grasz's concerns by recognizing the *R.A.V.* principle, but finding § 717A.3A did not "draw[ ] a further content-based distinction in addition to the distinction between truth and falsity." *Id*. at 794 n.3 (Gruender, J., concurring).

While both provisions "target false speech used to obtain access to or employment at an agricultural production facility," Judge Gruender asserted that "does not, by itself, entail anything about the content of the speech." *Id*. Judge Gruender's dissent, though, is not controlling as to § 717A.3A (and says nothing about § 717A.3B).

B. Section 717A.3A's Access Provision is Viewpoint Based.

Section 717A.3A's access provision imposes impermissible viewpoint discrimination for similar reasons that § 717A.3B and the Kansas law do. While § 717A.3A's access provision lacks the intent requirement fatal to the Kansas law (and, Plaintiffs assert, to § 717A.3B), there can be little doubt that § 717A.3A was motivated not by a desire to prevent trespass on animal agriculture facilities, but by a desire to limit speech critical of those facilities and the industry more broadly. For that reason alone, it is viewpoint-based.

When the government enacts a law to suppress a particular viewpoint, it is a viewpoint-based restriction on speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (Kagan, J., concurring in the judgment); *Vieth v. Jubelirer*, 541 U.S. 267, 314-15 (2004) (Kennedy, J., concurring in the judgment); *McCullen v. Coakley*, 573 U.S. 464, 481 (2014); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). Legislative motive matters. *See* Kagan, 63 U. CHI. L REV. at 423–42; *see also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (examining legislative history that revealed "hostility to day laborer solicitation"); *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1378 (S.D. Fla. 2011) (finding legislative history, in which legislators expressed disagreement with health practitioners' firearm safety message, reinforced conclusion that law prohibiting licensed health care practitioners from asking patients about firearm ownership was content-based); *Jamal v. Kane*, 105 F. Supp. 3d 448, 457 (M.D. Pa. 2015) (rejecting state's argument that law authorizing civil suits against an

"offender" for conduct that "perpetuates the continuing effect of the crime on the victim" was limitation on behavior rather a content-based regulation of speech where the law "was championed primarily as a device for suppressing offender speech").

As shown above, sponsors of both Iowa laws were clear that their intentions were to silence undercover investigations in agriculture and the viewpoint of animal rights groups that conduct them. Plaintiffs' Statement of Undisputed Material Fact, ¶¶ 78–82, ECF No. 49-1 in Case No. 4:17-cv-00362-JEG-HCA; *see also*, *supra* at 12–13 (quoting from legislative history). Where, as here, the legislature did not create committee reports in support of the law, the law's sponsors' statements are an "'authoritative guide to the statute's construction.'" *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983)); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982)." And the authoritative guide exposes the impermissible viewpoint-based legislative purpose motivating the § 717A.3A's passage—the motive Judge Grasz warned about. *Reynolds*, 8. F.4th at 788–89.

Section 717A3A's industry-specific scope also reveals the viewpoint discrimination underlying its enactment. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (noting that the term "content based" applies to a law that "singles out specific subject matter for differential treatment") (citation omitted). Like other states that have adopted similar laws, the Iowa legislature focused its criminalization on undercover investigations in animal industries, reflecting its desire to snuff out only investigations critical of the treatment of animals in commercial settings and not investigations of nursing homes, hospitals, child-care facilities, or mechanics' garages. That focus reveals that the legislative intent to suppress public discourse and debate only about the animal industry.

Section 717A.3A violates one of the central premises of free speech law—that the

government must remain neutral in regulating people's views on politics, public policy, morality, and other topics of public concern. *Reed*, 576 U.S. at 168; *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Applying this principle, the government must allow critics of animal facilities to stand on equal footing with their proponents.

Conclusion

Plaintiffs' viewpoint discrimination claims in both of these cases remain live. *Kelly* shows how § 717A.3B and the access provision of § 717A.3A are impermissibly viewpoint-based—an argument the Eighth Circuit in *Reynolds* did not address and indeed, explicitly left for this Court to resolve. This Court should grant summary judgment in favor of Plaintiffs and permanently enjoin § 717A.3B and the access provision of § 717A.3A.

Respectfully submitted this 18th day of January, 2022.

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APPENDIX A

Iowa Agricultural Production Facility Fraud Statute	**Iowa Agricultural Production Facility Trespass Statute**	**Kansas Farm Animal and Field Crop Research Facilities Protection Act**
Access Provision 717A.3A(1)(a): "A person is guilty of agricultural production facility fraud if the person willfully does any of the following: a. Obtains access to an agricultural production facility by false pretenses."	**Access Provision 717A.3B(1)(a):** "Uses deception as described . . . on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to the agricultural production facility, *with the intent to cause* physical or *economic harm* or other injury *to the agricultural production facility's* operations, agricultural animals, crop, owner, personnel, equipment, building, premises, *business interest*, or customer."	**K.S.A. 47-1827** (b) No person shall, *without the effective consent* of the owner [consent is not effective if "induced by . . . fraud [or] deception], acquire or otherwise *exercise control* over an animal facility, an animal from an animal facility or other property from an animal facility, *with the intent* to deprive the owner of such facility, animal or property and *to damage the enterprise conducted at the animal facility*. (c) No person shall, *without the effective consent* of the owner [consent is not effective if "induced by . . . fraud [or] deception] and *with the intent to damage the enterprise conducted at the animal facility*:" *inter alia* record, attempt to record, or trespass to record on an animal facility's property. (d)(1) No person shall, *without the effective consent* of the owner [consent is not effective if "induced by . . . fraud [or] deception] and *with the intent to damage the enterprise conducted at the animal facility, enter or remain* on an animal facility if the person:" had notice

		that such entry was forbidden.
Employment Provision 717A.3A(1)(b): Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized. ***Invalidation upheld by Eighth Circuit's decision***	**Employment Provision 717A.3B(1)(b):** Uses deception as described in section 702.9, subsection 1 or 2, on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.	**No Employment Provision**

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 18, 2022

/s/ Matthew Strugar
Matthew Strugar