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

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| **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**<br><br>Plaintiffs,<br><br>v.<br><br>**KIMBERLY 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,<br><br>Defendants. | **CASE NO. 4:17-cv-362**<br><br>**SURREPLY TO MOTION TO DISMISS** |

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, by and through their undersigned attorneys, and hereby submit this surreply on the Motion to Dismiss filed by Defendants Kimberly Reynolds, in her official capacity as Governor of Iowa, Tom Miller, in his official capacity as Attorney General of Iowa, and Bruce Swanson, in his official capacity as Montgomery County, Iowa County Attorney (collectively, "the State"):

In its reply brief, the State concedes that its motion to dismiss does not address Plaintiffs' first cause of action—that the Ag-Gag statute violates the First Amendment because it discriminates based on content and viewpoint—and claims it failed to do so because it contends

that the Iowa Ag-Gag statute "does not restrict protected speech under the First Amendment." Reply Brief in support of Motion to Dismiss ("Reply Br.") at 2. The State appears to misconstrue content neutrality doctrine. As Plaintiffs noted in their resistance brief, Resistance Brief to Motion to Dismiss ("Resistance Br.") at 26, the First Amendment prohibits content- and viewpoint-based restrictions even within categories of *unprotected* speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (striking down ordinance that only applied to unprotected "fighting words" because it drew content-based proscriptions within a category of unprotected speech).

In its reply, the State defends the Iowa Ag-Gag statute's prohibition on access by false pretense by arguing that the Ninth Circuit simply got it wrong in *Animal Legal Defense Fund v. Wasden,* No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018). But the Ninth Circuit decision is in accord with *every* Circuit Court to have examined the issue of whether misrepresentation vitiates consent to enter. *See, e.g*., *Desnick v. Am. Broad. Cos., Inc*., 44 F.3d 1345, 1352 (7th Cir. 1995) (lying to gain access constitutes trespass only when the access results in an "invasion . . . of any of the specific interests that the tort of trespass seeks to protect."); *Food Lion, Inc. v. Capital Cities/ABC, Inc*., 194 F.3d 505, 517 (4th Cir. 1999) (agreeing with "*Desnick*'s thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect"); *see also Am. Transmission, Inc. v. Channel 7 of Detroit, Inc*., 609 N.W.2d 607, 613-14 (Mich. App. 2000) (noting misrepresentation did not defeat consent to enter on trespass claim); *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1205 (D. Utah 2017) ("gaining access to a business by concealing an organizational affiliation, even if that concealment was the reason access was granted, does not alone cause a legally cognizable trespass harm"). As Plaintiffs noted in their resistance brief, the State's argument would make a criminal out of the job

applicant (or anyone else who seeks to access an agricultural operation) who falsely claims she is a Born Again Christian, married, a fan of the local sports team, or a local resident when she is actually from out of town. Resistance Br. at 9.

The State also attempts to fit the Ag-Gag's prohibition on obtaining employment by false statement or representation within the contours of the limits imposed by *United States v. Alvarez*, 567 U.S. 709 (2012), and *Wasden* by claiming that the statute's requirement that the applicant intend to commit an unauthorized act suffices for *Alvarez*'s material harm requirement. Reply Br. at 5-6. Of course, a wide variety of unauthorized acts by employees do not cause any tangible loss or physical harm to employers in the way the Ninth Circuit construed Idaho's intent-to-injure requirement. *Wasden,* 2018 WL 280905 at *12-*13. The law's legislative history suggests that the primary unauthorized act that legislators sought to protect agricultural facilities against was undercover video-recording that leads to damning exposés. *See* Compl. ¶¶ 49-60. Recording does not physically or materially injure an employer in any way that *Alvarez* or *Wasden* contemplate, which is evidenced by the fact that *Wasden* also struck down Idaho's prohibition on filming agricultural operations. *Wasden*, 2018 WL 280905 at *13-*15. Prospective employees might also apply for a job with the intent to promote unionization (a practice known as salting and protected by federal labor law) or to document unsafe working conditions as part of an effort to make a complaint to state or federal regulators—each of which involves no physical or material harm to the employer but is criminalized by the Ag-Gag statute if the employer does not 'authorize' it.

As to the Equal Protection Claim, the State's reply makes no mention the fundamental rights theory advanced in Plaintiffs' resistance brief, *see* Resistance Br. at 46-47, and instead improperly seeks to dismiss a theory instead of an entire claim. Even so, the State appears to

argue that the Court should determine the applicable level of scrutiny and make determinations regarding the law's level of tailoring to the government's interest on a motion to dismiss, and even goes so far as to suggest the Court sever certain aspects of the law should it strike down other sections. Reply Br. at 6.

The State is getting ahead of itself. The issue presented by the motion to dismiss is whether, accepting the allegations in the Complaint as true, Plaintiffs have adequately alleged their three causes of action. Whether the statute is ultimately upheld, whether aspects of the statute should be severed, and whether the statute is appropriately tailored to the government's interest are issues that are appropriate for summary judgment or at trial, not on a motion to dismiss. This was the route followed by both the Utah and Idaho district courts in assessing the constitutionality of those state's Ag-Gag laws. *See* Resistance Br. at 4-10.

Because Plaintiffs have stated facts demonstrating plausible claims, the State's motion to dismiss should be denied. The State will have ample opportunity to defend the constitutionality of the statute, demonstrate that the statute is appropriately tailored to its interests, and argue that certain sections of the law should be severed in future proceedings.

Dated this 31st day of January, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify 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 served by the CM/ECF system.

Date: January 31, 2018

/s/Matthew Strugar
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