IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANIMAL LEGAL DEFENSE FUND, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, BAILING OUT BENJI, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., and CENTER FOR FOOD SAFETY Plaintiffs, vs. KIMBERLEY K. REYNOLDS, in her official capacity as Governor of Iowa, TOM MILLER, in his official capacity as Attorney General of Iowa, and DREW SWANSON, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	No. 19-CV-00124-JEG-HCA **DEFENDANTS' COMBINED BRIEF IN SUPPORT OF RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendants Kimberley Reynolds, Tom Miller, and Drew Swanson (hereafter collectively referred to as "Defendants"), pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56(a) and (b), hereby submit the following Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment:

TABLE OF CONTENTS Pages

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Iowa's "Ag-Trespass" statute, Iowa code section 717A.3B, is not unconstitutional. The Ag-Trespass statute criminalizes: a) using deception on a material matter to obtain access to a private agricultural production facility with an intent to harm that facility; or b) using deception on a material matter to obtain employment with a private agricultural production facility with an intent to harm that facility. Iowa Code §§ 717A.3B(1)(a)-(b).

Plaintiffs assert the Ag-Trespass statute prohibits their preferred investigatory method—undercover investigations—and have moved for summary judgment, asserting the statute violates their First Amendment right to free speech and their Fourteenth Amendment right to due process. Specifically, Plaintiffs claim the statute violates the First Amendment because it is content-and viewpoint-discriminatory and overly broad. However, there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Trespass statute, and even if the conduct is protected, the statute is not overbroad and does not impose content or viewpoint-based

discrimination. Accordingly, Defendants urge this Court to deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment, upholding Iowa's Ag-Trespass statute as constitutional and lifting the injunction on its enforcement.

II. STATEMENT OF FACTS

Defendants, for purposes of summary judgment, do not dispute any of the facts in Plaintiffs' Statement of Undisputed Material Fact in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 55-1 ("Plaintiffs' SUMF"). *See* Defendants' Response to Plaintiffs' Statement of Undisputed Material Fact in Support of Plaintiffs' Motion for Summary Judgment ("Response to SUMF"). Defendants only deny Plaintiffs' erroneous legal interpretations/conclusions of Iowa's Ag-Trespass statute that are intertwined with Plaintiffs' SUMF in several paragraphs. Response to SUMF ¶¶ 12-13, 15, 32, 35, 43-52, 56, 60-61, 66, 72, and 76-77.

In addition, although Defendants do not deny the various quotes from several former and current legislators in Plaintiffs' SUMF on why the respective governmental officials supported bills that eventually become the Ag-Fraud or Ag-Trespass statute, respectively, Defendants have provided additional quotes or statements from those governmental officials identifying additional reasons they supported the legislation, which Plaintiffs conspicuously failed to note, including: 1) bio-security or the prevention of disease transmission; and 2) protection of private property. *See* Defendants' Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment ("Defendants' SUMF").

The late Senator Joe Seng, a sponsor of the bill that became the Ag-Fraud statute, defended the bill, stating "[h]ere's a commercial enterprise intent on bio-security and here comes someone (who gets in) under false pretenses and screws up your whole system. That should be

criminal." Defendants' SUMF ¶ 3. Then-State Senate President Jack Kibbie supported an earlier version of the Ag-Fraud statute because of a concern for bio-security, stating "[t]here's viruses that can put these producers out of business, whether it's cattle, hogs or poultry." Defendants' SUMF ¶ 5. Then-Governor Branstad, who signed the Ag-Fraud bill into law, supported the bill, stating "[i]f somebody comes on somebody else's property through fraud or deception or lying, that is a serious violation of people's rights—and people should be held accountable for that." Defendants' SUMF ¶ 6.

Sen. Ken Rozenboom, speaking in support of the bill that became the Ag-Trespass statute, codified at Iowa Code § 717A.3B, stated that "[t]he need for managing strict biosecurity practices is a critical component of this bill." Defendants' SUMF ¶ 8. Rep. Jarad Klein, speaking in support of the bill that became the Ag-Trespass statute, stated "[f]armers are protected from people who lie to get a job whose intent is to cause harm not just in social media but in biosecurity and life and health of their livestock." Defendants' SUMF ¶ 9. Finally, Rep. Bruce Bearinger, speaking in support of the bill that became the Ag-Trespass statute, stated "I[i]t's an unfortunate bill. But in this era of high-risk bioterrorism and the extreme need for biosecurity and extremism, it's an important bill to protect our agriculture entities across Iowa." Defendants' SUMF ¶ 10.

III. PROCEDURAL HISTORY AND LEGAL STANDARD

A. Iowa's Ag-Fraud Statute—Iowa Code § 717A.3A.

Iowa is one of the nation's leading states in agricultural production. Iowa is the nation's largest producer of pigs raised for meat and the country's biggest egg producer. (Complaint (Dkt. 1), ¶¶ 83-84). Because of agriculture's significance in Iowa, in 2012, the Iowa Legislature passed H.F. 589, "Agriculture Production Facility Fraud" ("Ag-Fraud"), which was signed by the

Governor and codified as Iowa Code section 717A.3A, in order to protect agricultural producer's private property and bio-security measures. (Defendants' SUMF ¶¶ 1-7).

Iowa's Ag-Fraud statute created the crime of "agricultural production facility fraud" and prohibits:

- obtaining "access to an agricultural production facility by false pretenses." Iowa Code § 717A.3A(1)(a);
- making "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." *Id*. § 717A.3A(1)(b); and
- conspiring to commit or aiding and abetting the commission of agricultural production facility fraud. *Id*. § 717A.3A(3)(a).

The same Plaintiffs in the present matter previously sued Iowa Governor Kimberly Reynolds, Iowa Attorney General Tom Miller, and Montgomery county Attorney Drew B. Swanson—who were all sued in their official capacities—alleging Iowa's Ag-Fraud statute was facially unconstitutional as a content-based, viewpoint-based, and overbroad regulation. *See Animal Legal Defense Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA (S.D. Iowa). Plaintiffs asserted claims under the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.*

On February 27, 2018, the District Court ruled on Defendants' Motion to Dismiss, concluding Plaintiffs had standing, dismissing their Equal Protection claim, and denying the motion with respect to Plaintiffs' claims under the First Amendment and Due Process Clause of the Fourteenth Amendment. *See Animal Legal Defense Fund v. Reynolds*, 297 F.Supp.3d 901 (S.D. Iowa 2018) ("*Reynolds I*"). On January 9, 2019, the District Court granted summary

judgment to Plaintiffs on their First Amendment claim. *See Animal Legal Defense Fund v. Reynolds*, 353 F.Supp.3d 812 (S.D. Iowa 2019) ("*Reynolds II*").

In its rulings in the Ag-Fraud litigation, the District Court concluded Iowa's Ag-Fraud statute restricted speech protected by the Speech Clause of the First Amendment. *Reynolds I*, 297 F.Supp.3d at 917-26. The District Court, relying upon *United States v. Alvarez*, 567 U.S. 709 (2012), held the false statements implicated by the Ag-Fraud statute were protected speech because they did not cause a "legally cognizable harm" or provide "material gain" to the speaker. *Id*. at 918-25. Next, the District Court held that § 717A.3A was a content-based restriction but need not decide whether the statute was subject to strict or intermediate scrutiny because it failed under both standards. *Reynolds II*, 353 F.Supp.3d at 822-24. The District Court concluded the statute failed strict scrutiny because the State's proffered interests were not compelling and § 717A.3A was not narrowly tailored—noting the statute was unnecessary to protect the State's interests and both under- and over-inclusive. *Id*. at 824-26. Finally, the District Court held that § 717A.3A failed to survive intermediate scrutiny, finding the statute was too "broad in its scope, 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.

The Court entered judgment for Plaintiffs, declaring the Ag-Fraud statute unconstitutional and permanently enjoining the State from enforcing it. *See Animal Legal Defense Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA, Dkt. 86 (Feb. 14, 2019) (granting declaratory and injunctive relief), 87 (Feb. 15, 2019 (judgment), *appeal docketed*, No. 19-1364 (8th Cir. 2019).

B. Iowa's Ag-Trespass Statute—Iowa Code § 717A.3B.

Addressing the alleged constitutional deficiencies identified by the Court in the Ag-Fraud statute, the Iowa Legislature passed S.F. 519, "Agriculture Production Facility Trespass," which was signed by the Governor March 14, 2019, and codified as Iowa Code section 717A.3B. The statute created a new crime of "Agricultural Production Facility Trespass" ("Ag-Trespass"). S.F. 519 took effect immediately upon enactment, and provides that a person commits agricultural production facility trespass if the person:

- "Uses deception as described in section 702.9, subsection 1 or 2, 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." Iowa Code § 717A.3B(1)(a);

- "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." *Id*. at § 717A.3B(1)(a); and

- "A person who conspires with another, as described in section 706.1, to commit agricultural production facility trespass is guilty of a serious misdemeanor for a first offense and an aggravated misdemeanor for a second or subsequent offense. For purposes of this subsection, a person commits conspiracy to commit agricultural production facility trespass, without regard to the limitation of criminal liability for conspiracy otherwise applicable under section 706.1, subsection 1." *Id*. at § 717A.3B(3).

Plaintiffs filed suit challenging the Ag-Trespass statute, asserting claims under the First Amendment and Due Process Clause of the Fourteenth Amendment. Complaint (Dkt. 1), ¶¶ 120-51. Specifically, Plaintiffs claim the statute violates the First Amendment because it is content-and viewpoint-discriminatory, overly broad, and void-for-vagueness. Defendants moved

to dismiss each of Plaintiffs' claims, and Plaintiffs moved to preliminarily enjoin the Ag-Trespass statute. *See* Dkt. 18 and 25.

On December 2, 2019, this Court granted Defendants' motion to dismiss Plaintiffs' void-for-vagueness claim but denied the motion in all other respects. *Animal Legal Defense Fund v. Reynolds*, No. 4:19-cv-124-JEG-HCA, ECF No. 41 (S.D. Iowa Dec. 2, 2019) ("*Reynolds III*"). In that same Order, this Court entered a preliminary injunction prohibiting enforcement of the Ag-Trespass statute during the pendency of this litigation. *Id*. Plaintiffs have now moved for summary judgment. Dkt. 55.

C. Legal Standard.

Defendants agree with Plaintiffs' description of the proper legal standard applicable to summary judgment.

IV. ARGUMENT

Defendants move this Court to grant summary judgment because the conduct prohibited by Iowa's Ag-Trespass statute is not protected under the First Amendment.[1] The Supreme Court has recognized that false speech that results in a legally cognizable harm or bestows a material gain falls outside the protections of the First Amendment. The use of deception on a material matter in order to obtain access to or employment with an agricultural production facility, not open to the public, with an intent to harm the facility or its interests, imposes a legally cognizable harm and bestows a material gain on the speaker.

[1] Defendants do not intend to argue standing in this Brief but would simply note that standing is a jurisdictional issue for courts to address. *See Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 850 (8th Cir. 2003) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (stating federal courts are under an independent obligation to examine their own jurisdiction, and standing "'is perhaps the most important of [the jurisdictional] questions.'") (alteration in original)).

Iowa's Ag-Trespass statute is not overbroad because it does not proscribe conduct protected by the First Amendment, and even if it did, any potential overbreadth is not substantial in relation to its plainly legitimate sweep. Iowa's Ag-Trespass statute does not create a content-based restring on speech in violation of the First Amendment because the statute is facially neutral and regulates conduct, not speech. The statute does not create a viewpoint-based restriction on speech in violation of the First Amendment because, even assuming the conduct prohibited by Iowa's Ag-Trespass statute is not exempt from the protections of the First Amendment, the statute is view-point neutral—it is focused on prohibiting certain conduct of persons, irrespective of the message or political agenda of those persons. Finally, the statute is narrowly tailored to serve compelling and significant governmental interests.[2]

Although this Court, in its MTD Order, held that the Ag-Trespass statute both prohibits false speech that does not fall within an exception to First Amendment protection and creates a content-based restriction, Defendants respectfully reassert their prior arguments set forth in the MTD, as well as provide additional jurisprudence and undisputed material facts about the legislative intent behind the Ag-Trespass statute, in the hope that the Court will view the arguments in a new light, and conclude that the Defendants are entitled to summary judgment for the reasons set forth herein.

A. USING DECEPTION ON A MATERIAL MATTER TO OBTAIN ACCESS TO OR EMPLOYMENT WITH AN AGRICULTURAL PRODUCTION FACILITY, NOT OPENT TO THE PBULIC, WITH AN INTENT TO HARM THE FACILITY, IS NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

[2] Although not plead in Plaintiffs' MSJ, Plaintiffs raised a Fourteenth Amendment due process argument in Count IV, alleging that the Ag-Trespass statute burdens a fundamental right—speech protected by the First Amendment. Complaint (Dkt. 1), ¶¶ 147-51. Defendants are entitled to summary judgment on this claim because the Ag-Trespass statute does not burden speech protected by the First Amendment. *See* Section IV.A. of this Brief, pp. 13-37.

1. False Speech that Causes Legally Cognizable Harms or that is Made for the Purposes of Material Gain is not Protected by the First Amendment.

Jurisprudence on the application of the First Amendment to certain undercover investigations demonstrates there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Trespass statute. The Supreme Court recently addressed whether certain fraudulent speech falls outside the First Amendment's protections, such that the speech can be criminalized. *See United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating the Stolen Valor Act—which made it a crime to lie about receiving military decorations or medals—under the First Amendment on the grounds that it criminalized false speech and nothing more). In *Alvarez*, the Supreme Court held that the government may criminalize false statements when the statements cause a "legally cognizable harm" such as "an invasion of privacy," *id*. at 719, or "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment." *Id*. at 723 (emphasis added). This Court has recognized the exception for false statements that cause a "legally cognizable harm," or provide a "material gain" to the speaker. *Reynolds III*, at 9.

Prior to *Alvarez*, the Supreme Court, rejecting defendants' First Amendment defense, upheld a complaint by the Illinois Attorney General alleging a telemarketing company fraudulently solicited charitable donations from members of the public. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003). The Court had previously invalidated several attempts by states to prohibit charitable solicitations where a high percentage of the donated funds were spent by companies. *Id*. at 612-18. The Court held the Illinois lawsuit was different because it had a "solid core in allegations that hone in on affirmative statements [defendants] made intentionally misleading donors regarding the use of their contributions." *Id*.

at 620. The Court noted that a false statement was not sufficient; the Attorney General had to show defendants "made a false representation of a material fact knowing that the representation was false" and "made the representation with the intent to mislead the listener, and succeeded in doing so." *Id.* The Attorney General bore the burden of proof and the showing had to be made by clear and convincing evidence. *Id.*

The Supreme Court, recognizing the importance of protecting private property, has also long recognized that the First Amendment's protections for speech conducted on private property are not unlimited. Information gatherers must obey laws of general applicability. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (stating that the First Amendment does not confer a license on news reporters or their news sources to violate valid criminal laws, even if the violation could result in the discovery of newsworthy information); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (stating "[t]he constitutional guarantee of free expression has no part to play" where picketers entered private shopping center to picket a retail store); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("This Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."); *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (recognizing "[a journalist] has no special privilege to invade the rights and liberties of others"); *see also State v. Lacey*, 465 N.W.2d 537, 539-40 (Iowa 1991) (court declined to overturn convictions for criminal trespass on First Amendment grounds where defendants were engaged in speech on private property without consent of the owner).

A number of courts have held that the First Amendment does not protect undercover, employment-based investigations, including the use of hidden recording devices, against tort claims. *See Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999)

(stating that the First Amendment did not shield reporters from breach of duty of loyalty and trespass claims when the reporters obtained employment at grocery store under false pretenses and surreptitiously recorded store's food handling practices); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (rejecting claim that the First Amendment shielded reporter from invasion of privacy suit when the reporter lied to obtain access and then surreptitiously recorded plaintiff in his home); *accord Sanders v. Am. Broad Cos.*, 978 P.2d 67, 77 (Cal. 1999) (recognizing the covert videotaping of employees of business by journalist posing as an employee violated employees' expectation of privacy); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998) (holding that the First Amendment did not shield reporter from a trespass claim when the reporter obtained a volunteer position at a facility for special needs persons and then surreptitiously recorded staffs' care of patients at the facility); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832 (Kan. Ct. App. 1979) (holding First Amendment did not shield reporter from tort liability for trespass where consent to enter was induced by fraud); *but see Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1352-53 (7th Cir. 1995) (finding no trespass claim from undercover videotaping of physicians in their office, open to the public, by purported patients interested in the physicians' services).

Thus, the state may proscribe false statements that impose a legally cognizable harm or convey a material benefit to the speaker, particularly where the harm or benefit occur on private property, where First Amendment protections are narrower.

2. Plaintiffs have had Mixed Success Challenging Similar Statutes in Other Jurisdictions.

Plaintiffs, or organizations similar to Plaintiffs, have challenged similar Ag-Trespass statutes in Idaho, Utah, Kansas, and Wyoming, on First Amendment grounds, and courts have rejected Plaintiffs' arguments in several instances. Where Plaintiffs have been successful, the

cases are either factually distinguishable or the court reached a conclusion contrary to the First Amendment jurisprudence on the scope of free speech protections on private property.

a. *Animal Legal Defense Fund v. Wasden*.

Animal Legal Defense Fund ("ALDF"), People for the Ethical Treatment of Animals Inc. ("PETA"), and the Center for Food Safety ("CFS"), among others, challenged Idaho's Ag-Fraud/Trespass statute, the relevant portions of which prohibited: a) a non-employee entering an agricultural production facility by misrepresentation or trespass; b) obtaining records of an agricultural production facility by misrepresentation or trespass; c) obtaining employment at an agricultural production facility by misrepresentation or trespass with the intent to cause economic or other injury to the facility; or d) entering an agricultural production facility that is not open to the public and, without consent of the owner, making an audio or video recording of the conduct of the facility's operations.[3] *See* Idaho Code §§ 18-7042(a)-(d).

[3] The statute reads as follows:

> (1) A person commits the crime of interference with agricultural production if the person knowingly:
>
> (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;
>
> (b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;
>
> (c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
>
> (d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or

The Ninth Circuit upheld the statute in part and invalidated the statute in part. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (*Wasden I*). The court, by a 2-1 decision, held that subsection (a)—prohibiting obtaining access by misrepresentations—violated the First Amendment, but unanimously held that subsections (b) and (c)—prohibiting obtaining records or employment, with an intent to harm, by misrepresentations—were not invalid under the First Amendment.[4] *Id*. at 1194-1203.

With respect to subsection (a), the court, relying upon *Alvarez*, 567 U.S. at 722-23, held that "lying to gain entry" does not result in a material gain to the speaker, and therefore, the lie is "pure speech" protected by the First Amendment. *Wasden I*, at 878 F.3d at 1194-99. In support of this conclusion, the court provided a hypothetical example of a teenager who lies to obtain a restaurant reservation, noting the teenager has obtained no material gain by lying to obtain the reservation but is still subjected to a criminal penalty under the statute—a troubling result for the majority. *Id*. at 1194-96.

Judge Bea issued a vigorous dissent from this portion of the court's ruling. *Id*. at 1205-13 (Bea, J., dissenting in part and concurring in part). The dissent included a lengthy discussion of Idaho's historic protection of private property rights. *Id*. The dissent also noted that in Idaho, unconsented entry—entry by misrepresentation—constitutes common law trespass, from which "damages are presumed to flow naturally." *Id*. at 1206. The dissent then criticized the majority for brushing aside the longstanding principle that the "right to exclude"—a fundamental element

---

(e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.

Idaho Code §§ 18-7042(a)-(e).

[4] The court also unanimously held that subsection (d)—prohibiting surreptitious audio/video recordings—was an invalid, content-based restriction on speech that could not survive strict scrutiny under the First Amendment because one could only determine criminal liability by viewing the recording. *Wasden I*, 878 F.3d at 1203-06.

of property rights—includes the ability to exclude *anyone* from entry, at *any* time, and for *any* reason, or no reason at all. *Id*. (emphasis added).

Rejecting plaintiffs' arguments that subsections (b) and (c) violated the First Amendment, the court reasoned that obtaining records or employment, with an intent to cause harm, by misrepresentations both inflicts harm upon the property owner and may bestow a material gain on the acquirer. *Id*. at 1199-1203. In support of its ruling, the Ninth Circuit relied upon the Supreme Court's statement in *Alvarez* that, "[w]here false claims are made to effect a fraud or secure … offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment" to uphold the prohibition on employment by misrepresentations. *Id*. at 1201 (quoting *Alvarez,* 567 U.S. at 723).

b. *Animal Legal Defense Fund v. Herbert*.

ALDF and PETA, among others, challenged Utah's Ag-Fraud/Ag-Trespass statute, the relevant portions of which prohibited: a) leaving a recording device at an agricultural operation without consent; b) obtaining access to an agricultural operation under false pretenses; c) applying for employment at an agricultural operation with the intent to record the operation; or d) recording an agricultural operation while trespassing.[5] Utah Code §§ 76-6-112(2)(a)-(d).

[5] The statute reads as follows:

(1) A person is guilty of agricultural operation interference if the person:

(a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;

(b) obtains access to an agricultural operation under false pretenses;

(c) (i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;

The court ruled that Utah's Ag-Fraud/Trespass statute was unconstitutional under the First Amendment's free speech protections. *Animal Legal Defense Fund v. Herbert*, 263 F.Supp.3d 1193, 1213 (D. Utah 2017). The court held that the statute's prohibitions on lying and recording created content-based restrictions on speech under the First Amendment and could not survive strict scrutiny. *Id*. at 1209-13.

The court, relying upon *Alvarez, Desnick*, and *Food Lion*, determined that the prohibition on lying was an unconstitutional restriction on free speech because lying to gain access to an agricultural operation, without more, does not result in a trespass-type harm. *Id*. at 1202-06. The court noted that in *Desnick* and *Food Lion*, the appellate courts found that consent to enter private property was not revoked—thereby turning that person into a trespasser—merely because consent would have been withheld if the truth had been known. *Desnick*, 44 F.3d at 1352-53; *Food Lion, Inc.*, 194 F.3d at 518. The court determined that the prohibition on audiovisual recordings was an unconstitutional restriction on free speech because it concerned whether the government can prosecute a person for speech on private property—not whether a private property owner can exclude a person from their property who wishes to speak—and it only targeted certain recordings concerning agricultural operations. *Id*. at 1206-13.

> (ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; or
>
> (iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or
>
> (d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.

Utah Code §§ 76-6-112(2)(a)-(d).

c. *Animal Legal Defense Fund v. Kelly*.

ALDF and CFS, among others, challenged Kansas' Ag-Fraud/Trespass statute, the relevant portions of which prohibited a person, without the effective consent of the owner, from: a) intentionally damaging the animal facility; b) acquiring or otherwise exercising control over an animal or other property at the animal facility; c) entering an animal facility, not open to the public, with an intent to damage the facility, and remain concealed to take pictures or to otherwise violate the act; and d) entering or remaining at an animal facility, with an intent to damage the facility, with notice that entry was forbidden or received notice to depart but failed to do so.[6] *K.S.A.* § 47-1827(a)-(d).

[6] The statute reads as follows:

> (a) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, damage or destroy an animal facility or any animal or property in or on an animal facility.
>
> (b) No person shall, without the effective consent of the owner, 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 and with the intent to damage the enterprise conducted at the animal facility: (1) Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section; (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility; (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or (4) enter an animal facility to take pictures by photograph, video camera or by any other means.
>
> (d) (1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person: (A) Had notice that the entry was forbidden; or (B) received notice to depart but failed to do so. (2) For purposes of this subsection (d), "notice" means: (A) Oral or written communication by the owner or someone with apparent authority to act for the owner; (B) fencing or other enclosure obviously designed to exclude intruders or to contain animals; or (C) a sign or signs posted on the property

The court ruled that subsections (b)-(d) of Kansas' statute were unconstitutional under the First Amendment's free speech protections.[7] *Animal Legal Defense Fund v. Kelly*, 2020 WL 362626, at *14-19 (D. Kan. Jan. 22, 2020). The court held that the statute's prohibitions created content-based restrictions on speech because the government would have to review the content of the speech to determine if the individual failed to obtain effective consent. *Id*. at 17. The court held the statute created viewpoint-based restrictions on speech because it only prohibits the "speech" if it is done with an intent to damage the facility, as opposed to benefiting the facility, and therefore impermissibly discriminated based upon the speakers' views about animal facilities. *Id*. Finally, the court determined the statute was "hopelessly underinclusive" because it did not prevent everyone from violating the property and privacy rights of animal facility owners—only those who intend to damage the facility—and therefore could not survive strict scrutiny. *Id*. at 18.

d. *Western Watersheds Project v. Michael*.

PETA and CFS, among others, challenged a Wyoming Ag-Fraud/Trespass-like statute, the relevant portions of which prohibited: a) entering private land with the intent to collect resource data[8]; b) entering private land and actually collecting resource data; or c) crossing

---

> or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

K.S.A. § 47-1827(a)-(d).

[7] The court ruled the plaintiffs lacked standing to challenge subsection (a) and granted defendants' motion for summary judgment on that claim. *Kelly*, 2020 WL 362626, at *6-8, 19.

[8] "Resource data" was defined as "data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species." Wyo. Stat. § 6-3-414(e)(iv).

private land without authorization to collect resource data on adjacent or proximate public land.[9]

Wyo. Stat. §§ 6-3-414(a)-(c).

---

[9] The statute reads as follows:

> (a) A person is guilty of trespassing to unlawfully collect resource data from private land if he:
>
> (i) Enters onto private land for the purpose of collecting resource data; and
>
> (ii) Does not have:
>
> (A) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or
>
> (B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.
>
> (b) A person is guilty of unlawfully collecting resource data if he enters onto private land and collects resource data from private land without:
>
> (i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or
>
> (ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.
>
> (c) A person is guilty of trespassing to access adjacent or proximate land if he:
>
> (i) Crosses private land to access adjacent or proximate land where he collects resource data; and
>
> (ii) Does not have:
>
> (A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or
>
> (B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

Wyo. Stat. §§ 6-3-414(a)-(c).

In *Western Watersheds Project v. Michael*, the court determined that subsections (a) and (b) of the statute did not violate the First Amendment because "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data." 196 F.Supp. 3d at 1242 (*rev'd on other grounds*, 869 F.3d 1189 (10th Cir. 2017)). The lynchpin of the court's analysis was that, irrespective of the importance of the information sought, the restriction on conduct occurred on private property. *Id*. at 1241 ("Plaintiffs' desire to access certain information, no matter how important or sacrosanct they believe the information to be, does not compel a private landowner to yield his property rights and right to privacy"). The court's reasoning carried over to its decision upholding subsection (c), which prohibited resource data collection on public property if one had to cross private property to collect such data. *Id*. at 1243-44.

On appeal, the Tenth Circuit did not reverse the district court's ruling that the prohibition on resource data collection on private property did not violate the First Amendment. *Western Watersheds Project*, 869 F.3d at 1193-94. The Tenth Circuit, noting that Plaintiffs did not appeal the portion of the district court's decision that upheld the prohibition on resource data collection on *private* property, simply held that resource data collection on *public* property constituted speech protected under the First Amendment and remanded the case to the district court for analysis consistent with that conclusion. *Id*. at 1193-98 (emphasis added). Moreover, the Tenth Circuit appears to tacitly accept the district court's conclusion that the prohibition on resource data collection on private property did not violate the First Amendment. *Id*. at 1194. The Tenth Circuit noted that the district court "relied on Supreme Court precedent holding that individuals generally do not have a First Amendment Right to engage in speech on the private property of others," and then went on to state "[a]lthough subsections (a) and (b) of the statutes

govern actions on private property, the district court was mistaken in focusing on these cases with respect to subsection (c)." *Id*.

3. *Alvarez does not Control Because Iowa's Ag-Trespass Statute does not Restrict Expressive Conduct that Qualifies for First Amendment Protection.*

The First Amendment only protects "conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66 (2006). Conduct does not generate First Amendment protection "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Here, the Ag-Trespass statute merely prohibits the act of entering or obtaining employment at a particular type of property ("agricultural production facilities") by a particular means ("deception") and with a particular motive (intent to case "physical or economic harm or other injury"). *See Wasden I*, 878 F.3d at 1207 (Bea, J., dissenting in part and concurring in part) (noting Idaho's prohibition on obtaining access by misrepresentation "no more regulates pure speech than do prohibitions on larceny by trick or false pretenses.").[10] And a "common law trespass 'symbolizes nothing.'" *Id*. at 1207-08; *see also Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014), *abrogated on other grounds by Nat'l Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) ("[a]n act that 'symbolizes nothing,' even if employing language, is not 'an act of communication' that transforms conduct into First Amendment speech.") (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011)).

[10] In a similar context, the Iowa legislature has criminalized conduct that is facilitated by false speech, defining a "fraudulent practice" as: soliciting money and holding oneself out as a member of a fraternal, religious, charitable, or veterans' organization, among others, Iowa Code section 714.8(6); and soliciting money by "deception" primarily by telephone and involving claims that someone has won a prize. Iowa Code § 714.8(15). "Fraudulent practice" is essentially theft by use of false speech.

Even if the Court determines the Ag-Trespass statute restricts "expressive conduct," the statute prohibits something more than "pure speech," which distinguishes the statute from the Stolen Valor Act at issue in *Alvarez*. *See Wasden I*, 878 F.3d at 1207 (Bea, J., dissenting in part and concurring in part). The Stolen Valor Act did not prohibit obtaining access to or employment at a private facility, with an intent to harm the facility, by lying about receiving a military award; it simply prohibited lying about receipt of an award. *See Alvarez*, 567 U.S. at 719. In contrast, the action in *Telemarketing Associations* proscribed misrepresentations only when they were intentional and accompanied by specific conduct—misleading the listener about the use of his/her donations. 538 U.S. at 620. Here, the harm arises when one uses deception to enter a private facility or obtain employment at said facility, with an intent to injure the facility's interests. Consequently, unlike the Stolen Valor Act, Iowa's prohibitions on access or employment by deception, with an intent to harm, does not target "falsity and nothing more." *Cf. Wasden I*, 878 F.3d at 1196 (citing *Alvarez*, 567 U.S. at 719). Accordingly, *Alvarez* does not control.

4. Using Deception on a Material Matter to Gain Access to or Employment at an Agricultural Production Facility, with an Intent to Harm, Imposes Both a Legally Cognizable Harm and Provides a Material Gain.

Even if the Court determines *Alvarez* controls, First Amendment jurisprudence on this issue demonstrates that the false statements prohibited by Iowa's Ag-Trespass statute are not protected by the First Amendment because they impose a legally cognizable harm or confer a material gain. First, false speech made with an intent to cause harm is a category of speech unprotected by the First Amendment. *See Alvarez*, 567 U.S. at 736) (Breyer, J., concurring) (noting statutes that prohibit false statements but do not run afoul of the First Amendment generally have "limitations of context" and "requirements of proof of injury," which narrow the

statute to a "subset of lies where specific harm is more likely to occur"); *see also Wasden I*, 1201-02 (noting Idaho's "intent to harm" element of their Ag-Fraud statute further cabined the statute against a First Amendment challenge). In *Alvarez*, the Supreme Court specifically identified fraud statutes as an example of restrictions on false speech that do not violate the First Amendment, as they typically require material misrepresentations, reliance on the misrepresentation by the victim, and injury to the victim.[11] *See Alvarez*, 567 U.S. at 734.

Here, the prohibition in Iowa's Ag-Trespass statute falls squarely in the categories of speech that courts have held are not protected by the First Amendment because the statute requires: 1) deception of a material matter; 2) reliance upon the deception; and 3) injury to the victim—the trespasser must have actually obtained "access" or "employ[ment]" while also harboring an intent to harm. Iowa Code § 717A.3B(1)(a) and (b). The intent language in Iowa's statute is virtually identical to Idaho's statute, which the Ninth Circuit upheld. *See Wasden I*, 878 F.3d at 1201-02. Discussing that very language in *Wasden I*, this Court previously recognized said language was sufficient to remove the speech from the protections of the First Amendment, stating, "[t]his intent provision cabined the application of the Idaho statute so that it only criminalized the sort of false statements that the plurality in Alvarez recognized the government may target with content-based restrictions: those likely to cause material harm to others." *See Reynolds I*, 297 F.Supp.3d at 924-25 (citing *Wasden I*, 878 F.3d at 1201-02). Moreover, Iowa's statute is arguably even more narrow than Idaho's because it requires that any deception be of a material nature, curing a deficiency in Iowa's Ag-Fraud statute identified by

[11] However, actual injury is not required for the conviction of a fraudulent practice in Iowa in some circumstances. *See State v. McSorely*, 549 N.W.2d 807, 809 (Iowa 1996) (court upheld a second-degree fraudulent practice conviction for falsifying corporate records even where the defendant did not obtain anything of value from the conduct).

this Court. *See* Iowa Code § 717A.3B(1)(a) (requiring the deception be on a "matter that would reasonably result in a denial of access"); *Reynolds I*, 297 F.Supp.3d at 924-25.

In *Reynolds III*, this Court concluded that not all false speech that causes harm falls outside First Amendment protection, only false speech that causes a "legally cognizable harm." *Reynolds III*, at 11-12 (citing *Alvarez*, 567 U.S. at 719, 724, 730-31). Applying that analysis to Iowa's Ag-Trespass statute, this Court held the statute placed "no meaningful limit" on the harm that would satisfy its intent element; it did not require the harm be "legally cognizable, specific, tangible, actual, or material." *Id*. at 12. However, the Ag-Trespass statute does have a limit or threshold on the harm that would satisfy its intent to harm element. The dictionary defines "injury" as a "violation of another's rights for which the law allows an action to recover damages." *Injury Definition*, Merriam-Webster, https://www.merriam-webster.com/dictionary/injury (last visited April 14, 2020); *see Bernau v. Iowa Dept. of Transp.*, 580 N.W.2d 757, 761 (Iowa 1998) (where the legislature has not defined a term, courts can look to the dictionary, among other sources, to determine the definition of a term). Accordingly, the Ag-Trespass statute requires an intent to harm such that there would be a violation of the rights of another and for which the law allows the recovery of damages, which is a "legally cognizable harm."

The interests Iowa's Ag-Trespass statute seeks to protect are real, substantial, and legitimate. Just as in *Telemarketing Associates*, where the Attorney General's suit was designed to protect people from being misled into giving away their money, Iowa's Ag-Trespass statute is aimed, in part, at protecting legitimate property interests, the invasion of which results in a "legally cognizable harm," particularly where the trespasser harbors an intent to harm those property interests. *See Nichols v. City of Evansdale*, 687 N.W.2d 562, 573 (Iowa 2004) (citing

75 Am.Jur.2d Trespass § 117 (1991)) ("From every unlawful entry, or every direct invasion of the person or property of another, the law infers some damage."); *see also Wasden I*, 878 F.3d at 1206 (Bea, J., dissenting in part and concurring in part) ("an unconsented entry constitutes a common law trespass, which is a legally cognizable harm—one from which damages are presumed to flow naturally").

Nonetheless, under Iowa's Ag-Trespass statute, even where a trespasser fails to inflict any physical or economic harm to the property interests, where there has been a trespass committed through deceit with an intent to harm, the result is still a "legally cognizable harm;" the property owner in that scenario can maintain an claim for trespass in Iowa even where no actual harm has occurred. *See Thunder & Lightning, Inc. v. 435 Grand Avenue, LLC*, 2018 WL 5850219 at 2 (Iowa Ct. App. Nov. 7, 2018) (unpublished opinion) (quoting *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994) (quoting Restatement (Second) of Torts § 158 (1964)), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004)) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally ... enters land in the possession of the other ...."); *Krotz v. Sattler*, 695 N.W.2d 41, at *3 n. 2, *4 (Iowa Ct. App. Oct. 14, 2004) (unpublished opinion) (court, relying upon *Wing v. Seske*, 109 N.W. 717 (Iowa 1906), stated "trespass can in some situations justify an award of nominal damages") (Vaitheswaran, J., specially concurring) (landowner "entitled to nominal damages without a showing of any harm"); *see also State v. Redmon*, 244 N.W.2d 792, 798 (Iowa 1976) (upholding a conviction for burglary, the Iowa Supreme Court recognized that it was the "intent to commit a

public offense at the time of breaking and entering" that formed the basis for the conviction and failure to complete the offense did not negate the burglary).[12]

The award of nominal damages in a trespass action also does not mean the property owner did not suffer a "legally cognizable harm." To hold otherwise risks erroneously conflating the importance of the underlying property right with the monetary recovery that may lie for its infringement. The award of nominal damages for a trespass simply caps the liability where no physical damage to the property occurred; it does not negate the protected private property interest.[13] *See* Laurent Sacharoff, *Trespass and Deception*, 2015 B.Y.U. L. Rev. 359, 366 (2015). It is the violation itself, not the violator's identity or amount of monetary harm arising from it, which counts for First Amendment purposes. *See generally id*. at 393-94 (lies vitiate consent whether by "a police officer or reporter disguising her identity and purpose" or a "burglar who lies about a surprise party" to facilitate a robbery).

---

[12] Other jurisdictions recognize actionable claims for trespass where the defendant merely crossed the threshold of the plaintiff's private property. *See Council on American-Islamic Relations Action Network, Inc., v. Gaubatz*, 793 F.Supp.2d 311, 344-45 (D.D.C. 2011) (holding trespass claim should not be dismissed even where plaintiffs did not plead damages, noting District of Columbia law allows plaintiffs to recover nominal damages for trespass); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160-61 (Wisc. 1997) (upholding a substantial award of punitive damages for a trespass that resulted in nominal damages of $1, noting "[t]he law infers some damage from every direct entry upon the land of another."); *Green v. Beaver State Contractors, Inc.*, 472 P.2d 307 (Idaho 1970) (recognizing that using false pretenses to gain entry inflicts a legally cognizable harm, even where the trespasser merely crossed the threshold).

[13] As one commentator has explained:

> Limiting the interests trespass protects merely to physical damage, simply because that is the only real compensation available in a lawsuit, ignores a key feature of trespass: that it provides nominal damages for trespasses that cause no harm. Why does it do so? Because trespass protects other important interests beyond damage to the land, including privacy and the right to exclude. It protects the right to associate with whomever one wishes. It protects the right to keep secret one's business, including meat handling (putting aside whether it protects the right to keep secret unlawful activity).

Sacharoff, 2015 B.Y.U. L. Rev. at 392 (footnotes omitted).

Plaintiffs, implying that the reputational or publication harms they intend to inflict are not legally cognizable harms, argue that Iowa's Ag-Trespass statute ranges too broadly because it criminalizes their preferred investigative method—undercover, employment-based investigations—and therefore the Ag-Trespass statute restricts speech protected by the First Amendment. *See* Brief in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Brief"), Dkt. 58, pp. 12-13. However, this argument has previously been made by some of the same plaintiffs here, and the court rejected the argument. *See Animal Legal Defense Fund v. Wasden*, 312 F.Supp.3d 939, 941-43 (D. Idaho 2018) (*Wasden II*). In *Wasden II*, on remand, the district court rejected plaintiffs' argument that Idaho's prohibition on making misrepresentations to get a job with an intent to injure did not apply to those who intend to cause only reputational harms—i.e. plaintiffs—as opposed to those with a "specific intent to cause concrete injury." *Id.* This argument also places too much emphasis on the "journalistic creation of speculative harm that may 'arise' after entry;" the focus should be on the speech used to gain entry to the agricultural production facility.[14] *Wasden I*, 878 F.3d at 1195 n.9.

The conduct prohibited by Iowa's Ag-Trespass statute is precisely the type that does not enjoy constitutional protection under the First Amendment, not merely because the presence of a false statement, "but because [the false statements] were made knowingly and in furtherance of a scheme to inflict ["physical or economic harm or other injury"]. *Zimmerman v. Bd. of Trustees of Ball State University*, 940 F.Supp.2d 875, 896 (S.D. Ind. 2013). Under the Ag-Trespass statute, the deception is "not irrelevant to [the Court's] analysis, but neither [is] it determinative." *Id*. at 896 (quoting *Alvarez*, 567 U.S. at 719). Moreover, the intent to harm is a critical element

[14] The argument also improperly weighs the social value of false statements which the Ninth Circuit discouraged in its First Amendment analysis in *Wasden I*. *See* 878 F.3d at 1195 n.9.

that requires proof beyond a reasonable doubt and must be determined on a case-by-case basis. *Wasden II*, 312 F.Supp.3d at 942.[15]

Second, the Ag-Trespass statute's prohibition on obtaining employment by deception is expressly addressed by the Supreme Court in *Alvarez*, where the Court stated the First Amendment does not protect using false claims to obtain "offers of employment." 567 U.S. at 723 ("Where false claims are made to effect a fraud or secure … *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment.") (emphasis added); *see also Wasden I*, 878 F.3d at 1202 (the court, relying upon the aforementioned language in *Alvarez*, upheld Idaho's prohibition on obtaining employment by misrepresentations where the applicant had the intent to injure the employer). In *Wasden II*, the district court rejected plaintiffs' request for a declaratory order, noting that although the plaintiffs may not really want the paycheck they receive, that does not mean they have not received a material gain. 312 F.Supp.3d at 942 (quoting *Wasden I*, 878 F.3d at 1201 ("ALDF ignores that the Supreme Court singled out offers of employment and that these undercover investigators are nonetheless paid by the agricultural production facility as part of their employment.")). The speech prohibited by Iowa's Ag-Trespass statute confers a material gain because the opportunity for a trespasser or "false friend" employee to harm the agricultural production facility's interests is arguably increased substantially where the trespasser/employee obtains access to or

[15] Courts presume a statute is constitutional, and "give it any reasonable construction necessary to uphold it." *See State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997); *Casbah, Inc. v. Thone*, 651 F.2d 551, 564 (8th Cir. 1981) (limiting ambiguous phrase "in part" within statute to only prohibit adverting related to drug paraphernalia in order to preserve its constitutionality). A court may also adopt a narrowing construction of the statute in order to preserve the constitutionality of a statute. *Milner*, 571 N.W.3d at 13. Thus, this Court could adopt a narrowing construction as it sees fit to uphold the constitutionality of the Ag-Trespass statute.

employment with the facility; conversely, denial of access or employment arguably decreases his/her opportunity to harm the property owner's interests.

Plaintiffs erroneously argue that the Ag-Trespass statute applies to both job applicants and existing employees, potentially stifling whistleblowing by existing employees. *See* Plaintiffs' Brief, p. 13. However, the statute does not apply to an employee who obtains employment without deception or intention to harm the facility, but who later records alleged wrongdoing in the facility, because the intent of the statute is to punish those with nefarious motives—not those who engage in legitimate whistle-blowing. There was a specific discussion in the legislature between Sen. Ken Rozenboom and Sen. Nate Boulton on ensuring that good-faith employees who observe wrongdoing would not be subject to the law. *See* Iowa Senate Floor Debate of Senate File 519 (March 12, 2019) (11:54:11-11:56:41), available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190312090629454&dt=2019-03-12. In addition, "deny" is defined in the dictionary to mean "to refuse to grant," which further supports the State's argument that the statute does not apply to existing employees—they have already been "granted" their employment. *See Deny Definition*, Merriam-Webster, https://www.merriam-webster.com/dictionary/deny (last visited April 14, 2020); *see Bernau*, 580 N.W.2d at 761. The "denial of an opportunity to be employed" language ensures that not only those who obtain a job using deception, but also those who attempted to use deception, but were unsuccessful in obtaining employment, are subject to the statute—not existing employees engaged in legitimate whistleblowing.[16]

5. Speech Conducted on Private Property is Afforded Less Protection Under the First Amendment Because Private Property Rights have Long been Recognized as Fundamental.

[16] This Court could adopt a narrowing construction as it sees fit to uphold the constitutionality of the Ag-Trespass statute. *See supra* n.15, p. 32.

First Amendment protections are at their "most attenuated when the forum is private property, because the rights of the property owner and his invitees are brought into play." *Cincinnati v. Thompson*, 643 N.E.2d 1157, 1163 (Ohio Ct. App. 1994) (citing *Lloyd Corp.*, 407 U.S. at 567) (upholding convictions of abortion protesters for violating municipal ordinance that prohibited trespass "on the land or premises of a medical facility," and rejecting claims that the First Amendment protected their speech). Federal courts have recognized this principle in cases similar to the present matter. The District Court in *Western Watersheds Project* rejected plaintiffs' claim that the First Amendment allowed someone to trespass on private property to engage in data collection (speech), 196 F. Supp. 3d at 1242 (*rev'd on other grounds*, 869 F.3d 1189 (10th Cir. 2017), and the Tenth Circuit tacitly accepted this determination. *Western Watersheds Project*, 869 F.3d at 1193-94.

The protection of private property has long been recognized in Iowa and was deemed so important and fundamental to the founders of the State of Iowa, that the right is enshrined in Iowa's Constitution. *See* Iowa Const. art. I, § 1 (identifying the inalienable right to acquire, possess, and protect property). Moreover, the Iowa Supreme Court has recognized in some instances that an Iowan's property rights warrant more protection under the Iowa Constitution than under the Federal Constitution. *See State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014) (recognizing the warrant requirement has full applicability to home searches of both probationers and parolees, in disagreement with United States Supreme Court precedent); *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (rejecting the United States Supreme Court case of *Samson v. California*, 547 U.S. 843 (2006), and concluding that the Iowa Constitution does not permit a warrantless search of a parolee's property).

In order to properly protect private property, particularly where a trespasser intends to harm the property owners' interests, the right to exclude others must be recognized. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979)) (The right to exclude others is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"). The Iowa Supreme Court has recognized the importance of the "right to exclude others" in a case that presented a direct conflict between the right to free speech and a property owner's right to exclude under Iowa's criminal trespass law. In *State v. Lacey*, defendants refused to leave a steakhouse after distributing union-related handbills that urged customers to boycott the restaurant. 465 N.W.2d 537, 538 (Iowa 1991). The Iowa Supreme Court rejected the defendants' argument that their activities were a reasonable exercise of free speech. *Id.* at 540. "The Constitution does not protect against a private party who seeks to abridge free expression of others on private property." *Id.* at 539.

The application of this principle to instances of undercover investigations has demonstrated that the closer a person gets to obtaining access or employment by deception to purely private property—not open to the public—the more likely the First Amendment does not apply. *Food Lion*, 194 F.3d at 518-19 (recognizing that defendants did not commit trespass when they obtained employment based upon misrepresentations, but they did commit trespass by breaching their duty of loyalty to plaintiff when they secretly filmed non-public areas of the store because such filming went beyond their authority to enter the store as employees); *Desnick*, 44 F.3d at 1352-1353 (holding that the First Amendment protected defendants' use of false pretenses to conduct undercover recordings of plaintiff's business activities where the recordings were conducted in the portion of the office that was open to the public); *Dietemann*, 449 F.2d at 248 (determining that the First Amendment did not protect defendants where they obtained

access to the plaintiff's home—where plaintiff was operating his business—under false pretenses and secretly recorded plaintiff).

Several recent decisions by federal district courts have recognized the potential for harm from a trespass where the entrant obtained "consent" to gain access or employment at private property through misrepresentations, or where persons conducted surreptitious recordings, exceeding the scope of said consent. *See Democracy Partners v. Project Veritas Action Fund*, 285 F.Supp.3d 109 (D.D.C. 2018); *Planned Parenthood Federation of America, Inc., v. Center for medical Progress*, 214 F.Supp.3d 808 (N.D. Cal. 2016); *Gaubatz*, 793 F.Supp.2d 311. In all three cases, plaintiffs brought trespass causes of action, among others, against defendants who had obtained internships with plaintiffs through misrepresentations and then surreptitiously recorded numerous conversations and/or released a number of confidential documents. *Democracy Partners*, 285 F.Supp.3d at 112-15; *Planned Parenthood*, 214 F.Supp.3d at 817-19; *Gaubatz*, 793 F.Supp.2d at 317-20. The courts rejected defendants' arguments that the trespass claims should be dismissed because the plaintiffs consented to the entry, as the consent was obtained through misrepresentations, and in any event, the defendants exceeded the scope of said consent by surreptitiously recording conversations in plaintiffs' offices or private spaces. *Democracy Partners*, 285 F.Supp.3d at 118-19; *Planned Parenthood*, 214 F.Supp.3d at 833-35; *Gaubatz*, 793 F.Supp.2d at 344-46. Moreover, the potential for harm is even greater where consent is obtained by deception and the trespasser harbors an intent to harm the property owner's interests. *See S. v. Alexander*, 802 F.3d 1134, 1140 (10th Cir. 2015) ("We see no principled reason to distinguish between a perpetrator who places another person in fear by brandishing a weapon and one who induces fear by deception").

Here, using deception on a material matter in order to obtain access to or employment at an agricultural production facility, not open to the public, with an intent to harm the facility imposes a legally cognizable harm or confers a material gain such that the protections afforded under the First Amendment do not apply. Accordingly, Iowa's Ag-Trespass statute does not violate the First Amendment.[17,18,19]

B. IOWA'S AG-TRESPASS STATUTE IS NOT OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

Iowa's Ag-Trespass statute is not overbroad in violation of the First Amendment because it does not burden substantially more speech than the First Amendment permits. The United States Supreme Court has held that a statute is facially overbroad

> if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's

[17] Should this Court uphold only one subsection of Iowa's Ag-Trespass statute, the Court may sever the offending portions from the statute and leave the remainder intact. *See State v. Louisell*, 865 N.W.2d 590, 599 (Iowa 2015) ("Severing constitutionally infirm provisions is appropriate if it does not substantially impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent, and if the remaining portion of the enactment can be given effect without the invalid provision") (internal citations and quotation marks omitted); *see also* Iowa Code § 4.12 (recognizing severability as applicable to all Iowa Acts or statutes).

[18] Plaintiffs also raised a Fourteenth Amendment due process argument in Count IV, alleging that the Ag-Trespass statute burdens a fundamental right—speech protected by the First Amendment. Complaint ¶¶ 147-151. Plaintiffs' due process claim should be dismissed because the Ag-Trespass statute does not burden speech protected by the First Amendment. *See* Section IV.A. of this Brief, pp. 13-37.

[19] If the Court were to find that Iowa's Ag-Trespass statute applies to conduct or speech unprotected by the First Amendment, for the same reasons set forth in section IV.C.2. of this Brief at pp. 44-48, the Court should conclude that the statute also does not create an invalid viewpoint-based restriction in violation of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

> plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed.

U.S. v. Williams, 553 U.S. 285, 292-93 (2008) (internal citations and quotation marks). The overbreadth doctrine should only be used as a "last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982)) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Plaintiffs also bear the burden of demonstrating substantial overbreadth exists. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

Plaintiffs concede that Iowa's Ag-Trespass statute has some legitimate applications but argue that it reaches "a substantial amount of constitutionally protected speech, such as the undercover investigations the Plaintiffs conduct and/or rely upon as well as similar types of speech-producing conduct by labor organizers, journalists, and others engaged in such investigations." Complaint ¶ 122. Plaintiffs identify union workers seeking to organize a workforce or a person conducting an investigation because they are concerned about the conditions under which food is processed as examples of alleged speech criminalized by the Ag-Trespass statute as support for their overbreadth claim. *Id*. at ¶ 126.

1. Iowa's Ag-Trespass Statute does not Prohibit Protected Speech or Target Expressive Conduct Necessitating First Amendment Protection.

First, as previously discussed in this Brief, to the extent an investigative journalist, or anyone else for that matter, uses deception to obtain access to or employment with an agricultural production facility that is purely private, and not open to the public, with the specific intent to cause physical, economic, or other injury to the facility's interests, that conduct does not fall within the protections of the First Amendment. *See also Wasden I*, 878 F.3d at 1201-03 (holding in part that Idaho may criminalize similar "employment-seeking misrepresentations" used to gain access to an agricultural production facility with an intent to harm without violating

the First Amendment). Therefore, Plaintiffs cannot rely upon said conduct as an example of "protected speech" to support their overbreadth argument. *See Johnson v. Quattlebaum*, 664 Fed.Appx. 290, 293 (4th Cir. 2016) (unpublished decision) (court held South Carolina's public disorderly conduct statute prohibiting the use of certain obscene or profane language reached only speech unprotected by the First Amendment, and was therefore not unconstitutionally overbroad); *U.S. v. Simpson*, 741 F.3d 539, 551 (5th Cir. 2014) (court held statute prohibiting aiding and abetting the transmission of spam, with an intent to deceive or mislead, only reached speech unprotected by the First Amendment because it only applies to intentionally misleading commercial speech, and was therefore not unconstitutionally overbroad).[20]

Second, the Ag-Trespass statute targets non-expressive conduct that does not warrant protection under the First Amendment. In *United States v. Petrovic*, the court upheld an interstate stalking statute against an overbreadth challenge because it was "directed toward 'course[s] of conduct,' not speech, and the conduct it proscribe[d] [was] not 'necessarily associated with speech.'" 701 F.3d 849, 856 (8th Cir. 2012) (quoting *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)). And punishing an individual for non-expressive conduct, even if he/she acts in order to ultimately engage in free speech, does not "'implicate[] the First Amendment.'" *Cross v. Mokwa*, 547 F.3d 890, 896 (8th Cir. 2008) (quoting *Hicks*, 539 U.S. at 123). In *Cross*, the court rejected a First Amendment challenge to a municipal ordinance brought by protestors who had been "arrested for illegally occupying a condemned building." 547 F.3d at 896. The protestors were not arrested for protesting but for trespassing. *Id.* Just because the trespassing occurred incident to the protesting activities, it did not implicate the First Amendment. *Id.*

[20] This Court could adopt a narrowing construction as it sees fit to address any overbreadth and uphold the constitutionality of the Ag-Trespass statute. *See supra* n.15, p. 32.

Like the challenged statute and ordinance in *Petrovic* and *Cross*, the Ag-Trespass statute targets non-expressive conduct: using deception to obtain access to or employment at an agricultural production facility, with an intent to harm the facility's interests. Engaging in this non-expressive conduct, even as part of a plan to engage in expressive conduct at a later date, clearly does not invoke First Amendment protections.

2. Even if the Ag-Trespass Statute Criminalizes Protected, Expressive Conduct, the Statute does not Proscribe a Substantial Amount of Protected Speech in Relation to its Plainly Legitimate Sweep.

Plaintiffs attempt to increase the "breadth" of Iowa's Ag-Trespass statute by pointing to the different types of entities engaged in similar "undercover" investigations, rather than pointing to different types of protected speech proscribed by the statute. Relying upon one example of protected speech proscribed by a statute is not sufficient to invalidate the statute as overbroad. *Gerlich v. Leath*, 152 F.Supp.3d 1152, 1177 (S.D. Iowa 2016) (citing *Ferber*, 458 U.S. at 772) ("A law is not overbroad merely because one can think of a single impermissible application"). "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally prescribable conduct.'" *United States v. McDermott*, 822 F. Supp. 582, 595 (N.D. Iowa 1993) (quoting *Ferber*, 458 U.S. at 770 n. 25).

In *United States v. Stevens*, the Supreme Court found that a statute that prohibited depictions of animal cruelty was overly broad when it would have applied to certain animal cruelty videos but also may apply to all other depictions of animals being wounded or killed, such as hunting magazines and videos, and that the market for the former was "dwarfed" by the latter, to which the statute could not legitimately apply. 559 U.S. 460, 474-83 (2010). Unlike Iowa's Ag-Trespass statute, where the alleged overbreadth is based upon preventing different

groups from engaging in the exact same conduct—undercover investigations and exposés (albeit on disparate topics)—in *Stevens*, the statute potentially applied to a variety of disparate conduct and speech, including, but not limited to; hunting magazines and videos; and the slaughter and processing of livestock. *Id*.

Instead of proscribing a substantial amount of protected speech as Plaintiffs allege, Iowa's Ag-Trespass statute proscribes a substantial amount of conduct that is not protected by the First Amendment, including the use of deceit to trespass or obtain a job in order to: cause physical or economic damage or other injury to the facility and various interests associated with the facility; steal trade secrets or other business/operation information in order to injure the facility; obtain client or producer contact information in order to intimidate or persuade said clients/producers from contracting with the facility; interfere with the facility's bio-security protocols in order to injure the facility; and release or remove any animals from the facility. While this is not an exhaustive list, it is sufficiently broad enough to demonstrate the potential overbreadth, if any, of Iowa's Ag-Trespass statute would be insufficient to invalidate the statute. *See United States v. Brune*, 767 F.3d 1009, 1018 (10th Circ. 2014) ("Thus, even where a fair amount of constitutional speech is implicated, we will not invalidate the statute unless significant imbalance exists"). Moreover, a journalist caught up in a prosecution could always bring an as-applied challenge to any conviction because not every investigative reporter hired as a result of deception intends to harm the employer; this is a critical element that requires proof, beyond a reasonable doubt, and to be determined on a case-by-case basis. *See Wasden I*, 878 F.3d at 1202; *see also Golb v. Attorney General of the State of New York*, 870 F.3d 89, 102 (2nd Cir. 2017) (rejecting overbreadth challenge to criminal impersonation statute because the statute had a

substantial legitimate sweep, and any alleged overbreadth could be raised in an as-applied challenge).

C. IOWA'S AG-TRESPASS STATUTE DOES NOT CREATE A CONTENT- OR VIEWPOINT-BASED RESTRICTION ON SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

1. Iowa's Ag-Trespass Statute is Content-Neutral.

Although this Court previously declared Iowa's Ag-Fraud statute content-based, Iowa's Ag-Trespass statute is distinguishable from Iowa's Ag-Fraud statute. *See Reynolds I*, 297 F.Supp.3d at 919. The Ag-Trespass statute does not create a content-based restriction on speech in violation of the First Amendment. A statute is content-based if it requires a person to "'examine the content of the message that is conveyed'" to decide if a violation occurs. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). A law is content-neutral when the violation of the law occurs solely because of where the person speaks, not necessarily what is said. *Id*.

Iowa's Ag-Trespass statute is facially neutral; it bans all persons, regardless of subjective motive, from using deception on a material matter to obtain access to or employment with an agricultural production facility, not open to the public, with an intent to harm the facility or its interests. *See* Iowa Code § 717A.3B. Similar to other statutes that prohibit the use of fraud to commit an act, the statute does not directly regulate speech, but rather conduct facilitated by speech. The speech only becomes subject to the statute if it is made in an attempt to obtain access or employment at an agricultural production facility and the person maintains an intent to harm the facility. Moreover, the use of deception is integral to the commission of a criminal act—trespass—under the Ag-Trespass statute. S*ee Giboney*, 336 U.S. at 502 (Court held that union's picketing and related activities constituted a single, integrated course of conduct violative of the state's anti-trade restraint law, and because the speech was integral to the

criminal conduct, it was not protected by the First Amendment).

Where a statute serves purposes unrelated to the content of the speech it is deemed content neutral, "even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *accord McCullen*, 573 U.S. at 480. Here, although the Ag-Trespass statute may have an incidental effect on persons who make true or false statements of a material nature, the statute's intent to protect private property against trespass and prevent bio-security measures from being compromised at agricultural production facilities are unrelated to the content of the statements. It makes no difference what specific false statements are made, as long as they are material and made to obtain access or employment to an agricultural production facility with an intent to harm the facility.

Plaintiffs allege Iowa's Ag-Trespass statute is content-based because it applies to a single industry—agricultural production. Plaintiffs' Brief, pp. 16. Plaintiffs' arguments are without merit and should be rejected. Legislatures can "adopt laws to address the problems that confront them." *Burson* v. *Freeman*, 504 U.S. 191, 207 (1992). Iowa's Ag-Trespass statute is not the only example of Iowa's legislature targeting only a certain industry for protection; Iowa also prohibits trespass on military bases, Iowa Code section 29A.42, in addition to the general prohibition of trespass in Iowa Code section 716.7. The Supreme Court has also recognized that laws are not content-based simply because they target a particular industry or business for protection. *See McCullen*, 573 U.S. at 479-81 (recognizing the law was content-neutral, but invalidating the law providing for buffer zones around only abortion clinics under a different First Amendment rationale); *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (finding content-neutral a statute enacted to end harassment outside abortion clinics). In *McCullen*, the Court acknowledged that the law had the "inevitable effect" of restricting abortion-related speech more than other speech,

but that alone did not make a facially neutral law content-based. 573 U.S. at 480. Accordingly, Iowa's Ag-Trespass statute is content-neutral.

2. The Ag-Trespass Statute is Viewpoint-Neutral.

Plaintiffs allege Iowa's Ag-Trespass creates a viewpoint-based restriction on speech in violation of the First Amendment "because it singles out speech critical of a single industry for special, disfavored treatment."[21] Plaintiffs' Brief, p. 17. Plaintiffs' arguments are without merit and should be rejected. Even assuming the conduct prohibited by Iowa's Ag-Trespass statute is not exempt from the protections of the First Amendment, the statute is viewpoint neutral. There is no clear, discriminatory legislative purpose against a viewpoint under the statute, and the law is focused on prohibiting certain conduct of persons, irrespective of the message or political agenda of those persons.

On its face, Iowa's Ag-Trespass statute does not discriminate between particular viewpoints; it prohibits deception without regard to the ideology or perspective of the speaker. *See Reynolds I*, 297 F.Supp.3d at 926 (stating that on its face, Iowa's Ag-Fraud statute did not discriminate between particular viewpoints). Plaintiffs rely upon *Kelly*, 2020 WL 362626, at *17 (concluding Kansas' Ag-Fraud/Trespass statute was viewpoint-based because it was limited to those with an intent to injure the agricultural facility), to support their claim, but *Kelly* is erroneous as a matter of law. Courts in Idaho, Iowa, Kansas, Utah and Wyoming have considered the constitutionality of Ag-Fraud/Trespass-like statutes, but only the Kansas District Court and Ninth Circuit have issued rulings on this particular issue, with the Ninth Circuit

[21] Although Plaintiffs alleged the timing of passage of Iowa's Ag-Trespass statute should be held against the State by allegedly showing the interests in passing the legislation remained the same—criminalizing undercover investigations—the timing arguably weighs in favor of the State by demonstrating the legislature sought to swiftly correct deficiencies this Court had previously identified in Iowa's Ag-Fraud statute, and virtually mirrors the language upheld by the Ninth Circuit.

reaching the opposite conclusion as the court in *Kelly*. *See Wasden I*, 878 F.3d at 1202 (holding the legislative purpose of Idaho's Ag-Fraud/Trespass statute cannot be said to have been "enacted solely to suppress a specific subject matter or viewpoint").

Notwithstanding the foregoing, when states "single[] out a subset of messages for disfavor based on the views expressed," they are discriminating based on viewpoint. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). Plaintiffs' only sources of evidence for their allegation are three (3) legislators' statements on the bill that eventually became Iowa's Ag-Trespass statute. Plaintiffs' SUMF ¶¶ 82-85. Those legislators allegedly stated the Ag-Trespass statute was needed: 1) because this Court struck down Iowa's Ag-Fraud statute, Iowa Code section 717A.3A; 2) to prevent farmers from being "disparaged;" 3) to protect farmers from "extremism;" and 4) to protect agriculture from those who use "deceptive practices to distort public perception of best practices to safely and responsibly produce food." *Id*.

It is not clear from those legislators' statements that they harbored an intent to suppress the viewpoints of animal activists; there are no disparaging remarks from the legislators about said activists. *Cf. Reynolds I*, 297 F.Supp.3d at 926 (noting Plaintiffs' Complaint contained statements from legislators disparaging animal activists in connection with the proposed legislation). Plaintiffs' argument also ignores other statements by legislators during floor debate of the bill that became Iowa's Ag-Trespass statute, expressing support for the legislation because of concerns for biosecurity and other intentions to harm the facility. *See* Defendants' SUMF¶¶ 8-10. Desiring to protect a particular industry, arguably vital to the State of Iowa, from those that would use deceptive practices to enter private property in order to harm the interests of said property owner does not equate to an intent to disfavor a subset of messages based upon their

viewpoint.[22] *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (A legislature need not "strike at all evils at the same time or in the same way").

In any event, courts generally avoid looking past the facial validity of a statute to identify the statute's alleged true purpose. *See Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (court declined to look past the facial neutrality of Michigan's prohibition on school districts' collection of membership dues for unions that represent public-school employees in a First Amendment challenge); *see also Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 649-50 (7th Cir. 2013) (the court stated they would not "peer[ ] past the text of the statute to infer some invidious legislative intention" of an otherwise viewpoint-neutral statute despite the "overtly partisan" statement of a legislator). In both *Baily* and *Walker*, the courts relied upon the following sentence from *United States v. O'Brien*, 391 U.S. 367, 383 (1968): "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Bailey*, 715 F.3d at 960; *Walker*, 705 F.3d at 652. The Supreme Court's rationale for this approach is that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384. Consistent with this rationale, in *Wasden I*, the Ninth Circuit upheld Idaho's prohibition on

[22] The importance of ensuring those with nefarious motives are excluded from agricultural production facilities in Iowa cannot be understated because the spread of disease can have significant consequences for individual farmers, consumers, and Iowa's economy as a whole. *See Rembrandt Enterprises, Inv. v. Illinois Union Insurance Co.*, 2017 WL129998 (D. Minn. 2017) (court acknowledged farmer had to euthanize over nine million birds due to the spread of highly pathogenic avian influenza ("bird flu") in 2014); *Rembrandt Enterprises, Inc. v. Illinois Ins. Co.*, 129 F.Supp.3d 782, 783 (D. Minn. 2015) (court acknowledged farmer lost millions of dollars in income as a result of the bird flu outbreak in 2014); *Farris v. Dep't of Employment Sec.*, 8 N.E.3d 49 (Ill. Ct. App. 2014) (court ruled employee was not eligible for unemployment benefits after being discharged for non-compliance with company's biosecurity protocols because the employee's conduct had the potential to harm the employer).

obtaining trade secrets by misrepresentation despite evidence of some legislators supporting the law to silence undercover journalists because the record identified other legitimate purposes for the law. 878 F.3d at 1200.

Thus, even if the Iowa legislators' comments were meant to refer to animal rights activists, the Court should refrain from looking past the text of the Ag-Trespass statute—an otherwise viewpoint-neutral statute—to infer some invidious legislative intention. The inherent futility of undertaking such a motive-finding endeavor has been identified by the Supreme Court. *See O'Brien*, 391 U.S. at 384 ("We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

The cases relied upon by Plaintiffs to support their argument demonstrate the hazard noted by the Court in *O'Brien*. Several involved statutes that were content-based on their face, but none of the courts found an otherwise facially content-neutral statute "content-based" because of alleged illicit motive. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015), involved a city ordinance regulating the content of temporary signs and was "content-based on its face." In *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 645-50 (1994), the Court held that, despite detailed statutory findings of Congress' desire to protect traditional broadcast television providers, must-carry provisions applicable to cable television providers were not content-based. In *United States v. Eichman*, 496 U.S. 310, 315-18 (1990), while the Court held that the Flag Protection Act was content-based because the government's interest was related to the communicative impact of flag destruction, it was not invalidated because of an alleged illicit motive, creating a viewpoint-based restriction on speech. *Whitton v. City of Gladstone*, 54 F.3d

1400, 1403-07 (8th Cir. 1995), involved a city ordinance regulating temporary political signs, and the court held it was "content-based" on its face.

Accordingly, Iowa's Ag-Trespass statute does not create a content- or viewpoint-based restriction on speech in violation of the First and Fourteenth Amendments.

D. IOWA'S AG-TRESPASS STATUTE IS NARROWLY TAILORED TO BOTH SIGNIFICANT AND COMPELLING GOVERNMENTAL INTERESTS.

1. Iowa's Ag-Trespass Statute is Subject to Intermediate Scrutiny.

Contrary to Plaintiffs' arguments, since Iowa's Ag-Trespass statute is content and viewpoint-neutral, intermediate scrutiny—not strict scrutiny—is the applicable standard of review. *See supra* Section IV.C.1 and 2. Moreover, because Iowa's Ag-Trespass statute concerns false statements, intermediate scrutiny is the proper standard of review. *See Alvarez*, 567 U.S. at 732 (Breyer, J. concurring) (intermediate scrutiny should apply where "dangers of suppressing valuable ideas are lower," such as when "the regulations concern false statements about easily verifiable facts that do not concern" more complex subject matter). Justice Breyer noted that a law restricting false statements about "philosophy, religion, history, the social sciences, the arts, and the like" calls for strict scrutiny, but the Stolen Valor Act did not fall into one of those categories. *Id*. The false statements at issue in *Alvarez* are "less likely than true factual statements to make a valuable contribution to the marketplace of ideas" and the "government often has good reasons to prohibit such false speech." *Id*.

Iowa's Ag-Trespass statute does not restrict false statements about "philosophy, religion, history, the social sciences, the arts, [or] the like"; rather, it prohibits the use of deception of a material nature to obtain access or employment at agricultural production facilities with an intent to cause harm. Lies of a material nature used to obtain access or employment with an intent to

harm arguably do not make a "valuable contribution to the marketplace of ideas", and as will be set forth in Section IV.D.2, Iowa has a "good reason[] to prohibit such false speech." *See Id*.

Plaintiffs' reliance on *281 Care Comm. I* and *II* for the proposition that strict scrutiny applies in this matter is misplaced. In *281 Care Comm. I* and *II*, the challenged statute prohibited false *political* speech on ballot measures; Iowa's Ag-Trespass statute does not address false *political* speech. *See 281 Care Committee v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2010) ("*281 Care Comm. I*") and *281 Care Committee v. Arneson*, 766 F.3d 774, 782-84 (8th Cir. 2014) ("*281 Care Comm. II*") (emphasis added). In *281 Care Comm. I*, the court held only that knowingly false campaign speech is not categorically exempt from First Amendment protection. 638 F.3d at 633-34. In *281 Care Comm. II*, the court simply held that strict scrutiny applies to restrictions on false political speech, rather than the intermediate scrutiny that was applied to the false speech at issue in *Alvarez*. 766 F.3d at 783. (noting that the regulation in *Alvarez* proscribed false speech, not "false *political* speech", a distinction that "makes all the difference and is entirely the reason why *Alvarez* is not the ground upon which we tread") (emphasis in original). Rather than support Plaintiffs' arguments, *281 Care Comm. II* supports the Defendants' argument that intermediate scrutiny is the proper standard of review.

2. Iowa's Ag-Trespass Statute Advances Significant Governmental Interests.

In order to survive intermediate scrutiny, the statute must be "narrowly tailed to serve a significant governmental interest." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 796). The law "'need not be the least restrictive or least intrusive means of' serving the government's interests." *Id*. (quoting *Ward*, 491 U.S. at 798). But, the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id*. (quoting *Ward*, 491 U.S. at 799).

This Court previously held that Iowa's Ag-Fraud statute failed intermediate scrutiny because the statute criminalized speech that inflicted no specific harm to property owners, ranged very broadly, and risked significantly chilling speech not covered under the statute. *Reynolds II*, 353 F.Supp.3d at 827. Iowa's Ag-Trespass statute addresses those deficiencies. The Ag-Trespass statute requires that: any deception be of a material nature; the agricultural production facility must be purely private property, not open to the public; the person using deception must actually obtain access or employment; and the person using deception must also harbor an intent to harm the facility or its interests. *See* Iowa Code § 717A.3B(1)(a) and (b). The Ag-Trespass statute expressly prohibits the use of false speech this Court recognized as historically excluded from protection by the First Amendment—false statements that impose a legally cognizable harm or confer a material gain. *Reynolds I*, 297 F.Supp.3d at 924 (distinguishing Iowa's Ag-Fraud statute from the language upheld by the Ninth Circuit in *Wasden I*).

Iowa's Ag-Trespass statute advances significant governmental interests. Given agriculture's significance in Iowa (*See* Complaint (Dkt. 1), ¶¶ 83-86), the importance of protecting agricultural production facilities—private property not open to the public—and their proprietary information[23] and biosecurity measures from those who intend to harm the facilities is certainly "significant." *See supra* Section IV.C.2, n. 22; *see also Wasden I*, 878 F.3d at 1200-01 (the Ninth Circuit, applying a "more searching" application of rational basis review, held

[23] A Chinese national was recently convicted of participating in a long-term conspiracy to steal trade secrets—seed technology—from DuPont and Monsanto in Iowa. *Chinese National Sentenced to Prison for Conspiracy to Steal Trade Secrets*, Department of Justice (Oct. 6, 2016), available at https://www.justice.gov/usao-sdia/pr/chinese-national-sentenced-prison-conspiracy-steal-trade-secrets. The defendant was also ordered to pay $425,000.000 in restitution to the companies for the theft. David Pitt, *Man Charged in Seed Corn Theft Must Pay $425K Restitution*, Des Moines Register (Dec. 22, 2016), available at https://www.desmoinesregister.com/story/money/agriculture/2016/12/22/man-charged-seed-corn-theft-must-pay-restitution/95773442/.

Idaho's concern about future injuries to agricultural productions facilities from the theft of trade secrets through misrepresentations was a "legitimate governmental interest," despite no specific examples of such conduct occurring in the record).

Plaintiffs' argument that the State's interests in protecting private property, proprietary information, or biosecurity measures are not "significant" because they are not the actual reasons fails for the same reasons the Ag-Trespass statute is content and viewpoint-neutral. *See supra* Section IV.C.1 and 2. Plaintiffs also argue that the interests Iowa's Ag-Trespass statute are meant to protect are not significant because other statutes addressing those same interests already exist, but, as will be set forth in Section IV.D.3, this argument fails for the same reasons the statute is narrowly tailored to serve the aforementioned interests.

3. Iowa's Ag-Trespass Statute is Narrowly Tailored to the Significant Governmental Interests.

Iowa's Ag-Trespass statute is narrowly tailored to the significant interests it aims to protect. It is focused only on those who intend to inflict harm on an agricultural production facility—whether it is to the facility's private property interests, proprietary information, or biosecurity—from obtaining access to or employment with said facility through deception. There is no criminal offense absent a specific intent to cause "physical or economic harm or other injury" to the agricultural production facility.

Plaintiffs' reliance on the existence of other statutes to argue the Ag-Trespass statute is not narrowly tailored ignores that the other statutes may not protect the same interests where the perpetrators have obtained access or employment by deception or misunderstands the interests to be protected. Iowa Code section 717A.2 only prohibits unauthorized access when it is paired with specific proscribed conduct; it does not address the harm from the initial trespass with an intent to cause a harm, which Iowa's Ag-Trespass statute was intended to prevent. Moreover,

Iowa Code section 717A.2 only prohibits the conduct when it is done "without the consent of the owner" and, according to Plaintiffs' logic, procuring consent to perform certain acts by deception may not vitiate consent.

Iowa's existing law on bio-security, Iowa Code section 717A.4, only prohibits the "willful[] possess[ion], transport[ation], or transfer [of] a pathogen with an intent to threaten the health of an animal or crop." Outside of the intentional introduction of a pathogen, the statute does not address the intentional interference with bio-security protocol by a "false-friend" employee or others with nefarious motives that could allow for the spread of disease or interfere with the production or processing of livestock. *See, e.g.*, 21 C.F.R. § 118.4(b) (requiring certain egg laying facilities to comply with various bio-security requirements to avoid salmonella enteritidis); *Farris*, 8 N.E.3d 49 (recognizing non-compliance with company's biosecurity protocols had the potential to harm the employer). Moreover, none of the statutes identified by Plaintiffs address the theft of trade secrets by deception from agricultural production facilities, which the Ag-Trespass statute proscribes.

Plaintiffs' arguments that Iowa's Ag-Trespass statute is over- and under-inclusive are red herrings and misunderstand the interests the statute intends to protect. The statute is not over-inclusive for the same reasons it is not overbroad. *See supra* Section IV.B.1 and 2. In addition, the potential application of the Ag-Trespass statute to Plaintiffs' activities does not render the statute over-inclusive because it would only apply to Plaintiffs' activities to the extent they intend to inflict "physical or economic harm or other injury" to the agricultural production facility. As previously indicated, the statute does not apply to all undercover investigations because not every investigative reporter hired as a result of deception intends to harm the

employer; this is a critical element that requires proof, beyond a reasonable doubt, and to be determined on a case-by-case basis. *See Wasden I*, 878 F.3d at 1202.

Plaintiffs' argument that the Ag-Trespass statute is under-inclusive because it does not address the same harms from someone who enters or obtains access without deception should fail for two reasons. First, instances where a party obtains access or employment with an intent to harm without deception are likely addressed in large part by Iowa Code sections 717A.2 and 717A.3, over even section 717.15—Iowa's criminal trespass statute. Second, the same logic would invalidate Iowa's laws prohibiting consumer fraud, theft by fraud and other fraud-related prohibitions. Those statutes all prohibit conduct already addressed by existing law but focus on those instances where the underlying conduct was facilitated by false statements or deception.

Plaintiffs also erroneously argue that, like the statute in *McCullen*, a substantial portion of the burden on speech imposed by the Ag-Gag law does not serve to advance the State's goals. Plaintiffs' Brief, p. 25. *McCullen* is distinguishable from the present case because there, the Court reversed a law restricting the ability to hand out leaflets—a type of speech that is afforded the greatest of constitutional protections—on public sidewalks, which are afforded special First Amendment protections and where the government's ability to restrict speech is "very limited." 573 U.S. at 476, 88-89 (noting public sidewalks "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate") (internal citations omitted). Conversely, Iowa's Ag-Trespass statute restricts conduct—obtaining access or employment at an agricultural production facility with an intent to harm the facility—facilitated by deception of a material nature and occurring on private property, where First Amendment rights are at their "most attenuated." *See Cincinnati v. Thompson*, 643 N.E.2d 1157, 1163 (Ohio Ct. App. 1994) (citing *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972)).

Moreover, in *McCullen*, the Supreme Court chided the state for failing to attempt less restrictive alternatives, and here, the Ag-Trespass statute is a stark example of the legislature attempting to impose a less restrictive alternative to the Ag-Fraud statute, which this Court found insufficiently tailored. 573 U.S. at 493-94.

Wasden I further supports the State's argument that the Ag-Trespass statute is narrowly tailored. In *Wasden I*, the Ninth Circuit invalidated Idaho's prohibition on access by misrepresentation, which contained no limiting restrictions, in part because Idaho already had prohibitions on trespass. 878 F.3d at 1196-98. The Ninth Circuit then went on to discuss the prohibition was not the "least restrictive means among available, effective alternatives" by specifically referring to Idaho's prohibition on obtaining employment by misrepresentations where the person harbored an intent to harm—which the court upheld—as an example of a less restrictive alternative. *Id*. at 1198. The prohibitions on obtaining access or employment by deception in Iowa's Ag-Trespass statute virtually mirror the language upheld by the Ninth Circuit in *Wasden I* as a less restrictive alternative.

Accordingly, Iowa's Ag-Trespass statute satisfies both intermediate and strict scrutiny.[24]

V. CONCLUSION

Iowa's Ag-Trespass statute does not restrict conduct facilitated by deception in violation of the First Amendment. The statute is not facially overbroad under the First Amendment. Finally, Iowa's Ag-Trespass statute creates neither a content-based or viewpoint-based restriction on protected speech because there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Trespass statute, and the statute is narrowly tailored to

[24] Even if the Court concludes strict scrutiny applies, the Ag-Trespass statute advances compelling governmental interests and is narrowly tailored to those interests for the same reasons set forth in this Section (IV.D.2 and 3).

serve compelling and significant governmental interests. Accordingly, Defendants respectfully request the Court deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment, upholding Iowa's Ag-Trespass statute as constitutional and lifting the injunction on its enforcement.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ *Jeffrey S. Thompson*
JEFFREY S. THOMPSON
Solicitor General
jeffrey.thompson@ag.iowa.gov

/s/ *Jacob J. Larson*
JACOB J. LARSON
Assistant Attorney General
jacob.larson@ag.iowa.gov

Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 281-5164
Fax: (515) 281-4209
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies 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 be served by the CM/ECF system.

DATE: April 27, 2020

/s/ *Jacob J. Larson*
JACOB J. LARSON
Assistant Attorney General

jacob.larson@ag.iowa.gov

Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 281-5164
Fax: (515) 281-4209
ATTORNEYS FOR DEFENDANTS