

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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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,

v.

KIMBERLY REYNOLDS, in her official capacity as Governor of Iowa,
TOM MILLER, in his official capacity as Attorney General of Iowa,
and DREW B. SWANSON, in his official capacity as county Attorney
for Montgomery County, Iowa,
DEFENDANTS-APPELLANTS.

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

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BRIEF OF *AMICUS CURIAE* IOWA FREEDOM OF INFORMATION COUNCIL IN
SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Iowa Freedom of Information Council is a non-profit organization that has no parent and issues no stock.

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STATEMENT OF INTEREST

Amicus curiae Iowa Freedom of Information Council is a non-profit coalition of journalists, librarians, lawyers, educators and other Iowans devoted to open government. The Council assists the Iowa Newspaper Association and the Iowa Broadcasters Association, whose members regularly report on Iowa's agriculture industry, with litigation and other assistance concerning open records and meetings laws. It has advocated as *amicus curiae* on behalf of the right to free speech and a free press in cases including, *Hutchison v. Shull*, 878 N.W.2d 221 (Iowa 2016); *Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013); *Dep't of Pub. Safety v. Iowa Dist. Court for Polk County*, 801 N.W.2d 544 (Iowa 2011); *Smith v. Iowa Bd. of Med. Exam'rs*, 729 N.W.2d 822 (Iowa 2007); *Burton v. Univ. of Iowa Hosps. & Clinics*, 566 N.W.2d 182 (Iowa 1997); *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994); *In re Iowa Freedom of Info. Council*, 724 F.2d 658 (8th Cir. 1983).

No counsel for a party authored this brief in whole or in party, and no person or entity other than the Iowa Freedom of Information Council, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION

While a majority of Americans consume news daily¹ about the food they eat, powerful farm interests and sympathetic lawmakers have scrambled to suppress any unflattering coverage of inhumane slaughterhouse practices, unsanitary factory conditions and worker abuses through so called “Ag-Gag” legislation. *See* Rita-Marie Cain Reed & 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). As these laws proliferate, their provisions intended to halt investigations of farm facilities by undercover activists and journalists have been blocked by courts mindful of the First Amendment implications. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1197 (9th Cir. 2018) *Animal Legal Def. Fund v. Herbert*, 263 F. Supp.3d 1193, 1206 (D. Utah 2017).

Defendants likewise should be enjoined from enforcing the Iowa “agricultural production facility fraud” statute, Iowa Code section 717A.3A, as it is rooted in the same fatally flawed premise as similar

¹ Cary Funk and Brian Kennedy, *The New Food Fights: U.S. Public Divides Over Food Science*, Pew Research Center (Dec. 1, 2016) available at www.pewinternet.org/2016/12/01/the-new-food-fights/ (last accessed June 18, 2019).

laws struck down by other courts:

If the lawmakers cannot stop the presses directly, they can suppress negative information by prosecuting newsgathering activities that serve as the foundation of investigative journalism.

This notion simply cannot be squared with the First Amendment.

Undercover investigations deserve First Amendment protection as crucial building blocks to informing public debate around proper animal care and food-handling practices. *See* Alan K. Chen and Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev 1435, 1473 (2015).

STATEMENT OF THE CASE

In 2012, Iowa joined other states in enacting an Ag-Gag legislation to regulate conduct and speech related to agricultural operations. *See Herbert*, 263 F. Supp.3d at 1196-98 (summarizing similar legislation). Specifically, the legislation amended Iowa Code chapter 717A to create the crime of “agricultural production facility fraud” if a person willfully:

- a. Obtains access to an agricultural production facility by false pretenses[, or]
- 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.

Iowa Code § 717A.3A(1). A first conviction under section 717A.3A is a serious misdemeanor, and a second or subsequent conviction is an aggravated misdemeanor. *Id.* § 717A.3A(2). A person can also be held criminally liable for conspiring to violate this statute, aiding and abetting a violation, or harboring, aiding, or concealing the person committing the violation, “with the intent to prevent the apprehension of the person.” *Id.* § 717A.3A(3)(a).

On December 8, 2017, Plaintiffs filed their Complaint in the Southern District of Iowa asserting that Iowa’s Ag-Gag bill is facially unconstitutional as a content-based and overbroad in violation of the First and Fourteenth Amendments. Following cross-motions, the district court granted summary judgment in favor of the Plaintiffs. This appeal followed.

SUMMARY OF THE ARGUMENT

From its inception, the First Amendment has allowed content-based regulation of speech only “in a few limited areas” such as

“obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). Iowa’s Ag-Gag legislation, however, does not fit within any of the “well-defined and narrowly limited” categories of unprotected speech. *Id.* at 469; *see also Care Comm. v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011) (observing that Supreme Court precedent “does not currently recognize knowingly false speech as a category of unprotected speech”). Accordingly, the district court correctly characterized the statements implicated by section 717A.3A, even though false, as protected speech because there is no requirement that they cause a legally cognizable harm to the listener or result in a material gain to the speaker. (DCD #79 at 10). The court also rightly determined that section 717A.3A constitutes a content-based regulation because the statute imposes a criminal penalty of up to a year of imprisonment for the mere utterance of a false statement—*without proof of any accompanying injury*. In this same way, the statute sweeps far more broadly than necessary to achieve the Defendants’ purported interest in deterring trespass and biosecurity breaches, it cannot survive strict scrutiny.

The issue in this case presents a greater threat to our right to free press than simply suppressing undercover investigations into agricultural production facilities in Iowa. There is nothing unique about the agricultural production industry (other than powerful lobbyists) to justify the heightened protection afforded under Iowa Code section 717A.3A. Correspondingly, Defendants offer no meaningful limiting principle to their authority to criminalize undercover investigations in any other context as well. While the hypotheticals are limitless, the threat is real. If the Ag-Gag statute is found to comport with the First Amendment, nothing would prevent the Iowa from criminalizing other means of obtaining information under false pretenses—regardless of whether the falsity itself results in any injury.

ARGUMENT

I. DENYING THE GOVERNMENT THE POWER TO PUNISH UNDERCOVER INVESTIGATIONS INTO MATTERS OF PUBLIC CONCERN IS ESSENTIAL TO FREEDOM OF SPEECH AND PRESS

A. Iowa’s Ag-Gag Statute Exposes A Variety of Legitimate Journalism Practices to Criminal Sanctions

The terms “undercover investigation” or “undercover journalism” in the agriculture sector often refer to investigations by animal

advocates who make misrepresentations to secure jobs at farm facilities, then wear hidden recording devices to document conditions. It concerns *amicus curiae* that the Ag-Gag statute prohibits these essential investigations on the basis of an individual's answers on an employment application. Iowa Code § 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”). Equally troubling is the reality that a number of other investigative techniques – including visiting a business as a paying customer or relying on mistaken or inaccurate impressions – might also be deemed criminal under the less clearly defined Iowa Code section 717A.3A(1)(a), which prohibits obtaining access to a farm facility “by false pretenses.”

These techniques, while deceptive, have an essential place in the toolbox of citizen journalists seeking to shed light on farming practices. *See* Brooke Kroeger, *Undercover Reporting: The Truth About Deception*, 11, (Northwestern University Press 2012). Whether employed by journalists, activists, or everyday Iowans, undercover investigative techniques criminalized by the statute are an *essential* tool in revealing the kind of evidence of serious farm abuses that fuels

the “uninhibited marketplace of ideas” the First Amendment was designed to foster. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). By suppressing these tactics, the state forecloses on the public’s right to “receive information and ideas” about how the treatment and health of the animals entering the food supply. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

Upton Sinclair’s heralded novel “The Jungle,” which exposed filthy conditions in Chicago’s meatpacking plants and led to significant reforms, was predicated on the author disguising himself as a worker and lying to gain access to infamous stockyards where he could witness conditions firsthand. Chen and Marceau, *supra* at 1457. Undercover reporting techniques proved the only way for Sinclair to expose stockyard abuses, as even in the early 1900s meatpackers were savvy manipulators of their public image. *Id.* Any tours allowed to journalists only visited highly sanitized areas of their factories. *Id.*

Evidence suggests times have not changed the industry attitude toward transparency with the media. Mark Bittman, a New York Times food columnist, tried to arrange tours of several egg, chicken and

pork producing facilities during a visit to Iowa in 2011, but was turned down or ignored by all but one hog operation. *See* Mark Bittman, *Banned From the Barn*, N.Y. Times, July 5, 2011. The columnist arrived for his tour to find a barn that would normally hold 1,200-pigs with only 200 inside. *Id.* It smelled suspiciously like deodorant. *Id.* Bittman suspected the farm had been sanitized prior to his visit. *Id.* Despite Iowa’s status as an agricultural leader, “when it comes to producing animals, zero is pretty much what you’re going to see,” Bittman wrote. *Id.*

Local journalists face similar roadblocks from the agriculture industry when an article demands a response to criticism of their practices. In 2014, a WHO-TV reporter sought an interview with the owners of a Jewell, Iowa dog breeding facility for a feature on a Humane Society report² that named the facility on a nationwide list of problem puppy mills with histories of animal care violations. *See* Aaron

² The report noted a 2010 state inspection that revealed a six-week-old puppy whose paw was stuck under a pen wall. Other dogs had been chewing on the puppy’s caught paw. *101 Puppy Mills: A Sampling of Problem Puppy Mills in the United States*, The Humane Society of the United States (May 2014); available at www.humanesociety.org/assets/pdfs/pets/puppy_mills/101-puppy-mills-report-2014.pdf (last accessed June 18, 2019).

Brilbeck, *Puppy Mill: What The Owners Are Hiding* (WHO-TV television broadcast May 7, 2014).³ An owner of the facility, Julie’s Jewels, refused to speak with the reporter and cameraman or give them a requested tour of the breeding facility to confirm or dispel claims from the Humane Society report. *Id.* A man then confronted the journalists and attempted to physically block them from recording video while they stood on a nearby public roadway. *Id.* Julie’s Jewels owners stonewalled other Iowa journalists reporting on the business, which lost its federal breeders license in 2011 following an inspection that revealed 19 violations. Lyle Muller and Jacob Luplow, *How Things Got Out Of Hand At One Iowa Dog Breeder Inspection Visit*, IowaWatch Oct. 11, 2014.⁴

These examples evidence why Paul Shapiro, an activist and former vice president of policy for the Humane Society, argues that “there really isn’t another way to find out what’s happening” inside slaughterhouses and farm facilities absent undercover investigation.

³ Available at <https://whotv.com/2014/05/07/puppy-mill-what-the-owners-dont-want-you-to-see/> (last accessed June 18, 2019).

⁴ Available at www.iowawatch.org/2014/10/11/how-things-got-out-of-hand-at-one-iowa-dog-breeder-inspection-visit/ (last accessed June 18, 2019).

Kroeger, *supra*, at 253. When abuses become public through the results of an undercover investigation, they spark public debate necessary to spur reforms and hold industry accountable. In November 2017, investigators with the group Direct Action Everywhere published photos and videos of dying turkeys with open sores packed on top of each other inside the cramped barns of a supplier for Utah-based turkey seller Norbest. *See* Glenn Greenwald, *Six Animal Rights Activists Charged with Felonies for Investigation and Rescue that Led to Punishment of a Utah Turkey Farm*, *The Intercept*, May 4, 2018.⁵ Norbest, which describes its turkeys as “mountain-grown” and features photos of pristine Western landscapes on its website, previously sanctioned its supplier for failing to meet internal company standards. *Id.* Once activists’ footage received attention in reports from the Salt Lake Tribune, CBS and Fox, the company publicly pledged to review training requirements for suppliers and inspection procedures for updates. *Id.* The company also reported suspending its contract with the offending farmer.

⁵ Available at <https://theintercept.com/2018/05/04/six-animal-rights-activists-charged-with-felonies-for-investigation-and-rescue-that-led-to-punishment-of-a-utah-turkey-farm/> (last accessed June 18, 2019).

Undercover investigations and whistleblowing by journalists and activists have proven a vital safeguard that aid state actors in their efforts. For instance, the United States Department of Agriculture forced the Agriprocessors meatpacking plant in Postville to make corrections to its procedures after a 2008 video released by People for the Ethical Treatment of Animals (“PETA”) showed violations of kosher slaughtering regulations. *See Philip Brasher, Postville Plant Cited for Improper Slaughtering, Des Moines Register, Sept. 6, 2008.* In perhaps a more egregious Iowa case, prosecutors in Greene County that same year charged six farm employees with various counts of animal abuse and neglect after PETA released video footage showing workers slamming piglets against concrete floors and using metal rods to hit sows. *See Henry C. Jackson, Company: 6 Charged with Abuse No Longer Employed, Associated Press, Oct. 24, 2008.* In California, a 2008 video made by an employee and released by the Humane Society showed immobile cows being brought to slaughter with forklifts – violating regulations designed to protect against “mad cow disease.” *See David Brown, USDA Orders Largest Meat Recall in U.S. History, Wash. Post, Feb. 18, 2008.* Releasing the video led to a record recall of

143 million pounds of beef prepared by the California company. *Id.*

B. Food Safety is a Matter of Great Public Concern

There can be no meaningful dispute that the happenings inside agricultural production facilities are matters of public concern as demonstrated by Americans' eating habits. The USDA projects that 2018 will be a record year for meat consumption, with the average American consumer eating more than 222 pounds of beef, pork or poultry. Megan Durisin and Shruti Singh, *Americans Will Eat a Record Amount of Meat in 2018*, Bloomberg, Jan. 2, 2018.⁶ American consumption of eggs is also expected to reach record levels. *Id.*

America's significant amount of meat and animal eating carries with it the risk of exposure to a host of sickness-inducing germs that enter the food supply during processing, distribution and preparation. *How Food Gets Contaminated – The Food Production Chain*, Centers for Disease Control and Prevention (Sept. 2017).⁷ Inattentive slaughtering can contaminate meat with any germs incubating on the

⁶ <https://www.bloomberg.com/news/articles/2018-01-02/have-a-meaty-new-year-americans-will-eat-record-amount-in-2018> (last accessed June 18, 2019).

⁷ <https://www.cdc.gov/foodsafety/production-chain.html> (last accessed June 18, 2019).

animal's hide. *Id.* An Iowa farm was at the center of a massive recall of 550 million eggs tainted with salmonella due to deliberate actions by the company to skirt health regulations. Jason Clayworth, *Iowa Epicenter in 2010 Outbreak of Salmonella*, Des Moines Register, March 20, 2016.

Public policy questions surrounding Iowa's agriculture processing industry have long been subjects of political debate in this state. For example, the state attorney general's alleged lax oversight of a hog confinement operator deemed to be a habitual violator of state environmental laws became a campaign trail talking point for Governor Terry Branstad in the 2010 general election. *See* O. Kay Henderson, *Branstad, Miller debate state authority over DeCoster operations*, Radio Iowa (Aug. 31, 2010).⁸ In 2012, Governor Branstad mounted a public relations "counter-offensive" to the media's use of the term, "pink slime" to refer to beef filler. Mike Wiser, *Branstad, team reacted quickly to 'pink slim'*, Sioux City Journal, May 6, 2012.⁹ More recently,

⁸ <https://www.radioiowa.com/2010/08/31/branstad-miller-debate-state-authority-over-decoaster-operations/> (last accessed June 18, 2019).

⁹ https://siouxcityjournal.com/news/local/branstad-team-reacted-quickly-to-pink-slime/article_9e976732-21f3-57b5-8aa5-

in the last presidential election cycle, the federal government's response to Iowa's avian influenza outbreak was discussed on the campaign trail. *See* Courtney Crowder, *Fiorina knocks feds' response to avian flu in Iowa*, Des Moines Register, July 23, 2015.¹⁰

The public's enduring interest in food safety and the farm industry is similarly reflected in the body of award-winning journalism on these issues. In 1968, Des Moines Register journalist Nick Kotz won the Pulitzer Prize – journalism's highest honor – for his reporting on the meatpacking industry's unsanitary conditions that helped spur the passage of the Federal Wholesome Meat Act of 1967. The Pulitzer Prizes, *National Reporting*.¹¹ Another Des Moines Register journalist, James Risser, won a Pulitzer Prize in 1976 for his series of articles disclosing large-scale corruption in the American grain exporting trade. *Id.* Journalist Tony Horwitz won the prize in 1995 while at the Wall

[48032aba3f1b.html](#) (June 18, 2019).

¹⁰

<https://www.desmoinesregister.com/story/news/elections/presidential/cucus/2015/07/23/carly-fiorina-iowa-campaign-avian-flu/30597573/> (June 18, 2019).

¹¹ www.pulitzer.org/prize-winners-by-category/209 (last accessed June 18, 2019).

Street Journal for a series that included a piece on the fast-paced, slippery and dangerous work inside a Missouri chicken processing plant. *Id.* Horwitz took a job at the plant to report the story, omitting his bachelor's degree and master's degree in journalism on the employment application. Kroeger, *supra*, at 161. The above examples are but a sampling of the journalistic work produced on this issue that has spurred public debate, industry action and reform.

II. FALSE STATEMENTS OF FACT, WITHOUT MORE ARE PROTECTED BY THE FIRST AMENDMENT

In addition to foreclosing undercover journalism from targeting the agricultural production facilities, Iowa's Ag-Gag statute runs afoul of the First Amendment for a more basic reason. It bears repeating that under Iowa Code section 717A.3A, a person can be convicted of agricultural facility fraud in two primary ways: (1) obtaining access to an agricultural production facility through "false pretenses" or (2) making a false statement or representation on an employment application "with an intent to commit an act not authorized by the owner." The United States Supreme Court, however, has been clear that falsehoods alone, absent a "legally cognizable" harm caused or "material gain" by the speaker, are protected First Amendment speech.

United States v. Alvarez, 567 U.S. 709, 724 (2012). The requirement of an attendant harm is a central Constitutional protection, or “there could be an endless list of subjects the National Government or the States could single out.” *Id.* Neither the false pretenses clause, nor the unauthorized act clause, is limited to conduct that causes a legally cognizable harm to the property owner or results in a material gain to the speaker.

On this point, the *Wasden* decision from the Ninth Circuit Court of Appeals is particularly instructive. *Wasden*, 878 F.3d at 1184. In *Wasden*, the Ninth Circuit Court of Appeals struck down Idaho’s Ag-Gag statute, which criminalized entry into an agricultural production facility by “misrepresentation,” because the provision alone acted to “control and suppress all false statements (related to access) in almost limitless times and settings.” *Id.* at 1195. As the court noted, merely gaining access to a facility cannot be considered to cause the kinds of harm generally associated with trespass because there is no intrusion on the ownership or possession of the land at issue; consent to be there was given, regardless of whether it was granted under false pretenses. *Id.* at 1196. “Thus, the misrepresentation provision . . . regulates

protected speech while ‘targeting falsity and nothing more.’” *Id.* (citing *Alvarez*, 567 U.S. at 719). From *Wasden*, it follows *a fortiori* that Iowa’s Ag-Gag statute similarly restricts constitutionally protected speech.

III. IOWA’S AG-GAG LAW CANNOT SURVIVE STRICT SCRUTINY

The district court correctly determined that both sections of Iowa Ag-Gag statute are facially content-based, as they require evaluation of the speech at issue. (DCD #79 at 11); *see also Herbert*, 263 F. Supp.3d at 1209 (“A law is content based – and therefore subject to strict scrutiny – if determining whether someone violated the law requires looking at what was said”). “Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007)). When a restriction is subject to strict scrutiny, the burden falls on the state actor to prove that the law is “narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 2222 (2015).

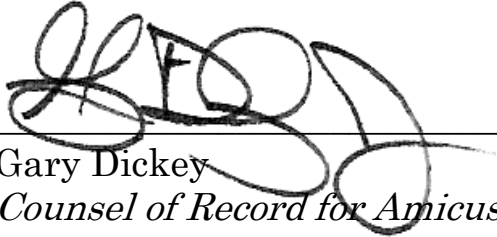
Even assuming Iowa’s Ag-Gag statute is intended to further Defendants’ purported interest in protecting “private property and biosecurity measures/protocols,” it is not narrowly tailored to achieve

those ends. The belief that gaining access to an agriculture production facility under false pretenses or making false statements to obtain employment interferes with a landowner's property interests and security is speculative at best. For example, a journalist who fails to disclose his or her journalism degree on a job application does not interfere with the employer's exercise of its property rights.

If Defendants believe existing laws are insufficient to protect private property and ensure biosecurity, they have several alternatives that would not burden protected speech. For starters, they could amend Iowa's trespass statute, Iowa Code sections 716.7 and 716.8, to include higher penalties for transgressions occurring at agricultural production facilities. In addition, they could limit the Ag-Gag statute to transgressions that result in a legally cognizable injury to the property owner or a material gain to the offender. Because these less restrictive alternatives are available, the Ag-Gag statute cannot stand in its current form. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) (striking down provisions in the Telecommunications Act of 1996 because of the availability of a less restrictive channel-blocking feature).

CONCLUSION

WHEREFORE, the *Amicus Curiae* ask this Court to affirm the district court's ruling granting summary judgment in Plaintiffs' favor.

A handwritten signature in black ink, appearing to read "G. Dickey", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 3,566 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).


This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Century, 14-point font.

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CERTIFICATE OF SERVICE

I certify that I filed this brief electronically through the Eighth Circuit Court of Appeals CM/ECF filing system on the 20th day of June 2019.

I further certify that I served the counsel of record for all parties via the Eighth Circuit Court of Appeals CM/ECF filing system on the 20th day of June 2019.



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