IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1364

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

Plaintiffs/Appellees,

vs.

KIMBERLEY K. REYNOLDS, in her official capacity as Governor of Iowa, TOM MILLER, in his official capacity as Attorney General of Iowa, and DREW B. SWANSON, in his official capacity as Montgomery County, Iowa County Attorney,

Defendants/Appellants.

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

DEFENDANTS'-APPELLANTS' BRIEF AND ARGUMENT

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General
JACOB J. LARSON
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 281-5164
Fax: (515) 242-6771
jeffrey.thompson@ag.iowa.gov
jacob.larson@ag.iowa.gov
ATTORNEYS FOR DEFENDANTS -APPELLANTS

SUMMARY OF THE CASE

In order to address concerns about protecting Iowa agricultural producers' private property and bio-security measures, the State of Iowa enacted Iowa's Ag-Fraud statute in 2012, codified as Iowa Code section 717A.3A. The statute prohibits obtaining access to or employment at, with an intent to commit an unauthorized act, an agricultural production facility by false pretenses.

Plaintiffs challenge the constitutionality of Iowa's Ag-Fraud statute on First Amendment grounds. The statute readily withstands examination of this claim because the conduct prohibited by the statute is not protected by the First Amendment, and even assuming arguendo the speech is protected, Iowa's Ag-Fraud statute is narrowly tailored to serve a significant governmental interest. The District Court denied Defendants' Motion to Dismiss and Motion for Summary Judgment while granting Plaintiffs' Motion for Summary Judgment. Defendants appeal the District Court's grant of summary judgment in favor of Plaintiffs and the denial of Defendants' Motion to Dismiss and Motion for Summary Judgment.

While several courts have addressed similar statutes to Iowa's law, they have reached different conclusions, and this is a matter of first impression in this Court. Defendants respectfully request 20 minutes per side for oral argument as the criteria in Fed. R. App. P. 34 (a)(2)(A)-(C) are not present.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

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

On February 27, 2018, the District Court entered an order denying in part and granting in part Defendants'-Appellants' Motion to Dismiss, dismissing Plaintiffs'-Appellees' Equal Protection claim but denying the motion in all other respects. (Docket No. 39 (JA 46)). On January 9, 2019, the District Court entered an order in favor of Plaintiffs-Appellees following its review of the parties' cross-motions for summary judgment, holding that Iowa's Ag-Fraud statute failed to survive strict and intermediate scrutiny under the First Amendment and dismissed Plaintiffs' Fourteenth Amendment due process claim as moot. (Docket No. 79 (JA 198)). The District Court entered Final Judgment on February 15, 2019. (Docket No. 87 (JA 238)). Defendants-Appellants filed a timely Notice of Appeal. (Docket No. 88 (JA 239)). This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides for appellate jurisdiction over a final judgment entry from a United States District Court.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT IOWA'S AG-FRAUD STATUTE RESTRICTED SPEECH PROTECTED BY THE SPEECH CLAUSE OF THE FIRST AMENDMENT.

Authorities

United States v. Alvarez, 567 U.S. 709 (2012)

Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003)

Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018)

Western Watersheds Project v. Michael, 196 F.Supp. 3d at 1242 (*rev'd on other grounds*, 869 F.3d 1189 (10th Cir. 2017))

Iowa Code § 717A.3A

II. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT IOWA'S AG-FRAUD STATUTE FAILED TO SURVIVE INTERMEDIATE SCRUTINY.

Authorities

Ward v. Rock Against Racism, 491 U.S. 781 (1989)

McCullen v. Coakley, 134 S. Ct. 2518 (2014)

Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018)

Iowa Code § 717A.3A

STATEMENT OF THE CASE

Iowa's Ag-Fraud Statute: History and Purpose. Iowa is one of the nation's leading states in agricultural production. Iowa is the nation's largest producer of pigs raised for meat and the country's biggest egg producer. (Complaint, ¶¶ 84-85 (JA 27)). Because of agriculture's significance in Iowa, in 2012, the Iowa Legislature passed H.F. 589, "Agriculture Production Facility Fraud" ("Ag-Fraud"), which was signed by the Governor and codified as Iowa Code section 717A.3A, in order to protect agricultural producer's private property and bio-security measures. (Dkt. 55-2, ¶¶ 1-7 (JA 181-183)).[1]

---

[1] In 2019, the Iowa Legislature passed S.F. 519, which was signed by the Governor on March 14, 2019, and codified as Iowa Code § 717A.3B. S.F. 519 created a new crime of "Agricultural Production Facility Trespass" but did not repeal Iowa Code § 717A.3A, which remains in the Iowa Code. S.F. 519 takes effect immediately upon enactment and specifically provides as follows:

1. A person commits agricultural production facility trespass if the person does any of the following:

    a. Uses deception as described in section 702.9, subsection 1 or 2, on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to the agricultural production facility, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.

    b. Uses deception as described in section 702.9, subsection 1 or 2, on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or

Several legislators who supported the bill that became the Ag-Fraud statute stated their support was based protecting bio-security and protection of private property. (Dkt. 55-2, ¶¶ 3, 5 (JA 182-83)). Then-Governor Branstad, who signed the Ag-Fraud bill into law, supported the bill, stating "[i]f somebody comes on somebody else's property through fraud or deception or lying, that is a serious violation of people's rights—and people should be held accountable for that." (Dkt. 55-2, ¶ 6 (JA 183)).

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

- obtaining "access to an agricultural production facility by false pretenses." Iowa Code § 717A.3A(1)(a);

---

economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.

2. A person who commits agricultural production facility trespass is guilty of a serious misdemeanor for a first offense and an aggravated misdemeanor for a second or subsequent offense.

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

- making "a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized." *Id*. § 717A.3A(1)(b); and
- conspiring to commit or aiding and abetting the commission of agricultural production facility fraud. *Id*. § 717A.3A(3)(a).

The first violation of the Ag-Fraud statute is a serious misdemeanor, and any subsequent violation(s) is an aggravated misdemeanor. *Id*. at §§ 717A.3A(2)(a)-(b). "Agricultural production facility" is defined as "an animal facility as defined in subsection 5, paragraph "a", or a crop operation property." Iowa Code § 717A.1(3). [2] The entire statute is reproduced in the Addendum.

---

[2] "Animal facility" is defined as any of the following:

a. A location where an agricultural animal is maintained for agricultural production purposes, including but not limited to a location dedicated to farming as defined in section 9H.1, a livestock market, exhibition, or a vehicle used to transport the animal;
b. A location where an animal is maintained for educational or scientific purposes, including a research facility as defined in section 162.2, an exhibition, or a vehicle used to transport the animal;
c. A location operated by a person licensed to practice veterinary medicine pursuant to chapter 169;
d. A pound as defined in section 162.2;
e. An animal shelter as defined in section 162.2;
f. A pet shop as defined in section 162.2;

Plaintiffs-Appellees Animal Legal Defense Fund *et al*. (collectively, "Plaintiffs") are various organizations who want to obtain access to or employment with agricultural production facilities to conduct "undercover investigations" related to food safety, animal welfare, environmental quality, and other concerns. (Complaint, ¶¶ 26-30 (JA 10-15)). Plaintiffs sued Iowa Governor Kimberly Reynolds, Iowa Attorney General Tom Miller, and Montgomery county Attorney Drew B. Swanson[3] (collectively, "Defendants")—who were all sued in their official capacities—alleging Iowa's Ag-Fraud statute was facially unconstitutional as a content-based, viewpoint-based, and overbroad regulation. (Complaint, ¶¶ 31-

---

g. A boarding kennel as defined in section 162.2; or
h. A commercial kennel as defined in section 162.2.

Iowa Code §§ 717A.1(5)(a)-(h).

"Crop operation property is defined as any of the following:

a. Real property that is a crop field, orchard, nursery, greenhouse, garden, elevator, seedhouse, barn, warehouse, any other associated land or structures located on the land, and personal property located on the land including machinery or equipment, that is part of a crop operation; or
b. A vehicle used to transport a crop that was maintained on the crop operation property.

Id. at §§ 717A.1(9)(a)-(b).

[3] Plaintiffs originally named Bruce E. Swanson, who was the County Attorney for Montgomery County at the time their Complaint was filed, as a defendant. (Complaint (JA 3)). On February 1, 2019, Defendants filed notice with the District Court that Drew B. Swanson should be substituted in this matter as the Defendant Montgomery County Attorney under Federal Rule of Civil Procedure 25(d). (Dkt. 82).

33, 115-158 (JA 17)). Plaintiffs asserted claims under the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id*.

Defendants filed a Motion to Dismiss on December 8, 2017, arguing Plaintiffs lacked standing to bring their claims, and alternatively, that Plaintiffs failed to state claims under either the First or Fourteenth Amendments. (Dkt. 18 (JA 44)). On February 27, 2018, the District Court ruled on the motion, concluding Plaintiffs had standing, dismissing their Equal Protection claim, and denying the motion in all other respects. (Dkt. 39 (JA 46)).

The parties then both moved for summary judgment. (Dkt. 49 (JA 102); Dkt. 57 (JA 185)). On January 9, 2019, the District Court entered an order on the merits of the parties' cross-motions for summary judgment on all claims, in which the Court granted Plaintiffs' Motion for Summary Judgment and denied the Defendants' Motion for Summary Judgment. (Dkt. 79 (JA 198)).

The District Court concluded that Iowa Code §§ 717A.3A(1)(a)-(b) violated the First Amendment. First, the District Court ruled that Iowa's Ag-Fraud statute restricted speech protected by the Speech Clause of the First Amendment. (Dkt. 39, 17-31 (JA 62-76)). The District Court, relying upon *United States v. Alvarez*, 567 U.S. 709 (2012), held the false statements implicated by § 717A.3A were protected speech because they did not cause a "legally cognizable harm" or provide "material gain" to the speaker. (Dkt. 39, 24-31 (JA 69-76)). Next, the

District Court held that § 717A.3A was a content-based[4] restriction but need not decide whether the statute was subject to strict or intermediate scrutiny because it failed under both standards. (Dkt. 79, 11-13) (JA 208-210)). The District Court concluded the statute failed strict scrutiny because the State's proffered interests were not compelling and § 717A.3A was not narrowly tailored—noting the statute was unnecessary to protect the State's interests and both under- and over-inclusive. (Dkt. 79, 13-18 (JA 210-215)). Finally, the District Court held that § 717A.3A failed to survive intermediate scrutiny, finding the statute was too "broad in its scope, it is already discouraging the telling of a lie in contexts where harm is unlikely and the need for prohibition is small."[5,6] (Dkt. 79, 18-19 (JA 215-216)).

On February 14, 2019, the District Court entered an Order declaring Iowa's Ag-Fraud statute unconstitutional under the First Amendment and permanently enjoining and prohibiting the State from enforcing the statute. (Dkt. 86 (JA 232)). On March 28, 2019, the District Court denied Defendants' Motion to Stay, and on

---

[4] Plaintiffs also argued that § 717A.3A was a viewpoint-based restriction, but the District Court—having found the law was a content-based regulation—declined to consider Plaintiffs' viewpoint-based argument. (Dkt. 79, 11 fn. 13 (JA 208)).

[5] Plaintiffs also argued that § 717A.3A was overbroad in violation of the First Amendment, but the District Court—having already found the statute unconstitutional under the First Amendment—declined to consider Plaintiffs' overbreadth argument. (Dkt. 79, 19 fn. 18 (JA 216)).

[6] The District Court's summary judgment order dismissed Plaintiffs' Fourteenth Amendment due process claim as moot. (Dkt. 79, 19-20 (JA 216-217)).

April 11, 2019, the Court issued an Order granting Plaintiffs' Motion for an Award of Attorneys' Fees and Costs. (Dkt. 101 & 102).

SUMMARY OF THE ARGUMENT

The conduct prohibited by Iowa's Ag-Fraud statute—using false pretenses to gain access to or obtain employment, with an intent to commit an unauthorized act, at an agricultural production facility—does not fall within the protections of the First Amendment. The Supreme Court has recognized that false speech that results in a legally cognizable harm or bestows a material gain falls outside the protections of the First Amendment. Plaintiffs have challenged laws similar to Iowa's Ag-Fraud statute in several other states and have received mixed results. While Utah's Ag-Fraud statute was ruled unconstitutional in its entirety, Idaho's Ag-Fraud statute and Wyoming's Ag-Fraud-like statute were upheld in part.

Iowa's Ag-Fraud statute should be upheld in its entirety. Obtaining access to or employment, with an intent to commit an unauthorized act, at agricultural production facilities—private property not open to the public—imposes a legally cognizable harm akin to trespass. It also bestows a material gain on the speaker by conferring the ability to do lawfully that which the law otherwise forbids and punishes as trespass, such that the protections afforded under the First Amendment do not apply.[7] Nor does Iowa's Ag-Fraud statute create a content-based restriction

[7] Although Defendants appealed the District Court's conclusion that Plaintiffs had

on speech in violation of the First Amendment, but even if it did, the statute is narrowly tailored to serve a significant governmental interest.

The District Court erroneously concluded that: 1) the conduct prohibited by Iowa's Ag-Fraud statute is protected speech under the First Amendment; 2) the statute created a content-based restriction; and 3) the statute failed to satisfy intermediate scrutiny. The District Court's judgment invalidating § 717A.3A on First Amendment grounds suffers, as did Plaintiffs' arguments, from both an overly broad interpretation of the statute and a misapplication of the First Amendment jurisprudence concerning false speech.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT CONCLUDED IOWA'S AG-FRAUD STATUTE RESTRICTS SPEECH PROTECTED BY THE FIRST AMENDMENT.

Standard of Review. This Court reviews a district court's summary judgment determinations de novo using the same standard as the district court. *Lager v. Chicago Northwestern Transp. Co.*, 122 F.3d 523, 524 (8th Cir. 1997). Hence, this Court's task is to determine if the record demonstrates that there is no

---

standing (Dkt. 39, 9-17, (JA 54-62); Dkt. 88 (JA 239)), Defendants do not intend to argue standing in this Brief but would simply note that standing is a jurisdictional issue for courts to address. *See Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 850 (8th Cir. 2003) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (stating federal courts are under an independent obligation to examine their own jurisdiction, and standing "'is perhaps the most important of [the jurisdictional] questions.'") (alteration in original).

genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. *Id.*

Plaintiffs claim § 717A.3A violates the Speech Clause of the First Amendment to the United States Constitution. (Complaint, ¶¶ 118-148 (JA 34-39)). Constitutional claims are subject to a de novo standard of review on appeal. *Escudero-Corona v. I.N.S.*, 244 F.3d 608, 614 (8th Cir. 2001). First Amendment challenges involve a three-step analysis: 1) whether the speech is protected by the First Amendment; 2) if the speech is protected, the court must determine what standard of review applies; and 3) application of the standard of review to the facts of the case. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Plaintiffs bear the burden of satisfying the first factor. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

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

Jurisprudence on the application of the First Amendment to undercover investigations demonstrates there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Fraud statute. The Supreme Court recently addressed whether certain fraudulent speech falls outside the First Amendment's protections, such that the speech can be criminalized. *See United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating the Stolen Valor Act—which made it a crime to

lie about receiving military decorations or medals—under the First Amendment on the grounds that it criminalized false speech and nothing more). In *Alvarez*, the Supreme Court held that the government may criminalize false statements when the statements cause a "legally cognizable harm" such as "an invasion of privacy," *id*. at 719, or "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment." *Id*. at 723 (emphasis added).

Prior to *Alvarez*, the Supreme Court, rejecting defendants' First Amendment defense, upheld a complaint by the Illinois Attorney General alleging a telemarketing company fraudulently solicited charitable donations from members of the public. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003). The Court had previously invalidated several attempts by states to prohibit charitable solicitations where a high percentage of the donated funds were spent by companies. *Id*. at 612-18. The Court held the Illinois lawsuit was different because it had a "solid core in allegations that hone in on affirmative statements [defendants] made intentionally misleading donors regarding the use of their contributions." *Id*. at 620. The Court noted that a false statement was not sufficient; the Attorney General had to show defendants "made a false representation of a material fact knowing that the representation was false" and

that defendants "made the representation with the intent to mislead the listener, and succeeded in doing so." *Id*. The Attorney General bore the burden of proof and the showing had to be made by clear and convincing evidence. *Id*.

The Supreme Court, recognizing the importance of protecting private property, has also long recognized that the First Amendment's protections for speech conducted on private property are not unlimited. Information gatherers must obey laws of general applicability. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (stating that the First Amendment does not confer a license on news reporters or their news sources to violate valid criminal laws, even if the violation could result in the discovery of newsworthy information); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (stating "[t]he constitutional guarantee of free expression has no part to play" where picketers entered private shopping center to picket a retail store); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("This Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."); *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (recognizing "[a journalist] has no special privilege to invade the rights and liberties of others"); *see also State v. Lacey*, 465 N.W.2d 537, 539-40 (Iowa 1991) (court declined to overturn convictions for criminal trespass on First Amendment

grounds where defendants were engaged in speech on private property without consent of the owner).

A number of courts have held that the First Amendment does not protect undercover, employment-based investigations, including the use of hidden recording devices, against tort claims. *See Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999) (stating that the First Amendment did not shield reporters from breach of duty of loyalty and trespass claims when the reports obtained employment at grocery store under false pretenses and surreptitiously recorded store's food handling practices); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (rejecting claim that the First Amendment shielded reporter from invasion of privacy suit when the reporter lied to obtain access and then surreptitiously recorded plaintiff in his home); *accord Sanders v. Am. Broad Cos.*, 978 P.2d 67, 77 (Cal. 1999) (recognizing the covert videotaping of employees of business by journalist posing as an employee violated employees' expectation of privacy); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998) (holding that the First Amendment did not shield reporter from a trespass claim when the reporter obtained a volunteer position at a facility for special needs persons and then surreptitiously recorded staffs' care of patients at the facility); *but see Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1352-53 (7th Cir. 1995) (finding no trespass claim from undercover

videotaping of physicians in their office, open to the public, by purported patients interested in the physicians' services).

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

B. Plaintiffs have had Mixed Success Challenging Similar Ag-Fraud Statutes in Other Jurisdictions.

Plaintiffs, or organizations similar to Plaintiffs, have challenged similar Ag-Fraud statutes in Idaho, Utah, and Wyoming, on First Amendment grounds, and courts have rejected Plaintiffs' arguments in several instances. Where Plaintiffs have been successful, the cases are either factually distinguishable or the court reached a conclusion contrary to the First Amendment jurisprudence on the scope of free speech protections on private property.

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

Animal Legal Defense Fund ("ALDF"), People for the Ethical Treatment of Animals Inc. ("PETA"), and the Center for Food Safety ("CFS"), among others, challenged Idaho's Ag-Fraud statute, the relevant portions of which prohibited: a) a non-employee entering an agricultural production facility by misrepresentation or trespass; b) obtaining records of an agricultural production facility by misrepresentation or trespass; c) obtaining employment at an agricultural

production facility by misrepresentation or trespass with the intent to cause economic or other injury to the facility; or d) entering an agricultural production facility that is not open to the public and, without consent of the owner, making an audio or video recording of the conduct of the facility's operations.[8] *See* Idaho Code §§ 18-7042(a)-(d).

---

[8] The statute reads as follows:

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

Idaho Code §§ 18-7042(a)-(e).

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

With respect to subsection (a), the court, relying upon *Alvarez*, 567 U.S. 709, 722-23 (2012), held that "lying to gain entry" does not result in a material gain to the speaker, and therefore, the lie is "pure speech" protected by the First Amendment. *Wasden*, at 878 F.3d at 1194-99. For support of this conclusion, the court provided a hypothetical example of a teenager who lies to obtain a restaurant reservation, noting the teenager has obtained no material gain by lying to obtain the reservation but is still subjected to a criminal penalty under the statute—a troubling result for the majority. *Id*. at 1194-96.

Judge Bea issued a vigorous dissent from this portion of the court's ruling. *Id*. at 1205-13 (Bea, J., dissenting in part and concurring in part). The dissent

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

included a lengthy discussion of Idaho's historic protection of private property rights. *Id*. The dissent also noted that in Idaho, unconsented entry—entry by misrepresentation—constitutes common law trespass, from which "damages are presumed to flow naturally." *Id*. at 1206. The dissent then criticized the majority for brushing aside the longstanding principle that the "right to exclude"—a fundamental element of property rights—includes the ability to exclude *anyone* from entry, at *any* time, and for *any* reason, or no reason at all. *Id*. (emphasis added).

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

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

ALDF and PETA, among others, challenged Utah's Ag-Fraud statute, the relevant portions of which prohibited: a) leaving a recording device at an

agricultural operation without consent; b) obtaining access to an agricultural operation under false pretenses; c) applying for employment at an agricultural operation with the intent to record the operation; or d) recording an agricultural operation while trespassing.[10] Utah Code §§ 76-6-112(2)(a)-(d).

---

[10] The statute reads as follows:

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

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

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

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

(ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; or

(iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or

(d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.

Utah Code §§ 76-6-112(2)(a)-(d).

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

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

3. *Western Watersheds Project v. Michael*.

PETA and CFS, among others, challenged a Wyoming Ag-Fraud-like statute, the relevant portions of which prohibited: a) entering private land with the intent to collect resource data[11]; b) entering private land and actually collecting resource data; or c) crossing private land without authorization to collect resource data on adjacent or proximate public land.[12] Wyo. Stat. §§ 6-3-414(a)-(c).

---

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

[12] The statute reads as follows:

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

In *Western Watersheds Project v. Michael*, the court determined that subsections (a) and (b) of the statute did not violate the First Amendment because "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data." 196 F.Supp. 3d at 1242 (*rev'd on other grounds*, 869 F.3d 1189 (10th Cir. 2017)). The lynchpin of the court's analysis was that, irrespective of the importance of the information sought, the restriction on conduct occurred on private property. *Id*. at 1241 ("Plaintiffs' desire to access

---

(i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person is guilty of trespassing to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

Wyo. Stat. §§ 6-3-414(a)-(c).

certain information, no matter how important or sacrosanct they believe the information to be, does not compel a private landowner to yield his property rights and right to privacy."). The court's reasoning carried over to its decision upholding subsection (c), which prohibited resource data collection on public property if one had to cross private property to collect such data. *Id*. at 1243-44.

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

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

C. Using False Pretenses to Gain Access to an Agricultural Production Facility Imposes a Legally Cognizable Harm on the Property Owner and Bestows a Material Gain to the Trespasser.

1. The Legally Cognizable Harm is the Trespass on Private Property.

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it." 1 William Blackstone, Commentaries *135. The protection of private property has long been recognized in Iowa and was deemed so important and fundamental to the founders of the State of Iowa, that the right is enshrined in Iowa's Constitution. *See* Iowa Const. art. I, § 1 (identifying the inalienable right to acquire, possess, and protect property). Moreover, the Iowa Supreme Court has recognized in some instances that an Iowan's property rights warrant more protection under the Iowa Constitution than under the Federal Constitution. *See State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014) (recognizing the warrant requirement has full applicability to home searches of both probationers and parolees, in disagreement with United States Supreme Court precedent); *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (rejecting the United States Supreme Court case of *Samson v. California*, 547 U.S. 843 (2006), and concluding that the Iowa Constitution does not permit a warrantless search of a parolee's property).

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

The interests that Iowa's Ag-Fraud statute seeks to protect are real, substantial, and legitimate. Just as in *Telemarketing Associates*, where the Attorney General's suit was designed to protect people from being misled into giving away their money, Iowa's Ag-Fraud statute is aimed at preventing people from invading legitimate property interests. In the current case, the District Court held such interests (and the harm to them) were insufficient to justify excluding lying to gain access to private property from the protections of the First

Amendment. (Dkt. 39, 24-29 (JA 69-74)). The District Court, relying upon *Alvarez*, *Wasden*, and *Herbert*, concluded that the types of false statements historically unprotected by the First Amendment are those that cause specific or tangible injuries, but a trespasser may enter property unauthorized and interfere with a property owner's right to control access to their property without causing any actual or material injuries. (Dkt. 39, 25-27 (JA 70-72)). The District Court also pointed out the lies plaintiffs would tell advance First Amendment values by facilitating truthful discourse or helping others realize the truth. (Dkt. 39, 28 (JA 73)).

The District Court's conclusion runs contrary to First Amendment jurisprudence. First, as the dissent in *Wasden* correctly points out, the statutes in Idaho and Utah, like Iowa's, prohibit conduct facilitated by speech—obtaining access by misrepresentations—rather than pure speech, which distinguishes the statute from the Stolen Valor Act at issue in *Alvarez*. *See Wasden*, 878 F.3d at 1207 (noting Idaho's prohibition on obtaining access by misrepresentation "no more regulates pure speech than do prohibitions on larceny by trick or false pretenses.").[13] The Stolen Valor Act did not prohibit obtaining access to private

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

property by lying about receiving a military award; it simply prohibited lying about receipt of an award. *See Alvarez*, 567 U.S. at 719. In contrast, the action in *Telemarketing Associations* proscribed misrepresentations only when they were intentional and accompanied by specific conduct—misleading the listener about the use of his/her donations. 538 U.S. at 620. Here, the harm arises when one enters another's property by false pretenses without need for further injury; the harm is the unwanted intrusion on the right irrespective of what happens once a person has secured entry. Consequently, unlike the Stolen Valor Act, Iowa's prohibitions on access by false pretenses does not target "falsity and nothing more." *Cf. Wasden*, 878 F.3d at 1196 (citing *Alvarez*, 567 U.S. at 719).

Second, the District Court trivializes private property owners' fundamental right to exclude persons from their property when it determined that—while inflicting a legally recognized injury—merely crossing the threshold through false pretenses, without more, does not inflict a sufficient harm to remove the speech from the protections of the First Amendment. As Defendants argued below, several courts, including in Iowa, have found unconsented entry onto private property, without more, results in damages—a "legally cognizable harm." Under Iowa law, an unconsented entry to private property constitutes a trespass—a

---

has won a prize. Iowa Code § 714.8(15). "Fraudulent practice" is essentially theft by use of false speech.

legally cognizable harm from which the law infers some damage. *See Nichols v. City of Evansdale*, 687 N.W.2d 562, 573 (Iowa 2004) (citing 75 Am.Jur.2d Trespass § 117 (1991)) ("From every unlawful entry, or every direct invasion of the person or property of another, the law infers some damage."); *Krotz v. Sattler*, 695 N.W.2d 41, at *3 n. 2, *4 (Iowa Ct. App. Oct. 14, 2004) (unpublished opinion) (court, relying upon *Wing v. Seske*, 109 N.W. 717 (Iowa 1906), stated "trespass can in some situations justify an award of nominal damages") (Vaitheswaran, J., specially concurring) (landowner "entitled to nominal damages without a showing of any harm"). Iowa is not alone in protecting private property rights.

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

(Idaho 1970) (recognizing that using false pretenses to gain entry inflicts a legally cognizable harm, even where the trespasser merely crossed the threshold).

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

The application of this principle to instances of undercover investigations has demonstrated that the closer a person gets to obtaining access by deception to purely private property—a home or business not open to the public—the more likely the First Amendment does not apply. *Food Lion*, 194 F.3d at 518-19 (recognizing that defendants did not commit trespass when they obtained

employment based upon misrepresentations, but they did commit trespass by breaching their duty of loyalty to plaintiff when they secretly filmed non-public areas of the store because such filming went beyond their authority to enter the store as employees); *Desnick*, 44 F.3d at 1352-1353 (holding that the First Amendment protected defendants' use of false pretenses to conduct undercover recordings of plaintiff's business activities where the recordings were conducted in the portion of the office that was open to the public); *Dietemann*, 449 F.2d at 248 (determining that the First Amendment did not protect defendants where they obtained access to the plaintiff's home—where plaintiff was operating his business—under false pretenses and secretly recorded plaintiff).

Several recent decisions by federal district courts have recognized the potential for harm from a trespass where the entrant obtained "consent" to enter private property through misrepresentations, or where persons conducted surreptitious recordings, exceeding the scope of said consent. *See Democracy Partners v. Project Veritas Action Fund*, 285 F.Supp.3d 109 (D.D.C. 2018); *Planned Parenthood Federation of America, Inc., v. Center for medical Progress*, 214 F.Supp.3d 808 (N.D. Cal. 2016); *Gaubatz*, 793 F.Supp.2d 311. In all three cases, plaintiffs brought trespass causes of action, among others, against defendants who had obtained internships with plaintiffs through misrepresentations and then proceed to surreptitiously record numerous conversations and/or released

a number of confidential documents. *Democracy Partners*, 285 F.Supp.3d at 112-15; *Planned Parenthood*, 214 F.Supp.3d at 817-19; *Gaubatz*, 793 F.Supp.2d at 317-20. The courts rejected defendants' arguments that the trespass claims should be dismissed because the plaintiffs had consented to the entry, as the consent was obtained through misrepresentations, and in any event, the plaintiffs had exceeded the scope of said consent by surreptitiously recording conversations in plaintiffs' offices or private spaces. *Democracy Partners*, 285 F.Supp.3d at 118-19; *Planned Parenthood*, 214 F.Supp.3d at 833-35; *Gaubatz*, 793 F.Supp.2d at 344-46.

Fourth, the District Court improperly placed a value judgment on the lies plaintiffs would tell by noting they would facilitate truthful discourse. Any alleged value from information gleaned through undercover investigations and obtained through conduct violative of Iowa's Ag-Fraud statute should not be part of the Court's analysis of whether the First Amendment protects said conduct. The Court does not balance the relative values of the property interests of one and the speech-related interests of another and then decide whether the First Amendment commands a particular result. *See Wasden*, 878 F.3d at 1195 n.9 (rejecting a similar argument, the court stated that focusing on the alleged harms stemming from the publication of information obtained through undercover investigations "places a value judgment on the reporting itself and undermines the First Amendment right to critique and criticize").

Here, contrary to the District Court's conclusions, obtaining access to agricultural production facilities—private property not open to the public—under false pretenses imposes a legally cognizable harm such that the protections afforded under the First Amendment do not apply to this speech. Plaintiffs' undercover investigations fall much closer to *Democracy Partners*, *Dietemann*, *Gaubatz*, and *Planned Parenthood*, than *Desnick*.

2. Trespass Results in a Material Gain Because the Trespasser has Obtained Access to Otherwise Inaccessible Property.

Even if using false pretenses to obtain access to an agricultural production facility does not impose a legally cognizable harm on the private property owner, obtaining access in said manner does provide a material gain to the trespasser. The District Court ruled to the contrary, stating "the nominal damage a property owner sustains from an unconsented entry to property, without more, does not generate the type of 'material gain' required under *Alvarez*" necessary to remove First Amendment protections for the speech. (Dkt. 39, 29 (JA 74)).

The District Court's conclusion was short on analysis and erroneously conflated the two *Alvarez* standards— "legally cognizable harm" and "material gain." Outside of the above-referenced statement and a reference to the Ninth Circuit's consideration of a similar argument, the Court provided no additional analysis of any "material gain" obtained through unconsented entry.

Notwithstanding the District Court's lack of analysis, the court's reliance upon the Ninth Circuit is still misplaced. The majority in *Wasden* erroneously concluded—without explanation—that the teenager in their hypothetical has not received a "material gain" when obtaining a reservation by misrepresentation. 878 F.3d at 1195. As the dissent astutely pointed out:

> However one defines "material" and "gain," it seems a stretch to say the teenager stands to obtain neither at the restaurant. The majority must imagine the lad served thin gruel indeed for him to have received nothing of "substance," leaving him with a sense of not "getting something" as a result of hoodwinking the *maître d'hôtel*.

Wasden, 878 F.3d at 1212. Obtaining permission to enter private property provides a material gain: "[i]t confers the ability to do lawfully that which the law otherwise forbids and punishes as trespass." *Id*. (quoting *Shultz v. Atkins*, 554 P.2d 948, 953 (Idaho 1976)).

Moreover, obtaining access by false pretenses to a restaurant—private property generally open to the public—is very different than obtaining access by false pretenses to an agricultural production facility—private property not open to the public. *See Food Lion*, 194 F.3d at 518-19; *Dietemann*, 449 F.2d at 248; *Democracy Partners*, 285 F.Supp.3d at 118-19; *Planned Parenthood*, 214 F.Supp.3d at 833-35; *Gaubatz*, 793 F.Supp.2d at 344-46; *cf. Desnick*, 44 F.3d at 1352-1353. Obtaining access to the latter arguably results in a greater "material gain" than access to the former.

The District Court's error in conflating the *Alvarez* standards—"legally cognizable harm" and "material gain"—is best exemplified by Plaintiffs' own words, wherein they admit it is necessary to obtain access to agricultural production facilities under false pretenses in order to obtain the information they seek. (Dkt. 49-1, ¶¶ 6, 32 (JA 107, 112); Complaint, ¶ 104 (JA 30)) ("Realistically, there is no investigative strategy that would meaningfully reveal the conditions inside agricultural production facilities without violating the statute."). Even assuming the District Court correctly determined that unconsented entry, without more, does not impose a "legally cognizable harm", it is difficult to argue the unconsented entry does not result in a "material gain" to the entrant where, absent such entry, there is no other "[r]ealistic[]…investigative strategy" by which the entrant could obtain similar information.

D. Using False Pretenses to Obtain Employment at an Agricultural Production Facility, with an Intent to Commit an Unauthorized Act, Imposes a Legally Cognizable Harm on the Property Owner and Bestows a Material Gain to the Speaker.

The argument that the conduct prohibited by subsection (b) of Iowa's Ag-Fraud statute is not protected by the First Amendment is even stronger than the argument for subsection (a) because there is a specific intent to not only trespass, but to commit an unauthorized act on private property—imposing a legally cognizable harm—by a person who otherwise would not have access to the property, and who is also being paid by the agricultural production facility—both

of which are a material gain. *See Wasden*, 878 F.3d at 1202 (rejecting an argument that the lies made by the Animal Legal Defense Fund were not to "secure monies"—a material gain—and therefore still protected by the First Amendment, the court noted "these undercover investigators are nonetheless paid by the agricultural production facility as part of their employment.").

The District Court found *Wasden* to be unpersuasive, determining Iowa's "intent" clause contained within subsection (b) was not sufficiently narrow to remove the speech from the protections of the First Amendment. (Dkt. 39, 29-31 (JA 74-76); Dkt. 79, 17-18 (JA 214-215)). The Court concluded that just because an act is not authorized by an employer, commission of that act may not cause the sort of material harms contemplated in *Alvarez*, and the lack of a requirement the false statements be material further distinguishes subsection (b) from a recognized prohibition of fraud. (Dkt. 39, 30 (JA 75)).

The Court's conclusion was based upon a misapplication of *Alvarez* and *Wasden* and an erroneous interpretation of that statute—rendering the statute broader than it is. The prohibition at issue in subsection (b) is expressly addressed by the Supreme Court in *Alvarez*, where the Court stated the First Amendment does not protect using false claims to obtain "offers of employment." 567 U.S. at 723 ("Where false claims are made to effect a fraud or secure … *offers of employment*, it is well established that the Government may restrict speech without

affronting the First Amendment.") (emphasis added). The Ninth Circuit relied on that precise language in *Wasden* to uphold Idaho's prohibition on obtaining employment by misrepresentations where the applicant had the intent to injure the employer. 878 F.3d at 1201-02 (citing *Alvarez*, 567 U.S. at 723).

The District Court erroneously asserts the Ninth Circuit "placed great emphasis on the intent prong of the Idaho statute" in *Wasden* as a rationale for distinguishing that case from § 717A.3A. (Dkt. 39, 29 (JA 74)). Contrary to the District Court's assertion, the Ninth Circuit found the above-quoted language in *Alvarez* alone sufficient to justify its decision. *Wasden*, 878 F.3d at 1201 (directly after quoting *Alvarez*, the court stated "[t]he misrepresentations criminalized in subsection (c) fall squarely into this category of speech.").

Although the majority in *Wasden* then went on to discuss the restriction in Idaho's prohibition that required intent to injure the employer as additional support for its conclusion about the inapplicability of the First Amendment, it was not an outcome determinative analysis. 878 F.3d at 1201. The court introduced the paragraph addressing the intent prong analysis by using the word "[a]dditionally", rather than something more determinative, such as "importantly" or "significantly." *Id*. The court was simply providing additional support for the conclusion it had already reached. *Id*. (noting the intent prong of the statute "*further* cabin[ed] the prohibition's scope.") (emphasis added).

The District Court's interpretation of § 717A.3A(1)(b) rendered the statute broader than it was intended by failing to recognize the necessary elements for the statute to apply must *all* be present at the same time at the outset of the employment or application process, which narrows the statute significantly. Iowa's statute imposes liability on *only* those persons who meet *all* of the following criteria: 1) knowingly makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility; 2) have the intent to commit an unauthorized act at the time they make the false statement or representation; and 3) know that the act they intend to commit is not authorized at the time they make the false statement or representation. Iowa Code § 717A.3A(1)(b). The necessary convergence of all of these elements in order for the statute to apply further narrows the statute and inoculates against any argument that the prohibition punishes those who simply overstate their education or experience to obtain employment.

Iowa's Ag-Fraud statute is more similar to Idaho's law than the District Court gave it credit for. The only real difference is that Iowa's requires an intent to "commit an unauthorized act" rather than to cause "economic or other injury." Though the District Court found this distinction critical, Iowa's intent requirement merely reflects the common sense understanding that most employers likely prohibit unauthorized acts because they feel those acts may result in some harm or

injury, economic or otherwise, to the employer. Moreover, Iowa's law simply codifies the common law "duty of loyalty" implied in employment relationships, which provides that a "servant must do nothing hostile to the master's interest." *Condon Auto Sales & Services, Inc. v. Crick*, 604 N.W.2d 587, 599 (Iowa 1999) (citing *LaFontaine v. Developers & Builders, Inc.*, 156 N.W.2d 651, 658 (Iowa 1968)). Although the District Court correctly noted that the Iowa Supreme Court has cautioned actions based upon the duty of loyalty must be limited in scope (citing *Condon*, 604 N.W.2d at 600), lying to obtain employment at an agricultural production facility while simultaneously harboring the specific intent to knowingly commit an unauthorized act arguably qualifies as "hostile to the master's interest."

Accordingly, Iowa's Ag-Fraud statute does not violate the First Amendment.[14]

II. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT IOWA'S AG-FRAUD STATUTE FAILED TO SURVIVE INTERMEDIATE SCRUTINY.

Standard of Review. When analyzing a statute under the First Amendment, courts must determine whether the law is content-based or content-neutral. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015) (identifying the level of scrutiny

[14] Should this Court uphold only one subsection of Iowa's Ag-Fraud statute, the Court "may sever the offending portions from the [statute] and leave the remainder intact." *Bonilla v. State*, 791 N.W.2d 697, 702 (Iowa 2010); *see* Iowa Code § 4.12 (recognizing severability as applicable to all Iowa Acts or statutes).

applied to a statute may change based on whether its content-based or content-neutral). A content-based statute is generally subject to strict scrutiny (*id*. at 2227), while a content-neutral statute is generally subject to intermediate scrutiny. *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). Intermediate scrutiny requires the statute be "narrowly tailed to serve a significant governmental interest." *Id*.

Even where a law is content-based, the statute may still be subject to intermediate scrutiny. *Alvarez*, 567 U.S. at 730-32 (Breyer, J., concurring). In *Alvarez*, Justice Kennedy wrote for a four-Justice plurality that the statute was subject to strict scrutiny, while Justice Breyer, who was joined by Justice Kagan (*id*. at 729-30), found intermediate scrutiny should apply where "dangers of suppressing valuable ideas are lower," such as when "the regulations concern false statements about easily verifiable facts that do not concern" more complex subject matter. *Id*. at 732.

A. Iowa's Ag-Fraud State is Content-Neutral.

Even assuming the conduct prohibited by Iowa's Ag-Fraud statute is not exempt from the protections of the First Amendment, contrary to the District Court's conclusion, the statute does not create a content-based restriction on speech in violation of the First Amendment. A statute is content-based if it requires a person to "'examine the content of the message that is conveyed'" to

decide if a violation occurs. *McCullen*, 134 S. Ct. at 2531. A law is content-neutral when the violation of the law occurs solely because of where the person speaks, not necessarily what is said. *Id*.

Iowa's statute is facially neutral; it bans all persons, regardless of subjective motive, from using false pretenses to obtain access to or employment, with an intent to commit an unauthorized act, at an agricultural production facility. *See* Iowa Code §§ 717A.3A(1)(a)-(b). Moreover, the statute does not directly regulate speech, but rather conduct facilitated by speech. The speech only becomes subject to the statute if it is made in an attempt to obtain access or employment at an agricultural production facility.

The District Court determined that the statute was content-based because in order to determine if a person has violated either subsection (a) or (b), one must "evaluate what the person has said", noting the statute makes distinctions between those that seek access or employment by false pretenses and those that seek access or employment by other means. (Dkt. 39, 21 (JA 66)). While a technically accurate description of the statute, is an incomplete legal analysis. If the statute serves purposes unrelated to the content of the speech it is deemed content neutral, "even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. 791; *accord McCullen*, 134 S. Ct. at 2531. Here, although the statute may have an incidental effect on persons who make true or false statements,

the statute's intent to protect private property against trespass and prevent bio-security measures from being compromised at agricultural production facilities are unrelated to the content of the statements. *See Ward*, 491 U.S. at 791. It makes no difference what specific lies or false statements are made; as long as it is done to obtain access or employment with an intent to commit an unauthorized act, the statute prohibits it. Accordingly, Iowa's Ag-Fraud statute is content-neutral.[15]

B. Iowa's Ag-Fraud Statute is Narrowly Tailored to Serve a Significant Governmental Interest.

A content-neutral statute must still satisfy intermediate scrutiny, which requires the statute be "narrowly tailed to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 796). The law "'need not be the least restrictive or least intrusive means of' serving the government's interests." *Id*. (quoting *Ward*, 491 U.S. at 798). But, the government still "may not regulate expression in such a manner that a substantial

[15] Although Plaintiffs argued below that §717A.3A was also viewpoint-based, the District Court declined to rule on that claim, instead finding they need not address the argument because the Court had already found the statute was a content-based regulation and subject to strict scrutiny. (Dkt. 79, 11 fn. 13 (JA 208)). Plaintiffs did not appeal that portion of the District Court's ruling, and therefore, the matter is not before this court as it was not preserved for appeal. Nonetheless, should this Court want to consider that claim, Defendants continue to assert that § 717A.3A is viewpoint-neutral for the reasons set forth in its Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment. (Dkt. 63, 22-23). Defendants can provide additional analysis should this Court so desire.

portion of the burden on speech does not serve to advance its goals." *Id*. (quoting *Ward*, 491 U.S. at 799).

However, even if this Court determines that Iowa's Ag-Fraud statute is content-based, because the statute concerns false statements, it is subject to intermediate scrutiny. 567 U.S. at 730-32 (Breyer, J., concurring). In *Alvarez*, Justice Breyer, who was joined by Justice Kagan, found intermediate scrutiny should apply where "dangers of suppressing valuable ideas are lower," such as when "the regulations concern false statements about easily verifiable facts that do not concern" more complex subject matter. *Id*. at 732. Justice Breyer noted that a law restricting false statements about "philosophy, religion, history, the social sciences, the arts, and the like" are concerning call for strict scrutiny, but the Stolen Valor Act did not fall into one of those categories. *Id*. The false statements at issue in *Alvarez* are "less likely than true factual statements to make a valuable contribution to the marketplace of ideas" and the "government often has good reasons to prohibit such false speech." *Id*.

The District Court held that, because it found § 717A.3A failed to satisfy both strict and intermediate scrutiny, it need not determine the proper standard to apply. (Dkt. 79, 13 (JA 210)). The court's conclusions are wrong on both accounts.

Iowa's Ag-Fraud statute does not restrict false statements about "philosophy, religion, history, the social sciences, the arts, [or] the like"; rather, it restricts false statements used to obtain access or employment, with an intent to commit an unauthorized act, at agricultural production facilities. Lies used to trick a property owner into allowing access to private property or to obtain employment, where the employee harbors an intent to commit an unauthorized act, arguably do not make a "valuable contribution to the marketplace of ideas", and as will be set forth below, Iowa has a "good reason[] to prohibit such false speech." *See Id*. Consequently, § 717A.3A is subject to intermediate scrutiny—not strict scrutiny.

Iowa's Ag-Fraud statute is narrowly tailored to serve significant governmental interests. Given agriculture's significance in Iowa—as demonstrated by Plaintiffs' statements in their Complaint on the size and importance of agriculture in Iowa—the inability of the State to protect private property and promote biosecurity through the enforcement of Iowa's Ag-Fraud statute may significantly impact Iowans, and protecting the aforementioned interests is certainly "significant." (*See* Complaint, ¶¶ 84-88 (JA 27)); *see also United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016) (court upheld the sentences imposed on defendants who had been convicted of introducing eggs into interstate commerce that had been adulterated with salmonella enteritidis—due in part to defendants' failure to comply with bio-security measures—resulting in the illness affecting

approximately 56,000 Americans); *Farris v. Dep't of Employment Sec.*, 8 N.E.3d 49 (Ill. Ct. App. 2014) (court ruled employee was not eligible for unemployment benefits after being discharged for non-compliance with company's biosecurity protocols because the employee's conduct had the potential to harm the employer). The spread of disease can have significant consequences for individual farmers, consumers, and the State's agricultural economy as a hole. *See DeCoster, 828 F.3d at 635* (noting the 2010 salmonella outbreak may have affected up to 56,000 victims, some of whom were hospitalized or suffered long term injuries, including a child who was hospitalized in an intensive care unit for eight days and permanent damage to his/her teeth); *Rembrandt Enterprises, Inv. v. Illinois Union Insurance Co.*, 2017 WL129998 (D. Minn. 2017) (court acknowledged farmer had to euthanize over nine million birds due to the spread of highly pathogenic avian influenza ("bird flu") in 2014); *Rembrandt Enterprises, Inc. v. Illinois Ins. Co.*, 129 F.Supp.3d 782, 783 (D. Minn. 2015) (court acknowledged farmer lost millions of dollars in income as a result of the bird flu outbreak in 2014).

The District Court held the statute was not narrowly tailored because it criminalized speech that inflicted no specific harm to property owners, ranged very broadly, and risked significantly chilling speech not covered under the statute. (Dkt. 79, 18-19 (JA 215-216)). Section 717A.3A does not burden more speech than is necessary to further the government's interest in protecting private property

rights. As previously indicated, the District Court erroneously discounted the harms property owners and employers may suffer as a result of the conduct addressed in § 717A.3A and mis-construed the statute broader than its express terms—particularly subsection (b).

Moreover, Plaintiffs' own admissions demonstrate that enforcement of Iowa's existing trespass laws would not deter them from continuing to obtain access or employment under false pretenses in the absence of the Ag-Fraud statute, contrary to the District Court's conclusion that "the need for [the statute] is small."[16] (Dkt. 79, 19 (JA 216); (Dkt. 49-1, ¶¶ 10-16, 35-39, 45-46, 51, 58-59, 63-64 (JA 108-109, 112-115, 117-118)); *see also Western Watersheds Project*, 196 F. Supp. 3d at 1247 (*rev'd on other grounds*, 869 F.3d 1189) (rejecting an equal protection argument that the legislature intended to punish animal rights organizations, noting the statute was meant to prohibit a specific trespass, and existing law was not an effective deterrent as evidenced by plaintiffs' own admissions).

Although *Wasden* addressed similar arguments to Plaintiffs in this case, *Wasden* is only persuasive authority for Iowa's prohibition on access by false pretenses. While the Ninth Circuit invalidated the access by misrepresentation

[16] The Supreme Court has also recognized that where "sanctions that presently attach to a violation [of the law] do not provide sufficient deterrence, perhaps those sanctions should be made more severe." *Bartnicki*, 532 U.S. at 529.

prohibition for failing to be adequately tailored, it upheld the prohibition on employment by misrepresentation. *Wasden*, 878 F.3d at 1194-1202. Here, Iowa's prohibition on obtaining employment under false pretenses is adequately tailored because it only applies to those who use false pretenses when applying for or obtaining employment, and only then if they also harbor the specific intent to knowingly commit an unauthorized act.

Iowa's Ag-Fraud statute does not create a content-based restriction on speech in violation of the First Amendment, but even if it did, the statute is narrowly tailored to serve a significant governmental interest.[17]

CONCLUSION

Iowa's Ag-Fraud statute does not restrict conduct facilitated by false speech in violation of the First Amendment. Iowa's Ag-Fraud statute does not create a content-based restriction under the First Amendment, and the statute is narrowly tailored to serve a significant governmental interest. Accordingly, Appellants-

[17] Although Plaintiffs argued below that that §717A.3A was also overbroad, the District Court declined to rule on that claim because it had already found the statute constitutionally invalid under Count I of Plaintiffs' Complaint. (Dkt. 79, 19 fn. 18 (JA 216)). Plaintiffs did not appeal that portion of the District Court's ruling, and therefore, the matter is not before this court as it was not preserved for appeal. Nonetheless, should this Court want to consider that claim, Defendants continue to assert that § 717A.3A is not overbroad for the reasons set forth in its Combined Brief in Support of Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment. (Dkt. 63, 25-30). Defendants can provide additional analysis should this Court so desire.

Defendants respectfully request this Court reverse the District Court's February 27, 2018 ruling denying, in part, Appellants-Defendants' Motion to Dismiss and the January 9, 2019 ruling granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,855 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

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

CERTIFICATE OF SERVICE

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

DATE: April 24, 2019

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

CERTIFICATE OF SERVICE

I further certify that on _____, 2019, I mailed by First-Class Mail, postage prepaid, ten (10) copies of the foregoing paper to the Eighth Circuit Clerk of Court, and 1 copy thereof to the respective counsel for the Appellees:

Rita Bettis Austen
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309

Alan K. Chen
Univ. of Denver Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208

Matthew Strugar
Law Office of Matthew Strugar
3435 Wilshire Blvd., Ste. 2910
Los Angeles, CA 90010

Kelsey R. Eberly
Animal Legal Defense Fund
515 East Cotati Avenue
Cotati, CA 94931

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