IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANIMAL LEGAL DEFENSE FUND, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 18-2657-KHV-JPO**
LAURA KELLY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

For the reasons stated below, in Plaintiffs' opening brief, and in Plaintiffs' opposition to Defendants' motion, summary judgment should be granted to Plaintiffs Animal Legal Defense Fund ("ALDF"), Center for Food Safety ("CFS"), Shy 38, Inc. ("Shy"), and Hope Sanctuary ("Hope"), and Defendants' motion for summary judgment should be denied.

Plaintiffs' Reply Concerning Their Statement of Uncontroverted Facts

While Defendants do not controvert the majority of Plaintiffs' facts, several of Defendants' objections call for a response.

First, Defendants object to paragraph 5 of Plaintiffs' uncontroverted facts on the grounds that it is inadmissible hearsay, Defendants' Response to Plaintiffs' Motion for Summary Judgment and Reply in Support of Defendants' Motion for Summary Judgment (Defs.' Resp.) at vii, but newspaper reports of then-Governor Hayden's public statement are admissible to the extent they are offered to show the state of mind of the Governor in signing the bill into law. *See Blair v. Inside Ed. Prods.*, 7 F. Supp. 3d 348, 362 n.11 (S.D.N.Y. 2014); *Roniger v. McCall*, 119 F. Supp. 2d 407, 410 (S.D.N.Y. 2000). Defendants also lodge hearsay objections to paragraphs

6–11, all but one of which are newspaper articles that were part of the official legislative record considered by the Kansas legislature when deliberating about the enactment of the Kansas Ag-Gag law. But those articles are not presented for the truth of what is contained in them. Because Defendants concede that these articles were presented to the Senate Committee considering the law, they can be presented as materials considered by the Kansas legislators in enacting the Ag-Gag law, from which a reasonable inference can be drawn that they factored into the legislators' intent.

Second, Defendants object to large swaths of Plaintiffs' uncontroverted facts—paragraphs 22, 31, 44, 45, 60, 64–66, 70, 71, 73, 74, 76, 77, 79, and 80, in whole or in part—as based on "self-serving" (or "self-servicing"), and/or "conclusory" affidavit testimony. As explained below, there is no evidentiary rule precluding the admissibility of self-serving testimony, and indeed many circuits specifically reject that as a basis for objecting to affidavits submitted on summary judgment. *C.R. Pittman Const. Co. v. National Fire Ins. Co. of Hartford*, 453 Fed. Appx. 439, 443 (5th Cir. Oct. 24, 2011); *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003); *Santiago–Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000).

While the Tenth Circuit may seemingly recognize that testimony may not be self-serving, the language from its decisions actually suggests that objection as synonymous with lack of personal knowledge. *See Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995). As explained further in the Argument, there is no basis for Defendants' assertion that Plaintiffs' witnesses were "self-serving" and no conflicting evidence introduced by Defendants to respond to Plaintiffs' assertions, since Defendants opted not to depose any of Plaintiffs' witnesses. Moreover, the description of the affiants' testimony as "conclusory" is similarly empty and unexplained.

Third, Defendants object to paragraphs 23, 27–29, 46, 47, 49, 50, 52–55, stating that "Mr. Walden's affidavit does not establish that he possesses the required personal knowledge to testify to" statements therein, or that the facts are "speculative" because "no foundation has been provided Mr. Walden could express such opinions." This is inaccurate for several reasons. First, ALDF has long identified Mr. Walden as its designated corporate witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure and the individual with personal knowledge of the way in which ALDF conducts its current investigations and the manner in which the Kansas Ag-Gag law chills ALDF's speech and impedes its mission.[1] As ALDF stated in response to Defendants' Interrogatory No. 2, "ALDF's Chief Programs Officer, Mark Walden, provides strategic direction for ALDF's undercover investigations, and has been charged with aiding the organization in fulfilling its mission-driven objectives by pursuing undercover investigations in a variety of states and locations to uncover animal cruelty and support the organization's advocacy efforts." ECF 47-1 at 7. In response to Defendants' interrogatories, ALDF identified Mr. Walden as the person "who possesses knowledge about ALDF's capacity and current intention to conduct undercover investigations," "about the types of investigative activities in which ALDF-retained investigators engage or are likely to engage when conducting an undercover investigation for ALDF," and "about the reasonably foreseeable economic consequences and harms that flow from the types of undercover investigations ALDF conducts." *Id.* at 10, 18, 44. Mr. Walden also verified ALDF's responses to the interrogatories. *Id.* at 48.[2] Defendants' claim

[1] Plaintiffs should not be prejudiced by Defendants' decision not to depose ALDF's Rule 30(b)(6) witness, whose deposition testimony would unquestionably have been admissible on summary judgment. *See Dodson Aviation, Inc. v. HLMP Aviation Corp.*, No. 08-4102-KGS, 2011 WL 1234705, at *10 (D. Kan. Mar. 31, 2011).

[2] Defendants' claim that Plaintiffs cannot point, as evidence, to their own sworn statements in their responses to Defendants' interrogatories, is nonsense, as Defendants' own authority shows. *Champlin v. Oklahoma Furniture Mfg. Co.*, 269 F.2d 918, 920 (10th Cir. 1959) ("interrogatories and answers thereto may properly be considered when ruling on a motion for summary

that Mr. Walden's *affidavit* "does not establish that he possesses the required personal knowledge to testify to these statements" relies on ignoring a plethora of other admissible evidence in the record providing the full context and foundation for the facts Mr. Walden provides in his affidavit as well as his official position as ALDF's Chief Programs Officer. *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990).

Moreover, Mr. Walden's affidavit, on its own, establishes that he possesses such personal knowledge of the facts stated therein, and that he is authorized to provide such facts on behalf of ALDF. Mr. Walden explains that, since 2016[3], he has been the organization's Chief Programs Officer, "responsible for overseeing and coordinating ALDF's activities across its five programs," and for "coordinat[ing] the work of these programs with ALDF's executive leadership, Communications department, and donor and member outreach." Defendants do not contest that ALDF relies on "undercover investigations inside animal facilities—including industrialized farms and slaughterhouses to pursue [its] stated mission[]," nor that "ALDF conducts such undercover investigations." Pltfs SUF ¶¶ 21, 43. As Chief Programs Officer, in charge of the substantive programs through which ALDF pursues its mission, there simply can be no credible claim that Mr. Walden lacks personal knowledge of the way in which ALDF relies on and conducts undercover investigations to further the organization's mission.

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judgment"). Defendants point to no deficiency in Plaintiffs' interrogatory responses, besides to reiterate that responses "not based on personal knowledge, will not be considered." Defs.' Resp. at xxvi, n.7. But again, and as detailed further below, all the facts contained within Plaintiffs' interrogatory responses and affidavits *are* within the personal knowledge of the affiants (who are their respective corporate witnesses and who verified the interrogatory responses for each Plaintiff).

[3] Despite it preceding Mr. Walden's tenure at ALDF, Mr. Walden also possesses personal knowledge of the facts provided concerning ALDF's 2015 Tyson chicken slaughterhouse investigation and the complaints ALDF submitted resulting from it (Pltfs SUF ¶¶ 27-29), by virtue of his responsibility for "provid[ing] strategic direction for ALDF's undercover investigations" and his role in verifying ALDF's interrogatory responses detailing the same information. *See* ECF 47-1, 8-9.

Defendants object to paragraphs 24, 29, 31, and 42, concerning newspaper articles, press releases, and advocacy materials Mr. Walden and Ms. Spector attached to their declarations, on the basis that the press releases and other documents are "unsworn" and contain "inadmissible multiple hearsay." This misses the point. First, Plaintiffs are not offering any of the cited documents to prove the truth of any matter stated therein, but to provide examples of the ways in which each has used video, photos, and information gained through investigations to further their mission-driven work (for 24, 29, and 31), and of the ripple effects of such undercover investigations. And second, to the extent the descriptor "unsworn" is meant to attack documents' authenticity, that is improper and contravenes the parties' stipulation on authentication. *See* ECF 49 (Pretrial Order) at ¶ 2.b.

Defendants state that the facts in paragraphs 38–40, concerning Hope Sanctuary, are uncontroverted, but object that the affidavit of President and Founder Cambria Martin "does not establish the required personal knowledge to support the claim images and information used by the organization come from undercover investigations." This makes no sense and should be rejected. Are Defendants' really suggesting that Ms. Martin lacks personal knowledge about what motivated her to found her own organization? *See* Pltfs SUF ¶ 38 ("Images and information made public through undercover investigations are what motivated Hope Sanctuary's founding.") Elsewhere Defendants state it is uncontroverted that each of the Plaintiffs, including Hope, relies on undercover investigations to further its missions. Pltfs SUF ¶¶ 21, 43. Defendants cannot elsewhere contravene that fact.

Likewise, Defendants call the facts in paragraphs 70–71, concerning Shy 38, "speculative" and claim that "[n]o foundation has been provided Ms. Taylor could express such an opinion." This is meritless. As detailed in her affidavit, Kris Taylor is the Founder of Shy 38

and personally pursues the majority of the organization's work. She was identified, in Plaintiffs' Initial Disclosures, as the person with knowledge of Shy 38's standing. She unquestionably has first-hand knowledge of what constitutes an obstacle to Shy 38 fulfilling its mission. Her affidavit offers a detailed, personal account of her founding of Shy 38 (motivated by witnessing undercover investigation footage) and the manner in which and reasons why Shy 38 relies on undercover investigations, with its particular tie to Kansas, as its home state. Any suggestion of a lack of foundation is baseless.

Finally, Defendants claim, with regard to paragraphs 77, 79, and 80, concerning CFS, that "[i]t has not been shown that Mr. [sic] Spector has personal knowledge" to make assertions concerning CFS's devotion of organizational resources to activities aimed at combatting Ag-Gag laws, including in Kansas. This is simply not the case. As with the other affiants, *Ms.* Rebecca Spector, CFS's West Coast Director, was identified in Plaintiffs' Initial Disclosures as the person with knowledge of CFS's standing. She also verified CFS's responses to Defendants' interrogatories. Further, as detailed in her affidavit, Ms. Spector has worked for the organization for nearly 20 years, during which time she has "coordinated public outreach campaigns." The suggestion that Ms. Spector lacks personal knowledge of what motivates CFS to do public outreach and education about Ag-Gag laws like Kansas's is without merit.

* * *

At Defendants' calling, Plaintiffs responded to (and supplemented their responses to) interrogatories, answered other written discovery, and produced hundreds of pages of documents. Plaintiffs' Statement of Uncontroverted Facts is largely based on affidavits that restate what Plaintiffs have already detailed in sworn testimony, verified by the affiants. Because Defendants have no basis on which to *contest* these facts, nor to question the affiants' credibility or the basis

for their knowledge of the facts, Defendants resort to accusing Plaintiffs' affiants of being biased mouthpieces. This effort must fail.

Argument

Summary of Uncontroverted Facts

The one thing the parties can agree on is this dispute can be properly disposed of on summary judgment by this Court interpreting and applying existing law to the facts. Here are the basic undisputed facts that support summary judgment in favor of the Plaintiffs.

- Kansas is the among the largest animal agriculture producers in the United States, accounting for nearly 11% of commercial red meat production nationwide. Defs.' Resp. to Pltfs SUF ¶ 1.

- Articles put into the record by Senator Montgomery during a meeting of the Senate Committee on Agriculture at which the bill that became the Ag-Gag law was being considered, reference the animal rights movement and its messages and tactics, and specifically mention Plaintiff Animal Legal Defense Fund and other animal welfare organizations. Defs.' Resp. to Pltfs SUF ¶¶ 7–11.

- On June 13, 1990, then-Kansas Attorney General Robert T. Stephan issued an Attorney General Opinion regarding the K.S.A. 47-1825 et. seq., in which he wrote, "You also ask in relation to section (3)(c)(4) of Senate Bill 776 whether the phrase 'intent to damage the enterprise conducted at the animal facility' is limited to physical damage or whether it also includes damages resulting from the later publication of a photograph taken at the facility. … Upon a conviction for the crime defined in section (3)(c)(4), the sentencing court has authority to order restitution. K.S.A. 21-4603(2)(c), K.S.A. 21-4610(4)(a). In a criminal case the measure of damage is that loss suffered by the victim of the crime; restitution should make the victim whole. Actual loss suffered is therefore the measure of restitution to be ordered. State v. Hinckley, 13 Kan.App.2d 417 (1989). The actual amount of restitution is a question of fact for the trial court's determination based on evidence presented of loss incurred in connection with the crime…. In [] a civil action actual damages, sometimes referred to as compensatory damages, is also compensation for the actual loss for injuries sustained by reason of the actor's wrong doing. The term contemplates out-of-pocket losses and may also include damages for impairment of reputation, personal humiliation, and loss of profit, both present and future. Compensatory damages generally must have a money value, and be capable of estimation with a pecuniary standard. 22 Am.Jur.2d Damages, §§ 24 and 28 (1988)…. *The intent to damage the enterprise conducted at the animal facility is a necessary element of a criminal prosecution* or a civil action for damages. Upon conviction of the crime defined in a criminal case, or upon a finding of liability in a civil case, actual damages, which include consequential damages, may be assessed. The dollar amount of such order of restitution or assessment of civil damages will depend upon evidence of the amount required to make the injured party whole for losses actually suffered." Defs.' Resp. to Pltfs SUF ¶¶ 12–13 (emphasis added).

- Plaintiffs are 501(c)(3) non-profit organizations that have missions that include exposing, addressing, and reforming the harms caused by industrial animal agriculture, including the mistreatment of animals and unsafe and unsustainable food production practices. To pursue their missions, Plaintiffs seek out and rely upon whistleblower and investigative employees' undercover investigations inside animal facilities—including industrialized farms and slaughterhouses. Defs.' Resp. to Pltfs SUF ¶¶ 14, 20–21.

- Plaintiff ALDF conducts such undercover investigations, while CFS, Shy 38, and Hope use and rely upon, but do not themselves conduct, such investigations. ALDF conducted such an investigation in Nebraska, which resulted in reports of neglect of pigs, and led ALDF to engage in public and legal advocacy concerning the investigation. Defs.' Resp. to Pltfs SUF ¶¶ 21, 23, 25, 43.

- ALDF possesses the funds, infrastructure, expertise, and personnel necessary to complete an undercover investigation of an animal facility in Kansas, as well as to share information obtained from such an investigation with the public. ALDF has the current intention to conduct such an investigation in Kansas, due in part to ALDF's specific interest in Kansas, as a major locus of animal agriculture. Defs.' Resp. to Pltfs SUF ¶¶ 44–45.

- For the investigation Plaintiff ALDF desires to carry out in Kansas, ALDF would retain a qualified investigator to obtain photographic and/or video footage documenting the conditions inside a Kansas factory farm, slaughterhouse, or other animal facility, who would go about gaining access to the facility, mostly likely by applying for and securing employment. Defs.' Resp. to Pltfs SUF ¶ 46.

- In hopes of getting the job, the investigator would lie, if necessary, about his background, experience (although not to inflate his credentials in a way that would implicate safety or his fitness for the position), and his intention to conduct an investigation. If he gained employment, while performing his job duties, the investigator would wear a minute camera on his clothing operated with no or virtually no effort. Defs.' Resp. to Pltfs SUF ¶¶ 47–48, 51.

- ALDF would do everything in its power to ensure that investigator would follow all applicable protocols and rules. Neither ALDF nor the investigators it sends intend to or would: (i) cause physical or tangible damage—actual destruction and theft of property—to any animal facility, animal, research facility, or field crop product; (ii) exercise actual and ongoing physical control over an entire animal facility; (iii) physically conceal themselves until after an agricultural facility is closed for business or otherwise physically conceal themselves in order to be able to do actual physical damage; or (iv) enter and remain on the premises of an agricultural facility and refuse to leave after being specifically and directly instructed to. Defs.' Resp. to Pltfs SUF ¶¶ 56–59, 64.

- In directing its investigating entity to document any illegal and unethical practices happening at the animal facility, ALDF aims to expose animal cruelty, unsafe working conditions, food safety violations, and other misconduct, in the hopes that such exposure

will spur reforms. ALDF proceeds with investigations intending that they have warranted negative consequences for the investigated facility and resulting economic harm. Defs.' Resp. to Pltfs SUF ¶¶ 61–62.

- It would be ALDF's intention to share and make available the evidence it recovered from an investigation in Kansas to Plaintiffs CFS, Shy 38, Hope, and other peer organizations, and it would be ALDF's and the other Plaintiffs' intentions to use the evidence to further their work. Defs.' Resp. to Pltfs SUF ¶¶ 66–69, 72.[4]

I. THE UNDISPUTED FACTS DEMONSTRATE THAT THE PLAINTIFFS HAVE STANDING TO CHALLENGE EACH OF THE SPECIFIED PROVISIONS OF THE KANSAS AG-GAG LAW.

A. Plaintiffs' Speech is Being Unlawfully Chilled by the Kansas Ag-Gag Law—and That Law Alone.

It is the clear law of this circuit that standing in a First Amendment challenge to a state law may be found if the plaintiffs demonstrate that the law has a chilling effect established by "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (emphasis in original). Furthermore, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U. S. 452, 459 (1974).

The first part of the *Walker* test is met here. ALDF has established that it has engaged in a programmatic, mission-driven practice of engaging in undercover investigations of commercial agricultural facilities to uncover evidence of inhumane treatment of farm animals. Pltfs SUF ¶¶

[4] Although Defendants objected to some of these facts, specifically Pltfs SUF ¶ 23, 44-47, 64, Plaintiffs have already fully addressed the invalidity of their objections, above.

15, 22, 43, A022. Plaintiff ALDF conducts such undercover investigations. Pltfs SUF ¶¶ 22, 43, A023–A025. Mr. Walden's personal knowledge of these investigations is apparent from his position as the designated witness on behalf of ALDF in this case and his role as ALDF's Chief Programs Officer, which includes responsibility for ALDF's undercover investigations. Walden Aff. 1–2, A021. *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) ("That Rule 56(e)'s requirements of personal knowledge and competence to testify have been met may be inferred from the affidavits themselves . . . . Hoglander's and Keilin's personal knowledge and competence to testify are reasonably inferred from their positions and the nature of their participation in the matters to which they swore. . . .").

Plaintiffs CFS, Hope, and Shy 38, have proffered undisputed evidence that their organizations rely on information produced by the investigations of ALDF and other animal welfare organizations in advancing their own missions. Pltfs SUF ¶¶ 21, 30–32, 39, A244–45, A302, A317, Defs' MSJ Ex. 2, Plaintiffs' Responses to Defendants' Requests for Admission Nos. 12–14). They therefore have so-called listener standing because the Kansas law impedes their ability to hear speech produced by Plaintiff ALDF. The First Amendment protects not only the rights of speakers, but also the rights of listeners or audiences. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997). Listeners have standing to challenge laws that regulate other parties in ways that will prevent the listeners from having access to such speech. *See, e.g., Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 697 (D.C. Cir. 2005).

The second part of the *Walker* test, the present desire to engage in speech activities, is established by the undisputed evidence that ALDF has the capacity and desire to engage in an undercover investigation of an animal agriculture facility in Kansas. That desire is due to ALDF's great need to pursue such investigations, and Kansas being of particular interest to

ALDF "because of its being a major locus of animal agriculture." Pltfs SUF ¶¶ 44, 45, A025; Defs' MSJ Ex. 1, Plaintiffs' Supplemental Response to Defendants' Interrogatory No. 2. ALDF would conduct such an investigation if this Court were to declare the law unconstitutional and enjoin its enforcement. Pltfs SUF ¶¶ 45, 65, A029; Defs' MSJ Ex. 1, Plaintiffs' Supplemental Response to Defendants' Interrogatory No. 2.

Finally, ALDF has established that it has not conducted an undercover investigation in Kansas precisely because of the Kansas Ag-Gag law and that it has a reasonable fear that it and its agents will be prosecuted for violating the challenged provisions, which directly regulate the speech-producing conduct they routinely engage in to expose animal cruelty and other unlawful or unseemly practices of the animal agriculture industry. Pltfs SUF ¶ 64, A028 ("If ALDF were to proceed with an investigation of an animal facility in Kansas, we would fear prosecution under the Kansas Ag-Gag law because of our role in facilitating, funding, supporting, and using the results of the investigation")); DUF ¶ 13; *see also* Walden Aff. 2, A021 (noting that he is "intimately familiar with the negative effects" of laws such as Kansas's Ag-Gag law on ALDF's mission-driven activities). Moreover, at no time in the course of this litigation have Defendants ever disclaimed any intent to enforce the law against persons engaged in such investigative conduct.

In their Opposition brief Plaintiffs fully addressed why ALDF's planned investigations are not barred by Kansas's criminal trespass law, and how the Kansas Ag-Gag law, and not any other law, imposes a unique chill on Plaintiffs' desired speech, such that ALDF would proceed with an investigation should the law be enjoined. Defendants present no argument or facts contradicting this, other than to insist that ALDF's planned investigation *does* violate the trespass law. Defs.' Resp. 8–10. But Defendants' erroneous construction of the trespass statute is

irrelevant—it has no bearing on the sworn testimony that ALDF, disagreeing with this construction, *would* proceed with its investigation absent the Ag-Gag law's proscription.[5] Because Defendants' legal arguments cannot change that fact, Plaintiffs' injuries are fairly traceable to the Ag-Gag law and would be redressed by an order enjoining the law's enforcement.

B. Plaintiffs' Affidavits Establish Plaintiffs' Standing, Notwithstanding Defendants' Unwarranted Attempts to Undermine the Affidavits' Validity.

The Defendants' arguments against Plaintiffs' standing rely primarily on the claim that large portions of Plaintiffs' affidavits are "self-serving" or "conclusory" rather than based on the affiants' personal knowledge. Upon careful examination, this objection has no legitimate basis. The notion that testimony is inadmissible on summary judgment because it is self-serving does not come from the Federal Rules of Evidence. Indeed, all testimony for any party is, or should be, in support of that party's case. If the "self-serving" nature of affidavit testimony on summary judgment automatically rendered that evidence inadmissible, then no party could ever submit affidavits (or, for that matter, have witnesses testify in court). Several circuits have expressly rejected the argument that testimony's self-serving nature makes it inadmissible. *C.R. Pittman Const. Co. v. National Fire Ins. Co. of Hartford*, 453 Fed. Appx. 439, 443 (5th Cir. Oct. 24, 2011) ("A party's own testimony is often 'self-serving,' but we do not exclude it as incompetent

[5] Defendants argue that the Plaintiffs' complaint reveals that ALDF believes it could be prosecuted under the Kansas criminal trespass statute when it alleges "The Kansas legislature's intent to silence a viewpoint critical of animal industry is further evident by the utter redundancy of the Ag-Gag statute to target trespass and other property crimes. Comprehensive, content-neutral laws prohibiting fraud, trespass, adulteration of food products, theft, theft of trade secrets, and destruction of property already existed in Kansas at the time of Ag-Gag statute's enactment." Complaint, ¶ 69. *See* Defs.' Resp. at iv. This argument misreads that allegation, which clearly focuses on the transparency of Kansas's motive to protect the animal agriculture because it already has other laws that directly protect the interests it claims are served by the Ag-Gag law. That has nothing to do with whether Plaintiffs interpret the generally applicable trespass law to prohibit ALDF's undercover investigations.

for that reason alone."); *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003) ("Provided that the evidence meets the usual requirements for evidence presented on summary judgment—including the requirements that it be based on personal knowledge and that it set forth specific facts showing that there is a genuine issue for trial—a self-serving affidavit is an acceptable method for non-moving party to present evidence of disputed material facts."); *Santiago–Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000) ("[A] 'party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment.'") (citation omitted).

While the Tenth Circuit has nodded to the idea that testimony may not be self-serving, a close reading of its cases indicates that this really just means that the testimony is not based on personal knowledge. Perhaps the most cited precedent (including by some of the cases cited by Defendants) on this point is *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995), in which the Court stated that "[t]o survive summary judgment, 'nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.'" (citation omitted). It is evident from the phrase's construction that the Court means that affidavits *not* based on personal knowledge or that set forth facts that would be inadmissible *are* conclusory and self-serving in nature. In other words, conclusory and self-serving are not independent rules of admissibility, but are the flip side of admissible testimony based on personal knowledge.

Second, to the extent Defendants' description of the affiants' testimony as "self-serving" is meant to suggest they disagree with the statements, they have waived the opportunity to create that factual dispute. Every witness who submitted an affidavit for the Plaintiffs was identified as a witness with relevant knowledge during discovery. Defendants chose not to depose any of

those witnesses, and therefore *did not test any of the Plaintiffs' factual assertions* in discovery. If Defendants mean that the facts support Plaintiffs' standing, this is unremarkable and not a valid basis to discount the affidavits. *See Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005); Fed. R. Civ. P. 56(e).

Third, the description of the affiants' testimony as "conclusory" is also similarly empty and unexplained. Each affidavit contains specific dates, numerous examples, citations to supporting documents, detailed explanations of certain organizational activities, and context for the facts provided. Defendants' description of these affidavits as "conclusory" is itself conclusory, and should be ignored.

II. THE KANSAS AG-GAG LAW IMPLICATES THE FIRST AMENDMENT.

A. Application of the Specific Statutory Provisions at Issue.

The Kansas Ag-Gag law has multiple provisions with multiple elements. For the Court's convenience, Plaintiffs offer this breakdown of the elements of each challenged provision. Yet, it is important to note that all the challenged provisions have two common elements. First, they all require that the perpetrator's actions be undertaken without the "effective consent" of the facility's owner, which, as of 2012, excludes consent that is "Induced by . . . fraud, [or] deception." K.S.A. 47-1826(e)(1). Because investigators working with ALDF often affirmatively lie or omit information about their connection to an advocacy group in order to get hired by animal facilities, each provision directly impedes their ability to engage in such an undercover investigation.

Second, each provision requires that the action be undertaken with the intent to damage the enterprise conducted at the animal facility. The Attorney General Opinion regarding this law states this element can be met by one who intends to cause only reputational harm from the

publication of information. Pltfs SUF ¶¶ 12–13. In response to a specific question about whether the phrase "intent to damage the enterprise conducted at the animal facility" is limited to physical damage or whether it also "includes damages resulting from the later publication of a photograph taken at the facility," the Attorney General explicitly endorsed the latter notion. *Id.*, A009–10.

Photography and Video Recording Provision, 47-1827(c)(4)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"enter an animal facility to take pictures by photograph, video camera, or other means."**

Entry with Intent Provision, 47-1827(c)(1)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"Enter an animal facility, not then open to the public"**
	"with intent to commit an act prohibited by this section" [including 1827(c)(4)]	

Entry and Attempt Provision, 47-1827(c)(3)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"enter an animal facility and commit or attempt to commit an act prohibited by this section" [including 1827(c)(4)]**

Damage Provision, 47-1827(a)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"damage or destroy an animal facility or any animal or property in or on an animal facility"**

Control Provision, 47-1827(b)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to deprive the owner of such facility, animal or property"**	**"acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility"**
	"with the intent . . . to damage the enterprise conducted at the animal facility"	

Concealment Provision, 47-1827(c)(2)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"remain concealed, with intent to commit an act prohibited by this section [including 1827(c)(4)], in an animal facility"**

Notice Provision, 47-1827(d)(1)

PREDICATE	STATE OF MIND	CONDUCT
"without the effective consent of the owner"	**"with the intent to damage the enterprise conducted at the animal facility"**	**"enter or remain on an animal facility if the person: (A) Had notice that the entry was forbidden; or (B) received notice to depart but failed to do so."**

B. Each of the Challenged Provisions Criminalizes Conduct That is Undertaken by ALDF-Sent Investigators.

Every federal court—including the Tenth Circuit Court of Appeals—to consider whether laws like the Kansas Ag-Gag law implicate the First Amendment has found they do. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194–95, 1203 (9th Cir. 2018); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196–97 (10th Cir. 2017) ("*Western Watersheds II*"); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) ("*Reynolds II*"); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1205–06; 1206–08 (D. Utah 2017). In claiming that the First Amendment has no application to the Kansas law, Defs.' Resp. at 14–19,

Defendants ask this Court to break with unanimous precedent. The Court should reject that invitation.

In *Wasden*, *Herbert*, and *Reynolds*, the courts each considered state laws that criminalized obtaining access to or employment at agricultural facilities through misrepresentation, taking photographs or videotaping at agricultural operations, or some combination of the two. I.C. § 18-7042(a), (c), (d) (Idaho Ag-Gag law at issue in *Wasden*); Utah Code Ann. § 76-6-112(2)(a), (b), (c) (Utah Ag-Gag law at issue in *Herbert*); Iowa Code § 717A.3(1)(a), (b) (Iowa Ag-Gag law at issue in *Reynolds*). Each court found that each law implicated the First Amendment. *Wasden*, 878 F.3d at 1194–95, 1203; *Herbert*, 263 F. Supp. 3d at 1205–06; 1206–08; *Reynolds II*, 353 F. Supp. 3d at 827. And in *Western Watersheds II*, the Tenth Circuit considered two Wyoming statutes that prohibited crossing private property to collect resource data, including water samples or photographs of wildlife, on adjacent public or private property. 869 F.3d at 1191–92. Although the statute did not prohibit pure speech, but restricted conduct closely related to the creation of speech, the Tenth Circuit still held "that the statutes regulate protected speech under the First Amendment and that they are not shielded from constitutional scrutiny merely because they touch upon access to private property." *Id.* at 1192.

While Plaintiffs raised each of these cases in their opening brief, Pltfs' MSJ Br. at 16–18, Defendants continue to insist that the First Amendment has *no* application to the Kansas Ag-Gag law. Defendants attempt to distinguish the Iowa law at issue in *Reynolds* by contending that under the Kansas law one can lie on a job application "and the lie is not a criminal offense." Defs.' Resp. at 14. Not so; the Kansas law prohibits entering an animal facility by fraud or deception, which would undoubtedly apply to lying (i.e., using fraud or deception) to gain access by employment. KSA 47-1827(c)(1); 47-1826(d)(1). Indeed, while Defendants do not attempt to

distinguish the Utah's Ag-Gag law access provision, that law directly paralleled the Kansas law: a prohibition on "obtain[ing] access to an agricultural operation under false pretenses." Utah Code Ann. § 76-6-112(2)(b). The court in *Herbert* found this provision not only implicated the First Amendment, but also *violated* it. 263 F. Supp. 3d at 1213.

Defendants also claim that the Kansas law "does not punish collecting information or taking of photos [or] videos, unlike the Utah statute." Defs.' Resp. at 14. Also, not so. Like the Utah statute's prohibition on photographing or video recording (which required an intent to record at the time of applying, knowledge that recording was prohibited, and recording), Utah Code Ann. 76-6-112(2)(c)(i–iii), the Kansas law prohibits "enter[ing] an animal facility to take pictures by photograph, video camera or by any other means" without consent of the owner. KSA 47-1827(c)(4). This prohibition was also present in a portion of the Idaho law struck down in *Wasden*, which prohibited "mak[ing] audio or video recordings of the conduct of an agricultural production facility's operations" "without the facility owner's express consent." I.C. § 18-7042(1)(d). Defendants' assertion that the Kansas law is so materially different from these other laws that it not only survives First Amendment scrutiny, but that the First Amendment has no application, borders on inexplicable.

In fact, the Kansas law's prohibition on recording and misrepresentations to gain access are unquestionably closer to core First Amendment protected speech and activity than crossing private land to obtain water samples, as was at issue in *Western Watersheds II*. While the Tenth Circuit found those statutes that chilled the "creation of speech" implicated the First Amendment, 869 F.3d at 1196, the Kansas Ag-Gag law directly criminalizes pure speech—misrepresentations to gain access—as well as activity that is closer to the creation of speech than

the activity at issue in *Western Watersheds II*. This binding precedent controls on the issue of the First Amendment's application.

Defendants attempt to muddy the waters by arguing that "when speech and nonspeech elements are combined, and the nonspeech element (e.g., trespass) triggers the legal sanction, the incidental effect on speech rights does not raise First Amendment concerns." Defs.' Resp. at 16–17 (citing *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-03522, 2018 WL 5879786, *6 (N.D. Cal. Nov. 7, 2018)). That statement does not apply here because elements of each challenged provision are aimed at speech. The Tenth Circuit has held if any part of the "statute[] appl[ies] specifically to the creation of speech" it targets speech and requires review under the proper First Amendment scrutiny. *Western Watersheds II*, 869 F.3d at 1197. Defendants attempt to analogize the Ag-Gag law to "generally applicable" laws, which are laws "not aimed at the exercise of speech or press rights as such." *Am. Civil Liberties Union of Illinois*, 679 F.3d at 601 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)). Even then, in Defendants' scenario the First Amendment would apply because their hypothetical law could regulate speech. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (First Amendment scrutiny applies unless the government's interest is "unrelated to the suppression of free expression."). But that is irrelevant here. As Plaintiffs explained in their opposition, while a speed limit could be considered generally applicable, a different speed limit only for people on the way to a political rally cannot, as that targets speeders only when engaged in expression. Pltfs' Br. in Opp. to Ds' MSJ at 23. If Plaintiffs challenged the state's generally applicable trespass statute (KSA 21-5808), Defendants' argument might have some traction, but Kansas' Ag-Gag Law is equivalent to a special speed limit for speakers—those who gain access to a

particular type of facility through deception (speech) for the purpose of engaging in photography or video recording, all of which are expressive activity—not a speed limit that applies to all. Criminal prohibitions that meld prohibitions on access to private property with speech or speech-facilitating conduct are subject to First Amendment scrutiny. *Western Watersheds II*, 869 F.3d at 1197; *Wasden*, 878 F.3d at 1194–95; *Herbert*, 263 F. Supp. 3d at 1205–06; *Reynolds II*, 353 F. Supp. 3d at 827.

Defendants own authority makes this distinction clear. The *National Abortion Federation* case cited by Defendants *explicitly* distinguished the generally applicable trespass and fraud torts at issue in that case from Ag-Gag laws, explaining the *Wasden* decision invalidating the Idaho Ag-Gag law was irrelevant "because the laws being applied in this case are 'generally' applicable laws, not laws criminalizing speech." *Nat'l Abortion Fed'n v. Ctr. for Med.* Progress, No. 15-3522, 2018 WL 5879786, at *6 (N.D. Cal. Nov. 7, 2018) (citing *Wasden*, 878 F.3d at 1190).

Unanimous precedent holds that the First Amendment applies to law like the Kansas Ag-Gag statute.

III. THE KANSAS AG-GAG LAW VIOLATES THE FIRST AMENDMENT.

A. *Alvarez*, *Wasden*, and *Reynolds* Provide the Roadmap for Defining Legally Cognizable Harm and Material Gain.

The Court should also reject Defendants' argument that even if the First Amendment applies, the Kansas Ag-Gag law's criminalization of false speech is consistent with the First Amendment. Defs.' Resp. at 19–21. As the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), and the Ninth Circuit decision in *Wasden* illustrate, the Kansas Ag-Gag law's requirement that deception be made with an "intent to damage the enterprise" does not transform the lies proscribed by the statute into ones causing legally cognizable harm or

conferring material gain to the investigator—the only circumstances in which false speech falls outside the First Amendment.

In *Alvarez*, the Supreme Court relied on the First Amendment to invalidate the conviction of a man who lied about having been awarded the Medal of Honor. 567 U.S. at 729–30. In striking down the Stolen Valor Act, the majority fractured into a plurality and concurrence; however, all six justices voting to invalidate the law agreed that there is no "general exception to the First Amendment for false statements." 567 U.S. 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 an actual 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) (defining these as "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 that 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 are in agreement. *See Alvarez*, 567 U.S. at 719, 722–23 (plurality opinion); *id*. at 734 (Breyer J., concurring)). Not every psychological or nominal harm is sufficient to justify a restriction on lies.

The Court's illustrations of what constitutes a "legally cognizable harm" or "speech related harm" clarify the meaning of these terms. "Legally cognizable" contemplates injuries that would be recognized under the civil or criminal law. Thus, invasion of privacy is legally cognizable because other legal provisions protect privacy. Not all harms, however, are legally cognizable. A fraud victim may have a legally cognizable harm that a damages award can compensate, but she may not 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.

Building on *Alvarez*, the Ninth Circuit struck down a provision of the Idaho Ag-Gag law that criminalized obtaining access to agricultural facilities by misrepresentation. *Wasden*, 878 F.3d at 1194–99. Although the court upheld a provision that prohibited obtaining employment at an animal agricultural facility through false pretenses with a specific intent to "cause economic or other injury" to the facility's operations—i.e., to cause direct and tangible harm—it applied an important and substantial narrowing construction. *Id*. at 1201. Applying the rule that "'[w]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies,'" *id*. at 1202 (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc)), a court ought to give it that narrower construction, the *Wasden* court made it clear that it was construing the statute's provisions to exclude those who misrepresent themselves to gain employment and only intend to cause "reputational and publication" injuries. *Id*. Specifically, as the court explained, the fact that the statute "excludes 'less tangible damage' such as emotional distress indicates that reputational damages would not be considered 'an economic loss.'" *Id*.

Thus, for example, under *Wasden*, a person who lied to gain employment with the intent to engage in physical destruction of the agricultural operation's property could legitimately be prosecuted. *Id*. at 1202. In contrast, someone who lied to gain employment and merely intended to cause "reputational damages" to the enterprise could not be prosecuted because, according to the court, the intangible damages that typically flow from the exposés resulting from undercover investigations would not constitute "economic injury" or give rise to "economic loss" under the Idaho statute's restitution provision. Idaho Code Ann. §§ 18-7042(1)(c); 18-7042(4) (providing for restitution pursuant to Idaho Code Ann. § 19-5304). The statute broadly defined "economic loss" to include "the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct" but excluded "less tangible damage such as pain and suffering, wrongful death or emotional distress." Idaho Code Ann. § 19-5304(1)(a). The *Wasden* court relied on this definition in finding that the "reputational and publication" injuries that could flow from the plaintiffs' investigations would not result in liability under the Idaho law, salvaging it from First Amendment scrutiny. 878 F.3d at 1202. In the words of the Ninth Circuit, this statute's narrow definition of "economic loss," unlike the Kansas Ag-Gag law, "eliminate[d] its constitutional deficiencies." *Id*.

This narrowing construction is sensible insofar as it retains criminal penalties for persons who intend to gain employment in order to steal trade secrets, cause property damage, or otherwise engage in physical sabotage, while at the same time recognizing that misrepresentations to secure employment that are made in order to expose or document wrongdoing and that do not cause direct, tangible harms fall outside the scope of what the statute can constitutionally regulate.

Synthesizing *Alvarez* and *Wasden*, the district court in *Reynolds* observed that only those false statements "that cause 'specific or tangible' injuries" can constitutionally be proscribed, and that "the common thread through all these [constitutional] sanctions is the centrality of actual harm suffered by the recipient of the false speech." *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 921-22 n.12 (S.D. Iowa 2018) (citing *Wasden*, 878 F.3d at 1194). That court found that the Iowa's Ag-Gag law's prohibition on lies used to gain employment at agricultural facilities markedly distinct because its criminalization of lies "require[d] no likelihood of actual, tangible injury on the part of the recipient of false speech." *Id.* at 924. The court highlighted the important limiting principles discussed above in *Wasden*: "Th[e] intent provision cabined the application of the Idaho statute so that it only criminalized the sort of false statements that the plurality in *Alvarez* recognized the government may target with content-based restrictions: those likely to cause material harm to others." *Id.* By contrast, if it were to find that the Iowa Ag-Gag law's employment provision "prohibits no speech protected by the First Amendment," the *Reynolds* court said it "would have to conclude" that *Alvarez* allows for "government prosecution of all misrepresentations made to secure employment, whether material or not, and irrespective of any actual damage suffered by the employer." *Id.* at 925. The court refused, because doing so would be antithetical to the "remainder of the Supreme Court's jurisprudence caution[ing] against the assumption of any such 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'" *Id.* (quoting *Alvarez*, 567 U.S. at 722).

In other words, not all lies used to obtain employment fall outside the First Amendment's protection, but only those lies where either the liar intends to do tangible harm to the property or the lie results in the liar obtaining a job that the she is either unable or unwilling to do, so that her

salary is like an unjust enrichment. Although the *Alvarez* plurality suggests that lies used to secure "offers of employment" are not within the scope of the First Amendment, the Court was clearly referring to the idea that *the reason* that such lies are not protected is that they are made to "secure moneys or other valuable considerations," 567 U.S. at 723, which would be a material gain. However, when an undercover investigator misrepresents his *political* 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, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 514 (4th Cir. 1999) (overturning fraud verdict against two undercover reporters who lied about their identities in job applications but competently performed their employment duties).

Applying these principles to the Kansas Ag-Gag law's prohibitions on misrepresentations to gain access to an animal facility shows that the law implicates the First Amendment.

B. Nothing in the Kansas Ag-Gag Law Limits its Scope to Criminalizing Only Lies That Cause Tangible Harms.

Defendants argue that the Kansas Ag-Gag law serves legitimate state interests in protecting private property, and therefore the lies are not protected under *Alvarez*. This is simply not the case. The law is not nearly as limited as the employment prohibition in the Idaho Ag-Gag law or non-covered lies as envisioned by *Alvarez*. It contains no such saving limitation that could cabin it to lies told with an intent to cause direct and *tangible* losses such as property damage. In fact, reading the statute in light of the Attorney General Opinion, it punishes those who intend to expose misconduct at animal facilities, leading to reputational damage and lost profits. Pltfs SUF ¶¶ 12–13, A009–11. An investigator could intend to "damage" an animal facility by wishing to expose misconduct, leading to lost customers or suppliers. In contrast, someone who gains access

to an animal facility to publish information singing the praises of an agricultural enterprise would not be subject to criminal punishment, as they would not bear the requisite intent.

Defendants claim both in their standing argument, Defs.' Resp. at 9, and their merits argument, Defs.' Resp. at 20, that the Plaintiffs' planned investigative activities would violate the Kansas criminal trespass law, which prohibits a person from "entering or remaining upon or in any . . . Land . . . by a person who knows such person is not authorized or privileged to do so. . . ." Kan. Stat. Ann. § 21-5808. This claim is premised on their assertion that any consent to enter land achieved through deception means that the person entering the land "is not authorized or privileged to do so." This is wrong for several reasons. First, Defendants can cite no Kansas authority that supports their interpretation of that law.[6] Rather, the act of hiring an investigator specifically authorizes that person to enter the property to perform his job duties. Multiple cases in other jurisdictions have agreed that deception does not vitiate consent in the trespass context. *Food Lion,* 194 F.3d at 518; *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1351-52 (7th Cir. 1995) (Posner, J.); *Herbert*, 263 F. Supp. 3d at 1203 ("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."); *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

[6] Their lone citation is to a case interpreting the aggravated burglary statute, which prohibits "knowingly and without authority entering" a building "with intent to commit a felony or theft therein," to apply to a person who gains such authority through deception. *State v. Maxwell*, 234 Kan. 393 (1983). In addition to the obvious distinction that criminal law policy might dictate broader liability to deter crimes much more serious than trespass, as argued above, the Kansas criminal trespass statute is not violated even by an unauthorized entry alone.

> 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* recognizes the severe implications of a rule permitting 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 ...."").

Second, under Kansas law, unauthorized entry alone does not violate the trespass law; entry must be accompanied by some act in defiance of the land entrant in the face of affirmative steps to exclude her from the property, such as a personally communicated order to leave or the presence of sufficiently clear posted notices. K.S.A. 21-5808(a)(1)(A) – (C).

Finally, Defendants appear to argue that "legal injury is presumed from a trespass," and thus the Court should assume that cognizable harms flow from gaining access through deception. Defs.' Resp. at 20 (citing *Belluomo v. KAKE TV & Radio, Inc.*, 3 Kan.App.2d 461, 469 (1979)). But as *Belluomo* itself recognizes, that presumed injury solely establishes nominal damages. *Belluomo*, 3 Kan.App.2d at 469. And "nominal damage is just that—damage in name only." *Reynolds*, 297 F. Supp. 3d at 922. "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." *Id*. (citing *Food Lion*, 194 F.3d at 518–19; *Desnick*, 44 F.3d at 1353; *Herbert*, 263 F. Supp. 3d at 1203–05; *Wasden*, 878 F.3d at 1195, 1199). *Alvarez*'s requirement that lies must result in "cognizable" harm before they can be placed outside the First Amendment demonstrates that that the Court contemplated more than damage in name only.

Alvarez, 567 U.S. at 719. A contrary finding would render the requirement of cognizable harm meaningless; every nominal, psychological harm would permit the criminalization of that speech.

Recording or other information-gathering for whistleblowing, even when done with the knowledge and intent that such whistleblowing could harm a facility's reputation or bottom line, does not materially injure an employer in any way *Alvarez* contemplated because those activities, without more, cause no direct, concrete damages to the employer. *See Wasden*, 878 F.3d at 1202; *Reynolds*, 297 F. Supp. 3d at 922–23. Indeed, to accept that falsehoods that lead to disclosure of information causing reputational harm are the type of speech *Alvarez* exempts from the First Amendment would paradoxically allow prosecutions of falsehoods that reveal horrific criminality and abuse, while potentially allowing deception that results in a report of less public import. The investigator whose deception leads to a story showing minimal environmental damage would likely escape prosecution (because the reputational injury would be de minimis), but the investigator who made the same misrepresentation and then went on to document graphic violence, a dangerous workplace, or environmental degradation inside the facility would face a serious threat of prosecution because the expansive public discourse it would bring about would produce more substantial reputational injury and economic blowback. That result would be inconsistent with the First Amendment's values and cannot be the law.

C. Defendants' Public Forum Analysis Completely Misapprehends the Purpose of that Area of First Amendment Doctrine.

The Court need not dwell long on the Defendants' misguided argument drawing on the Supreme Court's public forum cases because the Kansas Ag-Gag law's restrictions do not

regulate the use of public property for expression.[7] The public forum doctrine allows the government to impose reasonable regulations of private expression on different types of public property in order to exercise managerial control over public spaces. In the Court's hallmark case, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939), it upheld a previously unrecognized First Amendment right of the people to express themselves on public property. *Id*. at 502 n.1 (invalidating an ordinance prohibiting "'public parades or public assembly in or upon the public streets, highways, public parks or public buildings'" of a municipality); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714–15 (1987) (describing the evolution of public forum doctrine as "an elaborate, even byzantine scheme of constitutional rules designed to ascertain *when members of the general public can use government property* for communicative purposes.") (emphasis added) (footnote omitted).

Because public spaces are limited, however, the Court has also acknowledged that the government has the power to manage the use of such property to, for example, ensure that the same space in a public park is not used simultaneously by two groups of speakers. *Hague*, 307 U.S. at 515–16; Timothy Zick, Summum, *the Vocality of Public Places, and the Public Forum*, 2010 B.Y.U. L. REV. 2203, 2238–39 (2010). The degree of permissible government regulation depends on the classification of public property at issue – traditional public forums, limited or designated public forums, and nonpublic forums. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). As used in First Amendment law, the term "nonpublic forum" does not mean nonpublic in the sense that it is private property; it is a label for *government*

[7] The Defendants claim that the Ag-Gag law may sometimes affect governmental property, such as research facilities, which includes an "elementary school, secondary school, college or university." (Defs.' Resp. at 24). While this conceivably could touch on some small subset of public property, the public forum doctrine is nonetheless inapposite for the reasons described above.

property that is not generally open to the public, such as the Oval Office in the White House or the grounds of a military base. *See United States v. Kokinda*, 497 U.S. 720, 727 (1990). Indeed, the only cases in which the Court has examined the applicability of the public forum doctrine to private property is when the government has somehow appropriated or opened up such property to quasi-public uses. *See, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (private property temporarily converted to government use as a polling place); *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (1992) (privately owned airport).

If Defendants' point is that if the government can exclude speakers from its own private-like properties (nonpublic forums), it should also be able to exclude speakers from actual private property, that is true only to the extent that the laws are generally applicable, as in the case of a traditional trespass law. Where such laws exclude persons from private property *only when they engage in speech or only because they are engaged in speech*, such as prohibiting deception to gain entry and making video recordings after that entry, the law is subject to full and rigorous First Amendment scrutiny.

In response to the Plaintiffs' additional argument that the public forum doctrine is inapplicable to this dispute, Defendants further confuse the issue by citing to cases not involving public forums at all, but delineating the rare cases in which there are exceptions to the presumption of unconstitutionality for content-based laws, Defs.' Resp. at 22. The cases Defendants rely on, however, are again inapposite to the current dispute. It is true that in limited circumstances, the Supreme Court has excluded certain categories of speech, such as obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973), and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), from First Amendment coverage. But lies are not one of those categories. *Alvarez*, 567 U.S. at 722. Defendants also cite cases in which the challengers claimed

that the government engaged in content or viewpoint discrimination *within* a category otherwise outside the First Amendment. Defs.' Resp. at 22. But again, lies that do not cause legally cognizable harms are protected by the First Amendment so they are not in the category of non-speech. Moreover, these cases actually support the Plaintiffs' alternative claim: that, even if these lies are not protected, Kansas has singled them out, regulating them in a viewpoint discriminatory manner to target critics of the animal agriculture industry. Complaint, ¶ 100; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

D. The Kansas Ag-Gag Law Violates the First Amendment Whether Reviewed Under Strict or Intermediate Scrutiny.

Plaintiffs have previously developed their arguments that the Ag-Gag law engages in either viewpoint discrimination or content discrimination, and that strict scrutiny therefore applies. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 18-22; Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 27-30. But even if the Court views the Kansas Ag-Gag law as a content-*neutral* regulation of speech, it must review it under intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (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.'" (citations omitted). At no point in the briefing have the Defendants ever argued that the law could meet either of those standards or presented any record evidence to support their suggestion that the government has legitimate, much less important or compelling, interests that would sustain this law from invalidation under the First Amendment.

CONCLUSION

The Defendants conclude their response brief with the same inapt comparison with which they open their summary judgment briefing, suggesting that acceptance of Plaintiffs' claims would lead to a right to enter a star quarterback's bedroom as long as the person lied to gain access to the property or "wants to take some pictures." Defs.' Resp. at 28. This frivolous example has nothing to do with this case. Kansas's Ag-Gag law prohibits deceptive entry onto private, but commercial, property in a highly regulated industry to document illegal or unethical conduct in the animal agriculture industry—all matters of unquestionable public concern (unlike the quarterback's private life).

While the Kansas legislature can protect the animal agriculture industry from actual physical damage or destruction, the First Amendment prohibits it from exercising its power to protect that economically important industry from public criticism. It is Defendants' position that is untenable. Upholding the Kansas Ag-Gag law would open the door for the government to criminalize undercover investigations by professional journalists and civil rights testers, who use the exact same tactics as ALDF to secure important, truthful information and expose it to public scrutiny. For the reasons set forth herein, Plaintiffs respectfully request the Court grant their motion for summary judgment, and correspondingly, deny the Defendants' motion for summary judgment.

Dated this 29th day of October, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I electronically filed the foregoing document with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing on the following:

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