In The United States District Court
For The Southern District of Iowa

ANIMAL LEGAL DEFENSE FUND; **PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.**; **BAILING OUT BENJI; FOOD & WATER WATCH**; and **IOWA CITIZENS FOR COMMUNITY IMPROVEMENT**

Plaintiffs,

v.

KIM REYNOLDS, in her official capacity as Governor of Iowa; **TOM MILLER**, in his official capacity as Attorney General of Iowa; **VANESSA STRAZDAS**, in her official capacity as Cass County Attorney; **CHUCK SINNARD**, in his official capacity as Dallas County Attorney; and **JOHN GISH,** in his official capacity as Washington County Attorney

Defendants.

Case No.: 4:21-cv-00231

PLAINTIFFS' RESISTANCE TO DEFENDANTS' MOTION TO DISMISS

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I. Introduction.

This case is the third challenge to Iowa's "Ag-Gag" laws. "The term 'ag-gag' was coined in 2011 by former *New York Times* columnist Mark Bittman to describe a series of state bills appearing across the country that criminalized photographing and video recording inside agricultural facilities" with the goal of "hid[ing] industry practices" and keeping that truthful information from sparking reforms. Chip Gibbons, *Ag-Gag Across America: Corporate-Backed Attacks on Activists and Whistleblowers*, Center for Constitutional Rights & Defending Rights & Dissent, 6 (2017).[1] Undercover investigations related to unsafe and unhealthy meat production date back to Upton Sinclair and *The Jungle*, which brought about the Federal Meat Inspection Act. "Ag-Gag" laws were motivated by Plaintiff People for the Ethical Treatment of Animals' (PETA) similar "undercover exposés documenting violence against animals in fur, agriculture, and experimentation, resulting in animal cruelty prosecutions and increased public awareness of the mistreatment of animals as a social issue." *Id.* at 2.

Indeed, the publication of the images and data obtained through the investigations of Plaintiffs PETA, Animal Legal Defense Fund (ALDF), and Bailing Out Benji (BoB), have served as an essential mechanism to inform and change how the public and government view and treat animals, helping motivate statutory and regulatory reforms and spurring criminal sanctions against animal abusers, among other impacts. *See* Dkt. No. 1 ¶¶ 37–41. The information gathered has been integral in these Plaintiffs' and others' advocacy to protect people, the environment, and animals—including that of Plaintiff Food & Water Watch (FWW). *Id.* ¶ 49. Similarly, Plaintiff Iowa Citizens for Community Improvement (ICCI) relies on photos and videos of its non-violent civil disobedience—the making of which is also punished by the challenged law—in its political

[1] https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf.

campaigns. *Id.* ¶¶ 55–58. The recordings are featured in its fights against factory farms and to protect Iowa's water and workers. *See id.* ¶¶ 61–63.

Plaintiffs have been required to bring three different challenges to Iowa's laws because there have been several "waves" of Ag-Gag laws. *Id.* ¶¶ 4–8. Each emphasizes slightly different methods to squelch speech. Nonetheless, every challenge has resulted in courts holding they chill advocates' speech and violate the First Amendment in whole or in part. *E.g.*, *ALDF v. Kelly ("Kelly")*, 9 F.4th 1219 (10th Cir. 2021) (striking down all challenged provisions of Kansas Ag-Gag law); *ALDF v. Wasden ("Wasden")*, 878 F.3d 1184 (9th Cir. 2018) (striking down Idaho Ag-Gag Law in part); *ALDF v. Herbert ("Herbert")*, 263 F. Supp. 3d 1193 (D. Utah 2017) (striking down Utah Ag-Gag law in full). Still, Iowa has ridden every wave.

Iowa's first and second Ag-Gag laws focused on criminalizing "misrepresenting oneself in order to gain access to an animal agriculture facility"—for example, an applicant "failing to answer truthfully when asked if [they are] a member of an animal rights group"—which is a technique animal advocacy organizations use. Gibbons, *supra*, at 6. Lawmakers hoped an exception to the First Amendment for false speech that causes a "legally cognizable" harm would protect these laws. *See United States v. Alvarez,* 567 U.S. 709, 719 (2012) (plurality opinion).

However, consistent with other jurisdictions, the Eighth Circuit recently held Iowa's first Ag-Gag law unconstitutional in part, remanding to determine if the remainder is viewpoint discriminatory and thereby unlawful. *ALDF v. Reynolds ("Reynolds")*, 8 F.4th 781 (8th Cir. 2021). Another court in this district has preliminarily enjoined Iowa's second law. *ALDF v. Reynolds*, No. 419CV00124JEGHCA, 2019 WL 8301668 (S.D. Iowa Dec. 2, 2019).

As efforts to criminalize false speech faltered, Ag-Gag laws morphed into statutes like the one at issue here. They moved "beyond the agricultural industry to target whistleblowers more

broadly" in hopes of making the laws appear less content based. Gibbons, *supra*, at 5. They also focused on "[p]rohibiting documentation" rather than representations, particularly when made without permission on another's property, so states could argue the laws protected property and privacy rather than prohibited speech. *See id.* at 6.

The second wave has fared no better than the first. The Tenth Circuit, in the first decision on this type of Ag-Gag law, held that even if a law prevents trespass, it requires First Amendment review if it also suppresses speech. *W. Watersheds Project v. Michael ("W. Watersheds Project I")*, 869 F.3d 1189 (10th Cir. 2017). The Wyoming district court then struck down the provisions at issue, which prohibited "cross[ing] private land" without permission "to access adjacent or proximate land," be it public or private, to "collect[] resource data." *W. Watersheds Project v. Michael ("W. Watersheds Project II")*, 353 F. Supp. 3d 1176, 1180, 1191 (D. Wyo. 2018). A district court in North Carolina held unconstitutional provisions that penalized "[a] person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter," where that was defined to mean gathering information in "nonpublic areas," particularly by "record[ing] images or sound." *PETA v. Stein*, 466 F. Supp. 3d 547, 558–59, 587 (M.D.N.C. 2020), *appeal docketed*, No. 20-1776 (4th Cir. July 15, 2020). Most recently, the Eighth Circuit held that animal protection groups that have engaged in undercover investigations in the past have standing to challenge an Arkansas law essentially identical to the North Carolina statute. *ALDF v. Vaught* ("*Vaught")*, 8 F.4th 714 (8th Cir. 2021).

Yet, Iowa enacted § 727.8A, which is equivalent to the Wyoming, North Carolina, and Arkansas laws. Section 727.8A creates a new crime that applies to "[a] person committing a trespass as defined in section 716.7 who knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed

property[.]" Iowa Code § 727.8A. Thus, Iowa has criminalized an activity that has two elements: (1) trespassing; and (2) knowingly recording images or data on that trespassed-upon property.

A first offense is an aggravated misdemeanor, *id.*, a punishment that exceeds anything under Iowa's trespass statute, Iowa Code § 716.7, including when a person "knowingly trespasses" with "the intent to commit a hate crime[.]" *Id.* § 716.8(3). A second offense is a felony. *Id.* § 727.8A. The heightened penalties are available *only* if a person makes a recording.

Defendants' motion to dismiss Plaintiffs' challenge to § 727.8A not only fails to establish Defendants prevail, but affirmatively demonstrates § 727.8A cannot stand. For this reason, Plaintiffs have simultaneously filed a motion for summary judgment or, in the alternative, for a preliminary injunction. At bottom, Defendants err as a matter of law in claiming Plaintiffs lack standing and that § 727.8A targets activities outside the First Amendment's reach. Their argument to establish the law survives scrutiny and is not overbroad actually demonstrates they cannot carry their burden to sustain the law. Therefore, their papers establish the law is facially invalid.

Regarding standing, Defendants rightly concede Plaintiff ICCI alleges that it and its members are suffering an injury-in-fact because the law is chilling their speech. Dkt No. 19, at 9. Defendants' cursory claim that ICCI has not identified a "legally recognized interest" federal courts can adjudicate is an exercise in quote-mining, and their redressability argument ignores ICCI's allegations. *See id.* at 9–10. And Defendants' effort to dodge Plaintiffs' as-applied—although not their facial—claims as unripe overlooks recent Eighth Circuit law that if there is First Amendment standing, courts should not entertain ripeness arguments. *Vaught*, 8 F.4th at 721, n.*. All the other Plaintiffs also have standing. But only one Plaintiff must establish standing for the Court to proceed to the merits. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53, n.2 (2006). ICCI's clear standing is sufficient.

On the merits, in arguing that the First Amendment does not apply to § 727.8A, Defendants rehash the exact arguments that have been considered and uniformly rejected in the Ag-Gag case law above, which itself built on a host of other Circuit and Supreme Court precedent. Their arguments that the law is not overbroad and survives intermediate scrutiny merely repeat their disproven claim that the First Amendment does not protect the regulated activities. Dkt. No. 19, at 30, 34. Even Defendants agree that an overbroad law is facially invalid. *Id.* at 33.

For these reasons, the Court should deny Defendants' motion to dismiss and, now that Plaintiffs have substantiated their standing allegations in their parallel motion for summary judgment, enter judgment for Plaintiffs. There is no legitimate dispute in this matter. Defendants' have only succeeded in proving they cannot justify § 727.8A.

II. Standard of Review.

"'When a motion to dismiss is made on standing grounds the standing inquiry must, as a prerequisite, be done in light of the factual allegations of the pleadings.' The standing inquiry is separate from an assessment of the merits of a plaintiff's claim." *ALDF v. Reynolds,* 297 F. Supp. 3d 901, 912 (S.D. Iowa 2018) (cleaned up) (quoting *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 570 (8th Cir. 2007) (citing *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012)). In analyzing the complaint to determine if the facts allege standing, courts "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Even were the Court to conclude the allegations were lacking, it should allow Plaintiffs the opportunity to amend. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1033 (8th Cir. 2014). And here the Court can also refer to the declarations filed with Plaintiffs' parallel motion for summary judgment that further detail the facts

alleged in the Complaint. When the Court turns to the arguments on the merits, it must determine whether the Complaint contains "'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *ALDF v. Reynolds,* 297 F. Supp. 3d at 912 (cleaned up) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

III. Each Plaintiff Has Alleged the Law Is Chilling Its Speech, Which Establishes Each Has Standing and the As-Applied Claims Are Ripe.

As Defendants recognize, Plaintiffs have standing to challenge a law when it objectively reasonably chills their or their members' speech. This is precisely what Plaintiff ICCI alleges, and Defendants' bizarre argument to defeat ICCI's standing effectively acknowledges that its claims are sufficient. That alone is enough for the Court to proceed to the merits. However, all Plaintiffs have established standing because they have shown the law deters their speech. Defendants' suggestion that Plaintiffs' as-applied claim is unripe flouts Eighth Circuit law holding jurisprudential ripeness concerns should not keep the Court from entertaining First Amendment claims where standing exists. Even were the Court to consider Defendants' argument, ironically, Defendants' argument is itself unripe; it fails to develop what information Defendants believe is lacking from any of Plaintiffs' claims.

a. First Amendment standing doctrine.

Plaintiffs have standing to bring pre-enforcement challenges against enforcers of laws that hinder the plaintiffs from developing their desired speech. *E.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding reasonable "self-censorship" is a First Amendment injury-in-fact); *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (plaintiff "can establish standing by alleging that it self-censored"). "Because the First Amendment protects against not only direct censorship but the chilling of protected speech, a plaintiff making a First Amendment claim alleges an injury-in-fact 'even if the plaintiff has not engaged in the

prohibited expression[.]'" *ALDF v. Reynolds*, 297 F. Supp. 3d at 912 (quoting *Republican Party of Minn., v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004)).

To establish an injury-in-fact based on chill, a plaintiff must show it is "'objectively reasonably chilled from exercising [it]s First Amendment right to free expression[.]'" *Id.* (quoting *Republican Party of Minn.*, 381 F.3d at 792). Once a law's objectively reasonable chill is proven, that injury-in-fact is traceable to and redressable against the people who can enforce the law. *Vaught*, 8 F.4th at 721 (citing *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019)). Defendants, rightly, do not contest they are such people. *See* Iowa Code § 13.2(b) (Attorney General oversees and coordinates enforcement of Iowa's criminal laws); Iowa Code § 331.756 (County Attorneys make initial charging decisions).

The Eighth Circuit has held it is objectively reasonable to be chilled by the existence of a criminal statute, as it makes sense to presume the State will enforce its laws. "[A] plaintiff 'suffers Article III injury when it must either make significant changes to its operations to obey the regulation, or risk a criminal enforcement action by disobeying the regulation.'" *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (quoting *Minnesota Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997)).

A plaintiff can prove a law is chilling *its* activities by explaining it is declining to develop speech that could be punished by the law. A plaintiff does not need to point to specific speech the law has suppressed to show chill. If the plaintiff shows the law deters it from undertaking activities to engage in speech, that is sufficient. "Because the First Amendment protects against the chilling of speech, it is not necessary for Plaintiffs to provide concrete operational blueprints—who, what, when, and where—for activities they do not intend to conduct when the entire basis for their claim is that the challenged law makes such activities *illegal*." *Reynolds*, 297 F. Supp. 3d at 915

(emphasis in original). "'A plaintiff who alleges a chilling effect asserts that the very existence of some statute discourages, or even prevents, the exercise of [its] First Amendment rights. Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future.'" *Id.* (quoting *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc)).

A plaintiff establishes it is sufficiently impacted by a statute by showing that it has "'in the past conducted'" activities that could be covered by the statute, that it "'wish[es] to continue'" to engage in similar activities, and that it is "'prepared to go forward'" but is not attempting to do so given the statute. *Vaught*, 8 F.4th at 719 (quoting *PETA, Inc. v. Stein*, 737 F. App'x 122, 130 (4th Cir. 2018) (unpublished)). These facts "lend[] concreteness and specificity to the plaintiffs' claims" so they do not need "to show that they have specific plans or intentions to engage in the type of speech affected by the challenged government action" to have standing. *Initiative & Referendum Inst.*, 450 F.3d at 1089; *see also Iowa Right To Life Comm., Inc. v. Tooker,* 717 F.3d 576, 604 (8th Cir. 2013) ("Merely alleging a desire to engage in the proscribed activity is sufficient to confer standing.").

Certainty of prosecution, if the First Amendment plaintiff were to pursue her desired speech activities, is not required. Pre-enforcement standing exists to prevent "plac[ing] the hapless plaintiff between the Scylla of intentionally flouting state law" in order to vindicate its ability to proceed "and the Charybdis of forgoing what [it] believes to be constitutionally protected activity[.]" *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). Put another way, pre-enforcement standing exists when the party "risk[s]" being charged, so it need not choose to take that risk and face uncertain consequences or forgo its desired speech. *St. Paul Area Chamber of Com.*, 439 F.3d at 487; *see also id.* at 486 (plaintiffs only need "'some reason in fearing prosecution'" (quoting

Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 302 (1979))).

Accordingly, the Eighth Circuit has held a plaintiff does not "need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *281 Care Comm. v. Arneson*, 638 F.3d 621, 629 (8th Cir. 2011). When "plaintiffs have not alleged that they wish" to act in contravention of the statute, but allege "they wish to engage in conduct that could reasonably be interpreted" as falling within the statute, and thus are not proceeding with their desired speech, they are suffering a First Amendment injury-in-fact. *Id.* at 628–29. Because, in these circumstances, plaintiffs "have reasonable cause to fear consequences of" the challenged law, their "decision to chill their speech [i]s objectively reasonable." *Id.* at 28.

Finally, where, as here, the plaintiff organizations include membership organizations, they can establish this standing on behalf of themselves or their members. To represent their members, the members must "'have standing to sue in their own right,'" "'the interest [the organization] seeks to protect'" must be "'germane to the organization's purpose,'" and "'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532–33 (8th Cir. 2005) (cleaned up) (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). An activity is germane to an organization's purpose where one of the organization's "announced goals" include engaging in the restricted activity. *Minnesota Fed'n of Tchrs. v. Randall*, 891 F.2d 1354, 1359 (8th Cir. 1989) (citing *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986)). If, as here, the suit "seeks only declaratory and prospective injunctive relief, the participation of individual" members is not required and thus the third element is met as a matter of law. *Heartland Acad. Cmty. Church*, 427 F.3d at 533.

b. ICCI has standing because it and its members have been chilled.

As Defendants recognize, ICCI's allegations make out a First Amendment injury-in-fact based on chill. Dkt. No. 19, at 9. ICCI explains that it seeks to engage in advocacy that involves its staff and members participating in non-violent civil disobedience. Dkt. No. 1 ¶¶ 54, 61. This non-violent civil disobedience frequently involves trespassing, and when it does ICCI records its advocacy on the trespassed-upon property—precisely what is covered by § 727.8A. *Id.* ¶¶ 54–55. In fact, on numerous occasions people associated with ICCI have been arrested for trespass as part of ICCI's non-violent civil disobedience. *Id.* ¶ 54. Moreover, the recording is integral to ICCI's work, increasing the impact of the non-violent civil disobedience by ensuring it can be seen by others, *id.* ¶¶ 55–57, and protecting ICCI's members and staff from mistreatment, *id.* ¶ 58. As a result, ICCI explains its speech has naturally been deterred by § 727.8A. Because of the penalties imposed by Iowa Code § 727.8A, both ICCI and its members are not engaging in ICCI's non-violent civil disobedience to the same extent as they were before the law was passed. *Id.* ¶¶ 62–63. Certain members will not participate in any non-violent civil disobedience that involves trespassing and recording due to the heightened penalties imposed by the law. *Id.* ¶ 63.

Defendants' argument that ICCI has alleged an injury-in-fact, but lacks standing because it and its members do not have a "legally recognized interest" in claiming they should be protected from § 727.8A's criminal prohibitions, Dkt. No. 19, at 9–10, is nonsense. Contrary to Defendants' spin, Plaintiffs are not alleging the right to engage in crimes—they are alleging the right to be free from an unconstitutional punishment for their speech. Despite Iowa's continued disregard for the First Amendment, Iowans retain the ability to assert their First Amendment rights.

Defendants' own case law explains that so long as Plaintiffs advance a "nonfrivolous legal challenge, alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected."

Initiative & Referendum Inst., 450 F.3d at 1093; *see also Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014) (Defendants' authority, which relies on *Initiative & Referendum Institute,* 450 F.3d at 1093). Defendants cherry-pick a quote that suggests there is no legally cognizable interest to challenge criminal laws, Dkt. No. 19, at 9, but that citation actually stands for the unremarkable rule that if a plaintiff only alleges a right to engage in the regulated conduct, without explaining how the regulation infringes on its rights, the plaintiff did not allege an invasion of a "legally protected interest," *Initiative & Referendum Inst.*, 450 F.3d at 1093. Were Defendants' reading correct, the State could criminalize anything—from expressing a political view to requesting a speedy trial—and no party would have standing to challenge those laws because they would be challenging a criminal statute and they would not have a "legally recognized interest." Defendants are incorrect. As Plaintiffs' First Amendment claims are hardly frivolous, they can proceed.

To the extent Defendants mean Plaintiffs lack standing because Defendants believe ICCI's First Amendment arguments are incorrect, that argument also fails. "'The standing inquiry is not an assessment of the merits of a plaintiff's claim.'" *Am. Farm Bureau Fed'n v. U.S. Env't Prot. Agency*, 836 F.3d 963, 968 (8th Cir. 2016) (quoting *Red River Freethinkers* 679 F.3d at 1023). "'In assessing a plaintiff's Article III standing, [courts] must assume that on the merits the plaintiffs would be successful in their claims.'" *Id*. (citing *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008)); *see also ALDF v. Reynolds*, 297 F. Supp. 3d at 912.

Finally, if Defendants seek to raise their redressability argument against ICCI—which is unclear from their brief, Dkt. No. 19, at 10–11—that too relies on misdirection. Defendants argue ICCI's injury is not redressable because, "even if the Court enjoins [§ 727.8A], if Plaintiffs' investigations involve a criminal trespass, then the investigations would still be unlawful[.]" *Id.* at

10. But ICCI alleges that it is solely due to § 727.8A's heightened penalties, particularly that a first offense is an "aggravated misdemeanor," that ICCI and its members are declining to engage in their protected activities. Dkt. No. 1 ¶¶ 60–63. They explain that if the law were enjoined they would engage in further non-violent civil disobedience involving trespass and recording (speech). *Id*. Thus, ICCI's injury—the suppression of its speech—would be redressed if § 727.8A were enjoined. *Minnesota Citizens Concerned for Life,* 113 F.3d at 131 ("When government action or inaction is challenged by a party who is a target or object of that action, 'there is ordinarily little question that the action or inaction has caused [them] injury, and that a judgment preventing or requiring the action will redress it.'" (cleaned up) (quoting *Lujan*, 504 U.S. at 661–62)).

ICCI has standing. The Court can proceed to the merits. *Rumsfeld*, 547 U.S. at 53, n.2.

c. ALDF, PETA, and BoB have standing because their speech has been chilled.

Defendants argue, without citing any case law, that ALDF, PETA, and BoB lack standing based on chill because they have not described the "specific manner" in which they would violate § 727.8A. *E.g.,* Dkt. No. 19, at 8, 12. Likewise, Defendants argue that because these Plaintiffs do not believe they would rightfully be charged under the law—as they do not believe they trespass for their advocacy—they cannot claim to be objectively reasonably chilled. *Id.* at 7–8. Not so. A party need not concede it would be properly charged. These Plaintiffs have previously engaged in activities that could fall within the laws reach, but are refraining from those activities now because of § 727.8A. This is enough. *281 Care Comm.*, 638 F.3d at 629; *see also St. Paul Area Chamber of Com.*, 439 F.3d at 487.

Indeed, this Circuit in *281 Care Committee* and the Supreme Court in cases such as *Susan B. Anthony List v. Driehaus* have made clear that plaintiffs can face a credible threat of prosecution even when they *disclaim* an intent to do the activity the challenged law proscribes. *Susan B.*

Anthony List, 573 U.S. 149, 162–63 (2014) (finding "no difficulty concluding that petitioners' intended speech is arguably proscribed by" statute prohibiting dissemination of false election-related statements, and thus finding their fear of prosecution reasonable, notwithstanding petitioners' insistence they would make only factually true statements).

ALDF's, PETA's, and BoB's allegations fall squarely within this precedent and make clear each reasonably fears being charged under § 727.8A. The legislature stated the law was designed to punish ALDF's, PETA's and BoB's activities. Dkt. No. 1 ¶ 43. Moreover, ALDF, PETA, and BoB allege that investigators and volunteers sent on these Plaintiffs' behalf regularly engage in recordings on private property without permission to make those recordings, indicating their recordings could be argued to infringe on private property rights. *Id.* ¶¶ 39-41. And ALDF, PETA, and BoB allege the challenged law is the third in a series Iowa legislators passed to curtail their core investigative activities of photography, video recording, and data collection—and that the second law and third, § 727.8A, were passed not long after the Plaintiffs succeeded in getting previous Ag-Gag laws preliminarily or permanently enjoined. *Id.* ¶¶ 4-6, 39.

While Defendants assert those are not bases enough for ALDF, PETA and BoB to fear § 727.8A, Dkt. No. 19, at 22–23, they go on to state their own reading of Iowa trespass law makes it "not clear" if ALDF, PETA, and BoB would fall within it*, id.* at 31. Further, the State has repeatedly labeled ALDF, PETA, and BoB as trespassers and their activities as trespass.[2] If the

[2] *See, e.g.*, Dkt. 19, at 30–32 (arguing § 727.8A "enhanc[es] the penalty for conduct that is already prohibited by law—using a camera on a business' property without consent (trespass)"); Defs' Reply Brief in Supp. of Mot. for Summ. J. 2, Dkt. 76, *ALDF v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) (arguing § 717A.3A is simply a prohibition against "trespass[] facilitated by lies"), *aff'd in part, rev'd in part and remanded*, 8 F.4th 781 (8th Cir. 2021); Defs.' Combined Brief in Supp. of Resistance to Pls' Mot. for Summ. J. and Cross-Mot. for Summ. J. 28, Dkt. 63, *id.* ("Even in the absence of the statute, the activities Plaintiffs want to engage in are still illegal under Iowa's trespass laws. *See* Iowa Code § 716.7.").

State and its prosecutors have called Plaintiffs trespassers and their activities trespassing, and believe Plaintiffs may face charges under the law, then ALDF's, PETA's and BoB's apprehension is objectively reasonable and it is proper for them to self-censor in response. *Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016) (holding the government's "own potentially contradictory assertions" about the law's applicability helps show fear is objectively reasonable).

Defendants' additional redressability argument—that ALDF, PETA, and BoB could "still violate Iowa's general criminal trespass law" if they proceed, Dkt. No. 19, at 10—further confirms ALDF, PETA, and BoB have reason to fear § 727.8A. And the argument fails for the same reason Defendants' redressability argument against ICCI failed: Defendants misstate the allegations. ALDF, PETA and BoB explain it is the fear of charges under § 727.8A that is keeping them from proceeding, not the fear of Iowa's standard trespass law and its sanctions. Dkt. No. 1 ¶ 43. Plaintiffs ALDF, PETA, and BoB allege that if § 727.8A were enjoined, this would alleviate their chill notwithstanding that the general trespass law, § 716.7, would remain in place. *Id.* In the words of the district court considering a challenge to the Kansas Ag-Gag law ("the Act"), "whether ALDF faces a threat of prosecution under trespass law, removing the threat of prosecution under [the Act] addresses the chilling effect of the Act. Put another way, if ALDF knew that it only risked violation of one law (trespass) rather than two (trespass and the Act), it would reasonably be less afraid to exercise its rights." *ALDF v. Kelly*, 434 F. Supp. 3d 974, 993 (D. Kan. 2020).

Defendants claim the cases they cite in support of their redressability argument establish that if one law is deterring speech there is no standing to challenge another law. But Defendants' authority actually explains that if a plaintiff challenges only one aspect of a law it claims is chilling its speech, but does not challenge other aspects that would equally keep the plaintiff from proceeding, its injury from that statute is not redressable. *Midwest Media Prop., L.L.C. v. Symmes*

Twp., 503 F.3d 456, 461-62 (6th Cir. 2007) (discussing Defendants' authority *Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F.3d 793 (8th Cir. 2006) and *Harp Adver. Ill., Inc. v. Vill. of Chi. Ridge,* 9 F.3d 1290 (7th Cir. 1993), among others). Unlike in those cases, ALDF, PETA, and BoB have challenged all the Ag-Gag laws they explain are causing their chill.[3] Section 727.8A, standing alone, is chilling ALDF, PETA, and BoB's speech, and the relief these Plaintiffs seek will provide them at least redress from that chill, which is sufficient.

In sum, ALDF, PETA and BoB are being objectively reasonably chilled by the law, and their injury can be redressed through prohibiting its enforcement.

d. FWW, ALDF, PETA, and BoB have standing because others have been chilled.

FWW, ALDF, PETA, and BoB have standing because the law is chilling ALDF, PETA, BoB, and others from developing recordings that they would use in their own advocacy and share with other groups. Dkt. No. 1 ¶¶ 38, 42, 55. FWW, ALDF, PETA, and BoB draw on those recordings in their advocacy, and § 727.8A is denying them access to that information. *Id.* ¶¶ 45, 49–50. "[P]utative recipients of speech usually have standing" to challenge a law so long as there is "reason to believe [another person] is willing to speak and is being restrained from doing so" by the law. *United States v. Wecht*, 484 F.3d 194, 202 (3d Cir. 2007) (quoting *FOCUS v. Allegheny Cty. Ct. of Common Pleas*, 75 F.3d 834, 838–89 (3d Cir. 1996)); *see also, e.g.*, *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 491–92 (4th Cir. 2008); *In re Application of Dow Jones & Co., Inc.*, 842

[3] As Defendants may note, ALDF, PETA, and BoB are also challenging Iowa's first and second Ag-Gag laws, alleging those statutes deter the same speech that is chilled by § 727.8A. *See*, *e.g.*, *ALDF v. Reynolds*, 297 F. Supp. 3d at 910. (ICCI is alleging a different injury to speech in this case.) The challenges to those other Ag-Gag laws remain ongoing. When Plaintiffs filed this case, the other laws were enjoined in full; today, as Defendants note, Dkt. No. 19, at 23, n.5, they are enjoined in full or in part. Nonetheless, even if another law is also a deterrent, a plaintiff has standing to challenge government action that is a "contributing factor" to the plaintiff's injury. *Nat. Res. Def. Council, Inc. v. U.S. FDA*, 710 F.3d 71, 85 (2d Cir. 2013).

F.2d 603, 607 (2d Cir. 1988). On this basis, another court in this district held an organization had adequately alleged standing where it explained the challenged law created "a reduced, or possibly eliminated, pipeline of information . . . that it can use in its advocacy." *Reynolds*, 297 F. Supp. 3d at 916.

Defendants complain that "FWW has provided no examples of past prosecution for trespass," Dkt. No. 19, at 9, but FWW does not claim the law is keeping it from gathering information. Rather, it alleges § 727.8A is keeping others from gathering information on which FWW would rely.[4] Section 727.8A's chill of those other "willing speaker[s]" creates FWW's standing. *Wecht*, 484 F.3d at 202. Indeed, because § 727.8A is an obstacle to FWW, ALDF, PETA and BoB developing their speech based on others' recordings, they all have standing on this basis. *Am. C.L. Union v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011) (noting a plaintiff has standing if they "identif[y] willing speakers [who] would have spoken to [them] in the past but for the speech restriction or would speak with [them] in the future but for the speech restriction").

e. Plaintiffs' as-applied claims are ripe.

Lastly, Defendants erroneously argue Plaintiffs' as-applied claims are unripe. The Eighth Circuit just explained in the Arkansas Ag-Gag case that, "where a plaintiff alleges a chill on speech, 'Article III standing and ripeness issues boil down to the same question.'" *Vaught*, 8 F.4th at 721, n.* (cleaned up) (quoting *Susan B. Anthony List*, 573 U.S. at 157, n.5). Moreover, it emphasized ripeness is a prudential consideration and, where plaintiffs allege First Amendment injuries, "delaying judicial review would result in hardship to the plaintiffs" that should not be tolerated. *Id.* The Eighth Circuit authority Defendants cite finding a claim was unripe did not

[4] To the extent Defendants are arguing that FWW's standing fails because ALDF and PETA have not suffered an injury-in-fact, that argument fails for the reasons explained in the preceding paragraphs.

address a First Amendment claim. *See* Dkt. No. 19, at 4. Rather, the plaintiffs argued the defendants violated a statute but alleged no facts that would make the statute applicable; thus, the court concluded that claim was not ripe. *KCCP Tr. v. City of N. Kansas City*, 432 F.3d 897, 900 (8th Cir. 2005). Because the constitutional claims were "wholly dependent upon the existence" of a statutory violation, the court did not need to reach them. *Id.*

Accepting Defendants' ripeness argument would undermine First Amendment standing law. They claim Plaintiffs' as-applied challenge is not ripe because Plaintiffs have not identified "the specific … properties" they would investigate if § 727.8A did not chill their speech. Dkt. No. 19, at 12. As explained above, First Amendment standing law rejects the notion that Plaintiffs must identify the "who, what, when, and where" of their chilled activities, because the law's chilling effect logically keeps a party from developing those details. *Reynolds*, 297 F. Supp. 3d at 915.

Assuming Defendants can raise their ripeness argument, they fail to explain how the purportedly missing information renders Plaintiffs' as-applied claims unripe. Defendants complain that Plaintiffs have identified a "broad" set of locations they are being chilled from investigating. Dkt. No. 19, at 13–14. Even accepting this premise as true[5], no authority provides as-applied claims are unripe simply because there is a large volume of them, nor that Defendants can treat Plaintiffs' as-applied claims as an undifferentiated mass, failing to identify what specifically is deficient with each. Moreover, Defendants admit Plaintiffs have provided "descriptions of proposed conduct and locations of said conduct" they contend has been chilled. *Id.* at 14. As explained below, even that level of detail is unnecessary to resolve Plaintiffs' First Amendment claims.

Defendants' citation of *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir.

[5] Plaintiffs PETA, ALDF, and BoB focus exclusively on facilities holding live animals—factory farms, slaughterhouses, zoos, puppy mills—while Plaintiff ICCI focuses on factory farms and certain other specified locations and types of facilities. Dkt. No. 1 ¶¶ 2, 34–35, 41, 54, 62.

2020), only serves to confirm their ripeness argument is baseless. There, the plaintiff did not seek as-applied relief based on the investigations it intended to conduct, but asked the court to enjoin the law from applying in circumstances under which the plaintiff "g[ave] no indication that it intends to investigate[.]" *Id.* at 843. The court explained that if, as is true here, the plaintiff had limited its requested relief to its "plan of recording" then the pre-enforcement as-applied claim could have proceeded. *Id.* at 842. However, because Project Veritas sought an injunction against a universe of investigations far broader than those in which it planned to engage, the claims were both unripe, and the organization lacked Article III standing to proceed with that challenge. *Id.* at 843-44.

Indeed, Defendants acknowledge Plaintiffs' claims are unlike Project Veritas, but like those the First Circuit stated could proceed. Defendants state that Plaintiffs seek as-applied relief to stop § 727.8A from applying in the places Plaintiffs "wish to investigate"—which as noted above, Defendants recognize Plaintiffs identified in detail. Dkt. No. 19, at 11.

Consistent with this, the district court in *PETA v. Stein* provided as-applied relief based on essentially identical facts to those alleged here. 466 F. Supp. 3d at 575–76. ALDF's and PETA's declarations here, submitted with their parallel motion for summary judgment, mirror the declarations they built off of similar allegations in *PETA*.

Finally, even were this case not factually distinct from *Project Veritas*, that holding arose on summary judgment, not a motion to dismiss. The court ruled the way it did because while Project Veritas sought to obtain relief beyond its planned activities, its discovery responses failed to meaningfully define the parameters of the activities it wished the court to protect. *Project Veritas Action Fund*, 982 F.3d at 841. In seeking to dismiss Plaintiffs' claims, Defendants, in contrast, are asking the Court to guess that Plaintiffs will seek something similar—a guess that is inconsistent

with all parties' characterizations of the facts. Therefore, again assuming it can be raised at all, Defendants' ripeness argument is (ironically) premature and, in reality, groundless.

IV. The First Amendment Applies to § 727.8A.

Turning to the merits, Defendants offer three arguments for why the First Amendment does not apply to § 727.8A: (1) any regulation that prohibits both conduct and speech is free from First Amendment review; (2) section 727.8A's prohibition on data collection and recording does not regulate speech; and (3) the State can freely criminalize speech on private property. Each flies in the face of controlling and persuasive precedent.

a. Statutes that restrict conduct and speech are subject to the First Amendment.

The facts that § 727.8A prohibits "[c]ommitting a trespass" and that element alone does not criminalize speech, Dkt. No. 19, at 14, does not prevent First Amendment review because § 727.8A's other elements *do* criminalize speech. If any element of a law can be met by a person engaging in protected speech, the First Amendment applies. Thus, the Eighth Circuit recently held a statute that "requires proof of other elements, including intent to commit an unauthorized act" on private property, is not excluded from the First Amendment's reach if "some persons may be prosecuted" because they meet another element by engaging in protected speech. *Reynolds*, 8 F.4th at 787.

Other circuits have also rejected the claim "that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone." *Bartnicki v. Vopper*, 200 F.3d 109, 121 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001); *see also Am. C.L. Union of Illinois v. Alvarez,* 679 F.3d 583, 602 (7th Cir. 2012). The Supreme Court has similarly emphasized that the issue under the First Amendment is not whether a statute regulates conduct, but whether it also regulates speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also*

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 640–41 (1994).

Defendants' case law stands for the unremarkable proposition that the State can restrict unauthorized entry because that is non-communicative conduct. Dkt. No. 19, at 15. But "'[t]o determine if [a law is] subject to scrutiny under the First Amendment . . . the question is not whether trespassing is protected conduct,'" but whether the law's other restrictions prohibit activities that "'qualif[y] as protected speech.'" *Kelly*, 9 F.4th at 1228 (quoting *W. Watersheds Project I*, 869 F.3d at 1194–96). If so, First Amendment review is required. *Id.*

Were Defendants correct, the State could easily manipulate the marketplace of ideas. For example, it could create heightened penalties for speeding while displaying a flag, simply because speeding is not expressive. Thankfully, that is not correct. The State cannot evade First Amendment review by linking a conduct prohibition to a speech prohibition.

b. Section 727.8A's penalties for recording images or data restricts protected speech.

The rule above is particularly relevant because § 727.8A's second element, requiring that a violator "place[] or use[] a camera or electronic surveillance device that transmits or records images or data" on the trespassed-upon property, regulates First Amendment-protected speech. Defendants attempt to argue otherwise, relying on Eighth Circuit case law that "*rejected* an argument that each step in the video creation process is conduct and not protected speech," thereby suggesting recording could be speech. Dkt. No. 19, at 16 (citing *Telescope Media Group v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019)) (emphasis added). Defendants note that *Telescope Media* focused on the expressive qualities of "finished videos" and suggest this means this Court should conclude recording is not itself speech. *Id.* Defendants' argument fails in at least two ways.

First, where courts have had to address the issue, they have concluded recording images

and related data is "inherently expressive." *Wasden*, 878 F.3d at 1202.[6] Indeed, *Telescope Media* concluded the videos at issue there were speech because they reflected editorial "judgments." 936 F.3d at 751. Analogously, it was the Ninth Circuit's recognition that "decisions about" what to record are expressive that led it to conclude the act of recording is speech. *Wasden*, 878 F.3d at 1202. For instance, Plaintiffs' decisions as to what content they record and how communicates their views that certain unethical practices require public scrutiny and will move public opinion. Thus, *Wasden* shows the reasoning of *Telescope Media* leads to the conclusion recording is speech.

Second, even if only finished videos are speech, the process of making a recording would still be protected under the First Amendment as a predicate to speech. *Telescope Media* rejected the government's request that it evaluate "each of the [] acts" that make up producing a finished video to determine if it was speech or conduct, explaining doing so would improperly enable the government to restrict speech by restricting its component parts. 936 F.3d at 752 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792, n.1 (2011), among others). This follows directly from the Supreme Court's holding that "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference" for First Amendment purposes. *Brown*, 564 U.S. at 792, n.1 (2011); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding laws that establish a "disincentive to create or publish works" are subject to First Amendment scrutiny). The Court has recognized "[l]aws enacted to control or suppress speech may operate at different points in the speech process[,]" and to protect speech all such laws must be subject to the First Amendment. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Otherwise, the State could "simply proceed upstream

[6] Defendants do not contest that § 727.8A's prohibition on "data" collection is properly read to include recording sound, time stamps, and geographic coordinates that are part and parcel of making videos and taking photographs. *See* Dkt. No. 1 ¶ 39.

and dam the source" of speech it dislikes and evade First Amendment review. *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015); see *also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (government cannot "disaggregate" the steps required to develop speech and evade First Amendment review).

Therefore, Defendants' concession that "the Eighth Circuit has held that the recording, production, editing and subsequent publication of videos is protected speech when considered together," Dkt. No. 19, at 15 (citing *Telescope Media Group*, 936 F.3d at 751), necessarily means that the process of making a video is protected by the First Amendment. *Am. C.L. Union of Illinois*, 679 F.3d at 595 ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording." (emphasis in original)); *see also Kelly*, 9 F.4th at 1228 (similar); *Fields v. City of Philadelphia,* 862 F.3d 353, 358 (3d Cir. 2017) (similar); *PETA*, 466 F. Supp. 3d at 567 (similar); *Herbert*, 263 F. Supp. 3d at 1208 (similar).[7]

In sum, § 727.8A's prohibition on recording images or data to produce photos or videos is either a direct restriction on speech or a restriction on a predicate to speech, both of which are protected by the First Amendment. Therefore, that the law also prohibits trespass is irrelevant. It requires First Amendment review because it prohibits protected First Amendment activities.

c. Speech on another's private property is not free from First Amendment review.

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[7] The Tenth Circuit has also held a prohibition on gathering information implicates the First Amendment, regardless of whether that data gathering facilitates making a video, if plaintiffs have shown the information is necessary to produce advocacy. *W. Watersheds I*, 869 F.3d at 1197 (taking a sample of material is protected speech where that was necessary for speech). "'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.'" *Id.* at 1196 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (citing additional cases)). This Court need not reach that issue, however, as § 727.8A's prohibitions on recording "images" or "data" both interfere with making and distributing recordings.

Defendants' final assertion, that the rules above do not apply because § 727.8A prevents speech while committing a trespass, Dkt. No. 19, at 22; *see also, e.g.*, *id.* 15, 16, 20, 21, 32, 34, is equally incorrect. Section 727.8A's role in protecting property and privacy is taken into account as part of First Amendment scrutiny, not as a basis to evade First Amendment review altogether. *S.H.A.R.K. v. Metro Parks Serving Summit Cty*. 499 F.3d 553, 560 (6th Cir. 2007) (under the First Amendment courts cannot "merely determine[] that there was a rule prohibiting access and then stop[] there," but must analyze those rules to determine if they satisfy First Amendment scrutiny); *Bullfrog Films, Inc. v. Wick,* 847 F.2d 502, 512 (9th Cir. 1988) ("protected free speech interests" cannot be "subordinated" to enable other regulations, including where foreign policy interests are at stake).

In arguing the government can freely criminalize speech on private property, Defendants are asking for a never-before-heard-of exception from the First Amendment that is inconsistent with the amendment's history and purpose. In the few instances where the Supreme Court has exempted expressive activities from First Amendment review, it has explained it is because those "categories," not locations, of speech fall outside the First Amendment's historic protections. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). "If a person's First Amendment rights were extinguished the moment she stepped foot on private property, the State could, for example, criminalize any criticism of the Governor, or any discussion about the opposition party, or any talk of politics whatsoever, if done on private property." *Herbert*, 263 F. Supp. 3d at 1209. "This runs directly afoul of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' whether in the public square or in private coffee shops and cafes." *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Accordingly, in direct contravention of Defendants' proposed rule, the Supreme Court has struck down laws that restricted speech on private property. In *Watchtower Bible & Track Society*, a municipality required a license to "go in and upon private residential property," which the Court recognized would provide "important" protections for residents' privacy interests, but the Court held the rule unconstitutional because the restriction unduly burdened "solicitation" (speech). *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 154, 165–66 (2002) (cleaned up). In *Cornelius*, the Court held the government's prohibition on certain forms of charitable solicitation in a "nonpublic forum"—the governmental equivalent of private property—was subject to First Amendment review, although it survived that scrutiny. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805–06 (1985).

Of perhaps most relevance here, courts have struck down all of the provisions in Ag-Gag laws prohibiting recording on private property without permission, because they required and failed First Amendment review. *Kelly*, 9 F.4th at 1232–33; *Wasden*, 878 F.3d at 1202–03; *PETA*, 466 F. Supp. 3d at 579; *Herbert*, 263 F. Supp. 3d at 1211–13. Likewise, in *W. Watersheds I* the Tenth Circuit required First Amendment scrutiny of laws that prohibited "trespass" in order to engage in speech, although the law's regulation of speech concerned speech on "adjacent property." 869 F.3d at 1193. The district court on remand held the provisions facially invalid, explaining it was immaterial whether that "adjacent property" was public or private property; because the law restricted speech it required First Amendment analysis and the "speech interest" was no different depending on where it occurred. *W. Watersheds II*, 353 F. Supp. 3d at 1190 n.7.

Section 727.8A itself demonstrates why it would make no sense to have a blanket exception to the First Amendment on private property. The statute prohibits recording where privacy and property concerns are minimal, but where the First Amendment interests are at their apex. For

instance, § 727.8A would punish a live broadcast from the site of a rail accident, even though Iowa law provides every citizen the right to "pass over" that same property. Iowa Code § 716.7(2)(a)(5) (making it a trespass to "remain upon or in railway property" even when a party may "pass over" that same property).

The cases on which Defendants rely to argue otherwise are inapposite, as numerous courts have explained. *See* Dkt. No. 19, at 19–20, 24–25. Defendants' authority only "establishes that the First Amendment does not guarantee physical access to facilities" or other preferential treatment to would-be speakers. *Kelly*, 9 F.4th at 1237 (citing Defendants' authority *Houchins*, 438 U.S. at 16; *Lloyd*, 407 U.S. at 567). In other words, "the parties in those cases were attempting to raise their intention to speak or publicize information as a defense to a generally applicable law" that could be "violated without regard to whether or not they were engaging in speech." *Id.* at 1238 (cleaned up). That courts have allowed statutes whose elements do not restrict speech to be used against would-be speakers says nothing about whether the State can create a new crime "where liability is triggered by engaging in First Amendment protected activity[.]" *PETA*, 466 F. Supp. 3d at 567; *id.* at 568 (citing Defendants' authority *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), among others); *see also Herbert*, 263 F. Supp. 3d at 1208 (citing Defendants' authority *Branzburg v. Hayes*, 408 U.S. 665 (1972), among others). Put another way, Defendants "confuse[] two related but distinct concepts": (1) the "ability to exclude from property someone who wishes to speak," which their authority rightly notes remains intact, and (2) "the government's ability to jail the person for that speech,'" which is the actual issue in this case that their authority does not address. *Kelly*, 9 F.4th at 1238 (cleaned up) (quoting *Herbert*, 263 F. Supp. 3d at 1208)). "This distinction is of great constitutional import[.]" *Id.*

Indeed, Defendants admit their cases concern speakers requesting an exemption from

statutes that do *not* raise First Amendment concerns, particularly traditional trespass laws, and thus they do not establish the State can criminalize speech in any circumstance. Dkt. No. 19, at 20; *see also Bartnicki v. Vopper*, 532 U.S. 514, 532, n.19 (2001) (reporter not exempt from laws against theft); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976) (prohibition solely against "trespassing" can be applied to would-be picketers); *Lloyd*, 407 U.S. 551 (same for would-be hand billers); *Branzburg*, 408 U.S. at 682 (reporters required to respond to grand jury subpoenas because they satisfy First Amendment review for "average citizen"); *Adderley v. State of Fla*., 385 U.S. 39, 42 (1966) (Florida can apply statute "aimed at conduct of one limited kind . . . trespass upon the property of another with a malicious and mischievous intent" to would-be protesters); *Weed v. Jenkins*, 873 F.3d 1023, 1029 (8th Cir. 2017) (statute prohibiting resisting police did not implicate First Amendment because it "cover[ed] only physical acts or fighting words" rather than speech); *Poemoceah v. Morton Cty., N. Dakota*, No. 1:20-CV-00053, 2020 WL 8363156, at *10 (D.N.D. Dec. 29, 2020) (rejecting claim that person was retaliated against for exercising First Amendment rights because the person was also trespassing and that trespassing "conduct, not the content of his speech" led to the consequences).[8]

Defendants point out that in some of the cases the non-expressive conduct policed by the statutes was proven through evidence that a party engaged in recording (speech). Dkt. No. 19, at 20–21; *see also Dietemann*, 449 F.2d at 249 (defendant committed an "invasion of privacy" because they acted without consent, as shown by their recording); *Special Force Ministries v.*

[8] Defendants also cite two cases in which parties demanded special access to prisons above and beyond the access already granted. Those cases are especially inapplicable given the unique limits placed on constitutional freedoms at prisons, but at most they stand for the proposition that "'the First Amendment does not guarantee . . . a constitutional right of special access to information'" in those circumstances. *Houchins*, 438 U.S. at 11 (quoting *Branzburg*, 408 U.S. at 684); *see Rice v. Kempker*, 374 F.3d 675, 680 (8th Cir. 2004). They do not establish that the State may punish speech in any circumstance.

WCCO Television, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998) (reporter liable for trespass "if she exceeded the scope of her consent" as shown by her recording); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 840 (Kan. Ct. App. 1979) (generic trespass shown through recording). However, as Defendants' cases explain, in each instance it was non-expressive "tortious conduct" that was being regulated, as opposed to speech itself being criminalized. *Belluomo*, 596 P.2d at 842. That is, unlike here, speech was not an "essential element" of the cause of action. *Dietemann*, 449 F.2d at 249. Rather, the regulation was on the act of entering, remaining, or intruding without consent; speech merely established the non-expressive conduct, *i.e.*,acting without consent or exceeding the scope of the consent granted. *Special Force Ministries,* 584 N.W.2d at 792–93.

The Supreme Court has long explained there is a difference between statutes "explicitly directed at expression" and those "aimed at conduct unprotected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). "The First Amendment [] does not prohibit the *evidentiary* use of speech" to establish non-speech elements of a crime or to enhance a punishment of an offense that regulates non-expressive conduct. *Id.* at 489 (emphasis added). However, that does not alter the fact that a statute that "targets speech" as one of its elements, as is the case with § 727.8A, requires First Amendment review. *Kelly*, 9 F.4th at 1242 (discussing *Mitchell*, 508 U.S. at 487–88).

Defendants' insistence that it would be "incongruous that the State" could punish trespass, but it could not punish "other activity beyond the trespass on private property—such as photographing or recording," Dkt. No. 19, at 22, confirms their arguments are disconnected from First Amendment law. The goal of the First Amendment is not "efficiency" in regulating undesirable activities, but to protect discourse. *McCullen v. Coakley*, 573 U.S. 464, 486, 495 (2014). The First Amendment does in fact "constrain [the government's] ability to accomplish

certain goals," "limit[ing] [it] to legislative measures that do not abridge the Amendment's guaranteed freedoms[.]" *Colo. Republican Fed. Campaign Comm. v. F.E.C.*, 518 U.S. 604, 644 (1996) (Thomas, J., concurring in part in plurality opinion).

For all of these reasons, Defendants' claim that § 727.8A must stand because "peeping tom" statutes and others will fall if the Court applies the Constitution here is meritless. Dkt. No. 19, at 21. The State has long been able to prevent such activities while satisfying the scrutiny the Constitution demands—either by regulating non-expressive conduct or satisfying First Amendment scrutiny. There is no authority that the First Amendment must or can be pushed aside here to allow the State to prevent such intrusion.

At bottom, Defendants demonstrate that the State can punish unlawful entry or use other constitutionally "valid" laws against people who, in addition to engaging in the regulated non-expressive conduct, may wish to engage in speech in the future. Dkt. No. 19, at 20. However, that does nothing to resolve this matter, which concerns whether the state can directly criminalize speech. It certainly does it not establish that the State can prohibit any speech on private property without surviving First Amendment scrutiny. That proposition has been resoundingly rejected. The First Amendment applies to § 727.8A.

V. Section 727.8A Fails First Amendment Review.

Because the First Amendment applies to § 727.8A, the Court must turn to whether it can survive scrutiny. Defendants do not address whether the law can survive strict scrutiny, which would render it "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). They insist such scrutiny is unwarranted because "[o]ne need not review the recording or data captured to determine whether a violation occurred" and thus the law is content neutral and subject to intermediate scrutiny. Dkt. No. 19, at 26. But whether one needs to review the speech

to determine if the law applies is only one test for whether a law is content based and subject to strict scrutiny. A law can also be content based and require strict scrutiny if its "purpose" is to suppress speech, which can be determined by looking at its text or "justifications." *Reed*, 576 U.S. at 166. Plaintiffs allege that the purpose and justifications for § 727.8A establish it is content based. *E.g.*, Dkt. No. 1 ¶¶ 22–23. Defendants did not dispute those allegations. Therefore, Defendants' effort to dismiss Plaintiffs' claims because the law purportedly satisfies First Amendment review can be denied on this basis alone. However, Defendants' arguments further establish § 727.8A fails First Amendment review, and thus is facially invalid. Defendants also err in suggesting Plaintiffs would not prevail on their as-applied claim.

Assuming *arguendo* Defendants are correct and only intermediate scrutiny applies, Plaintiffs have not only stated a claim, but Defendants have shown they cannot carry their burden to justify the law and it is facially invalid. Dkt. No. 19, at 14 (conceding that, once Plaintiffs show the First Amendment applies, the burden shifts to Defendants to justify the law). Hence, Plaintiffs bring their motion for summary judgment in addition to this Resistance.

a. Facial relief is warranted if § 727.8A fails First Amendment scrutiny or is overbroad.

There are two ways to obtain facial relief for First Amendment claims. *United States v. Stevens*, 559 U.S. 460, 473 (2010). The first has confusingly been referred to as the "no set of circumstances" test, which quotes language from *United States v. Salerno*, 481 U.S. 739, 745 (1987). Defendants harp on that phrase to claim that if they can conjure any hypothetical instance in which they assert § 727.8A can be constitutionally applied, it survives facially. Dkt. No. 19, at 17. Not so. This form of a facial review asks whether the challenged law satisfies First Amendment scrutiny, which requires Defendants to show the law's restrictions on speech are properly tailored to achieve legitimate ends, not just that the law might have a few lawful applications. The "no set

of circumstances" language describes the consequence of facial relief—the law cannot be applied—not a test to be met.

In fact, the Supreme Court has explained: "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself[.]" *City of Chicago v. Morales*, 527 U.S. 41, 55, n.22 (1999) (plurality opinion). More recently it elaborated, "the distinction between facial and as-applied challenges" does *not* have "some automatic effect" that controls the nature of the proof the plaintiff must bring. *Citizens United*, 558 U.S. at 331. Therefore, facial relief cannot require Plaintiffs to establish there is no instance in which the statute could be lawfully applied, as that would amount to the relief dictating Plaintiffs' required evidence.

Building on this precedent, several circuits have explained "*Salerno* is correctly understood not as a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012). In other words, Courts may consider a "facial challenge[] simply by applying the relevant constitutional test to the challenged statute . . . such as strict scrutiny" or intermediate scrutiny. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016); *see also Doe*, 667 F.3d at 1124–28 (canvassing Supreme Court case law and confirming if a law fails scrutiny, it is facially invalid). As-applied relief is appropriate under this analysis only if the law can pass scrutiny in some instances, but not when applied to the challengers.

The Eighth Circuit itself has conducted its First Amendment analysis in this manner. It has reiterated *Citizens United*'s holding that the distinction between facial and as-applied challenges is not found in the plaintiff's burden of proof, but in the scope of the "relief" provided. *Free the Nipple - Springfield Residents Promoting Equal. v. City of Springfield*, 923 F.3d 508, 509, n.2 (8th

Cir. 2019). Moreover, while referencing the *Salerno* language, the Eighth Circuit has explained that a party can state a facial First Amendment challenge by alleging "the challenged provisions do not directly advance the government's asserted substantial interest, are more extensive than necessary, and unconstitutionally compel speech and association," *i.e.*, the law fails First Amendment scrutiny. *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 303 (8th Cir. 2017). Specifically in the context of Ag-Gag laws, the Eighth Circuit struck down a provision of Iowa's first Ag-Gag law because "it proscribed speech that is protected by the First Amendment and did not satisfy strict scrutiny," despite the court stating other applications of that provision "would pass constitutional muster." *Reynolds*, 8 F.4th at 787 (cleaned up).[9]

Separate and independent from the first type of facial review, Defendants concede an overbroad law is also facially invalid. Dkt. No. 19, at 33. A law is overboard if it fails aspects of First Amendment scrutiny or if it passes First Amendment scrutiny but simply restricts too much speech. To wit, the Supreme Court recently explained that if a law is not "narrowly tailored" there will always be "a substantial number of its applications" that are unconstitutional as compared to the law's legitimate applications, and it is overbroad and facially invalid. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021). Moreover, regardless of the law's tailoring, a law

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[9] To the extent Defendants argue that facial relief relying on scrutiny is improper at this time because § 727.8A applies on government property and it is unclear whether that property is a public or non-public forum, Dkt. No. 19, at 32, Defendants misconstrue the role of "forum analysis." Forum analysis is used to allow the government discretion over its property similar to a private landowner. Thus, it only applies "[w]hen the government is acting as a proprietor, managing its internal operations" by making rules that solely apply to government land. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Where, as here, the government is acting "as a lawmaker," enacting a broad statute that applies to governmental and private property, the courts do not employ forum analysis; they simply use traditional First Amendment scrutiny. *Id.* For these reasons, Plaintiffs do not address Defendants' discussion of whether there are "ample alternative channels for communicating the speech," Dkt. No. 19, at 33, as that is part of forum analysis, not standard First Amendment scrutiny. *See Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 678.

can also be overbroad if a Plaintiff demonstrates a "substantial number of" instances in which the law regulates constitutionally protected speech, and the government "makes no effort to defend" those applications. *Stevens*, 559 U.S. at 473, 481.

b. Defendants demonstrate § 727.8A fails scrutiny, is overbroad, and facially invalid.

Assuming *arguendo* § 727.8A is content-neutral and subject to intermediate scrutiny, Defendants' papers reveal the law fails that review in three different ways. Defendants also fail to dispute the law's numerous unconstitutional applications making it overbroad. *See Stevens*, 559 U.S. at 473. Thus, no matter which test for facial relief the Court applies, it is facially invalid.

i. <u>The law fails intermediate scrutiny in three ways.</u>

First, Defendants correctly concede that to survive intermediate scrutiny a law must be "narrowly tailored to the significant interests" the government claims to advance through the statute. Dkt. No. 19, at 28. According to Defendants, the State's interest in passing § 727.8A was "[t]he protection of property from interference" or the "protection of propriet[ary] information or trade secrets." *Id.* at 27–28. By its plain terms, § 727.8A is not tailored towards those ends.

Under intermediate scrutiny, if "a substantial portion of the burden on speech does not serve to advance the State's content-neutral goals" in passing the law, it is over-inclusive and falls. *Simon & Schuster*, 502 U.S. at 122, n.* (cleaned up) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)); *see also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 948–49 (9th Cir. 2011) (en banc) (content-neutral solicitation ban unconstitutionally over-inclusive when it applied to all in-street solicitation, but goal was only to stop solicitation that blocked traffic). Likewise, if a law does not capture a significant amount of the activities that produce the harms it is purportedly designed to address, it is under-inclusive and not tailored. *Showtime Ent., LLC v. Town of Mendon,* 769 F.3d 61, 75–76 (1st Cir. 2014) (content-neutral law

purportedly addressing aesthetic and traffic concerns fatally under-inclusive when targeted only at adult entertainment businesses).

Section 727.8A is both. All of its restrictions on speech are entirely unnecessary to achieve its goal of protecting property or trade secrets. Thus § 727.8A is over-inclusive and not tailored. At the same time, § 727.8A only protects against entry or theft when those acts are carried out by a person who also uses certain devices, leaving a host of ways to enter (such as simply not bringing a recording device during entry) or acquire information (such as by taking handwritten notes or printing out copies) undeterred. Thus, § 727.8A is underinclusive and not tailored.

Second, were that not enough (and it is), even if a law's text suggests it is tailored, that is not sufficient to sustain it under intermediate scrutiny. The State must produce evidence demonstrating that it determined this restriction on speech was necessary to achieve its interest. For these reasons, in *McCullen*, the Supreme Court held a buffer zone around abortion clinics was not sufficiently tailored to the government's needs, despite testimony in the legislative record stating the restriction was necessary, as the state failed to show it had first sought to protect abortion clinics by using existing laws, or that a law burdening "less speech" would fail to achieve the state's claimed objectives. *McCullen*, 573 U.S. at 494–95. In other words, to pass intermediate scrutiny, the legislature must develop a "record" showing that prior to enacting a restriction on speech, it at least "considered alternatives to" this restriction on speech and determined them inadequate. *Ams. for Prosperity Found.*, 141 S. Ct. at 2386–87 (citing *McCullen*, 572 U.S. at 495, among others).

Defendants do not suggest there is any evidence in the legislative record supporting the need for § 727.8A. In fact, despite claiming they can survive intermediate scrutiny, Defendants do not contest Plaintiffs' allegation that the legislative record is devoid of *any* evidence justifying

§ 727.8A. Dkt. No. 19, at 17–22.

In their brief, Defendants point to two incidents at factory farms they claim would fall within § 727.8A's reach. *Id.* at 28, nn.8–9. There is no suggestion those incidents motivated the legislation. Such "'post-hoc rationalizations' aren't the stuff of summary judgment victories" in First Amendment inquiries. *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010)) (applying the Religious Land Use and Institutionalized Persons Act, which applies First Amendment scrutiny). Moreover, Defendants' citations demonstrate other Iowa laws were successfully deployed to punish those invasions. Dkt. No. 19, at 28, n.9. Defendants offer no rationale why an additional statute criminalizing speech was "needed" to address these two incidents it successfully prosecuted. Accordingly, they also offer no explanation for why such a broad restriction on speech is needed to prevent these incidents. Therefore, based on Defendants' presentation, the law fails intermediate scrutiny because Iowa produced no evidence showing it needed to restrict any speech (let alone this amount of speech) and therefore the law is not tailored.

Finally, third, were that still not enough, Defendants' failure to demonstrate § 727.8A's restrictions on speech were proper undermines their claim that the law serves a legitimate purpose, a separate element Defendants must establish to survive intermediate scrutiny. *See id.* at 27–28. "The existence of adequate" alternatives to the enacted restriction on speech indicates the law was passed to show "special hostility" toward speech—"precisely what the First Amendment forbids." *R.A.V.*, 505 U.S. at 395–96. Put another way, where a law is over- or under-inclusive, it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint,'" which is not a legitimate objective that the State can pursue. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra,* 138 S. Ct. 2361, 2376 (2018) (quoting

Brown, 564 U.S. at 802); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424–30 (1993). As a result, while protecting private property or trade secrets might be a legitimate governmental purpose in the abstract, the Court cannot conclude *this law* was passed to further those ends. Rather, given the absence of any evidence showing the State needed to restrict speech, the Court must conclude the State chose to restrict speech in order to suppress speech, and thus the law's function is illegitimate.

For each and all of these reasons, Defendants have not only failed to show the case should be dismissed because the law will survive First Amendment review, but their arguments establish it fails intermediate scrutiny and is facially invalid. *Reynolds*, 8 F.4th at 787; *Bruni*, 824 F.3d at 363; *Doe*, 667 F.3d at 1123–28.

ii. The law is overbroad.

The law is equally invalid because it is overbroad. Defendants' sole argument to sustain the law against overbreadth analysis is that punishing speech on private property is not protected by the First Amendment. Dkt. No. 19, at 35. However, as explained above, that is incorrect. *See supra* § IV(c). Therefore, they have failed to explain why any restriction on speech was necessary and made no effort to defend the law's prohibitions on protected speech as constitutional.

Accordingly, Defendants' arguments demonstrate the law fails both tests for overbreadth. They once again show the law is not tailored, as they have offered no reason (let alone evidence) this restriction on speech was logical (let alone necessary). The lack of tailoring renders the law overbroad. *Americans for Prosperity Found*, 141 S. Ct. at 2389.

Moreover, Defendants offer no defense of the law's staggering restriction on protected speech, rendering it overbroad. *Stevens*, 559 U.S. at 473, 481. In fact, Defendants acknowledge that if the Court recognizes recording is protected speech, the law would prohibit reporters filming

breaking news on private property (protected speech), railroad hobbyists accidently entering onto railway property to take a photo (protected speech), business customers recording misconduct (protected speech), whistleblowers who record information to support their statements (protected speech), and activists engaging in nonviolent civil disobedience (protected speech). Dkt. No. 19, at 34. They make only an internally contradictory effort to defend the law's application to whistleblowers: in one breath claiming whistleblowers who record information to substantiate their claims will not be held to be trespassers and liable under § 727.8A, and in the next, that if a whistleblower has to enter an area without "authorization" to obtain that information they could be subject to the statute. *Id.* at 31 & n.10.

Thus, Defendants have not only shown Plaintiffs' overbreadth claim can proceed, but also that as a matter of law § 727.8A cannot survive because the State's arguments cannot justify the law's breadth.

c. In the alternative, Plaintiffs prevail as applied.

Even were the Court to conclude the law cannot be held facially invalid, Defendants' arguments demonstrate Plaintiffs should prevail because the law cannot be constitutionally applied to them. To argue the law can be used against Plaintiffs, Defendants again claim there is an exception to the First Amendment to "protect[] the right to privacy on private property." *Id.* at 20. While Plaintiffs have disproven this legal assertion, even if it were true, nothing about Plaintiffs' speech interferes with privacy or property rights. ICCI explains it seeks to record "its [own] non-violent civil disobedience," not any of the purportedly private activities on private property. Dkt. No. 1 ¶ 55. ALDF, PETA, and BoB make recordings about the treatment of animals in areas of businesses often open and accessible to a variety of people, including customers and third-party contractors. *Id.* ¶¶ 37, 41. The Ninth Circuit has explained that such recording "in a workplace"

that is open to third parties is not an "intru[sion] into private affairs" because there is "no reasonable expectation of privacy" there. *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 818 & n.6 (9th Cir. 2002) (cleaned up). As a result, the law should be held unconstitutional as-applied to Plaintiffs because Plaintiffs' speech does not fall within Defendants' purported exception to the First Amendment.[10]

VI. Conclusion.

Plaintiffs have standing, the First Amendment applies to § 727.8A, and Defendants have failed to show Iowa's restrictions on protected speech can be justified in any circumstances. For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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Respectfully submitted,

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[10] In addition, were the Court to conclude that there is any balancing involved in applying the novel rule that the First Amendment may not reach restrictions on speech on private property, such balancing would decidedly tip in Plaintiffs' favor. "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United,* 558 U.S. at 349; *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth*, 461 U.S. at 484)). Yet, § 727.8A infringes on this precise speech when applied to Plaintiffs. Plaintiffs' recordings are integral to their advocacy and have had significant political consequences. Dkt. No. 1 ¶¶ 38, 39, 41, 42, 45, 49, 50, 56, 57, 61.

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