

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ANIMAL LEGAL DEFENSE FUND,
IOWA CITIZENS FOR
COMMUNITY IMPROVEMENT,
BAILING OUT BENJI, PEOPLE FOR
THE ETHICAL TREATMENT OF
ANIMALS, INC., and CENTER FOR
FOOD SAFETY

Plaintiffs/Appellees,

vs.

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/Appellants.

No. 22-1830

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
NO. 4:19-cv-00124-SMR-HCA

DEFENDANTS'-APPELLANTS' BRIEF AND ARGUMENT

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SUMMARY OF THE CASE

In order to address concerns about protecting Iowa agricultural producers' private property, right to privacy, proprietary information and biosecurity measures, the State of Iowa enacted Iowa's Ag-Trespass statute in 2019, codified as Iowa Code section 717A.3B. The statute prohibits obtaining access to or employment at an agricultural production facility through deception while harboring an intent to harm the facility.

Plaintiffs challenge the constitutionality of Iowa's Ag-Trespass statute on First Amendment grounds. The statute readily withstands examination of this claim because the speech prohibited by the statute is not protected by the First Amendment, and the statute does not discriminate based upon viewpoint. The District Court denied Defendants' Motion to Dismiss and Motion for Summary Judgment while granting Plaintiffs' Motion for Summary Judgment. Defendants appeal the District Court's grant of summary judgment in favor of Plaintiffs and the denial of Defendants' Motion to Dismiss and Motion for Summary Judgment.

While several courts, including this Court, have addressed similar statutes to Iowa's Ag-Trespass law, they have reached different conclusions, and the specific issues raised in this appeal are a matter of first impression for this Court. Defendants respectfully request 15 minutes per side for oral argument as the criteria in Fed. R. App. P. 34 (a)(2)(A)-(C) are not present.

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JURISDICTIONAL STATEMENT

Plaintiffs'-Appellees' federal constitutional claims were filed under 42 U.S.C. §§ 1983 and 1988 and the Declaratory Judgment Act, 28 U.S.C. § 2201, and hence the District Court possessed jurisdiction under 28 U.S.C. § 1331.

On December 2, 2019, the District Court entered an order denying in part and granting in part Defendants'-Appellants' Motion to Dismiss, dismissing Plaintiffs'-Appellees' void-for-vagueness claim but denying the motion in all other respects. (App. 50; R. Doc. 41.) On March 14, 2022, the District Court entered an order in favor of Plaintiffs-Appellees following its review of the parties' cross-motions for summary judgment, holding that: Iowa's Ag-Trespass statute discriminated based upon viewpoint; it did not survive strict scrutiny under the First Amendment; and dismissed Plaintiffs' Fourteenth Amendment due process claim as moot. (App. 212; R. Doc. 84.) The District Court entered final judgment and issued a Permanent Injunction on March 28, 2022. (App. 240; R. Doc. 86.) Defendants-Appellants filed a timely Notice of Appeal. (App. 242; R. Doc. 89.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides for appellate jurisdiction over a final judgment entry from a United States District Court.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING IOWA’S AG-TRESPASS STATUTE DISCRIMINATED BASED UPON VIEWPOINT IN VIOLATION OF THE FIRST AMENDMENT.

Authorities

Animal Legal Def. Fund. v. Reynolds, 8 F.4th 781 (8th Cir. 2021)

Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 1997)

Wisconsin v. Mitchell, 508 U.S. 476 (1993)

United State v. Dinwiddie, 76 F.3d 913 (8th Cir. 1993)

II. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING IOWA’S AG-TRESPASS STATUTE FAILED TO SURVIVE STRICT SCRUTINY.

Authorities

Animal Legal Def. Fund. v. Reynolds, 8 F.4th 781 (8th Cir. 2021)

Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 1997)

STATEMENT OF THE CASE

Iowa's Ag-Fraud Statute (Iowa Code § 717A.3A): Iowa is one of the nation's leading states in agricultural production. (App. 27; R. Doc. 1, at 25.) 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 producers' private property, right to privacy and biosecurity. (App. 169-171; R. Doc. 62-1, at 1-3.)

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) ("Access Provision");
- 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) ("Employment Provision"); and
- conspiring to commit or aiding and abetting the commission of agricultural production facility fraud. *Id.* § 717A.3A(3)(a).

The first conviction is a serious misdemeanor and subsequent convictions are punished as aggravated misdemeanors. *Id.* at § 717A.3A(2)(a)-(b).

Plaintiffs-Appellees Animal Legal Defense Fund *et al.* (collectively, “Plaintiffs”) are various organizations who want to obtain access to or employment with agricultural production facilities to conduct “undercover investigations” related to food safety, animal welfare, worker safety, and other concerns. *See Animal Legal Def. Fund v. Reynolds*, 353 F.Supp.3d 812, 819 (2019) (“*Reynolds I*”). Plaintiffs sued Iowa Governor Kimberly Reynolds, Iowa Attorney General Tom Miller, and Montgomery County Attorney Drew B. Swanson (collectively, “Defendants”)—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 in violation of the First Amendment. *Id.*

In *Reynolds I*, the District Court concluded that Iowa Code section 717A.3A violated the First Amendment because the statute created a content-based¹ restriction on protected speech and did not satisfy either intermediate or strict scrutiny.² *Id.* at 821-27. The ruling was appealed, and on August 10, 2021, the

¹ Plaintiffs also argued that § 717A.3A was a viewpoint-based restriction, but the District Court—having found the law was a content-based regulation—declined to consider Plaintiffs’ viewpoint-based argument. *Reynolds I*, 353 F.Supp.3d at 822 fn. 13.

² Plaintiffs also argued that § 717A.3A was overbroad in violation of the First Amendment, but the District Court—having already found the statute unconstitutional under the First Amendment—declined to consider Plaintiffs’

Eighth Circuit affirmed in part and reversed in part. *See Animal Legal Def. Fund. v. Reynolds*, 8 F.4th 781 (8th Cir. 2021) (“*ALDF*”³). The Eighth Circuit held the statute’s Access Provision did not violate the First Amendment because it did not restrict protected speech, but the Employment Provision did violate the First Amendment because its prohibition was too broad, ensnaring some protected speech, and did not satisfy strict or intermediate scrutiny.⁴ *Id.* at 786-88.

Iowa’s Ag-Trespass Statute (Iowa Code § 717A.3B): After the District Court issued its ruling in *Reynolds I*, but before the Eighth Circuit ruled on Defendants’ appeal, the Iowa Legislature attempted to address the alleged constitutional deficiencies identified by the District Court with Iowa Code section 717A.3A, and passed Iowa’s Ag-Trespass statute, codified in Iowa Code section 717A.3B.

Iowa Code section 717A.3B provides that a person commits agriculture production facility trespass if the person:

- “Uses deception as described in section 702.9, subsection 1 or 2, on a

overbreadth argument. *Reynolds I*, 353 F.Supp.3d at 827 fn. 18.

³ Consistent with the District Court’s summary judgment ruling below (App. 215; R. Doc. 84, at 4 fn. 3.), for clarity, the Eighth Circuit’s opinion on appeal from *Reynolds I* will be referred to as *ALDF*.

⁴ The matter has been remanded back to the District Court, and, pursuant to the District Court’s order, the parties submitted supplemental briefs on what, if any, claims remain. *Animal Legal Defense Fund v. Reynolds*, Case No. 4:17-cv-00362-SMR-HCA (Dkt. 111). As of the submission of this Brief, the District Court has not issued a ruling.

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.” (Iowa Code § 717A.3B(1)(b)); 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.” (Iowa Code § 717A.3B(3)).

Similar to Iowa Code section 717A.3A, the first conviction under section 717A.3B is a serious misdemeanor and subsequent convictions are punished as aggravated misdemeanors. *Id.* at § 717A.3B(2).

The same Plaintiffs from *Reynolds I* sued Iowa Governor Kimberly Reynolds, Iowa Attorney General Tom Miller, and Montgomery County Attorney Drew B. Swanson (collectively, “Defendants”), alleging Iowa Code section 717A.3B was facially unconstitutional as a content-based, viewpoint-based, and overbroad regulation in violation of the First Amendment. (App. 35-39; R. Doc. 1, at 33-37.) Plaintiffs also alleged Iowa Code section 717A.3B was void under the First and Fourteenth Amendments because it was vague. (App. 39-40; R. Doc. 1, at 37-38.)

Defendants filed a Motion to Dismiss on June 21, 2019, arguing that Plaintiffs failed to state claims under either the First or Fourteenth Amendments. (App. 47; R. Doc. 18.) On December 2, 2019, the District Court ruled on the motion, dismissing Plaintiffs’ void-for-vagueness claim, and denying the motion in all other respects. (App. 50; R. Doc. 41.). In the same Order, the District Court

entered a preliminary injunction prohibiting enforcement of Iowa Code section 717A.3B during the pendency of the litigation. *Id.*

The parties then both moved for summary judgment in March and April of 2020. (App. 107; R. Doc. 55.); (App. 166; R. Doc. 62.) Given the pending appeal of *Reynolds I* to the Eighth Circuit, and pursuant to the agreement of the parties, the District Court continued the case challenging Iowa Code section 717A.3B while awaiting the Eighth Circuit's ruling. (R. Doc. 77.). Shortly after the Eighth Circuit issued its ruling in *ALDF*, the Tenth Circuit issued a ruling in a challenge to a similar Kansas statute in *Animal Legal Def. Fund v. Kelly*, 9 4th 1219, 1233-35 (10th Cir. 2021), *cert. denied*, 596 U.S. __ (U.S. April 25, 2022) (No. 21-760) (invalidating a statute that prohibited, among other things, trespassing by use of deception or false speech while harboring an intent to damage the facility because it imposed liability for a deceptive trespass depending upon the viewpoint of the individual). Thereafter, upon request of the District Court, the parties submitted supplemental briefs on what, if any, impact *ALDF* and *Kelly* had on the challenge to Iowa Code section 717A.3B. (R. Doc. 81-83.).

On March 14, 2022, the District Court entered an order on the merits of the parties' cross-motions for summary judgment, in which the Court granted Plaintiffs' Motion for Summary Judgment and denied the Defendants' Motion for Summary Judgment. (App. 212; R. Doc. 84.) The District Court concluded that,

although Iowa Code section 717A.3B did not restrict speech protected by the First Amendment, it nonetheless violated the First Amendment because it discriminated based upon viewpoint and did not survive strict scrutiny. (App. 226-236; R. Doc. 84 at 15-27.)

On March 28, 2022, the District Court entered an order declaring Iowa Code section 717A.3B unconstitutional under the First Amendment and permanently enjoining and prohibiting the State from enforcing the statute. (App. 240; R. Doc. 86.)

SUMMARY OF THE ARGUMENT

The conduct and speech prohibited by Iowa Code section 717A.3B—using deception to gain access to or obtain employment with an agricultural production facility while harboring an intent to harm that facility—does not fall within the protections of the First Amendment. 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. This Court has previously held that the use of false speech to commit a trespass is not protected speech because such speech imposes a legally cognizable harm. The District Court correctly concluded that Iowa Code section 717A.3B does not restrict speech protected by the First Amendment.

However, the District Court erroneously concluded that Iowa Code section 717A.3B discriminates based upon viewpoint and was therefore subject to strict scrutiny. The statute is a viewpoint neutral regulation of false, unprotected speech. Even if this Court determines the statute is subject to strict scrutiny, section 717A.3B is narrowly tailored to serve compelling governmental interests.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED IOWA CODE SECTION 717A.3B DOES NOT RESTRICT SPEECH PROTECTED BY THE FIRST AMENDMENT.

A. Standard of Review.

This Court reviews a district court's summary judgment determinations de novo using the same standard as the district court. *Lager v. Chicago Northwestern Transp. Co.*, 122 F.3d 523, 524 (8th Cir. 1997). Hence, this Court's task is to determine if the record demonstrates that there is no genuine issue as to any material fact and whether Plaintiffs or Defendants are entitled to judgment as a matter of law. *Id.*

Plaintiffs claim Iowa Code section 717A.3B violates the Speech Clause of the First Amendment to the United States Constitution. (App. 35-40; R. Doc. 1, at 33-38.) Constitutional claims are subject to a de novo standard of review on appeal. *Escudero-Corona v. I.N.S.*, 244 F.3d 608, 614 (8th Cir. 2001). First Amendment challenges involve a three-step analysis: 1) whether the speech is

protected by the First Amendment; 2) if the speech is protected, the court must determine what standard of review applies; and 3) application of the standard of review to the facts of the case. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Plaintiffs bear the burden of satisfying the first factor. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

B. False Speech that Causes Legally Cognizable Harm 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 false speech demonstrates there is no First Amendment protection for the conduct⁵ specifically prohibited by Iowa Code section 717A.3B. In one of the Supreme Court’s most recent opinions addressing the use of false speech, *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), a plurality of the 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

⁵ While Defendants maintain that Iowa Code section 717A.3B does not restrict speech or expressive conduct because a trespass facilitated by false speech does not symbolize anything (App. 225; R. Doc. 84 at 14.), Defendants recognize that this Court has previously determined that Iowa Code section 717A.3A constituted a direct regulation of speech despite Defendants’ similar arguments to the contrary. *See ALDF*, 8 F.4th at 784.

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.

In *ALDF*, this Court, relying upon *Alvarez*, upheld the Access Provision in section 717A.3A, stating that “intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment.” 8 F.4th at 786. Given that using false pretenses to gain access to property (trespass) is not protected under the First Amendment, the access provision of section 717A.3B—prohibiting obtaining access based upon deception with an intent to harm—also does not proscribe speech in violation of the First Amendment. *See Id.* (concluding trespass without physical damage to the property still imposes a legally cognizable harm because it results in a diminution of privacy and the right to exclude).

While this Court determined the Employment Provision in section 717A.3A was unconstitutional in *ALDF* because it lacked a materiality requirement and the intent element was too broad, Iowa Code section 717A.3B’s employment provision cured this deficiency by requiring the deception be material and providing a narrower intent requirement. *See ALDF*, 8 F.4th at 787 (“There is a less restrictive means available: proscribe only false statements that are material to a hiring decision.”); *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1201-02

(9th Cir. 2018) (upholding a similar Idaho statute that prohibited obtaining employment by misrepresentation while harboring an intent to harm because the prohibition was limited by the intent to harm element).

Accordingly, the District Court correctly concluded that the access and employment provisions of Iowa Code section 717A.3B do not regulate protected speech, which Plaintiffs effectively conceded below. (App. 226; R. Doc 84 at 15.); *see also* (R. Doc. 81, at 10.).

II. THE DISTRICT COURT ERRED WHEN IT CONCLUDED IOWA CODE SECTION 717A.3B DISCRIMINATED BASED UPON VIEWPOINT.

Even though speech is unprotected, that does not grant the government free license to regulate that speech based upon viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). However, Iowa Code section 717A.3B does not discriminate based upon viewpoint, and the District Court, relying upon the Tenth Circuit’s opinion in *Kelly*, erroneously concluded otherwise below, stating section 717A.3B only imposes liability on deceptive trespassers based upon their “intent.” (App. 232; R. Doc. 84 at 21.)

A. The District Court Failed to Adequately Distinguish, or Discuss in Some Instances, Jurisprudence on Statutes Similar to Section 717A.3B that Concluded the Inclusion of an Intent Element was not Viewpoint Discriminatory.

Although Iowa Code section 717A.3B does contain intent requirements somewhat similar to the Kansas statute, *Kelly* does not support the District Court’s

conclusion that Iowa Code section 717A.3B allegedly discriminates on the basis of viewpoint because it conflicts with: 1) the Ninth Circuit’s conclusion in *Wasden*; 2) Judge Gruender’s opinion, concurring in part and dissenting in part, in *ALDF*; and 3) the District Court’s prior decision in the litigation challenging Iowa Code section 717A.3A, denying the Defendants’ Motion to Dismiss. *See Wasden*, 878 F.3d at 1201-02; *ALDF*, 8 F.4th at 794 n.3; *Animal Legal Def. Fund v. Reynolds*, 297 F.Supp.3d 901, 926 (S.D. Iowa 2018) (“*Reynolds*”).

In *Wasden*, the Ninth Circuit rejected the same viewpoint-based argument put forward by Plaintiffs about a similar Idaho statute. 878 F.3d at 1202. The Idaho statute criminalized knowingly “[o]btain[ing] employment with an agricultural production facility by ... misrepresentation with the intent to cause economic or other injury” to the facility’s operations, property, or personnel. *See* Idaho Code § 18-7042(1)(c). The court, citing *R.A.V.*, held the statute did not discriminate based upon viewpoint because it was not enacted to suppress a specific subject matter or viewpoint. *Wasden*, 878 F.3d at 1202.

Consistent with *Wasden*, Judge Gruender’s opinion in *ALDF* concluded the Employment Provision in Iowa Code section 717A.3A did not discriminate based upon viewpoint notwithstanding an intent element to the statute.⁶ *See* 8 F.4th at

⁶ While the intent element(s) in Iowa Code section 717A.3B differ slightly from the intent element in the Employment Provision of section 717A.3A, it is immaterial to the viewpoint discrimination analysis.

794 n.3. Judge Gruender, responding to concerns about censorship raised in Judge Grasz’s concurrence, stated that “neither the Access Provision nor the Employment Provision draws a further content-based distinction in addition to the distinction between truth and falsity.” *Id.* Judge Gruender further stated that, while the statute targeted false speech to obtain access or employment at an agricultural production facility, the fact that such speech was used, does not, by itself, entail anything about the content of the speech, and, therefore, the concerns about censorship (viewpoint discrimination) were not implicated by section 717A.3A. *Id.*

Finally, the District Court had previously stated the Employment Provision in section 717A.3A was viewpoint-neutral on its face notwithstanding an intent element similar to section 717A.3B(1)(b). *Reynolds*, 297 F.Supp.3d at 926 (“On its face, § 717A.3A does not discriminate between particular viewpoints. The statute prohibits certain false statements without regard to the ideology or perspective of the speaker.”).

Here, the District Court did not distinguish or discuss the Court’s prior decision in *Reynolds* or the statements in Judge Gruender’s *ALDF* opinion, and, while the District Court attempted to distinguish the Ninth Circuit’s decision in *Wasden*, the attempt was limited to the following: “[t]he Court thinks *Wasden* is distinct from this case because § 717A.3B ‘on its face targets specific views about animal facilities.’ *Kelly*, 9 F.4th at 1239.” (App. 234; Doc. R. 84 at 23.)

However, similar to the employment provision in Iowa Code section 717A.3B, the Idaho statute did not prohibit all deceptive, successful job applicants—only those with an intent to cause economic or other injury to the facility. *See Wasden*, 878 F.3d at 1202. There is no material difference between the deceptive speech and intent requirements in the Iowa and Idaho statutes, which is the lynchpin of the District Court’s viewpoint discrimination determination. The District Court conducted no further analysis to specify why the Idaho statute also did not “on its face target specific views about animal facilities” despite a similar intent to harm requirement. (App. 234; R. Doc. 84 at 23.)

B. The Inclusion of an Intent to Harm Element in a Statute Proscribing Unprotected Speech does not Render the Statute Viewpoint Discriminatory.

The District Court’s viewpoint discrimination conclusion is also wrong because section 717A.3B is viewpoint neutral in that it is not based upon the viewpoint of the unprotected speech—deception used to gain access or employment—and it appropriately focuses criminal prohibitions on the most culpable content. Using deception to commit trespass or obtain employment with an intent to harm is not protected speech. *See supra* § I.B. (pp. 11-13). Section 717A.3B is limited to the conduct most likely to be harmful—trespassing or obtaining employment by deception with an intent to harm—and imposes a legally cognizable harm because it results in a diminution of privacy and the right to

exclude. *See R.A.V.*, 505 U.S. at 388 (“[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of viewpoint discrimination exists.”).

The Supreme Court distinguishes, for First Amendment purposes, between laws that discriminate based on the content or viewpoint of the message and laws that discriminate based upon intent or motive. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487-90 (1993) (Court held that a sentencing enhancement for intentionally selecting a victim because of a protected characteristic like race did not violate the First Amendment by punishing a person’s beliefs or motivation). In *Mitchell*, the Court noted *R.A.V.* was distinguishable because the ordinance invalidated in *R.A.V.* was explicitly directed at expression (speech or messages), whereas the statute at issue in *Mitchell* was aimed at conduct unprotected by the First Amendment—penalty enhancement for battery committed because of a protected characteristic of the victim. *Id.* at 487. The Court pointed out the penalty enhancement statute “singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.” *Id.* at 487-88.

This Court has also distinguished between statutes that discriminate based upon the content or viewpoint of the message from those that discriminate based upon motive or intent. In *United States v. Dinwiddie*, this Court considered a First Amendment challenge to the federal Freedom of Access to Clinic Entrances Act

(FACE), which, among other things, imposed criminal liability on anyone who by threat of force or obstruction, interferes with or intimidates any person who is obtaining or providing reproductive health services. 76 F.3d 913 (8th Cir. 1996). The defendant argued the statute discriminated against content in violation of the First Amendment because it did not outlaw all threats or intimidation, only those with a certain motive—because the victim obtains or provides reproductive health services. *Id.* at 922-23. This Court rejected the argument because FACE did not discriminate based upon the message conveyed; the motive requirement does not discriminate against speech or conduct that expresses an abortion-related message. *Id.* at 923. FACE applied to anyone who threatened or interfered with a victim who sought reproductive health services regardless of the message expressed by the threat. *Id.* (“FACE would prohibit striking employees from obscuring access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, ‘We are underpaid!’ rather than ‘Abortion is wrong.’”). The motive element of FACE accomplishes the “perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute.” *Id.*

The District Court attempted to distinguish *Mitchell* and *Dinwiddie* by stating that the intent requirement in *Mitchell* was pure conduct, whereas the prohibitions in *R.A.V.* and section 717A.3B involve speech, and in *Dinwiddie*, the

statute did not discriminate based upon viewpoint because it would apply to individuals who express viewpoints entirely unrelated to abortion, whereas here, section 717A.3B allegedly singles out individuals for punishment based upon their “disfavored viewpoint of agriculture.” (App. 233-235; R. Doc. 84 at 22-24.) The District Court’s analysis oversimplifies the issues and does not adequately address important distinctions.

First, while section 717A.3B does have a speech element, similar to *Mitchell*, the focus of the statute is conduct-based—the entry onto or employment with an agricultural production facility facilitated by deception while harboring an intent to harm. Second, unlike section 717A.3B, in *R.A.V.*, the prohibition involved speech, and only speech, and the inclusion of only certain fighting words—unprotected speech—was expressly directed at the message conveyed as opposed to the intent of the speaker. 505 U.S. at 386.

The Supreme Court highlighted the focus of the prohibition in *R.A.V.* on the message of the speech, stating:

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain ... messages of bias-motivated hatred and in particular, as applied to this case, messages based on virulent notions of racial supremacy.

Id. at 392. Here, the prohibition in section 717A.3B does not make a distinction on the message conveyed by the speech beyond truth or falsity. *See Dinwiddie*, 76 F.3d at 923 (FACE would apply equally to those who express viewpoints in support of and opposed to abortion, as long as their intent was to block access to the abortion clinic). Section 717A.3B applies to anyone who uses deception with an intent to harm, regardless of whether the false speech was critical or laudatory towards the facility, as long as their intent was to harm the facility. *See Kelly*, 9 F.4th at 1254-57 (Hartz, J., dissenting) (relying upon both *Mitchell* and *Dinwiddie* to conclude Kansas’ statute did not discriminate based upon viewpoint, notwithstanding the intent to harm element, because it applied regardless of whether the deceptive speech was critical or laudatory of the animal facility).

Finally, section 717A.3B does not apply only to those who hold “disfavored view[s] of agriculture.” (App. 235; R. Doc. 84 at 24.) In *Mitchell*, the Court held a sentencing enhancement based upon racial motivation does not constitute viewpoint discrimination despite the fact that many criminal defendants who select their victims based upon race also have racist viewpoints. 508 U.S. at 487. Similarly, while individuals who intend to harm an agricultural production facility may often—but not always—have anti-agriculture viewpoints, it does not render section 717A.3B’s intent to harm requirement viewpoint discriminatory. For example, section 717A.3B would prohibit an employee of a competitor agricultural

production facility, who has pro-agriculture views, from trespassing at such facility with an intent to steal trade secrets or harm the competition.

Moreover, although this Court upheld Iowa's trespass-by-false-speech law (section 717A.3A(1)(a)) absent an intent requirement in *ALDF*, the Ninth Circuit appears to believe such an intent requirement is necessary to make a trespass-by-false-speech law constitutional. *See Wasden*, 878 F.3d at 1198 (“[w]e see no reason ... why the state could not narrow the subsection by requiring specific intent...Idaho did exactly that with subsection (c), which covers misrepresentation ‘with the intent to cause economic or other injury.’”). Thus, the intent requirement in section 717A.3B, while not required by this Court to maintain its constitutionality, should not render the statute unconstitutional because it merely “single[s] out conduct that is thought to inflict greater individual or societal harm,” and the use of intent requirements in such a manner is “quite common.” *Dinwiddie*, 76 F.3d at 923.

Accordingly, Iowa Code section 717A.3B does not discriminate on the basis of viewpoint, and the District Court's order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment should be reversed, and summary judgment should be granted in favor of Defendants.

III. THE DISTRICT COURT ERRED WHEN IT CONCLUDED IOWA CODE SECTION 717A.3B WAS SUBJECT TO STRICT SCRUTINY, BUT EVEN IF STRICT SCRUTINY APPLIES, THE STATUTE IS NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST.

Standard of Review. When analyzing a statute under the First Amendment, courts must determine whether the law is content-based or content-neutral. *Reed v. Town of Gilbert*, 576 U.S. 155, 166-65 (2015) (identifying the level of scrutiny applied to a statute may change based on whether its content-based or content-neutral). A content-based statute is generally subject to strict scrutiny (*id.* at 163-64), while a content-neutral statute is generally subject to intermediate scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). However, a content-neutral statute that discriminates based upon viewpoint is subject to strict scrutiny. *See Reed*, 576 U.S. at 163-64. Strict scrutiny requires the law be narrowly tailored to accomplish a compelling governmental interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Where a statute proscribes unprotected speech and is viewpoint neutral, the statute is subject to the rational basis test. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (applying rational basis test to an ordinance proscribing selling obscene material to minors, which was a sub-category of obscenity, and obscenity is not protected speech); *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950

(9th Cir. 2009) (declining to extend the application of rational basis scrutiny under *Ginsberg* to statute imposing labeling requirements on violent material sold to minors, instead applying strict scrutiny because violent material did not fall into obscenity’s unprotected speech category). Under rational basis review, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Reynolds*, 297 F.Supp.3d at 927.

A. Iowa Code Section 717A.3B is Not Subject to Scrutiny Because it is a Viewpoint-Neutral Restriction on False, Unprotected Speech.

As a result of the District Court’s erroneous conclusion that Iowa Code section 717A.3B discriminated based upon viewpoint, the Court applied the wrong level of scrutiny (strict). Because Iowa Code section 717A.3B is a viewpoint-neutral restriction on false, unprotected speech,⁷ it is subject to rational basis scrutiny.

⁷ In the event this Court disagrees with the District Court and concludes section 717A.3B restricts protected speech, the appropriate standard of review for the statute is intermediate scrutiny, which the statute satisfies. Where a statute concerns false speech that imposes legally cognizable harms or achieves a material gain, it is subject to intermediate scrutiny. *Alvarez*, 567 U.S. at 730-32 (Breyer, J., concurring). In *Alvarez*, Justice Breyer, who was joined by Justice Kagan, found 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. *Id.* at 732. Iowa Code section 717A.3B restricts false speech that is material to obtaining access or employment, while harboring an intent to harm, at agricultural production facilities, and such speech arguably do not make a “valuable

Here, protecting private property owners’ right to exclude, right to privacy, proprietary information and biosecurity measures are legitimate state interests, and limiting access or employment of persons harboring an intent to harm the agricultural facility is rationally related to those interests. *See ALDF*, 8 F.4th at 786 (recognizing the right to exclude as a treasured property right and concluding prohibition on accessing an agricultural production facility by false pretenses is “consistent with the First Amendment.”); *see also Reynolds*, 297 F.Supp.3d at 928 (the court, rejecting an equal protection claim, held that Iowa Code section 717A.3A satisfied rational basis scrutiny).

Accordingly, Iowa Code section 717A.3B satisfies the rational basis test, and the District Court’s determination that strict scrutiny was the appropriate standard of review should be reversed.

contribution to the marketplace of ideas.” *See Alvarez*, 567 U.S. at 730-32 (Breyer, J., concurring). In *ALDF*, the Eighth Circuit held that the Employment Provision in section 717A.3A failed intermediate scrutiny because its prohibition on false speech with an intent to commit an unauthorized act ranged too broadly, proscribing speech protected by the First Amendment, and was not limited to false speech material to obtaining employment. 8 F.4th at 787. This Court expressly stated that the lack of materiality requirement is what distinguished the Employment Provision in section 717A.3A from “permissible prohibitions on fraud, perjury, and lying to government officials” under intermediate scrutiny. *Id.* Here, section 717A.3B requires the deception be material, curing the alleged constitutional deficiency identified by this Court in *ALDF*.

B. Iowa Code Section 717A.3B Satisfies Strict Scrutiny.

Even if this Court determines that Iowa Code section 717A.3B discriminates based upon viewpoint and is subject to strict scrutiny, the statute is narrowly tailored to compelling governmental interests, and the District Court’s decision to the contrary should be reversed. In order to survive strict scrutiny, the law “must be the least restrictive means of achieving a compelling state interest.” *McCullen*, 573 U.S. at 478.

Iowa Code section 717A.3B promotes compelling governmental interests. Given agriculture’s significance in Iowa—as demonstrated by Plaintiffs’ statements in their Complaint on the size and importance of agriculture in Iowa—the inability of the State to protect private property and proprietary information, preserve the right to privacy, and promote biosecurity through the enforcement of Iowa Code section 717A.3B may significantly impact Iowans. (*See* App. 27; R. Doc. 1 at 25.); *see also United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016) (court upheld the sentences imposed on defendants who had been convicted of introducing eggs into interstate commerce that had been adulterated with salmonella enteritidis—due in part to defendants’ failure to comply with biosecurity measures—resulting in the illness affecting approximately 56,000 Americans); *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). The spread of disease can have significant consequences for individual farmers, consumers, and the State's agricultural economy as a whole. *See DeCoster*, 828 F.3d at 635 (noting the 2010 salmonella outbreak may have affected up to 56,000 victims, some of whom were hospitalized or suffered long term injuries, including a child who was hospitalized in an intensive care unit for eight days and permanent damage to his/her teeth); *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).

In *ALDF* and *Wasden*, the Courts both reviewed similar statutes and neither held the interests the statutes were intended to protect were not compelling. 8 F.4th at 787-788 (concluding the Employment Provision in section 717A.3A failed strict scrutiny because it was not narrowly tailored—not because it did not serve compelling governmental interests); 878 F.3d at 1198 (concluding Idaho's prohibition on obtaining access to an agricultural facility by false speech did not survive strict scrutiny because it was not the least restrictive alternative).

Iowa Code section 717A.3B is narrowly tailored to the aforementioned compelling governmental interests because it cures the constitutional deficiencies in section 717A.3A identified by this Court in *ALDF* and virtually mirrors the statute upheld by the Ninth Circuit in *Wasden* as the least restrictive alternative. In *ALDF*, this Court held that the Employment Provision in section 717A.3A was not narrowly tailored because “[t]here is a less restrictive means available: proscribe only false statements that are material to a hiring decision.” 8 F.4th at 787. Here, Iowa Code section 717A.3B requires the deception be material—it must be “on a matter that would reasonably result in denial of” access or employment. Similarly, in *Wasden*, the Ninth Circuit invalidated Idaho’s access by misrepresentation provision, in part, because it contained no limiting restrictions and referenced Idaho’s prohibition on obtaining employment by misrepresentation with an intent to harm—which the Court upheld—as an example of a less restrictive alternative. 878 F.3d at 1198. Iowa Code section 717A.3B only restricts speech unprotected by the First Amendment and requires a specific intent to harm. Accordingly, Iowa Code section 717A.3B satisfies strict scrutiny, and the District Court’s determination that section 717A.3B failed strict scrutiny should be reversed.⁸

⁸ Although Plaintiffs argued below that that §717A.3B was also overbroad, the District Court did not address that claim. (R. Doc. 58, at 25-27.); (R. Doc. 84.). Plaintiffs did not appeal that portion of the District Court’s ruling, and therefore, the matter is not before this court as it was not preserved for appeal. Nonetheless, should this Court want to consider that claim, Defendants continue to assert that §

CONCLUSION

Iowa Code section 717A.3B does not restrict speech or conduct protected by the First Amendment. Iowa Code section 717A.3B does not discriminate based upon viewpoint. The statute satisfies rational basis scrutiny, but even if this Court determines strict scrutiny applies, the statute is narrowly tailored to serve compelling governmental interests. Accordingly, Appellants-Defendants respectfully request this Court reverse the District Court's December 2, 2019 ruling denying, in part, Appellants-Defendants' Motion to Dismiss and the March 14, 2022 ruling granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

717A.3B is not overbroad for the reasons set forth in its Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment. (R. Doc. 66, at 37-42). Defendants can provide additional analysis should this Court so desire.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,800 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I electronically filed the foregoing paper with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit 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: June 1, 2022

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CERTIFICATE OF MAILING

I further certify that on June ____, 2022, I mailed by First-Class Mail, postage prepaid, ten (10) copies of the foregoing paper to the Eighth Circuit Clerk of Court, and 1 copy thereof to the respective counsel for the Appellees:

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