No. 22-1830

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, ET AL.

Plaintiffs-Appellees

v.

KIMBERLEY K. REYNOLDS, in her official capacity as Governor of Iowa, ET AL.

Defendants-Appellants

IOWA PORK PRODUCERS ASSOCIATION

Amicus on Behalf of Appellants

On Appeal from the U.S. District Court for the Southern District of Iowa,
Case No. 4:19-cv-00124-SMR-HCA

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Summary of the Case and Request for Oral Argument

Plaintiffs challenged an Iowa law that criminalized undercover investigations at factory farms and slaughterhouses. This statute, Iowa's second attempt at an Ag-Gag law,[1] made it a crime to gain access to, or employment at, such a facility under false pretenses—that is, through speech—when done with an intent to harm the facility's business interest. The district court struck down the law as facially invalid under the First Amendment because it criminalizes speech based on the speaker's viewpoint and is not narrowly tailored to serve the State's asserted interests. The district court was correct.

Plaintiffs request the Court hold oral argument and allot 20 minutes per side because this case involves complex First Amendment questions related to the validity of a state criminal statute.

[1] "The term 'ag-gag' was coined in 2011 by former New York Times columnist Mark Bittman to describe a series of state bills appearing across the country that criminalized photographing and video recording inside agricultural facilities," with the goal of "hid[ing] industry practices" and keeping that truthful information from sparking reforms. Center for Constitutional Rights & Democracy and Dissent, *Ag-Gag Across America: Corporate-Backed Attacks on Activists and Whistleblowers* 6 (2017), https://tinyurl.com/3ajye9c7.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Plaintiffs-Appellees 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 hereby certify that they have no parent corporations, and that no publicly held corporation owns more than ten percent of any of the Plaintiff-Appellee organizations.

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Statement of the Issue

Did the district court correctly apply binding Supreme Court precedent in striking down Iowa Code § 717A.3B as an unconstitutional viewpoint-based criminalization of speech?

Authorities:

U.S. Const. amend. I

Iowa Code § 717A.3B (2019)

Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 596 U.S. __ (U.S. April 25, 2022) (No. 21-760)

R.A.V. v. St. Paul, 505 U.S. 377 (1992)

Statement of the Case

I. Undercover Investigations at Animal Facilities Reveal Important Matters of Public Concern.

Since at least the days of Nellie Bly[2] and Upton Sinclair,[3] journalists and activists have engaged in the time-honored practice of undercover investigations. They and countless others since have gained access to property that was not open to the public by affirmatively misrepresenting or otherwise obscuring their true identities to avoid detection. Such deception was not only important, but necessary to allow them to discover hidden practices so they could then report their findings to the public. Consistent with these methods, in a wide range of contexts, undercover investigations based on deception are authorized

[2] NELLIE BLY, TEN DAYS IN A MAD-HOUSE (1887); BROOKE KROEGER, NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST (1994).

[3] LEON HARRIS, UPTON SINCLAIR: AMERICAN REBEL (1975); UPTON SINCLAIR, THE AUTOBIOGRAPHY OF UPTON SINCLAIR (1962).

by law, as with law enforcement "stings,"[4] civil rights "testers,"[5] and union "salts,"[6] to name just a few.

In recent years, these investigative practices have been adopted by organizations that work to advance farm and companion animal welfare, worker safety and labor rights, consumer and food safety, and environmental protections, including Plaintiffs-Appellees Animal Legal Defense Fund, Iowa Citizens for Community Improvement, Bailing Out Benji, and People for the Ethical Treatment of Animals. These organizations conduct investigations of agricultural production facilities by having investigators obtain a job through the usual channels, or by working with existing employees who act as whistleblowers to expose the harms they encounter at work. (App. 112–113, 117, 119–120; R. Doc. 55-1, at 2–3, 7, 9–10.) Their investigators document activities in factory farms and slaughterhouses with a hidden camera while

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[4] *United States v. Janis*, 831 F.2d 773, 775 (8th Cir. 1987) (inviting informant into home waives any reasonable expectation of privacy); *United States v. Davis*, 646 F.2d 1298, 1301 (8th Cir. 1981) ("A purchase of drugs by a law enforcement officer acting as an undercover agent is not a search or seizure under the fourth amendment.")

[5] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982).

[6] James L. Fox, *"Salting" the Construction Industry*, 24 WM. MITCHELL REV. 681 (1998).

performing the tasks required of them as employees. (App. 112–113, 116–117; R. Doc. 55-1, at 2–3, 7–8.) Other plaintiffs have investigators pose as potential purchasers to gain access to facilities. (App. 123–124; R. Doc. 55-1, at 13–14.)

When applying for these jobs or seeking access as a potential buyer, investigators actively or passively conceal their investigatory motive, as well as their affiliations with newsgathering or advocacy groups. (App. 112–113, 116; R. Doc. 55-1, at 2–3, 6.)

All of these investigators document violations of laws and regulations, unsanitary conditions, cruelty to farmed animals and pets, dangerous work conditions and other labor violations, water pollution and other environmental violations, sexual misconduct, and other matters of public importance—all while performing the tasks assigned by the employer, just like any other employee. (App. 113, 116; R. Doc. 55-1, at 3, 6.)

The investigating organizations, as well as other plaintiffs, use the resulting pictures and video for public education and to alert public officials to any animal mistreatment, worker safety, or food safety issues that emerge. (App. 126–127; R. Doc. 55-1, at 16–17.)

Undercover investigations of industrial agricultural facilities produce information of tremendous political and public concern. Such investigations have exposed abuses so severe as to prompt state and federal officials to issue food recalls, pursue civil and criminal charges, and seize animals. Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 695 (2018); *see also* (App. 113–114, 117–118; R. Doc. 55-1, at 3–4, 7–8). They have also stirred public outrage, yielding new farm animal welfare legislation and changes in consumer behavior. *See, e.g.*, Chen & Marceau, *supra* at 695; Nicholas Kristof, *The Ugly Secrets Behind the Costco Chicken,* N.Y. TIMES (Feb. 6, 2021), https://tinyurl.com/356kvzp5.

II. Iowa Enacts Two Ag-Gag Laws to Chill Speech.

While the results of investigations of animal agriculture were being circulated by news media in 2012, the Iowa legislature considered H.F. 589, § 2 (Iowa 2012), which would eventually become § 717A.3A—Iowa's original Ag-Gag law. "Lawmakers described the bill as being responsive to two primary concerns of the agricultural industry: facility security (both in terms of biosecurity and security of private property) and harms that accompany investigative reporting." *Animal Legal Def.*

Fund v. Reynolds, 353 F. Supp. 3d 812, 817 (S.D. Iowa 2019), *aff'd in part and rev'd in part by Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021) (*ALDF*).[7]

That law criminalized "obtain[ing] access to an agricultural production facility by false pretenses," Iowa Code § 717A.3A(1)(a), as well as "mak[ing] a [knowingly] false statement or representation" on an employment application "with an intent to commit an act not authorized by the owner" of the facility. Iowa Code § 717A.3A(1)(b). In 2017, the same set of advocacy groups that are Plaintiffs here filed suit challenging § 717A.3A as violating the First and Fourteenth Amendments. *See Animal Legal Def. Fund v. Reynolds*, No. 4:17-cv-00362-JEG-HCA (S.D. Iowa).

In early 2019, the Southern District of Iowa granted summary judgment to Plaintiffs on their claim that the law impermissibly criminalized false speech and failed both intermediate and strict scrutiny. *Reynolds*, 353 F. Supp. 3d 812, 821–27. This Court later

[7] Consistent with the District Court's summary judgment ruling below (App. 215; R. Doc. 84, at 4 fn. 3) and the State's Brief (State's Br. at 5 n.3), Plaintiffs refer to this Court's opinion addressing Iowa's first Ag-Gag law as *ALDF*.

affirmed the district court's ruling on the provision restricting knowingly false statements on employment applications (the "employment provision") and reversed the district court's ruling on the provision restricting obtaining access by false pretenses (the "access provision"), remanding that issue for further consideration. *ALDF*, 8 F.4th at 785–88.

Less than three weeks after the district court enjoined enforcement of Iowa's first Ag-Gag law, the legislature introduced new Ag-Gag legislation. The legislation sped through subcommittees, committees, and both chambers in eleven days.

Sponsors of the bills in both the House (Rep. Klein) and the Senate (Sen. Rozenboom) were clear that the new bill was a response to the district court striking down Iowa's first Ag-Gag law. (App. 128–129; R. Doc. 55-1, at 18–19.) Representative Klein, speaking in support of the bill he introduced, said he "will not stand by and allow [Iowa farmers] to be disparaged in the way they have been." (App. 128–129; R. Doc. 55-1, at 18–19.) Representative Bearinger stated the new law was necessary due to "extremism" and that it was "an important bill to protect our agricultural entities across the state of Iowa." (App. 129; R.

Doc. 55-1, at 19.) Senator Rozenboom noted agriculture contributes $38 billion in economic output in Iowa and that "agriculture in Iowa deserves protection from those who would intentionally use deceptive practices to distort public perception of best practices to safely and responsibly produce food." (App. 129; R. Doc. 55-1, at 19.)

One month after being enjoined from enforcing Iowa's first Ag-Gag law and one day after the legislature sent the bill to her desk, Defendant Governor Reynolds signed into law Senate File 519, now codified at Iowa Code § 717A.3B. The bill, "deemed of immediate importance," took effect upon the Governor's signature.

III. After this Court Finds Half of Iowa's First Ag Gag Law Unconstitutional, the District Court Strikes Iowa's Second Ag Gag Law as Viewpoint Discriminatory.

Plaintiffs—a coalition of animal protection organizations, a food safety organization, and a grassroots advocacy organization whose work includes protecting worker's rights and Iowa's water quality—sued the Governor, the Attorney General, and the Montgomery County Attorney (collectively, the State) challenging the second law under the First and Fourteenth Amendments of the United States Constitution.

The district court preliminarily enjoined enforcement of the second Ag-Gag law in late 2019. (App. 91; R. Doc. 41, at 42.) The parties then moved for summary judgment but continued the case pending this Court's resolution of Plaintiffs' challenge to Iowa's first Ag-Gag law. (App. 215; R. Doc. 84, at 4.)

After this Court decided *ALDF*, 8 F.4th 781, and the Tenth Circuit decided a challenge to Kansas's Ag-Gag law in *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 596 U.S. __ (U.S. April 25, 2022) (No. 21-760), the parties submitted supplemental briefing on the impact of those cases on the challenge to the second Iowa Ag-Gag law.

The district court ruled the law was a viewpoint-based restriction on speech. The court held the law "does not prohibit all deceptive trespassers, it only imposes liability based on the 'intent' of the trespasser." (App. 232; R. Doc. 84, at 21.) While a trespasser intending to cause economic harm to the "business interest" of the agricultural facility can be punished, a "trespass intending no harm, or intending to 'laud' a facility is not punished." (App. 232; R. Doc. 84, at 21.)

Applying strict scrutiny, the district court held the entire statute unconstitutional under the First Amendment and granted Plaintiffs' motion for summary judgment. (App. 236–239; R. Doc. 84, at 25–28.)

Standard of Review

This Court "review[s] de novo a district court's grant of summary judgment." *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1157 (8th Cir. 2017).

Summary of the Argument

This case involves a straightforward application of longstanding viewpoint discrimination precedents to an Iowa statute that criminalizes speech. The district court correctly applied that precedent in striking down Iowa's second Ag-Gag law.

First, the law is a direct limitation on speech, and not, as the State argues, a regulation of conduct. The law aims its prohibition at deceptive communications—"[c]reating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition." Iowa Code §§ 702.9; 717A.3B (1)(a)–(b) (incorporating § 702.9). That is a direct limitation on speech.

Second, the law punishes speech based on viewpoint. On its face, the law directly regulates those who engage in undercover

investigations with "the intent to cause . . . economic harm . . . to the agricultural production facility's . . . business interest." Iowa Code § 717A.3B(1)(a)–(b); *see* (App. 63, R. Doc. 41, at 14). It is only this desire to produce and disseminate speech critical of the animal agriculture industry that subjects investigators to prosecution. "[A] trespasser intending 'to cause physical or economic harm' can be punished." (App. 232; R. Doc. 84, at 21 (quoting Iowa Code § 717A.3B).) In contrast, "[a] trespasser intending no harm, or intending to 'laud' a facility is not punished." (App. 232; R. Doc. 84, at 21.) "In other words, the statute considers the viewpoint of the trespasser when deciding whether or not to criminalize the conduct in question through its intent requirement." (App. 232; R. Doc. 84, at 21.)

Third, there are two alternative bases available to affirm the district court's conclusion that the law violates the First Amendment. First, the law criminalizes core protected speech that is not historically and traditionally understood to be outside the First Amendment's protection, thus also triggering strict scrutiny. Second, the legislative history reveals the Iowa legislators who enacted the law were motivated by concerns over undercover investigators from animal advocacy

organizations, also triggering viewpoint discrimination and strict scrutiny.

Fourth, because strict scrutiny applies and the law is presumptively invalid. The State did not overcome the presumption of invalidity because the law does not advance a compelling state interest and it is not narrowly tailored or the least restrictive means available. The text and legislative history show the State's proffered interests around protecting trade security, forbidding trespass, and protecting biosecurity are post-hoc justifications and not the real interests that motivated the law's passage. But even assuming the State's proffered interests were the actual interests, and even assuming such interests are compelling, the law is not narrowly tailored to advance those interests to satisfy strict scrutiny since it is substantially underinclusive; it singles out for punishment only a subset of those who might affect such interests. (App. 236–237; R. Doc. 84, at 25–26.) And the law is not the least restrictive means to advance the State's proffered interests because existing, generally applicable Iowa law already meets those interests. (App. 83–84; R. Doc. 41, at 34–35.)

This Court should affirm the district court's decision declaring Iowa Code § 717A.3B to be facially unconstitutional and enjoining the State from enforcing it.

Argument

I. The First Amendment's Free Speech Guarantee Extends to the Speech Prohibited by Iowa's Second Ag-Gag Law.

As a threshold matter, the district court properly concluded that Iowa's second Ag-Gag law implicates the First Amendment. (App. 225; R. Doc. 84, at 14.) The State insists that the second Ag-Gag law "does not restrict speech or expressive conduct because a trespass facilitated by false speech does not symbolize anything." State's Br. at 11 n. 5. But as this Court determined with respect to the first Ag-Gag law, regulating access to a facility by false pretenses or misrepresentation concerns speech, and not just conduct. *ALDF*, 8 F.4th at 784. Other circuits have reached the same conclusion in challenges to similar laws. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018); *Kelly*, 9 F.4th at 1232.

The same is true for the second Ag-Gag law. It regulates what a person may say to gain access to or employment at an agricultural production facility. Iowa Code § 717A.3B(1)(a)–(b). The statute's

prohibitions apply only if a person makes a particular kind of statement—here, deception—to obtain access to an animal facility. Thus, as with Iowa's first Ag-Gag law, "[b]oth provisions . . . target expression for restriction on the basis of its content." *ALDF*, 8 F.4th at 784.

II. Iowa's Second Ag-Gag Law is a Viewpoint-Based Restriction on Speech.

The district court was correct in concluding that Iowa's second Ag-Gag law is impermissibly viewpoint discriminatory because it criminalizes acquiring access to or employment at an agricultural production facility using deception, only when there is "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)–(b).

Iowa's second Ag-Gag law does just that. It applies to a person who obtains access to an agricultural production facility or employment at an animal agricultural facility by deception *with* the intent to expose and speak out against any wrongdoing observed at the facility, but not to a person who makes a similarly deceptive statement *without* the

intent to criticize the facility's operation. (App. 232; R. Doc. 84, at 21.) The latter scenario could include, for example, a journalist who plans to write a story objectively comparing the practices of various agricultural facilities with no intention or expectation of helping or harming any facility. Or a food writer who tours facilities to research an upcoming book about the food system who might enter an agricultural facility with similarly neutral intent but declines to reveal her affiliation for fear of special treatment. Or an actor researching a role about a character who works at a chicken farm; he lies about his reasons for applying for the job and works there for a few weeks before quitting. Or a scientist who lies to gain access to different properties to measure water quality along the length of a river. All these examples involve people who engage in the same basic conduct as Plaintiffs' investigators—they gain access to an agricultural production facility by deception—but they do not intend to engage in speech with an anti-agricultural facility viewpoint. Thus they, like Plaintiffs, are not covered by Iowa's second Ag-Gag law and are not subject to criminal liability.

Laws that "proscrib[e] speech . . . because of disapproval of the ideas expressed" are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). This is true even if the speech falls within the "categories of expression" that may otherwise "be regulated because of their constitutionally proscribable content," like obscenity and defamation. *Id.* at 383 (emphasis omitted). Even when the speech is "proscribable on the basis of one feature," it is a "commonplace" proposition that the government may not then proscribe the speech because of the viewpoint expressed. *Id.* at 385. For example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.* at 384 (emphasis omitted).

As the district court explained, the law "considers the viewpoint of the trespasser when deciding whether to criminalize the conduct in question through its intent requirement." (App. 232; R. Doc. 84, at 21.) It only prohibits deception made with the intent to harm. Iowa Code § 717A.3B(1)(a)–(b). The statute's legislative history confirms this conclusion. (*See* App. 128–129; R. Doc. 55-1, at 18–19.) Whether or not Iowa could categorically prohibit gaining access to an agricultural

production facility by deception, it cannot prohibit doing so only with the intent to harm the facility's business interests. *R.A.V.*, 505 U.S. at 384.

A. The District Court's Decision Is in Harmony with Recent Tenth Circuit Precedent.

The district court's conclusion follows the Tenth Circuit's decision in *ALDF v. Kelly*, which struck down Kansas's Ag-Gag law. The Kansas law prohibited certain actions directed at an animal facility, including gaining access, when done through deception and with the intent "to damage the enterprise conducted at the animal facility." *Kelly*, 9 F.4th at 1224 (analyzing Kan. Stat. §§ 47-1826, 47-1827). The Tenth Circuit held that whether or not any portion of the Kansas statute restricted speech that generally can be regulated under the First Amendment's scope, the Kansas statute was an unconstitutional viewpoint discriminatory regulation. *Id.* at 1232.

Like the district court here, the Tenth Circuit based its conclusion on the legal principle that even types of speech that may "'be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.),' [still] are not 'categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content

discrimination unrelated to their distinctively proscribable content.'" *Id.* at 1229 (quoting *R.A.V.*, 505 U.S. at 383–84) (emphasis in *R.A.V.*). That is, "'the government may not regulate use' of unprotected speech 'based on hostility—or favoritism—towards the underlying message expressed.'" *Id.* (quoting *R.A.V.*, 505 U.S. at 386). If the reason a law regulates speech—even speech that generally falls outside the First Amendment—is to restrict the *opinions* expressed by that speech rather than the *harm* that renders the speech unprotected, the law is viewpoint discriminatory and cannot stand. So "[e]ven if trespass constituted a legally cognizable harm such that deception to trespass was not protected speech," the *R.A.V.* principle meant Kansas could not prohibit deception to trespass in a viewpoint discriminatory way. *Id.* at 1239. The Tenth Circuit found the Kansas law did just that.

In invalidating the Kansas law, the Tenth Circuit zeroed in on the fundamental problem with all Ag-Gag legislation: it is targeted to disadvantage those critical of the commercial animal agriculture industry's mistreatment of farmed animals. The viewpoint discrimination was exhibited by the statute's intent to harm requirement. With that requirement, the law "treats differently

trespassers who have negative intentions towards the enterprise carried on at an animal facility from those with positive or neutral intentions." *Id.* A person who gains access through deception to make a recording and intends "to damage the enterprise, say by exposing animal cruelty or safety violations," breaks the law. *Id.* at 1236. "But neither a person who gains access through fraud to make a laudatory video nor a person who makes a video solely to demonstrate he was able to lie his way onto the premises would come within the Act's reach." *Id.*

As the Tenth Circuit explained, "[t]he damage to the enterprise intended from ALDF's investigations does not flow directly from deceiving the animal facility owner into allowing entry. Damage occurs only if the investigators uncover evidence of wrongdoing and share that information, resulting in other actors choosing to take further actions." *Id.* at 1234. Unlike defamation, perjury, or fraud, where the false speech directly causes the harm, the Kansas statute proscribed speech despite the "numerous further causal links between the false speech and the animal facility suffering damage." *Id.* The Tenth Circuit's interpretation of the statute revealed Kansas was not really restricting false speech because it supposedly caused a legally cognizable harm of

trespass, but because Kansas wished to repress the truthful information produced by undercover investigations, which constitutes impermissible viewpoint discrimination.

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

B. The State's Counterarguments Are Unfounded.

The State does not contend that the district court's decision here conflicts with the Tenth Circuit's approach in *Kelly*. Instead, the State asks that this Circuit split with the Tenth Circuit because *Kelly* supposedly conflicts with the Ninth Circuit's decision in *Wasden*, Judge Gruender's dissenting opinion in *ALDF*, Judge Gritzner's opinion denying the State's motion to dismiss the challenge to Iowa's first Ag-Gag law, as well as with the decisions in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) and *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996). State's Br. at 14–21.

None of the State's proffered bases create a principled reason to create that circuit split. The district court's decision below and *Kelly* both turn on viewpoint discrimination while *Wasden* and *ALDF* do not. Those decisions focus instead on the Supreme Court's ruling in *United States v. Alvarez*, 567 U.S. 709 (2012), addressing the First Amendment's protections for false speech—the scope of which the district court and the Tenth Circuit found unnecessary to resolve to determine the validity of the challenged laws because they were viewpoint discriminatory. There is no conflict with either Judge Gruender's dissenting opinion or an earlier district court opinion analyzing Iowa's first Ag-Gag law because those opinions do not create binding precedent that the district court's opinion could "conflict" with. And there is no conflict with *Mitchell* or *Dinwiddie* because *Mitchell* involved conduct, not speech, and *Dinwiddie* involved a statute that applied regardless of the speaker's viewpoint.

1. There Is No Conflict Between the District Court's Decision and the Ninth Circuit's Decision in *Wasden*.

No conflict exists between the district court's decision and the Ninth Circuit's decision in *Wasden*.[8] The Ninth Circuit there addressed Idaho's Ag-Gag law, which criminalizes "interference with agricultural production." Idaho Code Ann. § 18-7042(1). As relevant here, the Idaho crime is defined as knowingly: (1) "enter[ing] an agricultural production facility by force, threat, misrepresentation or trespass," or (2) "[o]btain[ing] 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." Idaho Code Ann. § 18-7042(1)(a), (c).

The Ninth Circuit analyzed the access provision and the employment provision under the Supreme Court's decision in *Alvarez* on

[8] The State's argument about this alleged split with Ninth Circuit tracks almost exactly those arguments Kansas made to the Supreme Court in its petition for certiorari. Petition for Writ of Certiorari, *Kelly v. Animal Legal Def. Fund*, 2021 U.S. S. Ct. Briefs LEXIS 3927, at *14–*17 (U.S. Nov. 17, 2021) (No. 21-760). The Supreme Court denied that petition. *Kelly v. Animal Legal Def. Fund*, 596 U.S. __ (U.S. April 25, 2022) (No. 21-760).

the scope of First Amendment protection for false speech. The Ninth Circuit understood *Alvarez* to permit regulation of intentionally false speech made "'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm.'" *Wasden*, 878 F.3d at 1194 (quoting *Alvarez*, 567 U.S. at 723, 719). The court then applied that framework to Idaho's access provision, concluding that its proscription on entry by misrepresentation covered much more than false speech "with a material benefit to the speaker." *Id.* at 1195. Rather, the access restriction covered lies that "do not inflict any material or legal harm on the deceived party." *Id.* at 1196. It therefore swept in "innocent behavior" that rendered the "overbreadth of th[e] subsection . . . staggering." *Id.* at 1195. The court also concluded Idaho's access "provision . . . regulates protected speech while 'target[ing] falsity and nothing more.'" *Id.* at 1196 (alteration in original) (quoting *Alvarez*, 567 U.S. at 719).

By contrast, the Ninth Circuit upheld the Idaho provision that imposed criminal penalties for obtaining employment by misrepresentation because the court interpreted a false statement in that context to be a "lie made for material gain." *Id.* at 1201. The Ninth

Circuit reasoned that false statements made to obtain "offers of employment" are a "category of speech" that the Supreme Court in *Alvarez* "explicitly" "singled out" as permissible to regulate because such statements "constitute[] . . . lie[s] made for material gain." *Id.* at 1201–02 (citing *Alvarez*, 567 U.S. at 723).

The State dwells on the fact that both the Idaho employment provision and Iowa's second Ag-Gag law include intent elements. State's Br. at 12–13, 1516, 21; *compare* Iowa Code § 717A.3B(1)(a)–(b) *with* Idaho Code Ann. § 18-7042(1)(c). But the intent elements to which the State points create no conflict because neither the Ninth Circuit's analysis nor its holding turned on that language. *Wasden* upheld the Idaho employment provision because it concerns offers of employment, not because it had an intent element. Because the *Wasden* court read *Alvarez* to permit states to criminalize gaining offers of employment by misrepresentation, and because it understood the Idaho employment provision to do exactly that, the court concluded the provision was constitutional. The provision's intent language did not produce the analysis.

Even more importantly, the Ninth Circuit did not address the point that both the district court and the Tenth Circuit found dispositive: whether the intent element in Idaho's employment provision rendered the law viewpoint discriminatory. The Ninth Circuit discussed the statute's intent requirement merely in passing, noting the intent element narrowed the employment provision by guaranteeing it protects against harms analogous to state-law "breach of the covenant of good faith and fair dealing." *Wasden*, 878 F.3d at 1201–02. To the extent *Wasden* discussed viewpoint discrimination at all, it did so in its analysis of a different provision of the Idaho statute, a monetary restitution clause, Idaho Code Ann. §§ 18-7042(4), 19-5304. The court rejected an argument that the restitution clause discriminated against those who seek to reveal misconduct at animal facilities, as it interpreted Idaho's law to not cover "reputational and publication damages." *Wasden*, 878 F.3d at 1202.

The second Iowa law, in contrast, unequivocally encompasses an "intent to cause . . . economic harm . . . to the agricultural production facility's . . . business interest." Iowa Code § 717A.3B(1)(a)–(b); *see* (App. 63, R. Doc. 41, at 14).

The district court correctly distinguished *Wasden* not only on that basis but also on substantive distinctions in Idaho and Iowa state law. (App. 64–65; R. Doc. 41, at 15–16.) *Wasden* concluded all employment obtained with "an intent to cause economic or other injury" would breach the "'covenant of good faith and fair dealing that is implied in all employment agreements in Idaho.'" (App. 65; R. Doc. 41, at 16 (quoting *Wasden*, 878 F.3d at 1201 (citing *Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 389–90 (Idaho 2005))).) But as the district court recognized, "Idaho is an outlier on this point," and the Iowa Supreme Court has """consistently rejected""" such an implied duty. (App. 65–66; R. Doc. 41, at 16–17 (quoting *Stoberl v. CybrCollect, Inc.*, No. 4:08-cv-00360-JEG-CFB, 2011 WL 13168823, at *13 (S.D. Iowa Nov. 28, 2011), in turn quoting *Porter v. Pioneer Hi-Bred Int'l*, 497 N.W.2d 870, 871 (Iowa 1993)).) "[T]herefore, unlike Idaho, the duty does not demonstrate that any harm an employee might cause an employer is legally cognizable." (App. 65; R. Doc. 41, at 16.) The State's brief simply ignores the differences in state law and the district court's reasoning addressing those differences.

In short, the district court's decision does not conflict with the Ninth Circuit's decision in *Wasden* striking certain provisions of Idaho's Ag-Gag law and upholding others. The decisions address very different state law provisions raising distinct constitutional concerns. And the Ninth Circuit never suggested that, to be constitutional, a state Ag-Gag law must contain an intent requirement that is viewpoint discriminatory.

2. There Is No "Conflict" Between the District Court's Decision and Judge Gruender's Dissenting Opinion in *ALDF*.

The State's argument asserting a "conflict" between the district court's decision and Judge Gruender's dissenting opinion in *ALDF* simply treats a dissenting opinion as a majority opinion because the State prefers the dissenting opinion's outcome.

This Court in *ALDF* upheld the first Iowa Ag-Gag law's access provision because, applying *Alvarez*, it understood the Iowa law to permissibly proscribe false speech that caused legally cognizable harm in the form of trespass to private property. *ALDF*, 8 F.4th at 786. But this Court invalidated that law's employment provision because it encompassed a job applicant's false statements that are immaterial to

the ultimate employment decision and thus cause no harm. *Id.* at 787–88.

The first Iowa Ag-Gag law's access provision contained no intent requirement and instead proscribed obtaining access to an agricultural production facility by false pretenses alone. Iowa Code Ann. § 717A.3A. And because the majority invalidated the employment provision on the *Alvarez* question, it did not decide whether the statute was viewpoint neutral. *ALDF*, 8 F.4th at 787–88.

Foreseeing potential viewpoint discrimination issues, Judge Grasz warned in a concurring opinion that "[g]oing forward, a key question will be whether access-by-deceit statutes will be applied to punish speech that has instrumental value or which is tied to political or ideological messages." *Id.* at 788 (Grasz, J., concurring)

Judge Gruender concurred in upholding the employment provision but dissented from the majority invalidating the access provision. *Id.* at 792–94 (Gruender, J., concurring in part and dissenting in part). In a footnote responding to Judge Grasz's concerns, Judge Gruender argued the first Iowa Ag-Gag law did not "draw[] a further content-based

distinction in addition to the distinction between truth and falsity." *Id.* at 794 n.3.

This was the entirety of the statement on which the State relies: a single sentence in a dissenting opinion, responding to a concurrence, addressing an issue the majority opinion never reached on a statute with a different intent requirement, and relegated to a footnote. It did not create law that bound the district court, especially as to a different statute with a different intent requirement. For that reason, there is no "conflict" between the statement and the district court's opinion—at least not one the law recognizes.

Even so, the second Iowa Ag-Gag law *does* draw the content-based distinction referenced by Judge Gruender by only criminalizing speech made with the intent to harm a facility's business interests. The conflict the State tries to conjure between Judge Gruender's opinion and the district court's decision is illusory.

3. The District Court's Opinion Does Not Conflict with the Opinion Denying the State's Motion to Dismiss in the Challenge to the First Ag-Gag Law.

In the same way, because district court opinions don't set binding precedent for other district court judges, the district court's conclusion

that the second Iowa Ag-Gag law is viewpoint discriminatory does not conflict with dicta in the opinion denying a motion to dismiss a challenge to the first Iowa Ag-Gag law. *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 926 (S.D. Iowa 2018). The dicta at issue concerned the court's analysis of a different law that contained a different intent provision—features that alone render it irrelevant to the Iowa's second Ag-Gag law. But even if it did control here, the conflict the State conjures is illusory since the district court found Plaintiffs' challenges to Iowa's first Ag-Gag law *stated a claim for viewpoint discrimination*. *Id.* at 926 ("Plaintiffs have plausibly alleged an intent to disfavor a subset of messages based on their viewpoint.").

4. The District Court's Decision Corresponds, rather than Conflicts, with Other Existing Precedent.

The State is also wrong that the district court's decision conflicts with cases prohibiting *conduct* undertaken with a certain intent because Iowa's second Ag-Gag law prohibits *speech* based on viewpoint. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which the State heavily relies on, State's Br. at 17–20, regulated *conduct* undertaken with a particular motive. *Mitchell*, 508 U.S. at 487 (explaining that the statute was "aimed at conduct," not "expression"); *see* (App. 234; R. Doc. 84 at

23 ("the intent requirement in *Mitchell* was a matter of pure conduct")). The Court in *Mitchell* distinguished the statute at issue as "aimed at *conduct* unprotected by the First Amendment," which it contrasted with *R.A.V.*, a case involving "a class of 'fighting *words*' deemed particularly offensive by the city" and thus required strict scrutiny. *Mitchell*, 508 U.S. at 487 (emphases added). Moreover, unlike the "bias-inspired conduct" at issue in *Mitchell*, deceptive statements made to gain access to an agricultural production facility with the intent to expose wrongdoing at the facility do not "inflict greater individual and societal harm" than statements made without that viewpoint. *Id.* at 487–88. So while *Mitchell* does not apply because it involved it conduct and not speech, its rationale would not support the restriction here even if it did apply.

Finally, the State is wrong that the district court's decision conflicts with cases challenging laws with intent requirements that apply regardless of the speaker's viewpoint. The State argues there is a conflict between finding Iowa's second Ag-Gag law viewpoint discriminatory and cases upholding the Freedom of Access to Clinic Entrances Act (FACE), which imposes criminal sanctions for, among

other things, intimidating or interfering with anyone seeking to obtain or provide reproductive health services. State's Br. at 17–21; *Dinwiddie*, 76 F.3d at 917 (citing 18 U.S.C. § 248(a)(1)). But unlike the second Ag-Gag law, the *Dinwiddie* court expressly rejected the notion that FACE's intent requirement "discriminate[d] against speech or conduct that expresses an abortion-related message." *Dinwiddie*, 76 F.3d at 923. The court determined the mere fact that FACE required the conduct be undertaken "because" a person is seeking reproductive health care or a facility provides such care, 18 U.S.C. § 248(a)(1), (3), does not discriminate against abortion-related speech or conduct because it prevents certain conduct regardless of any communicative message. *Dinwiddie*, 76 F.3d at 923. "FACE would prohibit striking employees from obstructing 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!'" *Id.* Thus, "[w]hat FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute." *Id.*; *see also* (App. 233; R. Doc. 84, at 22). Iowa's second Ag-Gag law, in contrast, attempts to distinguish between certain types

of speakers: for instance, those who are critical of animal agriculture and those who are neutral or positive towards it.

In addition, unlike Iowa's second Ag-Gag law, "the harm FACE sought to remedy is the very harm which makes the speech unprotected—threats and intimidation—which is an aim consistent with the admonition in *R.A.V.* that discrimination within unprotected speech must be based on the character of the speech which makes it unprotected in the first place." (App. 235; R. Doc. 84, at 24.) The second Ag-Gag law does not protect facility owners from harm that arises merely from trespass, or even trespass that causes a cognizable harm. Indeed, Iowa has already criminalized trespass. Iowa Code § 716.7. So the statute must be concerned with a harm other than trespass; otherwise, the statute would be superfluous. In fact, the statute does not even protect facility owners from the harm of the falsehood, but from the viewpoint of the speaker when they make the false statement.

The Iowa law seeks to protect a narrow slice of "business interest[s]" from the effects of true speech about the business. It does so by criminalizing obtaining access or employment entry by deception with the intent to damage the facility's "business interest."

That is significant in analyzing whether the speech is protected by the First Amendment. The earlier false statements that enable access or employment are attenuated from the damage to the facility caused by the later true statements about the conduct of the business. The harm that comes later results from true speech about activities taking place at the facility that is separate from the misrepresentation that allowed entry into the facility. *See Kelly*, 9 F.4th at 1233–34. As the Tenth Circuit observed in analyzing the Kansas Ag-Gag law, "the harm trespass laws protect against—entry into property—is not the harm at issue in the Act's intent requirement." *Id.* at 1244. The harm relevant to the statute is not the trespass, but the intent to harm the facility's business interests. *See id.* at 1243–45. In solely criminalizing speech that speech undertaken to reveal the appalling nature of an enterprise rather than speech undertaken for another purpose, the statute is the definition of viewpoint discrimination and subject to strict scrutiny.

III. The District Court Could Be Affirmed on Multiple Alternate Grounds.

The district court's decision invalidating Iowa's second Ag-Gag law could also be affirmed under at least two alternative grounds. *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 671 (8th Cir. 2013) ("[A]n

appellee may, without filing a cross-appeal, defend a judgment on any ground consistent with the record, even if rejected or ignored in the lower court.'" (quoting *Tiedeman v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975)). This Court could affirm on the alternative bases that (1) the second Ag-Gag law criminalizes speech not historically and traditionally exempt from protection under the First Amendment, and (2) the second Ag-Gag law is viewpoint-based because the Iowa legislature enacted it to silence viewpoints critical of animal agriculture.

A. This Court Could Affirm on the Alternate Ground that the Second Ag-Gag Criminalizes Lies that Are Not Historically and Traditionally Exempt from the First Amendment.

This Court could affirm on the alternative basis that the lies told to gain access or employment that are criminalized by the second Ag-Gag law are not the type historically and traditionally understood to be outside the First Amendment's protection.

The First Amendment only excludes speech historically and traditionally recognized as being excluded—those "'historic and traditional categories long familiar to the bar.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Simon & Schuster, Inc. v.*

Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)). The same rule applies to false speech—only those categories of false speech recognized by "law and tradition" falls outside the First Amendment. *Alvarez*, 567 U.S. at 721. All other false speech is protected. *Id*. at 722.

The government has the burden of establishing that speech falls outside a category of protected speech. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (citing *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U. S. 600, 620, n. 9 (2003)); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022) (requiring that Constitutional interpretation be "'objectively, deeply rooted in this Nation's history and tradition'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). "And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections." *Bruen*, 142 S. Ct. at 2130 (citing *Stevens*, 559 U. S. at 468–71) (emphasis in original).

The State produced no historical evidence that lies used to obtain access or employment are deeply rooted exceptions to the First

Amendment long familiar to the bar. Because the State shouldered the burden of doing so, that failure alone is fatal.

History and tradition show that such lies *were not* traditionally understood to be outside the First Amendment. High courts in the late nineteenth and early twentieth century rejected the premise of trespass by misrepresentation. *See, e.g.*, *Alexander v. Letson*, 7 So. 2d 33, 36 (Ala. 1942) ("[A]n action for trespass . . . will not lie unless plaintiff's possession was intruded upon by defendant without his consent, even though consent may have been . . . procured by fraud . . . ."); *North v. Williams*, 13 A. 723, 727 (Pa. 1888) ("If a citizen desired to see another upon business which he knew to be unpleasant to the latter, and chose to assign some other than the real reason for asking admission, he certainly would not become a trespasser merely because he failed to give the true reason."); *cf. Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (entry by deceit not a trespass because "the specific interests that the tort of trespass seeks to protect"—"the ownership [and] possession of land"—were not violated by deceit).

Admittedly, this Court held in *ALDF* that trespass by material misrepresentation is historically recognized as an exception to the First

Amendment. *ALDF*, 8 F.4th at 786. But the only case *ALDF* relied on to show a deeply rooted historical exception, *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146, 149 (Mich. 1881), doesn't support that conclusion. It is an *invasion of privacy case* that does not even mention trespass. *See, e.g.*, *Beaumont v. Brown*, 257 N.W.2d 522, 526 (Mich. 1977) (noting that *De May* recognized a cause of action for invasion of privacy); *Harkey v. Abate*, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (describing *De May* as an "early case" in which the Michigan Supreme Court "affirm[ed] a verdict . . . based on an invasion of privacy"). That case involved a physician called to a patient's home to deliver a child. *De May*, 46 Mich. at 161. The physician brought another man, who the patient believed to be a student of the physician, but who was in fact "a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine." *Id*. Because the patient "had a legal right to the privacy of her apartment," and to "intrude" upon it while she was in labor violated that right, both the physician and the friend were "guilty of deceit." *Id.* at 165. *De May* does not support finding a deeply rooted historical First Amendment exception for lies told to gain access, especially when viewed in light of other contemporary authority like *Alexander* and

North. *See generally*, *Recent Case: First Amendment – "Ag-Gag" Laws -- Eighth Circuit Upholds Law Criminalizing Access to Agricultural Production Facilities Under False Pretenses.* -- Animal Legal Defense Fund v. Reynolds, *8 F.4th 781 (8th Cir. 2021)*, 135 HARV. L. REV. 1166 (2022).

Since this Court's decision in *ALDF*, the United States Supreme Court repeatedly reaffirmed the requirement that the Constitution, including any exception to the First Amendment, be interpreted based on objective, deeply-rooted history and tradition. *Dobbs*, 142 S. Ct. at 2247; *Bruen*, 142 S. Ct. at 2130. It was the State's burden to establish that history. It has not done so because neither the Founders nor deeply-rooted common law tradition have historically allowed government to punish access by misrepresentation or resume puffery, either generally or in the agricultural context in particular.

Laws that criminalize false speech that falls outside of traditional and deeply-rooted historical exceptions to the First Amendment also receive strict scrutiny. *Alvarez*, 567 U.S. at 715.

This Court could affirm the district court on this alternate basis.

B. This Court Could Affirm on the Alternate Ground that the Second Ag-Gag Law Is Viewpoint-Based Because It Was Enacted to Silence Plaintiffs' Viewpoint.

This Court could also affirm on the alternative basis that the second Ag-Gag law is viewpoint based because the Iowa legislature enacted it to suppress a particular viewpoint. *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (Kagan, J., concurring in the judgment), *Vieth v. Jubelirer*, 541 U.S. 267, 314–15 (2004) (Kennedy, J., concurring in the judgment); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985).

Iowa's second Ag-Gag law is a viewpoint-based restriction on speech because it was animated by disagreement with, and a desire to suppress expression of, the political viewpoint of the advocacy groups directly affected by the law. "[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994); *see also Reed*, 576 U.S. at 166, ("strict scrutiny applies *either* when a law is content based on its face or when the purpose and justification for the law are content based" (emphasis added)). "[E]ven when a government supplies a content-neutral justification for the

regulation, that justification is not given controlling weight without further inquiry." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995).

Iowa legislators were candid about the viewpoint-based legislative purpose underlying the second Ag-Gag law. One sponsor declared he sponsored the law because he could "not stand by and allow [Iowa animal producers] to be disparaged in the way they have been." (App. 128–129; R. Doc. 55-1, at 18–19.) Another legislator supported the law as necessary to combat "extremism" and touted it as "an important bill to protect our agricultural entities across the state of Iowa." (App. 129; R. Doc. 55-1, at 19.) The bill's sponsor in the Senate noted agriculture contributes $38 billion in economic output in Iowa and that "agriculture in Iowa deserves protection from those who would intentionally use deceptive practices to distort public perception of best practices to safely and responsibly produce food." (App. 129; R. Doc. 55-1, at 19.) Where, as here, the legislature did not create committee reports in support of the law, the law's sponsors' statements are an "'authoritative guide to the statute's construction.'" *Rice v. Rehner*, 463 U.S. 713, 728 (1983)

(quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983)); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982).

Even if other legislators expressed motives unrelated to the viewpoint of critics of animal agriculture, an improper motive need not be the sole purpose for a law to trigger heightened scrutiny. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," but heightened scrutiny is required when there is proof that an improper purpose was "a motivating factor in the decision."). And while traditional rational-basis review permits the State to proffer any conceivable, hypothetical, post-hoc justification for a law, *see, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), the heightened scrutiny appropriate here requires the proffered interest be the "actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n. 4 (1996). The actual purpose here was to stop undercover investigations of animal agricultural facilities and silence critics from exposing true information about what happens inside such facilities.

Statutes that discriminate based on viewpoint receive strict scrutiny. *Turner*, 512 U.S. at 642; *Reed*, 576 U.S. at 163–64.

This Court could also affirm the district court on this alternate basis.

IV. Iowa's Second Ag-Gag Law Does Not Survive Strict Scrutiny.

Strict scrutiny requires that the law be narrowly tailored to accomplish a compelling governmental interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). To be narrowly tailored, the speech restriction must be the least restrictive means available to achieve the compelling interest and must not be underinclusive. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). Laws subject to strict scrutiny are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (internal quotation marks omitted).

Apart from a footnote incorporating its intermediate scrutiny arguments, the State did not attempt to justify the law under strict scrutiny in the district court. (R. Doc. 66, at 54 n. 24; *see also* R. Doc. 66, at 49–54 (seeking to justify the law only under intermediate scrutiny).) The State failed its burden for that reason alone. *See Ritchie Capital*

Mgmt., L.L.C. v. Jeffries, 653 F.3d 755, 763 n.4 (8th Cir. 2011) (refusing to address argument on the merits that was "mentioned in the[] brief only by way of a footnote").

Even if the State hadn't waived its argument that the law survives strict scrutiny, the State did not overcome the presumption of invalidity because the second Ag-Gag law does not advance a compelling state interest and it is not narrowly tailored or the least restrictive means available.

A. The Second Ag-Gag Law Does Not Advance a Compelling State Interest.

Strict scrutiny is never satisfied when the interest served by the law is anything less than the most "pressing public necessity." *Turner*, 512 U.S. at 680. It is not enough that the law would serve "legitimate, or reasonable, or even praiseworthy" ends. *Id.*

The State asserts the law serves interests related to ensuring biosecurity and protecting trade secrets, proprietary information, and private property. State's Br. at 25. On its face, though, the law reveals the State's proffered interests are pretextual in two ways. First, the law does not limit its application to biosecurity, trade secrets, or proprietary information. Indeed, it says nothing about those interests, but is

instead laser-focused on false speech made to gain access or employment at agricultural facilities by individuals with a particular viewpoint. Second, the law does not apply to any other industry that might require protection of trade secrets or threats to biosecurity.

The State's reliance on cases like *Rembrandt Enterprises, Inc. v. Illinois Insurance Company*, 129 F. Supp. 3d 782, 783 (D. Minn. 2015), and *Farris v. Department of Employment Security*, 8 N.E.3d 49 (Ill. Ct. App. 2014), to support its position that biosecurity is an important state interest is a diversion. Sure, "biosecurity breaches occur," but the State did "not provide any record that such breaches are the result of outsiders using deception to gain access to or employment at an agricultural production facility with the intention of harming the facility." (App. 82; R. Doc. 41, at 33.) That is, they do not support the State's purported objective here to narrowly target biosecurity concerns through false speech at agricultural facilities.

The State put forward *no evidence* that the harms the law is supposedly designed to protect against have ever materialized, either. If this law and the last were motivated by a need to protect biosecurity and trade secrets, surely there would be some evidence that someone at

some time had lied to gain access to an Iowa agricultural facility to wreak a biological harm or steal a trade secret. The threat both laws were supposedly designed to protect against were invented post-hoc, but even intermediate scrutiny requires the Court to assess the actual motive or purpose behind the law. *United States v. Virginia*, 518 U.S. 515, 535–36 (1996).

When assessing whether a law is justified by a compelling government interest, a court must look at the actual motive or purpose behind the law. "Indeed, the purpose of strict scrutiny is to 'smoke out'" illegitimate governmental classifications. *Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989)).

The disconnect between the State's asserted interests and the text of both the original and second Ag-Gag laws confirms the actual legislative interest in passing both laws was to suppress speech from undercover investigations that exposes industrial animal agriculture in a bad light. Sponsors and supporters of both the old and new law repeatedly expressed a concern for protecting the agriculture industry from the sunlight of undercover investigations. (App. 128–129; R. Doc.

55-1, at 18–19.) These statements reveal the desire to protect the agricultural industry from critical speech was a "motivating factor" of the law. *Vill. of Arlington Heights*, 429 U.S. at 265–66. Because the second Ag-Gag law was motivated, at least in substantial part, by illegitimate motives, it cannot survive the compelling-interest test.

But even accepting the State's purported interests, they are not compelling in this instance. Other statutory provisions that do not criminalize protected speech already advance those interests. Iowa has a prohibition against trespass that does not implicate speech in any way. *See* Iowa Code § 716.7 (defining trespass). Biosecurity, too, is effectively and appropriately protected in a way that does not restrict speech. *Id.* § 717A.4. So too with trade secrets. (App. 83–84; R. Doc. 41, at 34–35 (citing Iowa Code Ch. 550).)

Strict scrutiny seeks to uncover disguised, illegitimate governmental motives. Accepting the State at its word that the law was passed to protect broad biosecurity, intellectual property, and private property interests would require this Court ignore evidence of improper purpose simply because the State is also able to manufacture a different, arguably proper motive. That would water down strict

scrutiny into rational-basis review. That is not the law. This law does not serve a compelling interest.

B. The Law is Not Narrowly Tailored or the Least Restrictive Means Available.

Even if the State's interest underlying the second Ag-Gag law could be characterized as compelling for strict scrutiny purposes, the law still fails strict scrutiny because it is not narrowly tailored to serve those interests or the least restrictive means available to address them.

Strict scrutiny "entail[s] a most searching examination" and requires "the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotations omitted).

As the district court found, the second Ag-Gag law enjoys no close fit between the actions criminalized and the State's asserted interests. "Crucially, the stated purposes of the law—private property rights and biosecurity—would also be implicated for deceptive trespassers without the intent to harm the facility."[9] (App. 237; R. Doc. 84, at 26.) The State

[9] Despite its lengthy discussion of the supposed harms to private property and biosecurity that the law protects, the amicus brief of the Iowa Pork Producers Association never provides any explanation of how

"offer[s] no explanation why the strict biosecurity protocols discussed by some of the legislators are not at risk by a benign or benevolent deceptive trespasser." (App. 237; R. Doc. 84, at 26.) "The law does not focus solely on the right to exclude, the legally cognizable harm of trespass, but only on the right to exclude those with particular viewpoints." (App. 237; R. Doc. 84, at 26 (citing *Kelly*, 9 F.4th at 1234 n.10).) And again, if the State's real concerns are its stated interests, existing laws already address those concerns. *See Wasden*, 878 F.3d at 1196.

Nor is there any evidence the State even considered any meaningful alternatives to address its purported interests. As the Supreme Court has made clear, under any heightened scrutiny, the State must show "that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The Supreme Court found the challenged buffer zone in *McCullen* was not narrowly tailored in part because Massachusetts had

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those same harms aren't affected by those who gain access through deceit without an intent to harm the facility's business interests, either.

not showed it attempted alternatives such as enforcing existing criminal laws or enacting narrower laws that proved to be inadequate. *Id.* at 494–95. Massachusetts could not identify "a single prosecution brought under [existing, generally applicable] laws within at least the last 17 years." *Id.* at 494. And while Massachusetts claimed they "tried injunctions," "the last injunctions they cite[d] date[d] to the 1990s." *Id.* "In short, the Commonwealth ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.*

The State asserts the second Ag-Law *is* its attempt at a narrower law after the partial invalidation of the initial Ag-Gag law. State's Br. at 27. But this gets *McCullen*'s command exactly backward. Before the State can impose restrictions on speech that satisfy heightened scrutiny, it must first attempt to use generally applicable restrictions that do not restrict speech and find those restrictions lacking. It cannot—as the State has done here—go from an initial extreme restriction on speech to another, purportedly less onerous restriction on speech and then claim it has done all that it can.

Not only is the law not tailored to serve the State's putative interests, but like the Utah Ag-Gag statute that was earlier struck down, it "appears perfectly tailored toward . . . preventing undercover investigators from exposing abuses at agricultural facilities." *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017); *see also* (App. 236; R. Doc. 84, at 25 (finding Iowa's second Ag-Gag law "is squarely aimed at the investigations conducted by Plaintiffs")). If a law structured to accomplish an unconstitutional end, it is not constitutionally tailored.

The law fails strict scrutiny.

Conclusion

Because Iowa's second Ag-Gag law is a viewpoint-based restriction on speech that does not survive strict scrutiny, it violates the First Amendment.

This Court should affirm the district court.

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Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 9,709 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

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/s/ Matthew Strugar
Matthew Strugar

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I, Matthew Strugar, hereby certify that on August 8, 2022, I electronically filed the foregoing Plaintiffs-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have also filed with the Clerk of the Court ten paper copies of this Brief by sending them to the Court via United Parcel Service.

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/s/ Matthew Strugar
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