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 DREW B. SWANSON, in his official capacity as Montgomery County, Iowa County Attorney, Defendants.	No. 17-CV-00362-JEG-HCA **DEFENDANTS' MOTION TO STAY**

COME NOW DEFENDANTS, Kimberley Reynolds, Tom Miller, and Drew Swanson (hereafter collectively referred to as "Defendants") by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 62, and for this Motion to Stay STATE:

I. Procedure

On February 27, 2018, this Court entered an order (Docket No. 39) denying, in part, Defendants' Motion to Dismiss, holding that the Plaintiffs had standing and Iowa Code section 717A.3A ("Ag-Fraud statute") restricts speech protected by the First Amendment ("MTD Order").

On January 9, 2019, this Court entered an order on the merits of the parties' cross-motions for summary judgment on all claims (Docket No. 79), in which the Court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Motion for Summary

Judgment ("MSJ Order"). The Court found 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.

On February 14, 2019, this Court entered an Order (Docket No. 86) declaring Iowa's Ag-Fraud statute unconstitutional under the First Amendment and permanently enjoining and prohibiting the Defendants from enforcing the statute ("Injunction Order"). The Injunction Order left for further resolution only the issue of Plaintiffs' claims for fees, costs, and expenses in accordance with 42 U.S.C. § 1988 and other applicable law. This Court entered Final Judgment on February 15, 2019 (Docket No. 87).

Defendants filed a notice of appeal on February 20, 2019 (Docket No. 88), appealing as a matter of right: the MTD Order; the MSJ Order; the Injunction Order; and any and all rulings adverse to Defendants in said Orders.

Defendants now move to stay all proceedings to enforce the Final Judgment and enforcement of the injunctive relief granted in the Injunction Order pending appeal of this matter. This motion would preserve the status quo of the case pending appeal.

II. Legal Standard

In applying the correlative Rule 8 of Appellate Procedure, the Eighth Circuit considers "four factors in determining whether to issue a stay: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (internal quotation and citation omitted). These factors are balanced; a stronger showing on one may reduce the need to rely on another.

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991).

> To obtain a stay, the movant need not always show a strong likelihood or high probability of success on the merits. *Michigan Coalition*, 945 F.2d at 153; *Thiry*, 891 F.Supp. at 566. "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury" that the movant will suffer absent a stay. *Michigan Coalition*, 945 F.2d at 153. If the other "equitable factors strongly favor interim relief, the court 'is not required to find that ultimate success by the movant is a mathematical probability' and 'may grant a stay even though its own approach may be contrary to movant's view of the merits.' " *Thiry*, 891 F.Supp. at 566 (citations omitted); *see Hilton*, 481 U.S. at 778, 107 S.Ct. at 2120 (a stay is permissible when a substantial case on the merits exists and the other factors support the stay); *Standard Havens Products v. Gencor Industries*, 897 F.2d at 512– 13; *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981). When the other three factors strongly support the interim relief, the court may grant the stay if the movant presents a substantial case on the merits. *Hilton*, 481 U.S. at 778, 107 S.Ct. at 2120; *Ruiz*, 650 F.2d at 565; *McGregor Printing Corp. v. Kemp*, 811 F.Supp. at 12 ("serious legal questions").

First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 163 F.R.D. 612, 615 (D. Kan. 1995).

III. Application

A. Defendants have a likelihood of success on the merits.[1]

[1] Defendants note they are placed in the uncomfortable position of asking a district court to determine whether its decision is likely to be overturned. However, "the Court need not determine that it erred and will likely be reversed—an acknowledgment one would expect few courts to make; instead, so long as the other factors strongly favor a stay, such remedy is appropriate if 'a serious legal question is presented.'" *Loving v. I.R.S.*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (quoting *CREW v. Office of Admin.*, 593 F.Supp.2d 156, 160 (D.D.C. 2009)). It has been noted that "district courts should still apply the familiar 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes," *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir.2008) (en banc), "with a 'fair chance of prevailing' on the merits, with a 'fair chance' meaning something less than fifty percent," *id.* at 730. However, "[o]nly in a case ... where a preliminary injunction is sought to enjoin the implementation of a duly enacted state [or federal] statute, must district courts make a threshold finding that a party is likely to prevail on the merits." *Id.* at 732–33 (footnote omitted). *Gomez v. Allbee*, 134 F.Supp.3d 1159, 1173 (S.D. Iowa 2015).

Defendants respectfully submit there is substantial ground for difference of opinion, and thus a reasonable likelihood of success, as to whether Iowa's Ag-Fraud statute restricts protected speech in violation of the First Amendment. The Supreme Court has held false speech that imposes a legally cognizable harm or provides a material gain to the speaker is not protected under the First Amendment. *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).[2]

Defendants have argued 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 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 or employment at a facility on said property provides a material gain by conferring the ability to do lawfully that which the law otherwise forbids and punishes as trespass, and it can provide income to the speaker.

[2] 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).

Although the Court disagreed with the Defendants' arguments, there is precedent that supports those arguments and could lead to reversal of the Court's decisions. The Ninth Circuit has upheld a portion of Idaho's Ag-Fraud statute, which is arguably similar, although slightly narrower, than Iowa's. *See Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. Jan. 4, 2018) (invalidating Idaho's prohibition on obtaining access by misrepresentation under the First Amendment by 2-1 decision, but unanimously upholding Idaho's prohibition on obtaining employment by misrepresentations with an "intent to cause economic or other injury" to the employer). Iowa's prohibition on obtaining employment under false pretenses is not much broader than Idaho's prohibition on the same conduct, but with an intent to "commit an unauthorized act" rather than to cause "other harm." Most employers likely prohibit unauthorized acts because they feel said acts may result in some "harm", economic or otherwise, to the employer.

Moreover, as previously set forth, the Supreme Court expressly addressed the use of false pretenses in obtaining employment, finding a restriction on such conduct does not violate the First Amendment, which the court recognized in *Wasden*. 878 F.3d at 1201-02 (citing *Alvarez*, 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 Supreme Court's analysis is equally applicable to Iowa's Ag-Fraud statute and supports the conclusion that a prohibition on obtaining employment under false pretenses, with an intent to commit an unauthorized act, does not run afoul of the First Amendment.

Even with respect to the Ninth Circuit's invalidation of Idaho's prohibition on obtaining access by misrepresentation, the vigorous dissent by Judge Bea, along with the other

jurisprudence proffered by Defendants describing the historic importance of the protection of private property, offer substantial support for the Defendants' argument that unconsented entry—entry under false pretenses—constitutes common law trespass—a "legally cognizable harm"—from which "damages are presumed to flow naturally." *See id*. at 1206.

In addition, the U.S. District Court of Wyoming upheld a prohibition on entering private property to collect resource data against a challenge to the statute based upon the First Amendment, ruling "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data", which the Tenth Circuit tacitly affirmed. *Western Watersheds Project v. Michael*, 196 F.Supp.3d 1231, 1242 (D. Wyo. 2016) (*rev'd on other grounds*, 869 F.3d 1189, 1194 (10th Cir. 2017)) (the Tenth Circuit noted that the district court's analysis was mistaken when it extended that principle to the statute's prohibition on crossing public property to collect resource data on private property).

For these reasons, this Court should stay further proceedings and enforcement of the injunctive relief pending a determination by the Eighth Circuit on whether Iowa's Ag-Fraud statute restricts protected speech in violation of the First Amendment.

B. Defendants would be irreparably injured absent a stay.

The protection of private property and biosecurity is of the upmost importance. This Court acknowledged as much when it stated these interests were "important" but "not compelling in the First Amendment sense." MSJ Order, 14 (Docket No. 79). As previously argued by Defendants, the protection of private property in Iowa was deemed so fundamental and important that it was enshrined in Iowa's Constitution, and Iowa's Supreme Court has recognized that in some instances, an Iowan's property rights warrant more protection under the Iowa Constitution than under the Federal Constitution. *See* Iowa Const. art. I, § 1 (identifying

the inalienable right to acquire, possess, and protect property); *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).

The protection of private property is so revered that the law infers some damage from "every unlawful entry, or every direct invasion of the person or property of another." *Nichols v. City of Evansdale*, 687 N.W.2d 562, 573 (Iowa 2004) (citing 75 Am.Jur.2d Trespass § 117 (1991)). Moreover, in a case involving a direct conflict between the "right to exclude others" and the First Amendment, the Iowa Supreme Court held the Constitution does not protect against a private party who seeks to abridge free expression of others on private property. *See State v. Lacey*, 465 N.W.2d 537, 538 (Iowa 1991) (rejecting defendants' arguments they did not commit trespass on private property because their conduct was a reasonable exercise of free speech).

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 promote biosecurity through the enforcement of Iowa's Ag-Fraud statute may significantly impact Iowans. *See* Complaint (Dkt. #1), ¶¶ 84-88; *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).

These interests are in jeopardy, and the State is at risk of irreparable injury without a stay. Prior to issuance of the Court's MSJ Order, there had been no violations of Iowa's Ag-Fraud statute since its passage in 2012. *See* Complaint, ¶ 6 (Docket No. 1) ("In the years leading up to the passage of the Ag-Gag law in 2012, there were at least ten undercover investigations in Iowa. Since the law's passage, there have been zero."). Since the Court's MSJ Order, advertisements for undercover investigators at animal production facilities in Iowa have now been posted, despite Iowa's existing laws prohibiting trespass (Iowa Code § 716.7(2)) and the willful possession, transportation, or transfer of a pathogen with an intent to threaten the health of an animal or crop (Iowa Code § 717A.4). *See* Donnelle Eller, *With Iowa's Ag-Gag Law Ruled Unconstitutional, Animal Rights Group Seeks Undercover Investigator*, Des Moines Register, (Jan. 18, 2019), available at: https://www.desmoinesregister.com/story/money/agriculture/2019/01/18/animal-rights-group-mercy-for-animals-looks-undercover-investigator-iowa-ag-gag-law-video/2593886002/.

As Defendants have previously stated, based upon Plaintiffs' own admissions, Iowa's existing trespass laws will not deter undercover investigators from continuing to obtain access or employment under false pretenses in the absence of the Ag-Fraud statute. *See* Defendants' Combined Resistance to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (ECF No. 63), at 24.

Defendants have appealed this injunctive relief as a matter of right and would be irreparably harmed if the relief is not stayed until the Eighth Circuit has exercised its appellate jurisdiction over this issue.

C. A stay will not irreparably injure Plaintiffs.

Although a stay may prevent Plaintiffs from utilizing their First Amendment rights through their preferred investigatory method, the loss of one's preferred investigatory method is not an irreparable injury. A stay does not foreclose the Plaintiffs from using a number of other tactics to obtain information about agricultural production facilities, including traditional new-gathering methods such as interviews and public records requests, among others.

In addition, Plaintiffs will still be able to utilize whistleblowers to secretly record conditions at agricultural production facilities. Iowa's Ag-Fraud statute does not prohibit secret recordings and whistleblowing from legitimate employees. *See* Iowa Code § 717A.3A(1)(b). Plaintiffs admitted that a number of whistleblowers have approached them about conditions in facilities, notwithstanding Iowa's Ag-Fraud Statute. *See* Complaint ¶ 92 (Docket No. 1).

The Plaintiffs did not seek, nor did this Court order, a preliminary or temporary injunction, staying the enforcement of Iowa's Ag-Fraud statute during the pendency of the proceeding. Staying the pending injunction would maintain this status quo without injury to Plaintiffs.

D. Public interest.

Here, although the public certainly has an interest in ensuring the exercise of their First Amendment rights, the public also has a countervailing interest in protecting private property and ensuring the protection of biosecurity at Iowa's agricultural production facilities. The First Amendment right at issue here is the ability to make false statements in order to obtain access or employment—with an intent to commit an unauthorized act—to an agricultural production facility, and when compared with the interest to the public in protecting private property and biosecurity, including preventing the spread of food-borne illness, the balance arguably leans towards the latter.

E. Conclusion

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

Because the Defendants have made a strong showing that they are likely to succeed on the merits and the balance of harms, and the public interest weigh towards granting a stay and maintaining the status quo, Defendants respectfully request a stay on proceedings for the enforcement of injunctive relief until the Eighth Circuit has ruled on the pending appeal. Such a stay would maintain the status quo, protect all the parties' interests, and allow the orderly disposition of this case. No bond would be necessary because there are no monetary damages.

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: February 20, 2019

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