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

ANIMAL LEGAL DEFENSE FUND, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, BAILING OUT BENJI, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., and CENTER FOR FOOD SAFETY Plaintiffs, vs. KIMBERLEY K. REYNOLDS, in her official capacity as Governor of Iowa, TOM MILLER, in his official capacity as Attorney General of Iowa, and BRUCE E. SWANSON, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	No. 17-CV-00362-JEG-HCA **DEFENDANTS' COMBINED BRIEF IN SUPPORT OF RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

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

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I. INTRODUCTION

Iowa's "Ag-Fraud" statute, Iowa Code section 717A.3A, is not unconstitutional. The Ag-Fraud statute criminalizes: a) obtaining access to an agricultural production facility by false pretenses; and b) 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 facility, knowing that the act is not authorized. Iowa Code §§ 717A.3A(1)(a)-(b) (2017).

Plaintiffs Animal Legal Defense Fund, Iowa Citizens for Community Improvement, Bailing Out Benji, People for the Ethical Treatment of Animals, and Center for Food Safety (hereafter collectively "Plaintiffs") assert that the Ag-Fraud statute prohibits their preferred investigatory method—undercover investigations—and erroneously conclude the statute creates an unconstitutional restriction on free speech under the First Amendment to the United States Constitution. Specifically, Plaintiffs claim the statute violates the First Amendment because it is content- and viewpoint-discriminatory and overly broad.

II. STATEMENT OF FACTS

Defendants, for purposes of summary judgment, do not dispute any of the facts in Plaintiffs' Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 49-1 ("Plaintiffs' SUMF"). *See* Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ("Response to SUMF"). Defendants only deny Plaintiffs' erroneous legal interpretations/conclusions of Iowa's Ag-Fraud statute that are intertwined with Plaintiffs' SUMF in several paragraphs. Response to SUMF ¶¶ 45-51, 58-61, 64, 70, 74-75.

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

The late Senator Joe Seng, a sponsor of the bill that became the Ag-Fraud statute, defended the bill, stating "[h]ere's a commercial enterprise intent on bio-security and here comes someone (who gets in) under false pretenses and screws up your whole system. That should be criminal." Defendants' SUMF ¶ 3. Then-State Senate President Jack Kibbie supported an earlier version of the Ag-Fraud statute because of a concern for bio-security, stating "[t]here's viruses that can put these producers out of business, whether it's cattle, hogs or poultry." Defendants' SUMF ¶ 5. Then-Governor Branstad, who signed the Ag-Fraud bill into law, supported the bill, stating "[i]f somebody comes on somebody else's property through fraud or deception or lying, that is a serious violation of people's rights—and people should be held accountable for that." Defendants' SUMF ¶ 6.

III. PROCEDURAL HISTORY AND LEGAL STANDARD

Defendants agree with Plaintiffs' recitation of the procedural history of this matter and proper legal standard applicable to summary judgment. Defendants would only add that Defendants have also now moved for summary judgment because: 1) there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Fraud statute; 2)

Iowa's Ag-Fraud statute is not content- or viewpoint-based; 3) and the statute is not facially overbroad under the First Amendment. Since Defendants are not denying any of the underlying facts in Plaintiffs' SUMF, but rather Plaintiffs' interpretations of the law, this matter involves solely a legal dispute and is ripe for summary judgment.

IV. ARGUMENT

Defendants move this Court to grant summary judgment because the conduct prohibited by Iowa's Ag-Fraud statute is not protected under the First Amendment.[1] First Amendment jurisprudence establishes that there is no First Amendment right to use false pretenses to gain access to an agricultural production facility or employment at said facility, with the intent to knowingly commit an unauthorized act. Nor does Iowa's Ag-Fraud statute create a content-based or viewpoint-based restriction on speech in violation of the First Amendment, and the statute is narrowly tailored to serve a significant governmental interest. Finally, Iowa's Ag-Fraud statute is not unconstitutionally overbroad.[2]

Although this Court, in its MTD Order, held that the Ag-Fraud statute both prohibits false speech that does not fall within an exception to First Amendment protection and creates a

[1] Although Plaintiffs' Motion for Summary Judgment ("MSJ") (Dkt. #49) and Brief in Support of Plaintiffs' Motion for Summary Judgment (Dkt. #53) (hereafter collectively referred to as "Plaintiffs' MSJ") address arguments to establish standing, for purposes of summary judgment only, Defendants will not contest the issue. Defendants alleged Plaintiffs lacked standing in Defendants' Motion to Dismiss and Brief in Support of Motion to Dismiss (Dkt. #18 and 24) (hereafter collective referred to as "MTD"). This Court ruled that Plaintiffs had satisfied the requirements of standing in its Order on the MTD (Dkt. #39) (hereinafter referred to as "MTD Order"). Defendants continue to contest that Plaintiffs have satisfied the standing requirements, and only raise the issue of standing in this footnote in order to preserve the issue for any appeal.

[2] Although not plead in Plaintiffs' MSJ, Plaintiffs raised a Fourteenth Amendment due process argument in Count III, alleging that the Ag-Fraud statute burdens a fundamental right—speech protected by the First Amendment. Plaintiffs' Civil Rights Complaint (Dkt. #1), pp. 37-39. Defendants are entitled to summary judgment on this claim because the Ag-Fraud statute does not burden speech protected by the First Amendment. *See* Section IV.A of this Brief, pp. 6-20.

content-based restriction, Defendants respectfully reassert their prior arguments set forth in the MTD, as well as provide additional jurisprudence and undisputed material facts about the legislative intent behind the Ag-Fraud statute, in the hope that the Court will view the arguments in a new light, and conclude that the Defendants are entitled to summary judgment for the reasons set forth herein.

A. LYING TO GAIN ACCESS TO OR EMPLOYMENT, WITH AN INTENT TO COMMIT AN UNAUTHORIZED ACT, AT AN AGRICULTURAL PRODUCTION FACILITY ARE NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

The Ag-Fraud statute's prohibition on using false pretenses to obtain employment at an agricultural production facility, with the intent to commit an unauthorized act, does not violate the First Amendment because: 1) unconsented entry to private property constitutes a trespass in Iowa—a legally cognizable harm from which the law infers some damage; and 2) obtaining permission to enter private property provides a material gain by conferring the ability to do lawfully that which the law otherwise forbids and punishes as trespass.

While Plaintiffs allege that the Ag-Fraud statute runs afoul of their First Amendment right to free speech, in reality, Plaintiffs' Complaint and MSJ makes it clear that they are asking this Court to enshrine their preferred investigatory method—undercover, employment-based investigations—with the protections of the First Amendment. Undercover, employment-based investigations are the only investigative strategies the Plaintiffs complain they cannot avail themselves of under the statute.

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). Here, they cannot meet that burden. The Ag-Fraud statute does not prohibit protected speech, but rather prohibits conduct facilitated by false statements or material omissions that induce the target to do something he or she would not otherwise do. Specifically, the statute prohibits, under false pretenses, gaining entry to an agricultural production facility or obtaining employment at said facility, with the intent to commit an act not authorized by the owner. Iowa Code §§ 717A.3A(1)(a)-(b) (2017). 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.

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

The Supreme Court recently addressed whether certain fraudulent speech falls outside the First Amendment's protections, such that the speech can be criminalized. *See U.S. 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).[3]

[3] After the Supreme Court's decision in *Alvarez*, Congress amended the Stolen Valor Act to criminalize those "[w]hoever, with intent to obtain money, property, or other tangible benefit, fraudulently hold[] oneself out to be a recipient" of a specifically identified decoration or medal. 18 U.S.C. §704(b) (2013).

Prior to *Alvarez*, the Supreme Court had 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").

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).

2. Plaintiffs' Presentation of Persuasive Federal Jurisprudence on Similar Ag-Fraud Statutes in Other States is Incomplete.

Plaintiffs' presentation of federal jurisprudence on similar Ag-Fraud statutes in other states ignores some important distinguishing characteristics of the cases and completely ignores another case where a court rejected arguments similar to Plaintiffs. Defendants will not recite the specific details of each case discussed in Plaintiffs' Brief, as the Plaintiffs' descriptions were generally accurate, but instead will highlight specific issues Plaintiffs' ignored as well as the case law Plaintiffs' left out of their description.

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

Plaintiffs' description of the court's decision in *Animal Legal Defense Fund v. Wasden*, invalidating Idaho's prohibition on obtaining access by misrepresentation under the First Amendment, ignores Judge Bea's vigorous dissent from that portion of the decision. 878 F.3d 1184, 1205-13 (9th Cir. Jan. 4, 2018) (Bea, J., dissenting in part and concurring in part). The dissent included a lengthy discussion of Idaho's historic protection of private property rights. *Id*. The dissent also noted that in Idaho, unconsented entry—entry by misrepresentation—constitutes common law trespass, from which "damages are presumed to flow naturally." *Id*. at 1206. The dissent then criticized the majority for brushing aside the longstanding principle that the "right to

exclude"—a fundamental element 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).

While Plaintiffs correctly state that the Ninth Circuit upheld Idaho's prohibition on obtaining employment by misrepresentations under the First Amendment, they inaccurately describe that it was "only after applying an important narrowing construction." Plaintiffs' MSJ (Dkt. #53), p. 8. In *Wasden*, 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. 878 F.3d at 1201 (quoting *Alvarez*, 567 U.S. at 723). The court found the quoted language in *Alvarez* alone sufficient to justify its decision. (*Id*. 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 additional 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.").

b. *Western Watersheds Project v. Michael*.

In *Western Watersheds Project v. Michael*, the court held that a Wyoming statute—similar to Iowa's Ag-Fraud statute—did not violate the First Amendment's free speech protections. 196 F.Supp.3d 1231, 1242-47 (*rev'd on other grounds*, 869 F.3d 1189 (10th Cir. 2017)). The Wyoming statute specifically prohibited: a) entering private land with the intent to collect resource data[4]; b) entering private land and actually collecting resource data; and c) crossing private land without authorization to collect resource data on adjacent or proximate public land. Wyo. Stat. §§ 6-3-414(a)-(c) (2017).

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." *Western Watersheds Project*, 196 F.Supp. 3d at 1242. The lynchpin of the court's analysis was that, irrespective of the importance of the information sought, the restriction on conduct occurred on private property. *Id*. at 1241 ("Plaintiffs' desire to access certain information, no matter how important or sacrosanct they believe the information to be, does not compel a private landowner to yield his property rights and right to privacy."). The court's reasoning carried over to its decision upholding subsection (c), which prohibited resource data collection on public property if one had to cross private property to collect such data. *Id*. at 1243-44.

On appeal, the Tenth Circuit did not reverse the district court's ruling that the prohibition on resource data collection on private property did not violate the First Amendment. *Western Watersheds Project*, 869 F.3d at 1193-94. The Tenth Circuit, noting that Plaintiffs did not

[4] "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) (2017).

appeal the portion of the district court's decision that upheld the prohibition on resource data collection on *private* property, simply held that resource data collection on *public* property constituted speech protected under the First Amendment and remanded the case to the district court for analysis consistent with that conclusion. *Id*. at 1193-98 (emphasis added). Moreover, the Tenth Circuit appears to tacitly accept the district court's conclusion that the prohibition on resource data collection on private property did not violate the First Amendment. *Id*. at 1194. The Tenth Circuit noted that the district court "relied on Supreme Court precedent holding that individuals generally do not have a First Amendment Right to engage in speech on the private property of others," and then went on to state "[a]lthough subsections (a) and (b) of the statutes govern actions on private property, the district court was mistaken in focusing on these cases with respect to subsection (c)." *Id*.

3. 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.

a. 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 legislature and Governor recognized the importance of protecting private property by enacting Iowa's Ag-Fraud statute. *See* Defendants' SUMF ¶¶ 3, 6-7.

Depriving a property owner of their rights attending ownership or control of their private property through false pretenses imposes a "legally cognizable harm," and consequently, is the sort of speech that falls outside the protections of the First Amendment. Under Iowa law, an unconsented entry to private property constitutes a trespass—a 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) ("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 supreme courts in Wisconsin and Idaho both recognized actionable claims for trespass where the defendant merely crossed the threshold of the plaintiff's private property. *See 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).

Federal courts have also recognized the importance of protecting private property against trespass, even where the trespasser asserts First Amendment protections. The Wyoming District Court recognized the importance of protecting private property in *Western Watersheds Project*, rejecting the 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.

Federal court decisions to the contrary—*Wasden* and *Herbert*—fail to adequately recognize the importance of protecting private property rights and are distinguishable for three reasons. 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.").[5] The Stolen Valor Act did not prohibit obtaining access to private property by lying about receiving a military award; it simply prohibited lying about receipt of an award. 567 U.S. at 719. Consequently, unlike the Stolen Valor Act, Iowa's, Idaho's and Utah's prohibitions on access by false pretenses do not target "falsity and nothing more." *Cf. Wasden*, 878 F.3d at 1196 (citing *Alvarez*, 567 U.S. at 719).

Second, the courts trivialize private property owners' fundamental right to exclude persons from their property, stating "lying to gain entry merely allows the speaker to cross the threshold of another's property," *id*. at 1195, and "lying to gain entry, without more, does not itself constitute trespass." *Herbert*, 263 F. Supp. 3d at 1203. Unconsented entry onto private property constitutes trespass, for which the legislature in Iowa imposed criminal penalties. *See* Iowa Code §§ 716.7-716.8. The legislature clearly believed that unconsented entry onto private property imposed harm sufficient enough that it warranted a criminal penalty to deter such conduct.

However, Plaintiffs are apparently not deterred by Iowa's criminal penalties for trespass, having admitted that the conduct they seek to undertake is already prohibited by Iowa's trespass laws. *See* Plaintiffs' MSJ, p. 29 (arguing the Ag-Fraud statute's purported purpose of protecting private property does not advance a compelling state interest because "Iowa already has a

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

prohibition against trespass that does not implicate speech in any way."). As a result, the legislature determined it was necessary to provide additional restrictions on trespass at agricultural production facilities, specifically prohibiting trespass by false pretenses. 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.

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). 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).

Here, Plaintiffs' undercover investigations fall much closer to *Dietemann* than *Desnick*. Plaintiffs are using false pretenses to obtain access to an agricultural production facilities—private property not open to the public. The public or consumers have no right to access agricultural production facilities, and consequently, no right to obtain access by false pretenses in order to surreptitiously record conduct at said facilities. *See Food Lion*, 194 F.3d at 518-19; *Dietemann*, 449 F.2d at 248; *cf. Desnick*, 44 F.3d at 1352-1353; *Western Watersheds Project*, 196 F. Supp. 3d at 1241-42 (*rev'd on other grounds*, 869 F.3d at 1194, 1197-98).

b. 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 dissent in *Wasden* accurately describes that 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." 878 F.3d at 1212 (quoting *Shultz v. Atkins*, 554 P.2d 948, 953 (Idaho 1976)). The Plaintiffs' SUMF admits as much, wherein Plaintiffs state they have found it "necessary" to obtain access to agricultural production facilities under false pretenses in order to obtain the information they seek. (Dkt.# 49-1, ¶¶ 6, 32; *see also* Plaintiffs' Civil Rights Complaint (Dkt. #1), ¶ 104 ("Realistically, there is no investigative strategy that would meaningfully reveal the conditions inside agricultural production facilities without violating the statute.").

The majority in *Wasden* erroneously concludes—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, 1212. 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. 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; *cf. Desnick*, 44 F.3d at 1352-1353; *Western Watersheds Project*, 196 F. Supp. 3d at 1241-42 (*rev'd on other grounds*, 869 F.3d at 1194, 1197-98). Obtaining access to the latter arguably results in a greater "material gain" than access to the former.

4. 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 Trespasser.

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 is being paid by the agricultural production facility—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 prohibition at issue is also squarely and 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*, wherein the court rejected a First Amendment challenge to Idaho's prohibition on obtaining employment at an agricultural facility under false pretenses where the applicant had the intent to injure the employer. 878 F.3d at 1201-02 (citing *Alvarez*, 567 U.S. at 723).

Similar to Idaho, Iowa's statute contains a limiting restriction, imposing liability only on those who gain employment under false pretenses *and* who have the intent to commit an unauthorized act, further shielding the statute from infringement of the First Amendment. *See id.* at 1201-02. The added requirement of intent to commit an unauthorized act inoculates against any argument that the prohibition punishes those who simply overstate their education or experience to obtain employment. *Id.* Although Iowa's prohibition is slightly broader than Idaho's—because it addresses only the intent to knowingly commit an unauthorized act rather than an intent to injure—Iowa's prohibition should be no more problematic under the First Amendment than Idaho's since Iowa's 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)).

Here, although the Court's MTD Order concluded that conduct prohibited by Iowa Code sections 717A.3A(1)(a) and (b) do not impose the kinds of legally cognizable harms or bestow material gains that have historically removed certain conduct facilitated by false statements from the protections of the First Amendment, MTD Order, Dkt. No. 39, pp. 26-31, the Defendants

would respectfully request that the Court, based upon the foregoing, reverse its earlier decision and conclude that the Ag-Fraud statute's prohibitions in sections (a) and (b) do not violate the First Amendment.[6,7]

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

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

Even assuming the conduct prohibited by Iowa's Ag-Fraud statute is not exempt from the protections of the First Amendment, 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 v. Coakley*, 134 S. Ct. 2518, 2531 (2014). A law is content-neutral when the violation of the law occurs solely because of where the person speaks, not necessarily what is said. *Id.*

Iowa's 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.

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[6] 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).

[7] If the Court were to find that Iowa's Ag-Fraud statute applies to conduct or speech unprotected by the First Amendment, for the same reasons set forth in section IV.B.2 of this Brief at pp. 22-23, the Court should conclude that the statute does not create an invalid viewpoint-based restriction in violation of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Plaintiffs' argument that the statute is content-based because it makes distinctions amongst persons who make true or false statements, 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 v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *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.

Plaintiffs also argue that the statute is content-based because "it is limited to the subject matter of commercial agricultural industry practices" and "seeks to prohibit undercover investigations" of only agricultural faculties. Plaintiffs' MSJ (Dkt. #53), p. 23. Legislatures can "adopt laws to address the problems that confront them." *Burson* v. *Freeman*, 504 U.S. 191, 207 (1992). Iowa's Ag-Fraud statute is not the only example of Iowa's legislature targeting only a certain industry for protection; Iowa also prohibits trespass on military bases, Iowa Code section 29A.42, in addition to the general prohibition of trespass in Iowa Code section 716.7. The Supreme Court has also recognized that laws are not content-based simply because they target a particular industry or business for protection. *See McCullen*, 134 S. Ct. at 2531 (recognizing the law was content-neutral, but invalidating the law providing for buffer zones around only abortion clinics under a different First Amendment rationale); *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (finding content-neutral a statute enacted to end harassment outside abortion clinics). In

McCullen, the Court acknowledged that the law had the "inevitable effect" of restricting abortion-related speech more than other speech, but that alone did not make a facially neutral law content-based. 134 S. Ct. at 2531. Accordingly, Iowa's Ag-Fraud statute is content-neutral.

2. Iowa's Ag-Fraud Statute is Viewpoint-Neutral.

Plaintiffs allege Iowa's Ag-Fraud statute is unconstitutional under the First Amendment because it singles out speech critical of agribusiness for special, disfavored treatment, and consequently is a viewpoint-based restriction on speech in violation of the First Amendment. Plaintiffs' MSJ (Dkt #53), pp. 24-25. Plaintiffs' arguments are without merit and should be rejected.[8] Even assuming the conduct prohibited by Iowa's Ag-Fraud statute is not exempt from the protections of the First Amendment, Iowa's Ag-Fraud statute is view-point neutral. There is no clear, discriminatory legislative purpose against a viewpoint under the statute, and the law is focused on prohibiting certain conduct of persons, irrespective of the message or political agenda of those persons.

When states "single[] out a subset of messages for disfavor based on the views expressed," they are discriminating based on viewpoint. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). Plaintiffs' only sources of evidence for their allegation are several legislators' statements on the bill that eventually became Iowa's Ag-Fraud statute. Plaintiffs' MSJ (Dkt. #53), pp. 24-25. Plaintiffs' argument conveniently ignores a host of additional quotes from legislators and from then-Governor Branstad in which they articulated the intent behind the bill was to protect private property and bio-security measures/protocols. *See* Defendants' SUMF ¶¶ 1-7.

The Ninth Circuit addressed this very argument in *Wasden*, and concluded that Idaho's Ag-Fraud statute did not create a viewpoint-based restriction. 878 F.3d at 1202 (holding the

[8] Although the Court considered this issue in its ruling on Defendants' Motion to Dismiss, it did not make a substantive conclusion regarding it. MTD Order (Dkt. #39), pp. 32-33.

legislative purpose of the statute cannot be said to have been "enacted solely to suppress a specific subject matter or viewpoint."). And even if the regulation disproportionately affects animal-rights groups, that factor does not make the regulation content-based, let alone viewpoint-based. *McCullen*, 134 S. Ct. at 2531. The law can still be "justified without reference to the content of the regulated speech" based on concerns for private property or bio-security. *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, (1986)). The Ag-Fraud statute is not concerned with the message, positive or negative, of any speech resulting from breach of the statute. The Ag-Fraud statute simply regulates entry or employment by deception, for any reason, into an agricultural production facility.

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

Even where a statute is content-neutral, it must 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 portion of the burden on speech does not serve to advance its goals." *Id*. (quoting *Ward*, 491 U.S. at 799).

Plaintiffs argue that Iowa's Ag-Fraud statute cannot withstand intermediate scrutiny because the statute's intent is to prohibit speech critical of the animal agricultural industry, which is not a significant governmental interest, and the law is not adequately tailored since it burdens more speech than necessary. Plaintiffs' MSJ (Dkt. #53), pp. 33-34. Plaintiffs' arguments ignore the facts and the law.

First, as previously set forth, even assuming the conduct prohibited by Iowa's Ag-Fraud statute is not exempt from the protections of the First Amendment, the statute's purpose was not to prohibit speech critical of the animal agriculture industry, but to protect private property and bio-security measures/protocols. Defendants' SUMF ¶¶ 1-7. Given the facts set forth in Plaintiffs' Complaint about the size and importance of animal agriculture in Iowa, *see* Complaint (Dkt. #1), ¶¶ 84-88, protecting the aforementioned interests is certainly "significant."

Second, the statute does not burden more speech than is necessary to further the government's interest. The trespass-type harms imposed and material benefits conferred by access or employment under false pretenses are such that the First Amendment does not protect Plaintiffs' desired conduct. *See* Section IV.A. of this Brief, pp. 6-20. Plaintiffs rely upon *Wasden* and several other cases where courts indicated certain conduct could be deterred by enforcing existing penal laws. However, 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. Plaintiffs' SUMF (Dkt. #49-1), ¶¶ 10-16, 35-39, 45-46, 51, 58-59, 63-64; *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).

To the extent the Court relies upon *Wasden*, it is only persuasive authority for Iowa's prohibition on access by false pretenses. In *Wasden*, while the court invalidated the access by misrepresentation prohibition for failing to be adequately tailored, it upheld the prohibition on employment by misrepresentation. 878 F.3d at 1194-1202. 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 Code § 717A.3A(1)(b).

Iowa's Ag-Fraud statute creates neither a content-based nor a viewpoint-based restriction on speech in violation of the First Amendment. Iowa's Ag-Fraud statute is narrowly tailored to serve a significant governmental interest. Accordingly, this Court should deny Plaintiffs' Motion for Summary Judgment on this issue and grant Defendants' Cross-Motion for Summary Judgment.

C. IOWA'S AG-FRAUD STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD.

Even if the Court were to conclude that the conduct prohibited by the Ag-Fraud statute implicated the First Amendment, an overbreadth challenge to the Ag-Fraud statute should fail because the statute does not criminalize a sufficient amount of expressive conduct relative to non-expressive conduct. Even if it did, the statute is subject to a narrowing construction which renders it constitutional.

Any overbreadth challenge should be viewed skeptically. "A court should not lightly employ invalidation for overbreadth." *Gerlich v. Leath*, 152 F. Supp. 3d 1152, 1177 (S.D. Iowa 2016) (*aff'd* 861 F.3d 697 (8th Cir. 2017). "The overbreadth doctrine is 'strong medicine' to be used 'sparingly' and only when the overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Ways v. City of Lincoln, Neb.*, 274 F.3d 514, 518 (8th Cir. 2001) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)).

Courts typically evaluate overbreadth challenges using a three-step process. *See, e.g.*, *Phelps v. Powers*, 63 F. Supp. 3d 943, 953 (S.D. Iowa 2014); *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). The first step in the process is to construe the statute because "it

is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). If a statute's reach does not implicate expressive conduct, it is not vulnerable to an overbreadth challenge. But if a statute does implicate expressive conduct, the court must continue considering the challenge. *See, e.g., Phelps*, 63 F. Supp. 3d at 954-55; *Snider*, 752 F.3d at 1158.

As previously discussed, the behavior criminalized by the Ag-Fraud statute is not protected by the First Amendment. *See* Section IV.A. of this Brief, pp. 6-20. The Ag-Fraud statute only criminalizes a narrow range of conduct. It does not apply to the activities of legitimate whistle-blowers who are rightfully at the facility because the statute only criminalizes activities of individuals who have lied to gain access. Subsection (b) is even narrower because it only applies when someone attempts to gain employment under false pretenses, and only then if the person has the specific intent to knowingly commit an unauthorized act. *See Wasden*, 878 F.3d at 1201-03 (holding in part that Idaho may criminalize similar "employment-seeking misrepresentations" used to gain access to an agricultural production facility).

Existing overbreadth jurisprudence alone warrants a conclusion that the statute does not target expressive conduct necessitating First Amendment protection. In *United States v. Petrovic*, the court upheld an interstate stalking statute against an overbreadth challenge because it was "directed toward 'course[s] of conduct,' not speech, and the conduct it proscribe[d] [was] not 'necessarily associated with speech.'" 701 F.3d 849, 856 (8th Cir. 2012) (quoting *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)). And punishing an individual for non-expressive conduct, even if he acts in order to ultimately engage in free speech, does not "'implicate[] the First Amendment.'" *Cross v. Mokwa*, 547 F.3d 890, 896 (8th Cir. 2008) (quoting *Hicks*, 539 U.S. at 123). In *Cross*, the court rejected a First Amendment challenge to a municipal ordinance

brought by protestors who had been "arrested for illegally occupying a condemned building." 547 F.3d at 896. The protestors were not arrested for protesting but for trespassing. *Id*. Just because the trespassing occurred incident to the protestor's protesting activities did not implicate the First Amendment. *Id*.

Like the challenged statute and ordinance in *Petrovic* and *Cross*, the Ag-Fraud statute targets non-expressive conduct: obtaining access to or employment at an agricultural production facility, with an intent to commit an unauthorized act, under false pretenses. Engaging in this non-expressive conduct, even as part of a plan to ultimately engage in expressive conduct, clearly does not invoke First Amendment protections.

Even if the Ag-Fraud statute criminalizes protected, expressive conduct, to find it overbroad, the Court must still determine if it criminalizes a "'substantial' amount of protected conduct in relation to [its] legitimate applications." *Phelps*, 63 F. Supp. 3d at 955 (quoting *Snider*, 752 F.3d at 1158). Additionally, the complainant must overcome the "substantial barrier of showing that the challenged policies will inhibit the exercise of First Amendment rights by parties not before the Court." *Gerlich*, 152 F. Supp. 3d at 1178. "A law is not overbroad merely because one can think of a single impermissible application." *Id*. (citing *New York v. Ferber*, 458 U.S. 747, 772 (1982)). "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally prescribable conduct.'" *United States v. McDermott*, 822 F. Supp. 582, 595 (N.D. Iowa 1993) (quoting *Ferber*, 458 U.S. at 770 n. 25).

In *Phelps*, the Court considered overbreadth challenges to flag-desecration and flag-misuse statutes. The challengers sufficiently demonstrated that the flag-desecration statute criminalized a "'substantial' amount of protected conduct," pointing to the statute's explicit

prohibitions of various expressive activities. *Phelps*, 63 F. Supp. 3d at 955-56. The Court found that the flag-misuse statute lacked any legitimate application and that to violate it, the individual must "have the intent to engage in expressive conduct." *Id*. at 956.

Unlike the statutes in *Phelps*, the Ag-Fraud statute does not include any explicit prohibitions of various expressive activities. Iowa Code § 717A.3A. Plaintiffs also provide no information demonstrating that the Ag-Fraud statute criminalizes a sufficient amount of expressive conduct relative to non-expressive conduct. In fact, Plaintiffs fail to address this crucial aspect of the overbreadth analysis. *See* Plaintiffs' MSJ (Dkt. #53), at 34-36. They also assert speech is chilled without meaningfully considering the actual impact of the Ag-Fraud statute. Even in the absence of the statute, the activities Plaintiffs want to engage in are still illegal under Iowa's trespass laws. *See* Iowa Code § 716.7.

By deterring trespassing and protecting bio-security at agricultural production facilities, the Ag-Fraud statute has a host of legitimate applications. A mere handful of animal rights organizations claiming that their speech has been chilled simply does not establish that a sufficient amount of expressive conduct relative to non-expressive has been criminalized. Furthermore, Plaintiffs only speculate that the Ag-Fraud statute inhibits parties not before the Court from exercising their First Amendment rights. In the overbreadth section of Plaintiffs' MSJ, they conjure up numerous hypothetical scenarios but fail to provide examples of these scenarios actually occurring or to even address the likelihood of any of them occurring. *See* Plaintiffs' MSJ (Dkt. #53), at 35-36.

Nor does the analysis end here. Even if the Ag-Fraud statute criminalized a substantial amount of expressive, protected conduct in relation to its legitimate applications, the Court must consider if it is "readily susceptible" to a limiting construction rendering the statute

constitutional prior to finding it overbroad. *Snider*, 752 F.3d at 1158 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). Although "[f]ederal courts do not sit as a super state legislature, and may not impose their own narrowing construction if the state courts have not already done so," *Phelps*, 63 F. Supp. 3d at 957 (quoting *United Food & Commercial Workers Int'l. Union, et al., v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988)), no such imposition is needed here. The Ag-Fraud statute's legislative history demonstrates a legislative intention to proscribe certain courses of non-expressive conduct, not speech, to protect private property and the bio-security measures of agricultural production facilities. *See* Defendants SUMF, ¶¶ 1-7. Plaintiffs fail to address any of these statements in their analysis of the statute's legislative history. *See* Plaintiffs' MSJ (Dkt. #53), at 5, 25, 28.

Additionally, the statute's language of using false pretenses or making false statements is also susceptible to a limiting construction which alleviates any constitutional concerns. It is criminal to "obtain[] access . . . by false pretenses" or "make[] a false statement or representation . . . [to obtain employment] at an agricultural production facility . . . with an intent to commit an [unauthorized] act." Iowa Code §§ 717A.3A(1)(a)-(b). The textual construction of the statute cabins when lies become criminal by focusing on only the lies which facilitate entry or employment. The Ag-Fraud statute criminalizes deception only when it is material to gaining access or employment at the facility. Lies that are inconsequential to access are not criminalized. The Ag-Fraud statute thus falls firmly in the tradition of finding that entry through misrepresentation causes legally cognizable trespass harm. *E.g.*, *Green*, 472 P.2d 307; *cf. Herbert*, 263 F. Supp. 3d at 1204-05 (rejecting Utah's attempts to limit the application of its Ag-Fraud statute to material false statements). Trespass actions serve to vindicate a legal right and allowing individuals to deceive their way onto land without facing consequences for trespass

flies in the face of private property rights. *See Jacque*, 563 N.W.2d. at 160-61. The Ag-Fraud statute is quite susceptible to this limiting construction consistent with its legislative history (protecting private property and bio-security measures/protocols), the grammar of the text itself, and the purpose and history of trespass actions in America. *See* Defendants' SUMF, ¶¶ 1-7. Plaintiffs' overbreadth analysis never considers any limiting construction, and thus wholly fails to address either of the aforementioned ones.

Accordingly, the Court should find that the Ag-Fraud statute is not unconstitutionally overbroad, dismiss Plaintiffs' Motion for Summary Judgment on this issue, and grant Defendants' Cross-Motion for Summary Judgment on this issue.

V. 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 creates neither a content-based or viewpoint-based restriction on protected speech because there is no First Amendment protection for the conduct specifically prohibited by Iowa's Ag-Fraud statute, and the statute is narrowly tailored to serve a significant governmental interest. Finally, the statute is not facially overbroad under the First Amendment. Accordingly, Defendants respectfully request the Court deny Plaintiffs' Motion for Summary Judgment and uphold Iowa's Ag-Fraud statute by granting summary judgment for the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I electronically filed the foregoing paper with the Clerk of Court 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: July 13, 2018

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