UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. **KIMBERLY K. REYNOLDS**, et al., Defendants.	**Case No. 4:17-cv-362–SMR-HCA** **DEFENDANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S ORDER FOR BRIEFING**

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. **KIMBERLY K. REYNOLDS**, et al., Defendants.	**Case No. 4:19-cv-124–SMR-HCA** **DEFENDANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S ORDER FOR BRIEFING**

Defendants Kimberley Reynolds, et al., hereby submit this Supplemental Brief in Response to Court's Order for Briefing:

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I. INTRODUCTION

The Court requested a combined brief on the effect of the Eighth Circuit's decision in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021), and the Tenth Circuit's decision in *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1224 (10th Cir. 2021), *petition for cert. filed*, (U.S. Nov. 22, 2021) (No. 21-760), on the remaining issues in each of these cases. Order for Briefing, ECF No. 111 in Case No. 4:17-cv-00362-SMR-HCA and ECF No. 80 in Case No. 4:19-cv-00124-SMR-HCA.

With respect to Plaintiffs' challenge to Iowa Code section 717A.3A(1)(a) ("Access Provision"), there are no legal arguments left for the Court to decide on remand aside from attorneys' fees and expenses. The Eighth Circuit's opinion reversed this Court's judgment that section 717A.3A(1)(a) was unconstitutional and vacated the injunction against its enforcement. *Reynolds*, 8 F.4th 781. The Eighth Circuit did not remand the case for Plaintiffs' viewpoint discrimination or overbreadth argument, but even if this Court disagrees and considers the arguments, the Access Provision does not discriminate based upon viewpoint and is not overbroad.

While Plaintiffs argue *Kelly* provides more support for their arguments that the Access Provision in section 717A.3A violates the First Amendment by impermissibly targeting speech on the basis of viewpoint, the *Kelly* decision has little, if any, bearing on the statute. The Access Provision does not contain any intent requirement that draws any distinctions based on the message

of the speaker, and courts generally avoid looking past a facially constitutional statute to identify a statute's alleged true purpose based upon the statements of a few government officials. The Access Provision is not overbroad because Plaintiffs have not met their burden to demonstrate what, if any, protected speech is criminalized by the Access Provision after *Reynolds* and *Kelly*, let alone whether said speech is substantial in relation to the statute's plainly legitimate sweep.

The Eighth Circuit's *Reynolds* decision has a substantial impact on Plaintiffs' challenge to Iowa Code section 717A.3B and demonstrates that the access and employment provisions of that statute do not restrict speech protected by the First Amendment. Although Iowa Code section 717A.3B does contain intent requirements somewhat similar to the Kansas statute, *Kelly* does not support Plaintiffs' argument that Iowa Code section 717A.3B allegedly discriminates on the basis of viewpoint because the majority opinion is wrong for the reasons set forth in Circuit Judge Hartz's dissent and is in conflict with the Ninth Circuit's conclusion in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), that a similar Idaho statute did not discriminate based upon viewpoint. In addition, Plaintiffs' argument conflicts with both Judge Gruender's opinion, concurring in part and dissenting in part, in *Reynolds*, which concluded the employment provision in Iowa Code section 717A.3A did not discriminate based upon viewpoint notwithstanding an intent element to the statute, and also Judge Gritzner's earlier decision that the employment provision in section 717A.3A was viewpoint-neutral on its face notwithstanding an intent element. *See Reynolds*, 8 F.4th at 794 n.3; *Animal Legal Defense Fund v. Reynolds*, 297 F.Supp.3d 901, 926 (S.D. Iowa 2018). Iowa Code section 717A.3B is not overbroad for the same reasons the Access Provision in section 717A.3A is not overbroad.

II. PROCEDURAL BACKGROUND

While Defendants disagree with Plaintiffs' characterizations of the Iowa legislature's consideration of the bills that would eventually become Iowa Code sections 717A.3A and 717A.3B, the Defendants generally agree with Plaintiffs' description of the procedural history of the two cases at issue here and the outcomes of the Eighth and Tenth Circuit opinions.

III. ARGUMENT

A. Plaintiffs' Viewpoint Discrimination and Overbreadth Challenges to the Access Provision in Iowa Code Section 717A.3A are Foreclosed on Remand.

The Eighth Circuit's opinion in *Reynolds* reversed this Court's judgment that the Access Provision was unconstitutional, vacated the injunction against its enforcement, and "remand[ed] for further proceedings." 8 F.4th at 788. On September 30, 2021, the Eighth Circuit issued a mandate, remanding the case back to this Court.

A district court is obligated to adhere to the appellate mandate—the "mandate rule." *See generally* 18B Charles Allen Wright, *et al.*, *Federal Practice and Procedure* § 4478.3 (2d ed. 2002). "The mandate rule generally requires a district court to comply strictly with the mandate rendered by the reviewing court." *Hopkins v. Jegley*, 510 F.Supp.3d 638, 651 (E.D. Ark. 2021). The mandate rule provides that a district court is bound by any decree issued by the appellate court and "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion." *Pearson v. Norris*, 94 F.3d 406, 409 (8th Cir. 1996) (quoting *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940)).

Here, although the Eighth Circuit remanded the case for "further proceedings," the Court did not provide any specific directions to consider either viewpoint discrimination or overbreadth arguments. Absent specific instructions to consider said arguments, this Court is without authority

to consider them and is bound to comply with the mandate rule and vacate the injunction against enforcement of the Access Provision.

Although Plaintiffs argued in their Motion for Summary Judgment (Dkt. 53, 24-25, 34-36) that Iowa Code section 17A.3A was viewpoint-based and was also overbroad, this Court declined to rule on those claims, instead finding they need not address the arguments because the Court had already found the statute was a content-based regulation and subject to strict scrutiny. (Dkt. 79, 11 fn. 13, 19 fn. 18). The Defendants appealed this Court's ruling, but the Plaintiffs did not appeal the Court's refusal to rule on the viewpoint discrimination and overbreadth arguments.

On appeal, Plaintiffs briefed their viewpoint discrimination argument—but not their overbreadth argument. *See* Plaintiffs-Appellees' Answering Brief, No. 19-1364, 45-46 (8th Cir. June 20, 2019). A party may not litigate on remand or subsequent appeal issues that "were not raised in [the] party's prior appeal and that were not explicitly or implicitly remanded for further proceedings." *U.S. v. Smith*, 751 F.3d 107, 122 (3rd Cir. 2014) (quoting *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 203 (3d Cir.2004)). Plaintiffs are foreclosed from re-arguing their viewpoint discrimination and overbreadth arguments on remand as they were not appealed, and in the case of the overbreadth arguments, were not even argued on appeal.

While the Eighth Circuit did not expressly rule on Plaintiffs' viewpoint discrimination argument, it did so by implication when it concluded the Access Provision was "consistent with the First Amendment." *Reynolds*, 8 F.4th at 786. Plaintiffs argue that the viewpoint discrimination issue was left to be decided because: 1) the Eighth Circuit did not remand with directions to enter summary judgment for the Defendants as to the Access Provision; 2) Judge Grasz's concurring opinion allegedly noted the viewpoint discrimination issue was left to be decided; and 3) Judge

Gruender's opinion, concurring in part and dissenting in part, responded to Judge Grasz's alleged concerns about viewpoint discrimination. (Dkt. 112, 16-17).

The Eighth Circuit's alleged failure to remand with instructions to grant summary judgment for the Defendants on the Access Provision does not mean the Court intended for the case to be remanded for additional legal arguments about the Access Provision's constitutionality. According to the letter or spirit of the mandate construed in light of the opinion, the Access Provision is constitutional under the First Amendment, and the "further proceedings" necessary on remand are the issuance of summary judgment for the Defendants on the Access Provision and the resolution of attorneys' fees and costs. The Eighth Circuit held the Access Provision's "prohibition on assuming false pretenses to obtain access to an agricultural production facility is consistent with the First Amendment." *Reynolds*, 8 F.4th at 786. The Court did not limit its ruling to simply stating the Access Provision regulates speech that is not protected by the First Amendment, but rather went further by stating the statute is "consistent with the First Amendment" and reversed this Court's judgment declaring the Access Provision unconstitutional. *Id*. at 786, 788. The Access Provision cannot be both "consistent with the First Amendment" and still subject to viewpoint discrimination analysis.

Judge Grasz's concurring opinion also does not establish that the viewpoint discrimination argument was left to be decided on remand. Rather than supporting Plaintiffs' position, Judge Grasz's statement that "[w]hether this conclusion also holds true in the application of this or *future* access-by-deceit provisions remains to be seen," supports Defendants' argument that viewpoint discrimination was not remanded because there would be no need to reference future applications of similar statutes if the Eighth Circuit was only concerned about the current viewpoint discrimination challenge to the Access Provision. *Id*. at 789 (emphasis added). Moreover, because

this is a pre-enforcement challenge to the Access Provision, there has been no enforcement of the statute, let alone any alleged discriminatory enforcement based upon the political or ideological messages of the speakers. Judge Grasz was expressing a concern about the potential future application of the Access Provision in a viewpoint-based manner, such as punishing only those who use false pretenses to obtain access and hold certain political or ideological messages. *Id*. at 788-89. To the extent Judge Grasz intended for the viewpoint discrimination issue to be remanded for consideration by this Court, it is not controlling, and the language of Judge Colloton's opinion, which held the Access Provision is consistent with the First Amendment and contained the remand language, is controlling.

Finally, Judge Gruender's opinion, concurring in part and dissenting in part, although not controlling, provides additional support for Defendants' argument that Judge Grasz's opinion was only concerned about the larger issue of the criminalization of false speech by those with political or ideological messages as opposed to Plaintiffs' current viewpoint discrimination challenge to the Access Provision. Judge Gruender responds to Judge Grasz's concerns by pointing out that even if an access-by-deceit statute does not regulate speech protected by the First Amendment, a "statute criminalizing the expression of 'incorrect' opinions on politically charged topics would be constitutionally problematic." *Id*. at 794 n.3. Judge Gruender then goes on to identify that the Access Provision[1] does not draw any further distinctions about the message or ideology of the speaker beyond the distinction between truth and falsity in obtaining access. *Id*. Judge Gruender did not state the viewpoint discrimination issue would, or even could, be considered on remand; Judge Gruender simply stated the Access Provision does not discriminate based upon viewpoint.

[1] Although not relevant for the scope of the remand issue, Judge Gruender also stated the employment provision in Iowa Code section 717A.3A did not draw any further distinctions beyond truth and falsity. *Reynolds*, 8 F.4th at 794 n.3.

Id. While not controlling, it is highly persuasive that the Eighth Circuit implicitly decided the issue of viewpoint discrimination in favor of Defendants and concluded the Access Provision is constitutional and "consistent with the First Amendment." *Id*. at 786.

Accordingly, because there are no legal arguments, aside from attorneys' fees and expenses, left for this Court to decide on remand concerning the Access Provision in section 717A.3A, this Court should reject Plaintiffs' viewpoint discrimination and overbreadth arguments because they violate the mandate rule and are outside the scope of the remand and grant summary judgment for Defendants on those claims.

B. The Access Provision in Iowa Code section 717A.3A is Viewpoint-Neutral and is Not Overbroad.

Even if this Court disagrees with Defendants and determines the viewpoint discrimination and overbreadth issues were remanded for consideration, the Access Provision is viewpoint neutral and is not overbroad.[2] Plaintiffs correctly note the Access Provision is distinguishable from the Kansas law because the former lacks an intent requirement, which was critical to the majority in *Kelly*, and advance a single argument that the Access Provision is viewpoint-based, claiming the

[2] Plaintiffs did not provide any new analysis of their overbreadth claim against the Access Provision in light of the Eighth and Tenth Circuit rulings, and instead, stated they would "rely on their previous briefing on this claim." (Case No. 17-cv-00362, Dkt. 112, at 6 n.1); (Case No. 19-cv-00124, Dkt. 81, at 6 n.1). While Defendants also continue to rely upon their prior briefing on this issue, Defendants would note the Eighth Circuit's ruling has virtually eliminated Plaintiffs' ability to claim the Access Provision is overbroad. The ruling held that the speech regulated by the Access Provision—false speech used to gain access—was not protected by the First Amendment. *Reynolds*, 8 F.4th at 786. A statute is overbroad if is criminalizes a substantial amount of protected speech in relation to its plainly legitimate sweep. *United States v. Williams*, 553 U.S. 285, 292-93 (2008). Accordingly, after *Reynolds*, it is not clear what, if any, speech remains that is criminalized by the Access Provision but protected by the First Amendment, let alone whether said speech is "substantial" in relation to the statute's plainly legitimate sweep. Plaintiffs bear the burden of demonstrating overbreadth, and they have not attempted to demonstrate the sweep of the statute after the Eighth Circuit's ruling. *See New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988). Their overbreadth claim should therefore be denied, and the Court should award Defendants summary judgment on this claim.

State's alleged motivation in enacting the statute was "a desire to limit speech critical of those facilities and the industry more broadly." (Dkt 112, 17). For support, Plaintiffs rely upon the agriculture-specific scope or limitation of the Access Provision and statements from several legislators that allegedly were critical of animal welfare activists. *Id*. at 17-19.

In *Kelly*, while the Tenth Circuit relied, in part, upon legislative history to conclude the Kansas law was viewpoint discriminatory because it was allegedly motivated by a hostility to the types of investigations the plaintiffs wanted to perform, the legislative history was in the form of written testimony submitted to the legislature by the Animal Health Commissioner for the Kansas Department of Agriculture and included an express statement that the legislation was needed to stop "animal rights activists with an anti-agriculture agenda." 9 F.4th at 1233 (citing App., Vol. I at 198); Defendants' Memorandum in Support of Motion for Summary Judgment, Ex. 14 at AG000208 (Dkt. 47-16, p. 7), Case No. 2:18-cv-02657-KHV (D. Kan. July 25, 2019). Conversely, here, the only "legislative history" Plaintiffs have identified are statements by three (3)—out of one hundred and fifty (150)—legislators and then-Governor Branstad supporting the legislation that became Iowa Code section 717A.3A and purport to demonstrate hostility to the kinds of investigations Plaintiffs conduct. *See* Statement of Undisputed Material Facts in Support of Plaintiffs Motion for Summary Judgment, Dkt. 49-1, ¶¶ 78-82.

As Defendants have previously argued, Plaintiffs' argument conveniently ignores a host of additional quotes from legislators and then-Governor Branstad articulating a legislative intent unrelated to Plaintiffs' investigations—to protect private property and biosecurity at agriculture facilities. *See* Defendants' Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. 63, pp. 22-23). Plaintiffs' reliance on *Rice v. Rehner*, 463 U.S. 713 (1983), to support their claim that a lack of legislative

committee reports for the Access Provision somehow renders legislators' individual statements authoritative for purposes of determining animus is misplaced and wrong as a matter of law. In *Rice*, although the Court relied upon the law's sponsors' statements, in addition to legislative reports, the Court was attempting to interpret a statute to determine whether federal law preempted state law—not whether the legislative purpose behind the statute was to discriminate based upon viewpoint.[3] *Id*. at 725-29.

Plaintiffs' argument is wrong as a matter of law because courts generally avoid looking past the facial validity of a statute to identify the statute's alleged true, illicit purpose. *See In re Hubbard*, 803 F.3d 1298, 1312-13 (11th Cir. 2015) (court declined to look past the facial neutrality of Alabama's prohibition on school districts' collection of membership dues for unions that represent public-school employees in a First Amendment challenge); *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (court declined to look past the facial neutrality of Michigan's prohibition on school districts' collection of membership dues for unions that represent public-school employees in a First Amendment challenge); *see also Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 649-50 (7th Cir. 2013) (the court stated they would not "peer[ ] past the text of the statute to infer some invidious legislative intention" of an otherwise viewpoint-neutral statute despite the "overtly partisan" statement of a legislator). In *Hubbard*, *Baily* and *Walker*, the courts all relied upon the following sentence from *United States v. O'Brien*, 391 U.S. 367, 383 (1968): "[i]t is a familiar principle of constitutional law that this Court will not strike down an

[3] Plaintiffs' reliance on *N. Haven Bd. Of Educ. V. Bell*, 456 U.S. 512 (1982), is misplaced for similar reasons. In *Bell*, the Court, while noting the legislation's sponsor's statements were authoritative—although not dispositive— was attempting to interpret Title IX to determine whether rules prohibiting employment discrimination on the basis of sex in educational institutions was within the agency's authority—not whether the legislative purpose behind the statute was to discriminate based upon viewpoint. *Id*. at 526-27.

otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Hubbard*, 803 F.3d at 1312; *Bailey*, 715 F.3d at 960; *Walker*, 705 F.3d at 652. The Supreme Court's rationale for this approach is that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384. In addition, the Iowa Supreme Court does not look to legislators' comments to identify the purpose of a statute. *See Donnelly v. Bd. of Trustees*, 403 N.W.2d 768, 771-72 (Iowa 1987) ("we will not consider a legislator's own interpretation of the language or purpose of a statute, even if that legislator was instrumental in drafting and enacting the statute in question.").

Plaintiffs' identify several cases to support their argument that legislative motivation matters to determine whether a statute discriminates based upon viewpoint, but all of the cases are distinguishable because either: 1) the statute at issue creates a content or viewpoint-based distinction on its face in addition to an alleged illicit legislative motive; 2) there is additional legislative history beyond mere statements by legislators to confirm the alleged illicit legislative motive; 3) the court acknowledges that legislative statements are not dispositive; or 4) there were no countervailing statements by legislators articulating separate purposes for the statute. (Dkt. 112, 17-18). *See Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819-20 (9th Cir. 2013) (court determined statute created a content-based restriction on speech on its face, and the content-based nature of the restriction was confirmed by looking to the express language of the purpose clause in the legislation, the statements of legislators—but noting they were not dispositive—and the statute's alleged disproportionate punishments compared with similar violations); *Wollschlaeger v. Farmer*, 814 F.Supp.2d 1367, 1377-79 (S.D. Fla. 2011) (court determined statute created a content-based restriction on its face, and the content-based nature of the restriction was confirmed

by looking to the formal bill analysis created by the legislature, the title of the bill, and the statements of legislators); *Jamal v. Kane*, 105 F.Supp.3d 448, 457-58 (M.D. Pa. 2015) (court determined statute was content-based, in part, because of legislator's statements stating an express desire to suppress certain speech, but also noted that there were no legislator statements in the record supporting the Pennsylvania Attorney General's argument that the statute was only enacted to restrict certain conduct—not speech).

This Court has previously stated the Access Provision is viewpoint-neutral on its face. *See Reynolds*, 297 F.Supp.3d at 926 ("On its face § 717A.3A does not discriminate between particular viewpoints."). The Court need not look past the facial validity of the Access Provision.[4] *See O'Brien*, 391 U.S. at 384 ("We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

The agriculture-specific scope or limitation of the Access Provision also does not render an otherwise facially neutral statute viewpoint-based. Desiring to protect a particular industry,

[4] An Iowa district court recently rejected a First Amendment argument that Iowa Code section 716.7A(2), Iowa's "Food Operation Trespass" law, was unconstitutional because it discriminated based upon viewpoint. *See State of Iowa v. Johnson*, Order Denying Defendant's Motion to Dismiss, No. FECR035902 and AGCR036244 (Iowa Dist. Ct. Wright Cty. Jan. 18, 2022) (attached hereto as Exhibit A); Defendant's Motion to Dismiss, No. FECR035902 and AGCR036244 (Iowa Dist. Ct. Wright Cty. Dec. 28, 2021) (attached hereto as Exhibit B). Iowa's Food Operation Trespass law prohibits "entering or remaining on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property." Iowa Code § 716.7A(2). The defendant argued the statute was viewpoint-based because legislators' statements demonstrating an allegedly illicit motive to suppress speech critical of livestock facilities and would impact animal rights activists disproportionality. *See* Exhibit B at 1-4. The court, rejecting defendant's argument, held that, even though the Food Operation Trespass law would affect animal rights advocates more and punished violators more than ordinary trespass, a facially neutral law does not constitute viewpoint discrimination simply because it may disproportionately impact some speakers. Exhibit A at 6.

arguably vital to the State of Iowa, from those that would use deceptive practices to commit a trespass does not equate to an intent to disfavor a subset of messages based upon their viewpoint. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (A legislature need not "strike at all evils at the same time or in the same way"). Limiting the application of a statute or ordinance to a specific industry or type of business does not render an otherwise facially neutral statute content or viewpoint-based. *See McCullen v. Coakely*, 573 U.S. 464, 479-80 (2014) (noting buffer zones around abortion clinics are not content-based merely because they restrict speech near abortion clinics and may impact abortion-related speech more than others).

Judge Gruender's opinion in *Reynolds* provides additional support for Defendants' arguments, and, while not controlling, the opinion it is highly persuasive that the Access Provision does not discriminate based upon viewpoint. Judge Gruender concluded the Access Provision did not draw a further contented-based speech distinction beyond the distinction between truth and falsity. *Reynolds*, 8 F.4th at 794 n.3. Judge Gruender then explained that the use of speech, even if false, to gain access "does not, by itself, entail anything about the content of the speech." *Id*. Accordingly, the Access Provision does not discriminate on the basis of viewpoint, and summary judgment should be granted in favor of Defendants.

C. Iowa Code Section 717A.3B does not Restrict Speech Protected by the First Amendment.

The Eighth Circuit's ruling in *Reynolds* demonstrates that both the access and employment provisions of Iowa Code section 717A.3B do not regulate speech protected by the First Amendment. Given that using false pretenses to gain access to property is not protected under the First Amendment, obtaining access or employment, based upon deception of a material nature, with an intent to harm would also fall outside the protections of the First Amendment. *See Reynolds*, 8 F.4th at 786-87; *Wasden*, 878 F.3d at 1201-02. While the Eighth Circuit determined

the employment provision in Iowa Code section 717A.3A was unconstitutional because it lacked a materiality requirement, Iowa Code section 717A.3B's employment provision cured this deficiency by requiring the deception be material. *See Reynolds*, 8 F.4th at 787 ("There is a less restrictive means available: proscribe only false statements that are material to a hiring decision."). Plaintiffs essentially admit that, based upon *Reynolds*, the access and employment provisions of Iowa Code section 717A.3B do not regulate speech protected by the First Amendment. (Case No. 17-cv-00362, Dkt. 112, at 10); (Case No. 19-cv-00124, Dkt. 81, at 10).

D. Iowa Code Section 717A.3B is Viewpoint-Neutral and is Not Overbroad.

Although Iowa Code section 717A.3B does contain intent requirements somewhat similar to the Kansas statute, *Kelly* does not support Plaintiffs' argument that Iowa Code section 717A.3B allegedly discriminates on the basis of viewpoint because the opinion is wrong for the reasons set forth in Circuit Judge Hartz's dissent and is in conflict with the Ninth Circuit's conclusion in *Wasden*.[5] In addition, Plaintiffs' argument conflicts with both Judge Gruender's opinion, concurring in part and dissenting in part, in *Reynolds*, which concluded the employment provision in Iowa Code section 717A.3A did not discriminate based upon viewpoint notwithstanding an

[5] Similar to their overbreadth challenge to the Access Provision in Iowa Code section 717A.3A, Plaintiffs did not provide any new analysis of their overbreadth claim against Iowa Code section 717A.3B in light of the Eighth and Tenth Circuit rulings, and instead, stated they would "rely on their previous briefing on this claim." (Case No. 17-cv-00362, Dkt. 112, at 6 n.1); (Case No. 19-cv-00124, Dkt. 81, at 6 n.1). This Court should reject Plaintiffs' overbreadth claim against Iowa Code section 717A.3B for the same reasons the Court should reject Plaintiffs' overbreadth claim against the Access Provision in Iowa Code section 717A.3A. *See supra*, fn. 2. Accordingly, after *Reynolds*, it is not clear what, if any, speech remains that is criminalized by Iowa Code section 717A.3B but protected by the First Amendment, let alone whether said speech is "substantial" in relation to the statute's plainly legitimate sweep. Plaintiffs bear the burden of demonstrating overbreadth, and they have not attempted to demonstrate the sweep of the statute after the Eighth Circuit's ruling. Plaintiffs' overbreadth claim should be denied because they have not met their burden, and summary judgment should be granted to Defendants on this claim.

intent element to the statute, and also Judge Gritzner's earlier decision that the employment provision in section 717A.3A was viewpoint-neutral on its face notwithstanding an intent element. *See Reynolds*, 8 F.4th at 794 n.3; *Reynolds*, 297 F.Supp.3d at 926.

The access and employment provisions of Iowa Code section 717A.3B are viewpoint neutral because they are not based upon the message of the prohibited speech—deception used to gain access or employment—but instead on the intent or motivation of the speaker. Using deception to commit trespass or obtain employment with an intent to harm is not protected speech. *See Reynolds*, 8 F.4th at 786-88; *Wasden*, 878 F.3d at 1201-02. The statute is limited to the conduct most likely to be harmful—trespassing or obtaining employment by deception with an intent to harm or damage. *See R.A.V v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("[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) (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.

The Eighth Circuit 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*, the 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. The court rejected this 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 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 dissent in *Kelly* relies upon both *Mitchell* and *Dinwiddie* to conclude Kansas' statute did not discriminate based upon viewpoint. 9 F.4th at 1251-57. Judge Hartz's dissent notes Kansas' statute treats all lies the same; those that expressed bigoted sentiments were treated no differently that those that expressed an enlightened sentiment. *Id*. at 1256. The intent to harm element did not render the Kansas statute viewpoint discriminatory because limiting the

prohibition on unprotected speech—lying to obtain consent to trespass—to those who intend to harm the property owner "does not offend the First Amendment any more than limiting the prohibition on threats to those that are intended to frighten." *Id*. Judge Hartz noted that a number of statutes include an element of intent to harm but it does not render them viewpoint discriminatory under the First Amendment. *Id*. at 1253. To hold otherwise would render fraud-related statutes viewpoint discriminatory under the First Amendment because they discriminate between those who utter false statements with an intent to defraud from those who do not. *Id*.

The majority in *Kelly* also conflicts with the Ninth Circuit, who rejected the same viewpoint-based argument about a similar Idaho statute. *See Wasden*, 878 F.3d at 1202. The Idaho statute prohibited obtaining employment with an agricultural facility through misrepresentation while harboring the intent to harm the business. *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* and the dissent in *Kelly*, Judge Gruender's opinion in *Reynolds* concluded the employment provision in Iowa Code section 717A.3A did not discriminate based upon viewpoint notwithstanding an intent element to the statute. *See Reynolds*, 8 F.4th at 794 n.3; *see supra*, p. 13. Judge Gritzner has previously stated the employment provision in section 717A.3A was viewpoint-neutral on its face notwithstanding an intent element. *Reynolds*, 297 F.Supp.3d at 927 ("On its face, § 717A.3A does not discriminate between particular viewpoints."). 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; Iowa Code section 717A.3B does not draw a further contented-based speech distinction on speech beyond the distinction between truth and falsity.

Finally, Iowa Code section 717A.3B is not viewpoint discriminatory based upon alleged legislative intent or animus for the same reasons the Access Provision of section 717A.3A is not viewpoint-based. *See supra*, pp. 8-13. While legislators' statements should not be considered to invalidate a facially viewpoint neutral statute, in the event the Court considers such statements, Plaintiffs' argument again ignores a host of additional quotes from legislators and then-Governor Branstad that articulate a legislative intent unrelated to Plaintiffs' investigations—to protect private property and biosecurity at agriculture facilities. *See* Defendants' Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. 66, p. 45). In *Wasden*, the Ninth Circuit rejected a similar argument, concluding the employment provision of the Idaho statute was not viewpoint discriminatory notwithstanding evidence in the record of legislators' statements expressing hostility to animal welfare activists and the limitation of the statute to agriculture facilities. 878 F.3d at 1200-02 (while conducting an animus analysis under an Equal Protection Clause claim, court noted animus towards particular speech by reporters and activists was one factor driving Idaho's decision to pass the statute).

Accordingly, Iowa Code section 717A.3B does not restrict speech protected by the First Amendment or discriminate on the basis of viewpoint, and summary judgment should be granted in favor of Defendants.

IV. CONCLUSION

Plaintiffs' viewpoint discrimination and overbreadth claims against the Access Provision in Iowa Code section 717A.3A are foreclosed on remand. Even if those claims are not foreclosed on remand, the Access Provision in section 717A.3A is neither viewpoint discriminatory nor overbroad. Accordingly, Defendants are entitled to summary judgment on those claims, and the injunction against enforcement of the Access Provision should be lifted.

The only remaining issue for the Court to determine involving Plaintiffs' challenge to section 717A.3A is attorneys' fees and costs.

Iowa Code section 717A.3B does not restrict speech protected by the First Amendment. Iowa Code section 717A.3B is neither viewpoint discriminatory nor overbroad. Accordingly, Defendants are entitled to summary judgment on those claims, and the injunction against enforcement of section 717A.3B should be lifted.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

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

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

DATE: February 18, 2022

/s/ Jacob J. Larson

JACOB J. LARSON
Assistant Attorney General
jacob.larson@ag.iowa.gov

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

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IN THE IOWA DISTRICT COURT FOR WRIGHT COUNTY

STATE OF IOWA, Plaintiff, v. MATTHEW A. JOHNSON, Defendant.	FECR035902 AGCR036244 **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

A hearing on the Defendant's Motion to Dismiss was held on January 7, 2022. The Defendant and Defendant's counsel appeared by telephone and the State appeared in person. After listening to the arguments of counsel and reviewing the court file, the Court is prepared to rule.

I. Facts and Procedural Background

Defendant Matthew Johnson is accused of the crime of Food Operation Trespass in violation of Iowa Code § 716.8(8)(a) and other offenses not relevant to this motion. Iowa Code § 716.7A(2) defines Food Operation Trespass as "entering or remaining on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property."

The court has reviewed the Trial Information, Minutes of Testimony, and Criminal Complaint relating to this charge. The narrative reflected in those documents is as follows. On February 5, 2021, at approximately 5 p.m., an individual alleged to be the Defendant was recorded on a video surveillance camera entering property at 3158 290th St., Sow site 117 in Wright County. This property appears to be a food operation pursuant to Iowa Code 716.7A(d)(1)(a). The individual alleged to be the Defendant ran up to the door and pulled on the handle to determine if the farm facility was locked. That person is then observed to run to the road and out of sight of the camera.

Defendant argues that Iowa Code § 716.7A violates the First Amendment of the United States Constitution and article I, section 7 of the Iowa Constitution both facially and as applied to this Defendant. Defendant cites to Animal Legal Def. Fund v. Reynolds, arguing that a similar

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Iowa law, Iowa Code § 717A.3A, was held unconstitutional. 353 F. Supp. 3d 812 (S.D. Iowa 2019), *aff'd in part, rev'd in part and remanded*, 8 F.4th 781 (8th Cir. 2021).

Specifically, Defendant argues the law, while nominally focused on prohibiting trespass, is actually intended to punish individuals for expressing viewpoints disfavored by the Iowa Legislature. Defendant further argues that if the court considers this law to regulate conduct, not speech, then the court should apply the test defined in United States v. O'Brien. 391 U.S. 367, 88 S. Ct. 1673 (1968). Defendant notes in particular comments made by legislators critical of animal rights advocates and notes that Iowa Code § 716.7A applies only to farms with animal operations and not farms without animal operations.

The State responds that Iowa Code § 716.7A is constitutional under existing free speech jurisprudence because Iowa Code § 716.7A prohibits conduct, not speech. The State argues that it has a legitimate state interest in protecting property rights and the security of agricultural operations. The State also argues it has a legitimate interest in protecting farmers from "economic harm or injury". The State distinguishes Iowa Code § 716.7A from Iowa Code § 717A.3A and other similar laws. Iowa Code § 716.7A prohibits trespass, while Iowa Code 717A.3A prohibits gaining access to an agricultural production facility by false pretenses. As such, the State argues Iowa Code 716.7A is more narrowly tailored than Iowa Code § 717A.3A.

II. Analysis

A. The First Amendment and article 1, section 7 of the Iowa Constitution do not protect non-expressive conduct on private property.

Although the decisions of the Federal Courts are not binding on the interpretation of the Iowa Constitution, decisions interpreting the United States Constitution are persuasive authority regarding the interpretation of article I, section 7. State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997)("[T]he Iowa Constitution generally imposes the same restriction on the regulation of speech as does the federal constitution"). The Iowa Constitution sometimes provides greater protections than the United States Constitution. State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)(The Iowa Court engages in independent analysis of state search and seizure provisions); State v. Wright, 961 N.W.2d 396, 412 (Iowa 2021)(interpreting state search and seizure provisions by looking to property rights and common law trespass). The Iowa free-speech

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jurisprudence has not addressed the breadth of issues that the Federal jurisprudence has, but the court finds no reason in this case to depart from the Federal jurisprudence.

Under Wright, a peace officer in Iowa must seek a search warrant or qualify for a narrow exception to the warrant requirement before taking an action that would constitute a common law trespass. 961 N.W.2d at 412. The court will not grant more expansive investigatory powers to ordinary citizens under the guise of the freedom of speech or the press. Such investigatory powers would invade the privacy interests of Iowans in the same manner as a warrantless search. Both Wright and Animal Legal Def. Fund v. Reynolds found the interest protected by private property in the context of trespass is privacy. 8 F.4th 781, 785–86 (8th Cir. 2021). The Eighth Circuit also found it is constitutional to prohibit gaining access to an agricultural production facility by false pretenses. If it is constitutional to prohibit the use of false pretenses to gain access to an agricultural production facility, then it is constitutional to prohibit trespass on a food operation without any speech component. *See id.*

"Non-expressive conduct does not fall within the scope of the First Amendment." Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228–19 (10th Cir. 2021)(citing O'Brien, 391 U.S. at 376, 88 S.Ct. at 1678). First Amendment protection extends only to conduct that is inherently expressive. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 126 S. Ct. 1297, 1310 (2006)(citing Texas v. Johnson, 491 U.S. 397, 406, 109 S. Ct. 2533, 2540–41 (1989)). In determining whether or not conduct possesses sufficient communicative elements to invoke the First Amendment, the Court looks to two elements. First, there must be an intent to convey a message. Second, the likelihood must be great that the message would be understood by those who viewed it. Texas v. Johnson, 491 U.S. at 403–404, 109 S. Ct. at 2538–2539 (citing Spence v. State of Wash., 418 U.S. 405, 410–11, 94 S. Ct. 2727, 2730 (1974)). The message sent, for example, by burning a flag or draft card is clear. *Id.*

In contrast, the acts alleged in this case do not demonstrate an intent to convey a message. Defendant was alleged to have approached a door to see if it was locked. Even if this act was intended to convey a message, it is not a message that an onlooker would have understood. Therefore, the court finds the Defendant's alleged acts to be non-expressive conduct.

The First Amendment and article I, section 7 of the Iowa Constitution, in most circumstances, only apply to state action and do not restrict private actors. The owners of private

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property—and especially those owners who do not open their property to the public—have a right in most circumstances to exclude individuals even if those individuals are engaging in First Amendment activities. City of W. Des Moines v. Engler, 641 N.W.2d 803, 805 (Iowa 2002)(citing Lloyd Corp. v. Tanner, 407 U.S. 551, 569, 92 S.Ct. 2219, 2229, (1972))(finding no constitutional right to distribute leaflets in a privately owned shopping mall); State v. Lacey, 465 N.W.2d 537, 540 (Iowa 1991)(finding no constitutional right to distribute leaflets advocating the boycott of a restaurant at that restaurant).

In City of W. Des Moines v. Engler, the Iowa Supreme Court considered a policy argument similar to that of the Defendant's. 641 N.W.2d at 806. Defendants in City of W. Des Moines argued people no longer assembled in large numbers on public property. Therefore, in their view public property was no longer suitable for the distribution of political leaflets. Defendants in City of W. Des Moines believed in order to advocate effectively they needed to be able to distribute their leaflets at shopping malls. Defendants went to the entrance near the J.C. Penney Store at the Valley West Mall in West Des Moines, Iowa to distribute leaflets titled "Sweatshop Products Sold at J.C. Penney…". *Id.* at 805. Mall safety officers requested that the defendants distribute the leaflets and relocate their protest to the public street outside the mall but defendants refused. Defendants were ultimately arrested for and found guilty of trespass. The Iowa Supreme Court found, even assuming the defendants' argument was correct, that it was insufficient to convert a private space into a public one.

Similarly, Defendant argues that in order to conduct investigative journalism of the agricultural industry Defendant must have access to private property to record videos of alleged unethical treatment of animals. Even assuming investigative journalism required the ability to trespass in order to record videos of alleged unethical treatment of animals, such a requirement is not sufficient to effectively make any food animal operation in Iowa a public place. City of W. Des Moines, 641 N.W.2d at 806.

B. The Eighth Circuit upheld Iowa Code § 717A.3A(1)(a)—prohibiting obtaining access to an agricultural production facility by false pretenses—and explicitly recognized and invoked the harm to privacy interests caused by trespass to support their decision.

Defendant directs the attention of the Court to two cases involving "ag gag" laws which were held to be unconstitutional. Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019), *aff'd in part, rev'd in part and remanded*, 8 F.4th 781 (8th Cir. 2021); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219.

In Animal Legal Def. Fund v. Reynolds, the United States District Court for the Southern District of Iowa found that Iowa Code § 717A.3A was unconstitutional. The Eighth Circuit reversed with respect to Iowa Code § 717.3A(1)(a), referred to as the "Access Provision". The Access Provision prohibits obtaining access to an agricultural facility under false pretenses. The Access Provision was subjected to First Amendment scrutiny only because false statements were an element of the offense. Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 785–86 (8th Cir. 2021). The Access Provision was not considered offensive to the Constitution because of the trespass element, but was, in fact, *upheld* partially on the basis of that trespass element. *Id.* The Eighth Circuit was unable to determine the precise rule the Supreme Court would use to analyze false speech, but found that because the false speech at issue here caused a legally cognizable harm—trespass to property—prohibiting such speech was consistent with the First Amendment for the same reason it is permissible to prohibit fraud. *Id.* (applying the split decision in United States v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537 (2012), under the standard set by Marks v. United States, 430 U.S. 188, 97 S.Ct. 990 (1977)).

Iowa Code § 716.7A(2) and the case before the court do not involve false speech, but if the Iowa Legislature may constitutionally prohibit false speech that enables access to an agricultural production facility, then the Iowa Legislature may also prohibit trespass against a food animal operation that does not involve speech at all. *See id.*

Defendant also cited to Animal Legal Def. Fund v. Kelly, which found a Kansas act similar to Iowa Code § 717A.3A(1)(a) unconstitutional. 9 F.4th at 1232. The Kansas act added a third element in addition to the trespass element in Iowa Code § 716.7A(2) and the false speech element in Iowa Code § 717A.3A(1)(a). The additional element was an intent to damage the enterprise conducted at the animal facility. Kan. Stat. Ann. § 47-1827 (2022). Under the Kansas law, a person who lied intending to expose the activity at the animal facility violated the law, but a person who lied intending to praise the animal facility did not. Animal Legal Def. Fund v. Kelly, 9 F.4th at 1233. That may be illegal viewpoint discrimination under R.A.V. v. City of St.

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Paul, Minn. *See* 505 U.S. 377, 391 112 S. Ct. 2538, 2547 (1992). The Tenth Circuit was aware of the decision by the Eighth Circuit in Animal Legal Def. Fund v. Reynolds and distinguished its ruling from that decision. 9 F.4th at 1239 at n. 17. The Tenth Circuit did not view Iowa Code § 717A.3A(1)(a) as constituting viewpoint discrimination and therefore the Tenth Circuit would likely not view Iowa Code § 716.7A(2) as constituting viewpoint discrimination. *See id.*

Defendant argues the intent of Iowa Code § 716.7A(2) is to discriminate against animal rights advocates. Chapter 716 of the Iowa Code does penalize trespass on a food operation more severely than ordinary trespass, including trespass on farms without animal operations. Iowa Code § 716.8 (2022). Iowa Code § 716.7A(2) will likely affect animal rights advocates more than it will others because some animal rights advocates have an ideological motive to gain physical access to the food animal operations. However, a facially neutral law does not constitute viewpoint discrimination simply because it may disproportionately affect some speakers or messages more than others. McCullen v. Coakley, 573 U.S. 464, 480, 134 S. Ct. 2518, 2531 (2014).

Iowa Code § 716.7A(2) does not discriminate on the basis of the viewpoint of the offender. A person who trespasses on a food operation to abuse an animal is treated the same as a person who trespasses on a food operation to rescue one.

Therefore, the court concludes that Iowa Code § 716.7A(2) does not violate the First Amendment or article I, section 7 of the Iowa Constitution. Defendant's motion to dismiss is OVERRULED.

IT IS, THEREFORE, ORDERED that the Defendant's motion to dismiss is DENIED and OVERRULED.

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State of Iowa Courts

Case Number	**Case Title**
AGCR036244	STATE OF IOWA VS JOHNSON, MATTHEW A.
Type:	OTHER ORDER

So Ordered

Derek Johnson, District Court Judge,
Second Judicial District of Iowa

Electronically signed on 2022-01-18 18:45:33

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IN THE IOWA DISTRICT COURT FOR WRIGHT COUNTY

STATE OF IOWA, PLAINTIFF, vs. MATTHEW A. JOHNSON, DEFENDANT.	CASE NO. FECR035902 AGCR036244 **MOTION TO DISMISS**

The state has broad discretion to punish conduct that it deems worthy of reproach. However, in our constitutional system, that discretion has limits. Among the most important of those limits is presented by the First Amendment, which forbids the punishment of viewpoints, even when that punishment is dressed up as punishment of conduct.

Iowa Code § 716.7A (the "Iowa Ag Gag Law") was passed with precisely this intent. While nominally focused on alleged trespass, the law's legislative history – and its sponsor's public statements – make clear that this was a law intended to punish individuals for expressing viewpoints disfavored by the state legislature. Accordingly, the Iowa Ag Gag Law must be struck down – and the charge against defendant Matthew Johnson under § 716.7A dismissed – because it is unconstitutional both facially, and as applied to the facts of this case.

THE IOWA AG GAG LAW DISCRIMINATES BASED ON VIEWPOINT

Controlling Supreme Court precedent holds that, while the government has the authority to regulate the conduct of its citizens, it "may not… proscribe particular conduct because it has

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expressive elements." Texas v. Johnson, 491 U.S. 397, 406, 109 S. Ct. 2533, 2540, 105 L. Ed. 2d 342 (1989). The Supreme Court has held unconstitutional a law that prohibited civil rights activists from protesting within public libraries. Brown v. State of La., 383 U.S. 131, 143, 86 S. Ct. 719, 724, 15 L. Ed. 2d 637 (1966). It struck down a law that prohibited the use of military uniforms in protest. Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970). And it struck down a law forbidding the burning of a cross on private property. Virginia v. Black, 538 U.S. 343, 367, 123 S. Ct. 1536, 1552, 155 L. Ed. 2d 535 (2003). The key issue, in each of these cases, was not whether the laws in question prohibited *conduct* or *speech* but rather whether the law in each case "selectively chooses [the conduct] because of its distinctive message." Id. at 123.

The Iowa Ag Gag Law is a case where the Iowa legislature has selectively chosen to prohibit certain conduct – namely, trespass at a food animal operation (but not a non-animal food operation) – because of the distinctive message of the conduct. The Iowa Ag Gag Law was passed after a prior bill restricting investigations at factory farms was struck down as unconstitutional.[1] Both public comment by the law's sponsor, and the special punishment imposed on conduct by individuals at food animal facilities, show that the law was intended to discriminate on the basis of viewpoint. Indeed, the precise reason stated by legislators for passing a law to punish trespass at food animal facilities, as opposed to other sites, was because of the disfavored viewpoints expressed by those who might trespass, e.g., undercover investigators with concerns about the mistreatment of animals.

For example, the bill's sponsor, Senator Ken Rozenboom, stated in his closing remarks on the bill that one of his primary concerns was the speech activity of those criticizing factory

[1] https://www.desmoinesregister.com/story/money/agriculture/2019/01/09/ag-gag-law-iowa-struck-down-federal-judge-ia-agriculture-first-amendment-free-speech-puppy-mills/2527077002/

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farms: "The MO here [of animal rights activists] is simply lies, deception, and intimidation." Videotape at 5:40:25: Senate Video (2020-06-05) (Iowa Legislature 2020) (on file with the Iowa Legislature government website).[2] Senator Nate Boulton added, "The harm that is done by *taking a video of something* that has been done by the book every single step of the way can be immense." *Id*. at 5:53:25 (emphasis added). While Rozenboom and Boulton are entitled to disagree with the speech made by activists, including "lies" or "taking a video of something," they are not entitled to impose punishments on activists because of their distinctive message.

Indeed, one federal court has ruled on a similar case in Kansas by stating "[e]ven if Kansas may ban recordings on private property or trespass-through-deception, it may not limit the scope of the prohibition due to favor or disfavor of the message." Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1236 (10th Cir. 2021). That is precisely what is happening here: the Iowa legislature has chosen to limit the scope of a prohibition on trespass, to only food animal operations, because it disfavors a distinctive type of message.

Moreover, even a facially content-neutral law is considered content-based if it "[was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* At 1228-1229. As noted, the author of the Iowa Ag Gag Law himself made clear that the bill should be adopted because of his disagreement with the "lies, deception, and intimidation" of animal rights activists, i.e., because of his disagreement with their message.[3]

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[2] https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20200605082041259&dt=2020-06-05&offset=32847&bill=SF%202413&status=i

[3] The 10th Circuit in Kelly focused much of its analysis on the fact that the conduct prohibited in Kansas – namely, trespass by deception – included a speech component, i.e., deception. The 10th Circuit made clear, however, that there are First Amendment implications in all cases where the state chooses to "discriminate between persons who engaged in identical conduct based upon why they did so," even if there is no speech component to the offense charged. Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1238 (10th Cir. 2021).

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The Iowa Ag Gag law is accordingly unconstitutional viewpoint discrimination under the First Amendment, both facially and as applied in this case, and the charge in this case must be dismissed.

THE IOWA AG GAG LAW IS NOT NARROWLY TAILORED TO SERVE SUBSTANTIAL GOVERNMENTAL INTERESTS

The Iowa Ag Gag Law also fails on separate constitutional grounds. In United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Supreme Court set out a clear three-part test to determine whether regulation of conduct that impinges on speech, even if it is content neutral, can withstand constitutional muster: "(i) the regulation must serve an important or substantial governmental interest; (ii) the interest must be unrelated to the suppression of expression; (iii) the incidental restriction of First Amendment freedoms must be narrowly tailored to that interest." United States v. Weslin, 156 F.3d 292, 297 (2d Cir. 1998).

The Iowa Ag Gag Law fails this test. First, the government has no important interest in preventing undercover investigations of animal abuse. Second, to the extent it does have any such interest, it is directly linked to suppressing the expressive activity of the activists at issue, and not their non-expressive conduct. Third, the restriction on speech imposed by the law is not narrowly tailored to serve an important government interest. For example, to the extent that the government seeks to prohibit trespass on private property on privacy grounds, irrespective of a defendant's political speech, it fails to explain why such a prohibition cannot be maintained under the existing trespass laws. See, e.g., Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 168, 122 S. Ct. 2080, 2090 (2002) (regulation on "going in and

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upon" private residential property to promote a "cause" was not narrowly tailored to protect the residents' privacy interests). In short, even if the Iowa Ag Gag Law is deemed a content-neutral regulation on conduct, rather than a restraint on expression, it fails the Supreme Court's test regarding regulations on conduct that have an impact on speech.

CONCLUSION

There is widespread concern about animal cruelty at factory farms. The work by defendant Johnson to expose this cruelty has been covered by Pulitzer Prize winning journalists[4] and has been supported even by employees of the companies[5] where the investigations have unfolded. The public has a right to know what is happening in the food system. And individual citizens have a right to speak freely regarding not just the factual conditions they have witnessed, but their opinions regarding these conditions.

If the prosecution and Iowa legislature, in this case, were focused solely on punishing defendant Matt Johnson for his conduct, regardless of his political viewpoints, they would be entitled to do so. Indeed, they *are* doing so, as they have brought other charges against Johnson under content-neutral criminal statutes. What the state cannot do, however, is punish a particular type of conduct because of its distinctive, anti-factory farming message. This is exactly what the State is attempting to do in passing and applying the Iowa Ag Gag Law to Johnson's case.

For the foregoing reasons, the Iowa Ag Gag Law is unconstitutional, facially and as applied in this case, and that charge against Johnson must be dismissed.

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[4] https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/
[5] https://theintercept.com/2021/02/17/fbi-iowa-select-pigs-whistleblower/

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Dated this 28th day of December, 2021.

Wayne Hsiung, AT#288991
1466 8th St.
Berkeley, CA 94710
Tel: 510.680.0101
wayneh@dxe.io