No. 20-3082

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, ET AL.,

Plaintiffs-Appellees,

v.

LAURA KELLY,
in her official capacity as Governor of Kansas, **ET AL.,**

Defendants-Appellants.

On Appeal from the United States District Court for the District of Kansas
Honorable Kathryn H. Vratil, Case No. 18-2657–KHV

APPELLEES' BRIEF

Alan K. Chen
Civil Rights & Civil Liberties
Strategic Litigation Project
Univ. of Denver Sturm College of Law
2255 E. Evans Avenue
Denver, Colorado 80208
303-871-6283
achen@law.du.edu

Counsel for Plaintiffs-Appellees (additional counsel listed on inside cover)

ORAL ARGUMENT REQUESTED

Additional Counsel for Appellees

Matthew Strugar
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
(213) 252-0091 (fax)
matthew@matthewstrugar.com

Michael D. Moss, KS Bar #22624
Foley & Mansfield, P.L.L.P.
10740 Nall Avenue, Suite 242
Overland Park, KS 66211
913-232-8767
913-800-7238 (fax)
mmoss@foleymansfield.com

Justin Marceau
Of Counsel, Animal Legal Defense Fund
Civil Rights & Civil Liberties Strategic Litigation Project
University of Denver Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

Kelsey Eberly
Alene Anello
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533
keberly@aldf.org
ahowell@aldf.org

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
(202) 232-7203 (fax)
dmuraskin@publicjustice.net

George A. Kimbrell
917 SW Oak St., Suite 300
Portland, OR 97205
(971) 271-7372
(971) 271-7374 (fax)
gkimbrell@centerforfoodsafety.org

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiffs-Appellees Animal Legal Defense Fund, Center for Food Safety, Shy 38, Inc., and Hope Sanctuary hereby certify that they have no parent corporations, and that no publicly-held corporation owns more than ten percent of any of the Plaintiff-Appellee organizations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees request that the Court hold oral argument and allot 30 minutes per side because this case involves complex First Amendment questions related to the validity of a state criminal statute.

STATEMENT REGARDING PRIOR RELATED APPEALS

There are no prior or related appeals to this case.

STATEMENT OF THE ISSUES

Whether the Kansas Ag-Gag law, as codified in KAN. STAT. ANN. §§ 47-1827 (b), (c), and (d), which criminalizes using deception to gain entry to animal facilities in order to conduct undercover investigations, including the making of video recordings, violates the First Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

Introduction

Since at least the days of Nellie Bly[1] and Upton Sinclair,[2] journalists and activists have engaged in the time-honored practice of undercover investigations. They and countless others since have gained access to property that was not open to the public by affirmatively misrepresenting or otherwise obscuring their true identities to avoid detection. Such deception was not only important, but necessary to allow them to discover hidden practices so they could then report their findings to the public. Consistent with this practice, in a wide range of contexts, undercover investigations based on deception are *authorized* by law, such as in the case of law

[1] NELLIE BLY, TEN DAYS IN A MAD-HOUSE (1887); BROOKE KROEGER, NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST (1994).

[2] LEON HARRIS, UPTON SINCLAIR: AMERICAN REBEL (1975); UPTON SINCLAIR, THE AUTOBIOGRAPHY OF UPTON SINCLAIR (1962).

enforcement "stings,"[3] civil rights "testers,"[4] and union "salts,"[5] to name just a few.

In recent years, these investigative practices have been adopted by animal rights groups,[6] including Plaintiff-Appellee Animal Legal Defense Fund ("ALDF"), a non-profit animal advocacy organization. Over the past five years, ALDF has contracted with investigators to obtain jobs in the commercial animal agriculture industry in states other than Kansas to discover evidence of abusive mistreatment of farm animals and publicly disseminate the information it discovers. App. II, 149–50.[7] Plaintiffs-Appellees Center for Food Safety, Shy 38, Inc., and Hope Sanctuary

[3] *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1146 (10th Cir. 2014) ("[i]f total honesty by the police were to be constitutionally required, most undercover work would be effectively thwarted.").

[4] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982).

[5] James L. Fox, *"Salting" the Construction Industry*, 24 WM. MITCHELL L. REV. 681 (1998).

[6] *See* Caitlin O'Kane, *Fair Oaks Farms under investigation after undercover video exposes animal abuse*, CBS NEWS, June 7, 2019, https://www.cbsnews.com/news/after-undercover-video-exposes-animal-abuse-at-fair-oaks-farms-grocery-store-removes-products/; Katie Thompson, *'Deplorable' conditions found at Maine egg farm, Humane Society says*, WMTW-TV, June 7, 2016, https://www.wmtw.com/article/deplorable-conditions-found-at-maine-egg-farm-humane-society-says/2013517; Roberto A. Ferdman, *"That one was definitely alive": An undercover video at one of the nation's biggest pork processors*, WASH POST, Nov. 11, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/11/11/that-one-was-definitely-alive-an-undercover-video-at-one-of-the-fastest-pork-processors-in-the-u-s/; *Farm Workers in Undercover Video Charged with Animal Abuse*, NBC NEWS, Feb. 13, 2014, https://www.nbcnews.com/news/investigations/farm-workers-undercover-video-charged-animal-abuse-n29541.

[7] All citations to the record refer to the volume (I or II) and to the page number in that volume.

("Listener Plaintiffs") are non-profit organizations that rely on information collected through ALDF's and others' investigations to advance their mission-driven, public advocacy. *Id*.

Undercover investigations sponsored by ALDF and other organizations have revealed systematic and horrific animal abuse in the commercial animal agriculture industry to authorities and to the public, and have substantiated the need for food safety recalls, citations for environmental and labor violations, plant closures, criminal convictions, legislative and regulatory changes, and corporate reforms. App. I, 25, 129. ALDF's 2016 investigation in Nebraska, for example, revealed horrifying conditions of long-term neglect and lack of appropriate veterinary care, with pigs suffering for days or weeks with grossly prolapsed rectums, intestinal ruptures, large open wounds, and bloody baseball-sized ruptured cysts. Pigs were denied food for long periods of time, and a botched "euthanasia" resulted in a mother pig slowly dying after being shot in the head multiple times over the course of several minutes. App. I, 125.

A 2015 ALDF investigation in Texas exposed atrocious conditions suffered by the chickens and workers inside a Tyson Foods slaughterhouse, with birds left to suffocate by the hundreds on overcrowded conveyor belts and discarded, still alive, in heaps of dead and dying chickens, feathers, and filth. ALDF's investigation further documented the injuries and illnesses the investigator endured working on

the chicken-hanging line, including carpal tunnel syndrome from attempting to hang 35 live birds a minute, eye infections from the chicken feces, dirt, dust, and dander that got into her eyes because of inadequate "protective" gear provided by Tyson, and extreme heat abrasion on her arms, which caused a painful, red rash. App. I, 126.

These investigations and the public conversations they inspire are an integral part of the discussion surrounding animal rights and welfare and the nature, safety, and integrity of American food production—matters of profound public concern. App. I, 25; App. II, 17–18. Not surprisingly, the disclosure of objectionable practices in the commercial animal agriculture industry has also led to loss of business from suppliers and consumers because of the resulting negative publicity. App. I, 129; App. II, 151.

Rather than applauding these efforts to promote democracy and transparency by uncovering information critical to public discourse, the State of Kansas seeks to brand such investigators as criminals. In 1990, Kansas enacted its original Ag-Gag law,[8] which it called "the farm animal and field crop and research facilities protection act," KAN. STAT. ANN. §§ 47-1825 et seq. *See* Appellants' Opening Brief ("Op. Br."), Attachment 1. The Kansas Ag-Gag law makes it a crime to commit the

[8] Critics have dubbed these provisions "Ag-Gag" laws. Mark Bittman, Op-Ed., *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27.

following acts without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility: exercise control over an animal facility, an animal from an animal facility or animal facility property with the intent to deprive the owner of it, § 47-1827(b); enter an animal facility that is not open to the public to take photographs or recordings, § 47-1827(c);[9] and (3) enter or remain at an animal facility despite having notice that such behavior was against the owner's wishes. § 47-1827(d).[10] While the law originally prohibited entry to animal facilities without the owners' consent, in 2012 the State amended the definition of "effective consent" so that gaining access by "deception," a staple of undercover

[9] Subsection (c) actually has four separate provisions, each of which would likely be violated by an investigator taking photographs or making video recordings. *See infra* n.16.

[10] The district court granted the State's summary judgment motion in part, concluding that no Plaintiff had standing to challenge subsection (a), which prohibits deceptive entry to "damage or destroy an animal facility or any animal or property in or on an animal facility." ALDF had challenged subsection (a), and requested that the district court either invalidate that provision or, in the alternative, issue a declaratory judgment stating that subsection (a) did not apply to the types of undercover investigations ALDF sought to undertake. App. I, 45–46. ALDF maintained that the damage provision in subsection (a) referred not only to physical damage, but to reputational damage or business losses incurred because of an investigation, whereas the State argued that subsection (a) applied only to physical damage. The district court agreed with the State, concluding that "[a] plain reading of subsection (a) establishes that it only prohibits physical damage to an animal facility or any animal or property." App. II, 160. The court's ruling effectively granted Plaintiffs the alternative relief they sought because the ruling represents an authoritative construction of the statute that it does not apply to undercover investigations, which are not undertaken with intent to cause physical damage. Plaintiffs therefore did not cross-appeal that part of the district court's decision.

investigations, became a crime. This amendment coincided with the enactment of similar Ag-Gag laws in other states.[11]

ALDF and the Listener Plaintiffs filed this lawsuit on December 4, 2018 against Laura Kelly, in her official capacity as Governor of Kansas, and Derek Schmidt, in his official capacity as Attorney General of Kansas (collectively, "the State"), challenging the law's constitutionality on the ground that it violated the First Amendment right to freedom of speech. App. I, 15. The district court granted summary judgment to ALDF and the Listener Plaintiffs on the majority of their claims, declaring subsections (b), (c), and (d) on their face to be in violation of the First Amendment, App. II, 146, and, in a separate order, permanently enjoined the State from enforcing them. App. II, 216.[12]

---

[11] After a number of high-profile undercover investigations of the animal agriculture industry in the mid to late 2000s, "[l]egislators in sixteen states introduced ag-gag bills." Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 377–79 (2013). Ag-Gag laws in Idaho, Iowa, and Utah have all now been declared unconstitutional. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1199 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) ("*Reynolds II*") *appeal docketed*, No. 19-1364 (Feb. 22, 2019); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

[12] The district court also concluded that ALDF and the Listener Plaintiffs had standing to challenge subsections (b), (c), and (d) of the statute, because ALDF had provided evidence of its "intended conduct" for which it "faces a credible threat of prosecution under each section." App. II, 169. In its opinion, the court carefully explained how, based on the undisputed facts, investigators sponsored by ALDF would violate each of these subsections. *Id*. 161-69. The court found that the Listener Plaintiffs had standing to challenge these same provisions because they have a right

Summary of Legal Arguments

1. The district court properly held that the Kansas Ag-Gag law directly regulates communication and speech production that implicates the First Amendment's free speech clause. First, all provisions of the law target the use of deception to gain consent to enter animal facilities where investigators observe and document animal mistreatment and other health and safety violations. As the district court observed, the law's prohibition of deception "limits what plaintiffs may or may not say" and restricts "the communication an investigator may have with an animal facility," which it found to be "a regulation of speech in its most basic form." App. II, 177.

In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court held that lies are protected speech under the First Amendment unless they cause a "legally cognizable harm." *Id*. at 719 (plurality opinion); *see also id*. at 730 (Breyer, J., concurring in the judgment) (calling these "speech-related harms"). Though the Kansas Ag-Gag law regulates false speech, such speech does not cause a legally cognizable harm. ALDF-sponsored investigators do not intend to cause physical harm or tangible damage, but engage in the prohibited speech intending that

---

to receive information from a willing speaker, ALDF. *Id*. 170. The State has not challenged standing in this appeal.

investigations expose a facility's animal cruelty and other misconduct, and that such exposure result in warranted negative economic consequences for the facility's "enterprise" (i.e., business), such as from boycotts or other lost business resulting from bad publicity. App. II, 151–52. In other words, the harm produced by ALDF does not result from its speech and investigations of the facilities, but from the publication of truthful information discovered and the advocacy in which ALDF and others later engage. That is not a "legally cognizable harm" that places speech outside the First Amendment.

Further still, the law does not merely regulate ALDF and other animal rights groups, but also prohibits the free speech of many other individuals and organizations that might obscure their true identity to seek access to an animal facility, such as an investigative journalist doing a story on food safety, a union "salt" trying to organize animal facility workers, or an undercover investigator seeking to expose workplace safety violations, each of whom would be subject to prosecution just as with ALDF and its investigators.

2. The district court also correctly held that the law separately regulates speech, subjecting it to First Amendment scrutiny, because taking pictures at an animal facility is "speech and speech-creating activity that are within the ambit of the First Amendment." App. II, 177. Engaging in video recording is not only a pure form of expression in and of itself, *Animal Legal Def. Fund v. Wasden*, 878 F.3d

1184, 1203 (9th Cir. 2018), but also is protected by the First Amendment like other forms of speech production. *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *accord W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) (holding that "An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.").

3. Not only does the Kansas Ag-Gag law punish speech and speech creation, it does so in a viewpoint- and content-based manner. On its face, the law discriminates based on viewpoint because it directly regulates those who engage in undercover investigations with "the intent to damage the enterprise." It is only this desire to produce and disseminate speech that is *critical* of the animal agriculture industry that subjects ALDF-sponsored investigators to prosecution. In contrast, as the district court held, because the Ag-Gag law does not prohibit speech that is intended to *benefit* the enterprise, "the law plainly targets negative views about animal facilities and therefore discriminates based on viewpoint." App. II, 180.

The law is also viewpoint based because the legislative history reflects that in enacting original law and the 2012 amendments, Kansas legislators were motivated by their concerns about undercover investigators from animal advocacy organizations, even identifying ALDF by name. App. I, 77-78; App. II, 13-14. Thus, the Ag-Gag law was justified by reference to the speakers' objectives, which makes

it viewpoint discriminatory. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The law is also separately content based in two ways. First, the law's prohibition of deception-based entry overtly discriminates between truthful and non-truthful speech that does not cause a legally cognizable harm. *Reynolds II*, 353 F. Supp. 3d at 822. As the district court held, the law is content based because its prohibition of deception requires the State "to examine the content of speech" to determine whether the law has been violated (i.e., whether a person has in fact engaged in deception). App. II, 179. Again, because false speech that does not cause a legally cognizable harm or yield a material gain for the speaker is protected by the First Amendment, such discrimination triggers heightened judicial review.

Further, the law is content based because it targets undercover investigations only in the animal agriculture industry, and not speech used to investigate any other segments of the private sector. This is a distinct form of content discrimination because it focuses on critical speech only about the *subject matter* of animal facilities and the enterprises that operate them.

4. Because the law is both viewpoint and content based, strict scrutiny applies to its restrictions on speech, *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015), and the State bears the burden of proving the constitutionality of its actions. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). Observing

that the State did not even *attempt* to justify the law as furthering a compelling governmental interest, but instead asserted only that the law's provisions were a "reasonable" way to protect animal facility owners' privacy and property rights, the district court found the State's interests insufficiently weighty. App. II, 182. On appeal as well, the State does not attempt to meet its burden under strict or intermediate scrutiny. It fails to make any legal argument about the weight of its putative interests, and also neglects to identify any evidentiary basis for any such interests.

Even assuming the State had some interest in protecting agricultural property or privacy, and even assuming such interests were compelling or important, as the district court concluded, the law is not tailored to advance those interests to satisfy strict or intermediate scrutiny since it is substantially underinclusive; it singles out for punishment only a subset of those who might affect such interests. App. II, 182–83. There is also little doubt that the Ag-Gag law is not the least restrictive means to advance any property interest, because Kansas law already prohibits trespass through generally applicable laws.

The district court's decisions declaring §§ 47-1827 (b), (c), and (d) to be facially unconstitutional and enjoining the State from enforcing them should therefore be affirmed.

ARGUMENT

I. THE FIRST AMENDMENT'S FREE SPEECH GUARANTEES EXTEND TO THE SPEECH AND SPEECH-PRODUCING CONDUCT PROHIBITED BY THE KANSAS AG-GAG LAW.

The First Amendment to the U.S. Constitution prohibits government entities from "abridging the freedom of speech." U.S. CONST. amend. I.[13] This freedom is intended in part to promote public discourse about important legal, moral, and ethical truths and thereby further a robust democracy. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993). Laws like the Kansas Ag-Gag law, which suppress deception-based undercover investigations and the documentation of illegal, unethical, or otherwise unsavory conduct in the animal agriculture industry, impede those goals. For there can be little doubt that debates about the safety of the nation's food supply, cruelty to animals, workplace safety, and environmental harms in the animal agriculture industry are matters of profound public concern.[14] The law's sweep is also incredibly broad; its provisions regulate

[13] It has been long established, and frequently now goes without saying, that the First Amendment's free speech protections restrict state and local governments through the incorporation doctrine. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[14] While the public has shown increasing concern with the safety of our nation's food supply in recent years, *ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms*, ASPCA (Feb. 17, 2012), http://www.aspca.org/about-us/press-releases/aspca-research-shows-americans-overwhelmingly-support-investigations-expose, public attention to the overall conditions in the commercial animal agriculture industry has been especially heightened during the COVID-19 pandemic.

the speech of ALDF and other animal rights groups, but also chill the speech of others who engage in undercover investigations. For example, the law would criminalize the work of a journalist who lied about his professional identity to gain access to an animal facility to report on the facility's protection of workers from exposure to COVID-19 infection. Similarly, the State may prosecute a labor representative who hides her identity and seeks employment at a non-union animal facility to organize workers to form a union. In either case, the resulting actions may foreseeably result in economic "damage to the enterprise," thereby exposing the journalist and organizer to criminal prosecution. Recognizing this reality, the district court in this case found subsections (b), (c), and (d) of the Kansas statute to be facially unconstitutional in violation of the First Amendment.[15]

On appeal, the State appears to make two main arguments suggesting that the district court erred in concluding that the Kansas Ag-Gag law regulates speech protected by the First Amendment. First, the State claims that the actions of ALDF-sponsored investigators involve trespassory conduct and infringement of private property rights, not expression that counts as "speech" for purposes of the First

---

See, e.g., Robert Klemko & Kimberly Kindy, *He fled Congo to work in a U.S. meat plant. Then he – and hundreds of his co-workers – got the coronavirus*, WASH. POST. (Aug. 6, 2020); Jane Mayer, *How Trump is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 20, 2020).

[15] A facial constitutional challenge is evaluated "by applying the relevant constitutional test to the challenged statute." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012).

Amendment. Op. Br 11–22. Second, it claims that even if the law regulates speech, such expression is outside the First Amendment's scope because it constitutes false speech intended to "inflict damage," a legally cognizable harm that renders the speech unprotected. *Id*. 22–26. Essentially, the State attempts to characterize its law as if it were a generally applicable trespass statute, rather than what it is – a law uniquely targeting a particular type of speech and particular investigative activities that implicate the First Amendment's free speech guarantees.

Based on the plain text of the law, as recognized by the lower court, this Court should reject both of these claims. The Kansas Ag-Gag law targets protected speech, requiring First Amendment scrutiny, that the State does not even attempt to satisfy. Therefore, the law must be invalidated.

A. The Kansas Ag-Gag law criminalizes speech and speech-producing conduct that is central to ALDF's undercover investigations.

1. The law's anti-deception provisions directly prohibit pure speech used to facilitate information important to public discourse.

Each of the challenged sections of the Ag-Gag law prohibits the use of "deception" to secure consent for gaining entry to animal facilities. KAN. STAT. ANN. §§ 47-1826(e), 47-1827 (b), (c), and (d). The State claims that in doing so, the law prohibits physical entry, not speech, that is prohibited, thus attempting to characterize these provisions as nothing but trespass laws. Op. Br. 11–12. But as

ALDF and the Listener Plaintiffs demonstrated below, and the district court agreed, the law directly regulates pure speech.

The law seems perfectly suited to thwart undercover investigations by ALDF and other individuals, such as journalists and union organizers. Because "effective consent" excludes gaining consent by "deception," undercover investigators cannot obscure their identity to gain entry to an animal facility without violating that part of the law. The district court below found exactly that, noting that "the *prohibition on deception limits what plaintiffs may or may not say*. Plaintiffs intend for an ALDF investigator to speak to an animal facility owner to gain access to an animal facility, and whether the investigator violates the deception provision[s] depends on what he or she says." App. II, 177 (emphasis added). Thus, each of the challenged provisions "restrict[s] the communication an investigator may have with an animal facility owner. This is a regulation of speech in its most basic form." *Id*.

Other courts reviewing the constitutionality of state Ag-Gag laws with comparable provisions have agreed. *Wasden*, 878 F.3d at 1194 (holding that Idaho law prohibiting using a false statement to gain access to an agricultural production facility prohibits speech, not conduct); *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018) ("*Reynolds I*") (observing that Iowa law criminalizing gaining access to agricultural production facility "by false pretenses" is a restriction on speech, not conduct).

The State objects, contending that the Ag-Gag law only prohibits conduct, not speech, because "Entering private property is not speech." Op. Br. 11. As already explained, however, the law targets pure speech: deception to gain entry to animal facilities. As the district court in the Iowa Ag-Gag case noted, Iowa's law "does not merely prohibit obtaining unauthorized access to an agricultural production facility; it specifically prohibits doing so 'by false pretenses.' . . . [The law] on its face regulates what persons 'may or may not say' and thus is a restriction on speech." *Reynolds I*, 297 F. Supp. 3d at 918; *see also People for the Ethical Treatment of Animals, Inc. v. Stein*, No. 1:16CV25, 2020 WL 3130158, at *9 (M.D.N.C. June 12, 2020) ("where a law has more than an incidental effect on speech or where liability is triggered by engaging in First Amendment protected activity, the law is subject to First Amendment scrutiny.").

A typical trespass law would prohibit pure conduct – the act of nonconsensual physical entry onto private property – and only conduct. Indeed, this is precisely what Kansas's generally applicable trespass laws already forbids. KAN. STAT. ANN. § 21-5808 (prohibiting "entering or remaining upon or in any" private land or structure). In contrast, the Ag-Gag law's criminal provisions prohibit entry to property *when achieved through speech*. As the district court held, one cannot violate these provisions without engaging in deception, and deception requires communication to the animal facility owner or his agents. App. II, 177.

2. The law's prohibition of photography and audio-visual recording directly impedes ALDF's ability to engage in pure speech and speech-creating activity, both of which are protected by the First Amendment.

Kansas's Ag-Gag law also criminalizes speech in a second and distinct manner. The law specifically prohibits deceptive entry onto animal facilities to engage in photography and video recording, § 47-1827(c)(4) ("No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility . . . enter an animal facility to take pictures by photograph, video camera or by any other means."), as well as actions connected to such recording.[16]

The district court properly held that "the prohibition on taking pictures at an animal facility regulates speech for First Amendment purposes." App. II, 177. Thus, the provisions of subsection (c) unquestionably implicate the First Amendment's speech protections. The Supreme Court has long recognized that the display of

[16] Subsection (c) effectively prohibits recording in four distinct ways. In addition to (c)(4), which prohibits deception to gain entry to an animal facility to take photographs or make video recordings, two other parts of subsection (c) prohibit deception to gain access with the *intent* to violate the recording prohibition, (c)(1) and gaining such access *to commit or attempt to commit* any act "prohibited by this section," including the recording prohibition, (c)(3) (emphasis added). Finally, as the district court found, (c)(2) prohibits deception to gain entry and "remain concealed," because "an investigator may take minor steps to hide his or her investigative activities, such as standing behind a wall to covertly film a suffering animal." App. II, 151. Because they overlap, these provisions could be used to prosecute anyone who misrepresents their affiliation or motives to gain entry to an animal facility to make a video recording and evades detection while doing so.

movies, photographs, and other recorded images are speech shielded from government restriction by the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas."). Likewise, engaging in video recording and photography is expression protected by the First Amendment. As the Ninth Circuit has stated, "[t]he act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score." *Wasden*, 878 F.3d at 1203; *see also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (holding that "the process of tattooing is purely expressive activity.").

Numerous courts have recognized that citizens who make video recordings are engaged in a form of expression subject to constitutional protection. *See Am. Civil Liberties Union of Illinois*, 679 F.3d at 595–96 (right to record police officers while on duty in public); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (right to record police officers making arrest was clearly established); *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (right to record local government meeting and in the hallway outside that meeting); *Blackston v. State of Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (right to record state supreme court advisory committee meeting); *see also Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) (holding that law banning so-called "ballot selfies" violate First Amendment because of "special

communicative value" in memorializing such images). *See generally* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

Even if video recording were not purely expressive, subsection (c) of the Kansas Ag-Gag law would still implicate the First Amendment because the constitutional free speech guarantee extends not only to actual expression, but also to "the creation and dissemination of information." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see also W. Watersheds Project*, 869 F.3d at 1195–96 ("plaintiffs' collection of resource data constitutes the protected creation of speech."). As the Supreme Court has observed, "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 564 U.S. at 570. Furthermore, laws that restrict other actions that are preparatory to or facilitate speech are also subject to the First Amendment's protections. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (campaign spending); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012) (audio or audio-visual recording); *City of Hermosa Beach*, 621 F.3d at 1061–62 (process of tattoo creation). *See generally* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

The reasons for this scope of the First Amendment's coverage should be obvious. If the government is empowered to choke off the creation of speech at the outset of the expressive process, it can circumvent the freedom of speech by doing indirectly what the First Amendment forbids it to do directly. *W. Watersheds Project*, 869 F.3d at 1195–96; *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015). The freedom to distribute a political leaflet is an empty one if the government can criminalize the preparation and printing of leaflets.

Following these precedents, the district court correctly concluded that "the prohibition on taking pictures at an animal facility regulates speech for First Amendment purposes." App. II, 177. This holding is in accord with other courts that have examined the issue, including this one. *W. Watersheds Project*, 869 F.3d at 1195–96. By directly prohibiting photography or audio-visual recordings to document facts discovered behind an animal facility's walls, the Ag-Gag law restricts the creation of speech, just as much as it would if it prohibited investigators from taking handwritten notes or keeping a diary.[17]

The right to engage in photography and video recording is not solely limited to carrying out information gathering in public. Particularly instructive is this

[17] While investigating Chicago's meatpacking industry, Upton Sinclair wandered around work areas to gather information, but returned to his room to write down what he had observed. ANTHONY ARTHUR, RADICAL INNOCENT: UPTON SINCLAIR 49 (2006).

Court's decision in *Western Watersheds*, 869 F.3d at 1193, where it adjudicated the constitutionality of a provision of Wyoming law that imposed criminal and civil liability on any person who, intentionally or unintentionally, "*[c]rosses private land* to access adjacent or proximate land where he collects resource data." WYO. STAT. § 6-3-414(c)(i) (2016); WYO. STAT. § 40-27-101(c)(i) (2016) (emphasis added). The statute prevented individuals from gathering information "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." *Id.* §§ 6-3-414(e)(iv); 40-27-101(h)(iii). Furthermore, "collect" was broadly defined to mean to "*take a sample of material*, acquire, gather, *photograph or otherwise preserve information in any form* and the *recording of a legal description or geographical coordinates of the location of the collection*." *Id.* §§ 6-3-414(e)(i); 40-27-101(h)(i) (emphasis added).

This Court rejected Wyoming's claims that the statute was beyond the First Amendment's reach. Like the State here, Wyoming argued first that the law operated like a generally applicable trespass law, and second, that even if the law affected speech-creation, it did so only when such activity touched on private property. In rebuffing these arguments, this Court wrote, "The fact that one aspect of the challenged statutes concerns private property does not defeat the need for First Amendment scrutiny. In *Watchtower Bible & Tract Society of New York, Inc. v.*

Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), the Supreme Court applied the First Amendment to a law regulating both access to private property and speech." *W. Watersheds Project*, 869 F.3d at 1195. Furthermore, this Court noted that the Wyoming data trespass law differed from a generally applicable trespass statute because it "target[ed] 'creation' of speech by imposing *heightened penalties* on those who collect resource data." *Id*. at 1192 (emphasis added). The Kansas Ag-Gag law does precisely the same thing. It creates heightened penalties for those who gather information for advocacy; that a person may also need to "trespass" to fall within the law's prohibitions on speech is irrelevant.

The State attempts to evade the applicability of this Court's decision in *Western Watersheds* by referencing the district court's opinion before the appeal. It claims that the original district court decision, which dismissed the plaintiffs' complaint, established that laws prohibiting the gathering of information on private property are beyond the First Amendment's reach. Op. Br. 19–21 (citing *W. Watersheds Project v. Michael*, 196 F. Supp. 3d 1231 (D. Wyo. 2016), *rev'd*, 869 F.3d 1189). While the district court's opinion did reject plaintiffs' claim, and did address two provisions that were not raised on appeal—those that governed entering private land to collect data on that land rather than adjacent land—that does not limit

this Court's decision. Contrary to the State's assertions, this Court does not "accept[] the lower court's conclusion" when it does not pass on issues not raised. Op. Br. 20.

Indeed, the Wyoming provisions reviewed by this Court on appeal covered both trespassing to get to other property to gather information and gathering information on private property, which this Court held implicated the First Amendment. The Wyoming law imposed criminal and civil penalties on anyone who "crosses private land to access adjacent or proximate land where he collects resource data." WYO. STAT. §§ 6-3-414(a)–(c); 40-27-101(a)–(c). Under that provision, it does not matter whether one who violates the Wyoming law is going to collect resource data on public or private land, so long as it is "adjacent or proximate" to the private land crossed. This Court held that these provisions "regulate protected speech under the First Amendment and . . . are not shielded from constitutional scrutiny merely because they touch upon access to private property." *W. Watersheds Project*, 869 F.3d at 1192.

A careful reading of the district court's decision on remand in that case demonstrates that it understood this Court to have held laws that restrict information gathering on private land are subject to the First Amendment—and thus all provisions of the Wyoming law are now likely unconstitutional. Using the exact same theory as Kansas here, Wyoming argued the court should only consider an as-applied challenge, because this Court's decision did not apply to plaintiffs who

crossed private land to gather data on private land. The district court disagreed, stating that the Tenth Circuit's ruling established the First Amendment applied to "*data collectors on private land* with landowner permission who incidentally crossed other private land without permission" and therefore that "some instances of criminalized conduct may occur on private land does not prevent this Court from" applying the First Amendment. *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1190 n.7 (D. Wyo. 2018). That Kansas chose to criminalize video recording on private property, therefore, is of no consequence to whether that criminalization offends the First Amendment.

Accordingly, subsection (c) of the Kansas Ag-Gag law, which prohibits photography and video recordings at animal facilities, as well as associated actions taken to avoid detection of such recordings, restricts speech or speech-creating activity that implicate the First Amendment free speech rights of ALDF, the Listener Plaintiffs, and other undercover investigators. Because the creation of such recordings is inherently expressive, and because recording also serves as a critical precursor to speech, this part of the law is subject to heightened First Amendment scrutiny.[18]

[18] Although the restrictions on photography and video recording are sufficient to require First Amendment scrutiny of subsection (c), because that provision also prohibits deception-based entry to engage in such speech, it implicates free speech concerns in the same way as subsections (b) and (d).

B. The false speech prohibited by the Ag-Gag law neither causes a legally cognizable harm nor confers a material benefit on the speaker.

The State also seeks to evade First Amendment scrutiny by arguing that even if the Kansas Ag-Gag law's deception restrictions implicate speech, the speech it regulates is beyond the scope of constitutional protection.[19] As we interpret its claims, the State appears to argue that even if the law restricts false speech, it does so only because that speech either causes a legally cognizable harm or provides the speaker with a "material gain." Op. Br. 15–16. The relevant harms are, the State claims, (1) interference with private property owners' ability to restrict "control or entry" onto their property, *id*. at 16, and (2) the harm incurred when the speaker has the *intent* to cause harm (i.e., damage to the enterprise), even if no harm actually occurs. *Id*. at 22–26. We address these arguments in turn.

1. The Ag-Gag law does not prohibit falsehoods that cause a legally cognizable harm of access to private property.

In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court relied on the First Amendment to invalidate the conviction of a man who was found to violate the federal Stolen Valor Act when he lied about having been awarded the Medal of Honor. *Id*. at 729–30. Though the decision was divided into a plurality and

[19] Even if the Court were to accept this argument, it would not change the analysis with regard to the photography and video recording ban, which independently triggers First Amendment scrutiny.

concurrence, all six justices voting to invalidate the law agreed that there is no "general exception to the First Amendment for false statements." *Id*. at 718 (plurality opinion); *id*. at 733 (Breyer, J., concurring in the judgment). The lie at issue in *Alvarez* was indisputably valueless to society—"a pathetic attempt to gain respect that eluded [Alvarez]," *id*. at 714—and the government had identified a variety of harms to the military community when its honors are diluted by those who falsely claim to hold them, *id*. at 716. Nonetheless, six Justices in *Alvarez* recognized that even a worthless, truth-impeding lie is protected by the First Amendment unless it causes harm to the deceived party. *Id*. at 719 (plurality opinion) (using the phrase "legally cognizable harm"); *id*. at 730 (Breyer, J., concurring in the judgment) (calling these "speech-related harms").

Alvarez thus articulated a limiting principle for prohibiting lies—the government may restrict false statements of fact *only* when those statements cause "legally cognizable harm[s]" such as "an invasion of privacy or the costs of vexatious litigation," *id*. at 719, or are "made for the purpose of material gain," such as when someone engages in fraud and secures a victim's money (similar to an unjust enrichment). *Id*. at 723. On this point both the concurrence and the plurality opinion agree. *Id*. at 719, 722–23 (plurality opinion); *id*. at 734 (Breyer J., concurring).[20]

[20] In discussing legally cognizable harms, the State appears to misstate the holdings in two cornerstones of First Amendment doctrine, *New York Times Co. v.*

The Court's illustrations of what constitutes a "legally cognizable harm" or "speech related harm" make clear that not every psychological or nominal harm is sufficient to justify a restriction on lies. "Legally cognizable" contemplates injuries that would be recognized under the law. Thus, invasion of privacy is legally cognizable because other legal provisions protect privacy. Furthermore, "[t]he types of false statements historically unprotected by the First Amendment are those that cause 'specific or tangible' injuries." *Reynolds I*, 297 F. Supp. 3d at 921 (citations omitted). Not all harms, however, are legally cognizable. A fraud victim may have a legally cognizable harm for monetary losses for which a damages award can compensate, but there is no legal right to recover for the embarrassment from having been duped. The idea of "speech-related" harms suggests that the injury must be directly or proximately caused by the words themselves, as when victim is defrauded of her money as a result of someone lying about the true value of a product or investment.

The State first argues that the deception prohibited by its Ag-Gag law causes

---

Sullivan, 376 U.S. 254 (1964) and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), which the State represents as having "upheld the constitutionality" of speech restrictions. Op. Br. 23. The *New York Times* opinion, of course, overturned a jury's defamation verdict on the ground that the plaintiff was a public official, and required a high threshold for such suits to proceed. 376 U.S. at 283–84. Similarly, in *Hustler* the Court overturned a jury verdict for intentional infliction of emotional distress based on the right of free speech to engage in even outrageous parodies of public figures. 485 U.S. at 57.

a legally cognizable harm in the form of a trespass, and that the law is therefore not subject to First Amendment scrutiny. The State refers to several cases to support its claim that the Ag-Gag law protects private property rights. It further argues that the First Amendment does not establish a right of access to public or private property, even if that access is sought to engage in speech or speech creation. Op. Br. 12–14. But none of the cases relied on by the State are applicable here because they all involved laws of general applicability. In *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality opinion), for example, journalists sought special access to a county jail that would not have been available to others. In *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), there were similar claims for an *exemption from generally applicable laws* that incidentally burdened speech. These cases solely stand for the proposition that the State may regulate speakers in the same way it regulates all others—for example speed limits apply to someone on the way home just as much as someone on the way to a political rally and therefore the rally goer gets no special protection. Here, however, the Ag-Gag law specifically targets the investigative deceptions; contrary to Kansas's *actual* generally applicable trespass law, the Ag-Gag law specially criminalizes speech-related entry.

None of the cases on which the State relies involve the type of specific, speech-restricting criminal law that the Ag-Gag law represents. In *Animal Legal Def.*

Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017), a challenge to Utah's Ag-Gag law, the court addressed an argument virtually identical to the State's here:

> the State's reliance on these cases (and its argument in general) confuses two related but distinct concepts: a landowner's ability to exclude from her property someone who wishes to speak, and the government's ability to jail the person for that speech. The cases cited by the State deal with the first concept. They stand for the proposition that the First Amendment is typically *not a defense to generally applicable tort laws* . . . . [T]he cases cited by the State answer the question of whether a landowner can remove someone from her property or sue for trespass even when the person wishes to exercise First Amendment rights.

Id. at 1208–09 (emphasis added).

Moreover, in Ag-Gag challenges in other states, courts have repeatedly rejected the government's claims that there is a trespassory harm associated with deception-based investigations. These cases confirm that mere access gained by deception, without more, does not constitute the type of legally cognizable harm contemplated by *Alvarez*. For example, in *Animal Legal Def. Fund v. Reynolds*, the court noted that "A trespasser may enter a property unauthorized and interfere with a property owner's right to control who enters his property *without causing any actual or material injuries* to the property owner." 297 F. Supp. 3d at 922 (emphasis added). Similarly, in *Animal Legal Def. Fund v. Herbert*, the court held that deception-based access to an agricultural facility can be said to cause a cognizable harm only where "the person causes harm of the type the tort of trespass seeks to protect—interference with ownership or possession of the land." 263 F. Supp. 3d at

1203. But, the court added, "if the liar does not interfere with ownership or possession of the land, her consent to access the property remains valid, notwithstanding that it was obtained nefariously through misrepresentation." *Id*. Thus,

> the liar who causes no trespass-type harm—the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has occurred). In other words, under this reasoning, lying to gain entry, without more, does not itself constitute trespass.

Id.

Multiple cases from other jurisdictions have agreed that deception does not vitiate consent in the trespass context and therefore reject the idea that deception-based access to private property necessarily infringes on property interests that could produce a legally cognizable harm. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999); *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1351–52 (7th Cir. 1995) (Posner, J.); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) ("In a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass."). As the Fourth Circuit ruled in *Food Lion*:

> we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work. Moreover, if we turned successful resume fraud into trespass, we would not be

> protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land.

194 F.3d at 518; *see also Desnick*, 44 F.3d at 1352 (access to property obtained by deception does not always constitute trespass because in such cases there is no invasion of "the specific interests that the tort of trespass seeks to protect."). Indeed, *Desnick* recognized the severe implications of a rule permitting all deceptive investigators to be prosecuted. *Id*. at 1353 ("'Testers' who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers . . . ."). Thus, no cognizable trespassory harm is caused by the deception used to gain entry to an animal facility.

2. The State cannot evade First Amendment scrutiny on the ground that the Ag-Gag law criminalizes false speech made "with the intent to damage the enterprise."

To the extent the State argues that the cognizable harm is connected to undercover investigators' intent to "damage the enterprise," that is also unavailing. For this argument, the State relies on the Supreme Court's decision in *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003). Op. Br. 25. In that case, the Court held that the Illinois Attorney General had stated a valid cause of action when he sued a private, for-profit company that engaged in charitable solicitation for nonprofit groups. *Id*. at 606. The relevant fraudulent misrepresentation was the defendant's false statement to donors that a significant

percentage of each dollar donated would go to the nonprofit group, when instead it was going into the defendants' pockets. *Id*. at 605–06.

Fraudulent misrepresentations made to secure money, of course, are the type of lies that *Alvarez* contemplated would not be protected by the First Amendment. 567 U.S. at 723. *Telemarketing Associates* held that "under Illinois case law," the Attorney General had to show that "the defendant knowingly made a false representation of a material fact, that such representation was made with the intent to mislead the listener." *Id*. at 620. This discussion was not part of its First Amendment analysis, but its interpretation of what was required to state a valid legal claim under Illinois law. Indeed, the plurality opinion in *Alvarez* specifically relies on *Telemarketing Associates* for the proposition that falsity alone is not sufficient for the government to punish a speaker who lies. 567 U.S. at 719 ("False statement alone does not subject a fundraiser to fraud liability") (quoting *Telemarketing Associates*, 538 U.S. at 620)).

Thus, nothing about the quoted statement from *Telemarketing Associates*, Op. Br. 25, alters the basic rule from *Alvarez* – the government may not punish falsehoods alone, but most show a legally cognizable harm. In *Telemarking Associates*, of course, that harm was the tangible loss of money by donors who believed they were contributing to a nonprofit organization rather than boosting the charitable solicitation company's profits.

If the State's point is that the government may prohibit deception where it is accompanied by an intent to do harm, that argument is not supported by the relevant case law, either. All of the challenged subsections of the law prohibit speech that is done "with intent to damage the enterprise." KAN. STAT. ANN. §§ 47-1827 (b), (c), (d). As the district court found in its discussion of standing, "Neither ALDF nor its investigators intend to cause physical or tangible damage to any animal facility, animal or animal research facility." App. II, 151. Rather, the undisputed facts show that ALDF conducts its investigations to expose misconduct to the public, which foreseeably will lead to negative publicity, and other responses that are likely to reduce agricultural enterprises' profits due to consumer boycotts or reputational harm. App. II, 131. Though this subjects ALDF and its investigators to prosecution because it constitutes a requisite intent to "damage the enterprise," there is no legally cognizable harm from publication damages that might occur because the truthful information produced by the investigation results in lost profits for an animal enterprise. Any harm that results would be directly the result of misconduct by the animal enterprise and its agents.

The district court's analysis in a second round of Ag-Gag litigation in Iowa is instructive. Almost immediately after the court struck down a previous Ag-Gag law, *Reynolds II*, 353 F. Supp. 3d at 826–27, the Iowa legislature enacted a new version of the law that prohibited accessing an animal agriculture facility "with the intent to

cause physical or economic harm or other injury to the agricultural production facility's operations." IOWA CODE ANN. § 717A.3B. Iowa, like Kansas here, argued the intent requirement was sufficient to push the law beyond the reach of the First Amendment, but the district court disagreed.

> Section 717A.3B appears to place no meaningful limit on the harm that would satisfy its intent element—that is, it does not require the harm to be legally cognizable, specific, tangible, actual, or material. On its face, an intent to cause *any* injury, no matter how trivial or subjective, would suffice to establish the harm element of the statute. As such, it would include a business injury that arose from legitimate First Amendment activity, such as truthful reporting on animal abuse or unsanitary conditions. On the other hand, some applications of the statute certainly relate to legally cognizable harms. If an arsonist lied about their criminal history while intending to commit arson and thereby received a job at an agricultural production facility, the harm that the arsonist intended would be legally cognizable; if a competitor's agent lied about intending to steal trade secrets, the intended harm would also be legally cognizable. But that does not imply that all intended harms are material or legally cognizable.

Animal Legal Def. Fund v. Reynolds, No. 419CV00124JEGHCA, 2019 WL 8301668, at *6 (S.D. Iowa Dec. 2, 2019 (*Reynolds III*) (emphasis in original). This reasoning applies to the Kansas law, as well. "Intent to damage the enterprise" is not limited on its face to physical or tangible harms, but could include harms resulting from the exposure of an animal facility enterprise's own misconduct, which is not a legally cognizable harm under *Alvarez*. Therefore, the State's claim that the intent provision opens up an exception to the presumption that lies are protected by the First Amendment cannot carry the day.

3. The Ag-Gag law does not prohibit falsehoods that produce any material gain for the speaker.

To the extent that the State's claim is that its Ag-Gag law prohibits speech that secures a material gain to the speaker,[21] specifically, gaining access to private property, that interest is really just the flip side of the trespassory harm argument. Access alone neither causes a trespassory harm nor materially benefits the speaker. As the Ninth Circuit acknowledged in *Wasden*, the argument that a person who lies to gain access to private property is enjoying a "material gain" from such access "is not supported by any authority and does not establish how entry onto the property and *material* gain are coextensive." 878 F.3d at 1194–1195. The "entry alone does not constitute a material gain, and without more, the lie is pure speech." *Id*. at 1195.

It is unclear whether the State also means to argue that gaining employment at an animal facility is a material gain.[22] It cites language from *Alvarez* in which the plurality stated that the First Amendment is not implicated when the government punishes false speech to "secure moneys or other valuable considerations, say offers of employment." Op. Br. 15–16 (citing *Alvarez*, 567 U.S. at 723). If that is what the State is arguing, the case law does not support that argument, either.

[21] The State does not indicate how the Ag-Gag law targets speech conferring a material gain to the speaker.

[22] ALDF and the Listener Plaintiffs respond here in case that is what the State meant to claim.

The "offers of employment" language from *Alvarez*'s plurality opinion is perhaps the most misunderstood aspect of the Court's decision. As the plurality explained, "Where 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." *Alvarez*, 567 U.S. at 723.

In the context of that illustration the Court was clearly contemplating someone who lies to get a job that they are *not* qualified to do. The undercover investigations in this case, however, illustrate that not every fib or falsehood made to secure an offer of employment—"I admire your company motto," or "I'm not affiliated with PETA"—results in such a fraud because those falsehoods are *not material* to the investigator employees' ability to do the job. As the undisputed record makes clear, an ALDF-sponsored investigator would not lie about or misrepresent her qualifications in a way that would implicate safety or fitness for the position; she would not represent that she has skills or certifications she does not possess. App. II, 27, 150. Investigators retained by ALDF are transparent about their relevant work experience and knowledge, only omitting their investigatory goals and affiliation with an animal advocacy organization. *Id*. Further, while working at the facility, the ALDF-sponsored investigator would perform all the duties of her job while concealing a hidden camera worn on her clothing and operated with no or virtually

no effort, so as not to interfere with the investigator's ability to safely and competently perform the tasks required of the position. App. II, 28, 150.

Thus, when an undercover investigator misrepresents his *political* (or journalistic, or union) affiliations, but is fully trained and qualified to do a job and in fact competently performs that job, the fact that he is paid a salary is not unjustly securing money from a fraud. *Food Lion*, 194 F.3d at 514 (overturning fraud verdict against two reporters who lied about their identities in job applications but competently performed their employment duties while working undercover).

This is consistent with other courts' reading of this part of *Alvarez*. For example, the district court weighing a recent challenge to an Iowa Ag-Gag law rejected the employment-as-material-gain argument. It noted that "when read in context, the *Alvarez* plurality uses 'an offer of employment' as *an example* of a material gain in stating that a fraudulent false statement, such as overstating qualifications, would not receive First Amendment protection if it were meant to procure a material gain, *such as* an offer of employment." *Reynolds III*, 2019 WL 8301668, at *9 (quoting *Alvarez*, 567 U.S. at 723) (emphasis in original). "The plurality did not say that any false statement associated with an offer of employment falls outside the protection of the First Amendment" and did not "create a blanket First Amendment exception relating to offers of employment." *Id*.

Although the Ninth Circuit upheld the Idaho Ag-Gag law's prohibition on lying to gain employment, it did so based on its specific reading of the operation of that law. The Court concluded that, as written, the Idaho law would *not* apply to a person who overstated her qualifications for the job because someone who did so would not have the requisite intent required under the statute. *Wasden*, 878 F.3d at 1201. That provision required that misrepresentations to gain employment be undertaken "with the intent to cause economic or other injury." IDAHO CODE § 18–7042(1)(c). In another part of its opinion, however, the Court noted that the fact that the Idaho law's restitution provision "excludes 'less tangible damage' such as emotional distress indicates that *reputational damages would not be considered an 'economic loss*,'" *Wasden*, 878 F.3d at 1202. Reading those statements together the Ninth Circuit makes clear economic injury or loss must mean more tangible damage than reputational or publication harms.

The deception undercover investigators use to gain entry and conduct investigations does not convert the investigators into fraudsters. Because it results in no material gain to them, their speech receives First Amendment protection.[23]

[23] Finally, even were this Court to conclude that the Ag-Gag law proscribes unprotected conduct or speech, the law would still be unconstitutional. A regulation is subject to strict scrutiny even when the speech at issue falls under one of the exceptions to First Amendment protection (such as lies that cause legally cognizable harm, true threats, obscenity, or incitement) if it discriminates based on viewpoint *within* that category. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–86 (1992)

II. KANSAS'S AG-GAG LAW IS A VIEWPOINT- AND CONTENT-BASED RESTRICTION ON SPEECH AND SPEECH-PRODUCING CONDUCT.

As the Supreme Court has clarified, a state or local law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed,* 576 U.S. at 163. In evaluating such laws, courts may consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. (citation omitted). Alternatively, the Court explained, a law is content based if it cannot be "'justified without reference to the content of the regulated speech,'" or if it were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward,* 491 U.S. at 791.

A. The law regulates speech based on viewpoint.

The Kansas Ag-Gag law discriminates based on the speakers' viewpoint both on its face and when evaluated in relation to the State's justifications for enacting the law. First, it punishes those who engage in the prohibited conduct (e.g., exercising control over part of the facility; taking photographs or video recordings)

("[T]he power to proscribe [speech] on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements."). Thus, the State may not even prohibit lies that cause cognizable harm if it does so only to critics of the animal agriculture industry. The district court below agreed. App. II, 181–82. We address the State's rather different, and wrongheaded, take on *R.A.V.* below, *infra* at 44-45.

only if they have "intent to damage the enterprise." This targets those who, like ALDF-sponsored investigators, intend to expose misconduct at animal facilities, leading to reputational damage and lost profits. App. II, 151–52. In contrast, someone who gains access to an animal facility and publishes information singing the praises of an agricultural enterprise would not be subject to criminal punishment, as they would not bear the requisite intent.

As the district court below found:

> The law does not prohibit such conduct if the person has the intent to *benefit* the enterprise conducted at the animal facility, and in this respect it impermissibly discriminates based on the speaker's views about animal facilities. For example, if a journalist ignored posted keep-out notices and lied to an animal facility owner to gain access and exercise control over the animal facility with the intent to write a *positive* article about the enterprise, he or she would not violate subsections (b) or (d). Similarly, an undercover photographer would not violate subsection (c) if he or she lied to gain access to a Borden Dairy farm to covertly film a tribute to Elsie the cow. As long as the photographer did so with intent to benefit Borden Dairy, he or she would not violate subsection (c) . . . . The law plainly targets negative views about animal facilities and therefore discriminates based on viewpoint.

App. II, 180 (emphasis in original). Thus, the Ag-Gag law is viewpoint discriminatory on its face because the intent provision means the law will punish only critics of animal facilities, and not fans.

The Ag-Gag law's industry-specific scope also reveals that, on its face, it constitutes viewpoint discrimination. Like other states that have adopted Ag-Gag laws, Kansas focused its criminalization on undercover investigations in animal

industries, reflecting its desire to snuff out only investigations about the treatment of animals in commercial settings. The law does not prohibit the use of deception to gain access to nursing homes, child-care facilities, or immigration detention centers for the purpose of video recording, suggesting that Kansas's interest is in suppressing public discourse and debate only about the animal industry.

But there is also evidence that even if the law is not discriminatory on its face, the State's justification for the law *was* its fear of the speech's content, making the law viewpoint discriminatory. *Ward*, 491 U.S. at 791. The record indicates that the law was designed to protect the reputation and profits of a dominant animal agriculture industry. As the undisputed evidence shows, Kansas is the among the largest animal agriculture producers in the United States, accounting for nearly 11% of commercial red meat production nationwide. App. II, 10. It has the third most cows of any state in the United States (6.3 million) and is also among the country's largest producers of pigs—with approximately two million pigs raised for slaughter. App. II, 10–11.

Moreover, legislators in Kansas surely had animal rights groups in mind when they enacted the Ag-Gag law. An article introduced in the Minutes of the Kansas Senate Committee that was studying the Ag-Gag bill that became KAN. STAT. ANN. § 14-1827 even identified ALDF as one of its concerns. App. II, 13–14. The article, originally published in *Drovers Journal*, a beef industry publication, observed that:

"There are now several groups that sponsor legal defense funds for animals. *One is the Animal Legal Defense Fund, a nationwide network of 250 attorneys. ALDF has fought hot-iron face-branding of dairy cows, veal calf confinement and the patenting of genetically altered farm animals*." *Id.* (emphasis added). The article goes on, "But right now *the animal rights movement seems to be growing in numbers, clout, zeal, sophistication* and willingness to fight livestock producers." App. II, 14 (emphasis added).

Furthermore, another article considered by that Senate Committee overtly expressed concern about the *speech* of animal rights groups. In that article, published in *Beef Today* in 1990, the author, discussing the animal rights movement noted "many of these people are *well spoken and skilled at getting their points out to the general public*." App. II, 14 (emphasis added). This article goes on to describe the fact that for another animal rights organization, People for the Ethical Treatment of Animals ("PETA"), "[e]ducation plays the key role here. PETA distributes videotapes showing pigs castrated and ear-notched without anesthesia, and pigs in farrowing crates and slaughterhouses, and asks whether this is an ethical society and whether we can endure this treatment." *Id*.

Furthermore, the context of the law's enactment demonstrates that its proponents were antagonistic toward animal rights activists. In 2012, when the Kansas legislature was debating the amendment to the original act to prohibit gaining

entry to an animal facility by deception, a document placed into the record notes that the law is:

> being amended to specify that 'effective consent' shall not be deemed to include consent induced by fraud, deception, or duress (SB414, Page 27, Section 41 e(1)). *In some states, animal rights activists with an anti-agriculture agenda have lied on job applications in order to gain access to farms or ranches and take undercover video, some of which is believed to be staged.* This amendment is a tool that can be used against people using fraud to gain access to farms.

App. I, 77–78, 197–98 (emphasis added). This evidences the legislature's purpose in enacting the law "'because of disagreement with the message [the speech] conveys'" making it the most egregious type of speech suppression. *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U. S. at 791).

The State's contention that the law is not viewpoint or content based rests on a serious misunderstanding of what those terms mean. It argues that ALDF and the Listener Plaintiffs' argument "turns First Amendment law on its head by implying that all views of animal facilities must stand on equal footing, notwithstanding the fact that views have no possibility of inflicting harm to the enterprise." Op. Br. 26. But this is one of the central premises of free speech law—that the government must remain neutral when it comes to regulating people's views on politics, public policy, morality, and other topics of public concern. *Reed*, 576 U.S. at 168; *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Applying this principle, the government *must* allow critics of animal facilities to stand on equal

footing with their boosters.

The obvious invalidity of the State's argument here is easy to illustrate. Suppose, for example, that Kansas enacted a law prohibiting protests of the animal agriculture industry based on the protestors' disapproving views of how the industry mistreats farm animals because the negative publicity would be economically harmful to the industry. If the law does not also prohibit protests in favor of the animal agricultural industry, then it is facially discriminatory based on speakers' viewpoints and patently unconstitutional precisely because it does not treat all views of the animal industry as being "on equal footing." Op. Br. 26.

Further confusing the argument, the State says there is "no impermissible content or viewpoint discrimination against the slanderer or in favor of the slandered in defamation law." Op. Br. 27. True enough. But slander and defamation often are not protected by the First Amendment, so this argument makes no sense. Moreover, the concept of viewpoint and content discrimination is that the State must treat all *speakers* neutrally. In the State's hypothetical, a person who is slandered is not another speaker, but the target of the slanderer. In the end, this argument accomplishes nothing.

The State makes another claim unsupported by First Amendment doctrine in arguing that the Supreme Court has upheld content discrimination that is "based on the very reasons why the particular class of speech at issue . . . is proscribable." Op.

Br. 27 (quoting *Virginia v. Black*, 538 U.S. 343, 362 (citation omitted)). However, what the Court is explaining there is that states cannot discriminate *within* a category of speech that is otherwise beyond the First Amendment's reach, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), but they can regulate otherwise unprotected speech and certain subsets of those categories of speech if their justification is related to the reason the speech is not protected in the first place. Thus, the government may ban all obscene speech or all "fighting words," but it may not prohibit "only that obscenity which includes offensive political messages" *id*. at 388, or only those fighting words directed at Republicans. But under *R.A.V.*, the government *may*, consistent with the First Amendment, choose to prohibit only the *most obscene* material but not ban less extreme, but technically obscene materials.

In fact, the *R.A.V.* argument works in favor of ALDF and the Listener Plaintiffs. As stated earlier, a regulation is subject to strict scrutiny even when the speech at issue falls under one of the exceptions to First Amendment protection (such as lies that cause legally cognizable harm) if it discriminates based on viewpoint *within* that category. *Supra* n.23. As the district court found, even if the investigative deceptions were found to cause cognizable harms and be unprotected by the First Amendment, *R.A.V.* forbids discrimination between lies that are used to investigate the animal agriculture industry and lies that are used to promote it. App. II, 181–82. On that theory, the Kansas law is also unconstitutional.

Finally, the State at one point claims that it may engage in content discrimination in nonpublic forums so long as the restrictions are reasonable and viewpoint neutral. Op. Br. 28. That is a valid statement of the law, but it happens to not be applicable to this case. The public forum doctrine concerns government restriction of speech on *publicly owned land*, and its rules apply to different classifications of government property. A nonpublic forum "consists of '*[p]ublic property* which is not by tradition or designation a forum for public communication.'" *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). Because the Kansas Ag-Gag law regulates speech on private property, not public land, the forum analysis simply does not apply.

B. The Ag-Gag law is content based.

Even if the Kansas Ag-Gag law is not viewpoint discriminatory, it is nonetheless content based and therefore still subject to strict scrutiny. The law is content based because it overtly discriminates between truthful and non-truthful speech. *Reynolds II*, 353 F. Supp. 3d at 822. Gaining entry to an animal facility by using truthful statements is not criminalized; gaining access by lying about your political affiliation can land you in prison. Moreover, again, the Ag-Gag law is content based because it restricts expression only about the animal agriculture industry. This is an industry-specific subject matter restriction. *Barr v. Am. Ass'n of*

Political Consultants, Inc, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (noting that the term "content based" applies to a law that "singles out specific subject matter for differential treatment") (citation omitted).

III. THE KANSAS AG-GAG LAW CANNOT MEET THE BURDEN OF HEIGHTENED SCRUTINY.

Both in the district court and now on appeal, the State appears to concede that if its Ag-Gag law is subject to any kind of heightened scrutiny, it cannot survive. The State failed to present anything but abstract arguments about the government interest in privacy and property rights in claiming that the law does not regulate speech. Furthermore, in the district court, the State failed to produce even one iota of evidence that protection of property or privacy is an important interest in this context, much less a compelling one. Finally, the State introduced no evidence to suggest that the law is narrowly tailored to accomplish any putative interest.

As the Supreme Court has made clear, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). Accordingly, the government bears the burden of proof under both strict scrutiny, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §6.5 (4th ed. 2011), and intermediate scrutiny, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012).

The State has therefore essentially forfeited any claim that the Ag-Gag law can withstand any kind of heightened scrutiny. But even if it had not, the law cannot meet either strict scrutiny or intermediate scrutiny.

A. The law cannot survive strict scrutiny.

Under well-settled First Amendment jurisprudence, a law that is *either* viewpoint- or content-based is subject to strict scrutiny, and can be upheld only if the government can demonstrate that the law is necessary to serve a compelling governmental interest that could not be advanced by less restrictive alternatives. *Reed*, 576 U.S. at 163; *Alvarez*, 567 U.S. at 729.

First, the State makes no legal argument suggesting that the Ag-Gag law advances a compelling government interest. Second, even if it had articulated such an interest, there is no basis in the record on which it can rely. There is simply no evidence of any harms that have resulted or might result from an undercover agriculture investigation. Accordingly, there is no way for this Court to assess any claim about the weight of the State's putative interests.

Furthermore, the law is not even narrowly tailored to accomplish those general interests. As the district court found, the law is "hopelessly underinclusive'" because the challenged provisions "do not prevent *everyone* from violating the property and privacy rights of animal facility owners – only those who violate said rights with intent to damage the enterprise conducted at animal facilities." App. II,

183 (emphasis in original). The State also made no argument about why its generally applicable trespass law, KAN. STAT. ANN. § 21-5808, does not already address its interests.

Finally, the State's interests could be served by less speech-restrictive means and it has provided no evidence to the contrary. First, again, the existing, generally applicable trespass law already protects property owners' interests in possession and dominion over property. *Id*. Second, if there were any evidence that the Ag-Gag law promotes privacy or property interests, which there is not, the State could accomplish its goals by more narrowly by, for example, just prohibiting physical entry to private property with a generally applicable trespass law (as it already has). Or, the law could limit entry into or recording in specified private areas such as workplace locker rooms or restrooms or target only tangible harms, such as preventing the stealing of trade secrets.

B. Even if the Kansas Ag-Gag Law is Content Neutral, it is Not Narrowly Tailored to Serve a Significant Government Interest.

Even if the Ag-Gag law could somehow be construed as content neutral, the law would still be subject to intermediate scrutiny. For content neutral regulations of speech, the government must show that its laws are "'narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (citations

omitted).[24] Again, the State presented no record evidence of *any* interest it has in closing off undercover investigations, much less a significant one. Furthermore, as the Supreme Court has clarified, while the narrow tailoring requirement under intermediate scrutiny does not require the government to show that it adopted the least speech restrictive means to accomplish their objectives, *Ward*, 491 U.S. at 798, "the government *must* demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (emphasis added). Applying *McCullen*, this Circuit has subsequently invalidated content neutral laws when the government has failed to present *any* evidence that it considered less restrictive alternatives. *Verlo v. Martinez*, 820 F.3d 1113, 1135 (10th Cir. 2016). *See also Cutting v. City of Portland*, 802 F.3d 79, 91 (1st Cir. 2015); *Reynolds v. Middleton*, 779 F.3d 222, 231–32 (4th Cir. 2015); *accord iMatter Utah v. Njord*, 774 F.3d 1258, 1271 (10th Cir. 2014) (rejecting a parade permitting requirement where Utah "offered no evidence that its existing tort and criminal law

[24] If this Court concludes that intermediate scrutiny, rather than strict scrutiny applies, and that the Ag-Gag law cannot survive the intermediate scrutiny standard, this Court has the discretion to affirm the district court's ruling on this alternate ground, which is adequately supported by the record. *See Brown v. Perez*, 835 F.3d 1223, 1236 (10th Cir. 2016), *as amended on reh'g* (Nov. 8, 2016). This alternate ground was fully briefed by ALDF and the Listener Plaintiffs below, the State had a full opportunity to develop a factual record to justify the law under intermediate scrutiny, and this Court's decision to affirm on that basis would involve only a purely legal question. *Id.* (listing factors to be considered in exercising discretion).

[was] insufficient" to address the State's concerns). The Defendants have similarly failed to proffer evidence of any such attempts here.

CONCLUSION

Plaintiffs-Appellees respectfully request this Court to affirm the rulings of the district court below granting summary judgment to the Plaintiffs-Appellees, granting a declaratory judgment that K.S.A. §§ 47-1827 (b), (c), and (d) are facially unconstitutional in violation of the First Amendment, and permanently enjoining the State from enforcing those provisions.

August 26, 2020

Respectfully submitted,

/s/ Alan K. Chen

Alan K. Chen
Civil Rights & Civil Liberties
Strategic Litigation Project
University of Denver
Sturm College of Law
2255 E. Evans Avenue
Denver, Colorado 80208
303-871-6283
achen@law.du.edu
Counsel for Plaintiffs-Appellees

Matthew Strugar
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
(213) 252-0091 (fax)
matthew@matthewstrugar.com

Michael D. Moss, KS Bar #22624
Foley & Mansfield, P.L.L.P.
10740 Nall Avenue, Suite 242
Overland Park, KS 66211
913-232-8767
913-800-7238 (fax)
mmoss@foleymansfield.com

Justin Marceau
Of Counsel, Animal Legal Defense Fund
Civil Rights & Civil Liberties Strategic Litigation Project
University of Denver Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

Kelsey Eberly
Alene Anello
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533
keberly@aldf.org
ahowell@aldf.org

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
(202) 232-7203 (fax)
dmuraskin@publicjustice.net

George A. Kimbrell
917 SW Oak St., Suite 300
Portland, OR 97205
(971) 271-7372
(971) 271-7374 (fax)
gkimbrell@centerforfoodsafety.org

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with type-volume limits of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 12,779 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in 14-point Times New Roman, a proportionally spaced typeface.

/s/ Alan K. Chen
Alan K. Chen
Counsel for Plaintiffs-Appellees

August 26, 2020

CERTIFICATE REGARDING PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing brief, all required privacy redactions have been made per 10th Cir. R. 25.5.

/s/ Alan K. Chen
Counsel for Plaintiffs-Appellees

August 26, 2020

CERTIFICATE THAT ELECTRONIC COPY AND REQUIRED HARD COPIES ARE IDENTICAL

I hereby certify that seven hard copies of this brief, which are required to be submitted to the Clerk's Office within five business days of electronic filing pursuant to 10th Cir. R. 31.5, are exact copies of that which was filed with the Clerk of the Court using the electronic filing system on August 26, 2020.

/s/ Alan K. Chen
Counsel for Plaintiffs-Appellees

CERTIFICATE THAT THIS BRIEF HAS BEEN SCANNED FOR VIRUSES AND IS VIRUS FREE

I hereby certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning programs, Crowdstrike Antivirus and Malwarebytes, and according to these programs are free of viruses.

/s/ Alan K. Chen
Alan K. Chen
Counsel for Plaintiffs-Appellees

August 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2020, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/ Alan K. Chen
Alan K. Chen
Counsel for Plaintiffs-Appellees