No. 21-760

In the Supreme Court of the United States

LAURA KELLY, in her official capacity as Governor of Kansas, et al.,
Petitioners,

v.

ANIMAL LEGAL DEFENSE FUND, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of *Amici Curiae* State of Utah and Ten Other States in Support of Petitioners

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INTEREST OF AMICI CURIAE[1]

This case raises important but unsettled questions about states' ability to criminalize trespass by deception with the intent to damage the property owner's interests. The circuit courts have reached conflicting answers based on this Court's fractured opinions about the First Amendment's application to false speech in *United States v. Alvarez*, 567 U.S. 709 (2012). The circuit courts have also been unable to consistently decide whether an intent-to-harm-property requirement creates or negates a viewpoint discrimination problem under *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). So states are bound by different constitutional rules depending on the circuit in which they are located.

All states have a duty and interest to protect both free speech *and* private property rights. The *Amici* States need clarification now about how these important rights intersect. And this case gives the Court an excellent opportunity to resolve the confusion and provide much needed uniform guidance for the entire country.

SUMMARY OF ARGUMENT

The Court should grant the petition to resolve a split among the courts of appeals and provide states guideposts to help them proactively protect their citizens' private property rights. A fundamental aspect of an owner's control over his property is the right to exclude others from it—"one of the most essential sticks

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[1] *Amici* notified the parties of the intention to file this brief ten days in advance, and *Amici* submit this brief pursuant to Sup. Ct. Rule 37.4.

in the bundle of rights that are commonly characterized as property.'" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). That right is so important that the common law enforced owners' rights to exclude others through civil actions for nominal damages and often punitive damages even if the trespasser committed no further injury on the property other than his physical presence; the entry itself is wrong.

It is not surprising that states want to safeguard private property interests by reinforcing the owner's right to exclude, particularly in circumstances where states have determined that additional protections are necessary for these unique property rights. The Kansas statute at issue reinforces an owner's right to exclude others from her private property by preventing access through consent induced by force, fraud, deception, duress, or threat, among other things.

These statutes have been challenged as violations of the First Amendment because they prohibit false or misleading speech to gain access to private property, because the opponents of these statutes claim that they prohibit newsgathering of issues of public concern, and because they include a criminal intent-to-harm element. Lower courts have struggled with applying *Alvarez*, a case with no majority opinion and no clear holding to determine whether, or to what degree, false speech used to gain access to private property must be protected.

The Court should take the case to resolve the split and set a clear rule about the constitutional status of false speech used to gain access to private property and about whether including an intent-to-harm

element in a criminal statute makes the criminal statute subject to a content- or viewpoint-based First Amendment analysis. An answer in this case will help states protect private property owners' interests while safeguarding citizens' First Amendment rights.

ARGUMENT

I. The Court should grant certiorari to delineate how states may protect their citizens' private property from unwarranted intrusion by deceptive individuals.

A property owner has a fundamental right to exclude others from her property. To safeguard this right, state trespass statutes punish access to private property acquired through false statements. Indeed, the state has significant interests in enforcing such statutes where the unique characteristics of the property present important safety concerns.

A. The right to exclude is integral to private property rights.

Property rights' crucial role in the American experiment can hardly be overstated. "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom" and it "must be secured, or liberty cannot exist." *Cedar Point*, 141 S. Ct. at 2071 (internal quotation marks omitted). And a fundamental aspect of an owner's property rights is the right to exclude. *See generally* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39 (2000).

At common law, the right to exclude was recognized as a *defining* characteristic of property.

Blackstone described the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries* *2; *accord* Restatement (First) of Property § 7(a) (1936) (recognizing a possessory interest in land if a person has "a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land"). Simply put, "to the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property." Thomas Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753 (1998).

Indeed, so integral is the right to exclude, property rights are described as "relationships between people"—"exclusions which individuals can impose or withdraw with state backing against the rest of society." Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357 (1954). This Court, too, has consecrated the right to exclude as "'a fundamental element of the property right'" and "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna*, 444 U.S. at 176, 179-80).

The right to own private property is one of the distinguishing features of our society and has been engrained in our law for centuries. A defining and fundamental characteristic of private property is the right to exclude. It follows that violation of the right to exclude causes core harm to private property ownership rights.

B. Courts protect the right to exclude *itself*, without proof of additional injury.

Despite its importance as a property right, the right to exclude would be meaningless "without some institutional structure that stands ready to enforce it." Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. at 733); *see also* Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. at 371. ("[T]he existence of private property presupposes . . . some predictable course of sovereign action, so that the so-called property owner can count on state help in certain situations."). So American law protects property owners against trespassers, even if the trespasser does not create injury beyond the trespass.

For example, this Court has held that government entities violate the Fifth Amendment when they permanently occupy real property, even if it is *de minimis*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-30 (1982). The Court has also held that government entities search private property for Fourth Amendment purposes when they physically trespass to place devices to track citizens' movements, even if there might not be a reasonable expectation of privacy in citizens' public movements in the first place. *United States v. Jones*, 565 U.S. 400, 405–07, 411 (2012). These holdings are based on deeply rooted rules protecting property from trespass by private parties or the government. The Court has emphasized that "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all." *Jones*, 565 U.S. at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)).

Common-law torts are another mechanism enforcing the right to exclude. When a party enters onto the property of another without permission, even if the party's presence causes no harm, the party is liable for trespass. Restatement (Second) of Torts § 163 (1965). "The entry itself is wrong." *Snow v. City of Columbia*, 409 S.E.2d 797, 802 (S.C. Ct. App 1991).

Mere entry is wrong because at the root of common-law trespass is a violation of a property owner's right to exclude. Both scholars and courts recognize this settled principle. *See* 1 Dan B. Dobbs, et al., *The Law of Torts* § 49 (2d ed. 2021); Restatement (Second) of Torts § 163 cmt. d (1965) ("The wrong for which a remedy is given [for trespass] consists of an interference with the possessor's interest in excluding others from the land."); *see e.g.*, *Dalley v. Dykema Gossett*, 788 N.W.2d 679, 694 (Mich. Ct. App. 2010) ("[A] trespass on land violated the landowner's right to exclude others from the premises."); *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312, 315 (Miss. Ct. App. 1999) (("[H]istorically, the requirements for trespass to land under the common law . . . were an invasion . . . which interfered with the right of exclusive possession of the land" (internal quotation marks omitted)); *InnoSys, Inc. v. Mercer*, 364 F.3d 1013, 1020 n.10 ("The legally protectable interests of an owner of property encompass the right of exclusion, and the law presumes that an infringement of that right is inherently harmful.").

Under American common law, "[t]he gist of the tort [of trespass] is intentional interference with rights of exclusive possession [and] no other harm is required." 1 Dan B. Dobbs, et al., *The Law of Torts* § 49 (2d ed. 2021). Accordingly, most states authorize an award of at least nominal damages for trespass without

additional proof of harm. *See* Appendix A attached hereto.

The right to exclude is so important that the common law allows punitive damages against trespassers under certain circumstances, even when the trespasser does no additional harm to the property. When "the actor knows that his entry is without the consent of the possessor and without any other privilege to do so," the actor "show[s] such a complete disregard of the possessor's legally protected interest in the exclusive possession of his land as to justify the imposition of punitive in addition to nominal damages for even a harmless trespass." Restatement (Second) of Torts § 163 cmt. e (1965). Most states' laws follow suit. *See* Appendix B attached hereto.

Finally, consent to enter private property must be on the property owner's terms. Property owners may condition access to land, and the property owner's consent "creates a privilege to do so only in so far as the condition or restriction is complied with." Restatement (Second) of Torts § 168. Consent "induced by misrepresentation or mistake" is not effective. *Id.* § 173 & cmt. B; *id.* § 892B(2) (noting "consent is not effective" if "induced by the other's misrepresentation"); *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1248 (Hartz, J., dissenting) (discussing sections 173 and 892B); *but see Desnick v. Am. Brod. Cos., Inc.*, 44 F.3d 1345, 1351–52 (7th Cir. 1995) (concluding that consent to enter property induced by fraud is valid defense to trespass unless the person entering violates "the specific interests that the tort of trespass seeks to protect").

Subject to individual state laws, the property owner's scope of consent controls, whether the

trespasser intends on spying on a political opponent, *see Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109, 119 (D.D.C. 2018), engaging in activity protected by collective bargaining, *see Waremart Foods v. N.L.R.B.*, 354 F.3d 870, 876–77 (2004) (D.C. Cir. 2004), newsgathering on an issue of public concern, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518-19, 521-22 (4th Cir. 1999), or doing some other activity that might otherwise be constitutionally protected, *see Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) (concluding that there was no federal constitutional right to handbill in a private mall where the mall owners prohibited the activity).

Our common law history, the law from the several states, and this Court's interpretation of the Constitution paint a coherent picture: trespass law protects the right of property owners to exclude others on the property owner's own terms. Courts need not consider whether the trespasser causes separate, independent harm while on the property because "[t]he entry itself is wrong." *Snow*, 409 S.E.2d at 802. Whether through constitutional protections, tort claims, or punitive damages, courts recognize and protect the right to exclude.

C. States have an interest in protecting the right to exclude.

It can come as no surprise, then, that states would want to safeguard private property interests by reinforcing a private property owner's right to exclude through legislation. This is particularly true in circumstances where the states have determined that additional protections are necessary given the unique characteristics of certain types of private or restricted property faced with unique types of invasions by

trespassers.

Kansas has done so in the Kansas Farm Animal and Field Crop Research Facilities Protection Act at issue in this case. *See* Pet. at 4-5 (discussing Kan. Stat. Ann § 47-1827). Other states have done so to protect animal agricultural operations from deceptive trespassers. *See, e.g.*, Utah Code § 76-6-112, *held unconstitutional by Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017); Idaho Code Ann. § 18-7042(1), *held partially unconstitutional by Animal Legal Def. Fund v. Wasden*, 878 F.,3d 1184, 1205 (9th Cir. 2018); Iowa Code § 717A.3A(1)(a), *upheld as constitutional by Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2011).

State statutes protecting against special types of trespass or intrusion are not limited to animal agriculture. For example, Arizona and other states prohibit trespass on a commercial nuclear generating station. Ariz. Rev. Stat. Ann. § 13-4902(B); *see also e.g.*, Miss. Code Ann. § 97-17-95. New Hampshire enhances the penalties for criminal trespass if the trespasser enters or remains on the grounds of a state correctional facility. N.H. Rev. Stat. Ann. § 635:2(III)(b)(4). And California's "anti-paparazzi" law includes enhanced civil penalties for those who engage in physical invasions of privacy with the intent to capture evidence of the plaintiff engaging in a "private, personal, or familial activity." Cal. Civil Code § 1708.8(a). Federal law too adds sentencing enhancements if a criminal trespass occurred at, among other places, secured or restricted government facilities, vessels and airports, Arlington National Cemetery, or the White House. *See* U.S. Sent'g Guidelines § 2B2.3(b)(1).

States have also enacted laws specifically prohibiting trespass when the trespasser acquires consent from the owner through false statements. For example, carrying a concealed firearm on property of another, without effective consent, is a trespass in Texas. Tex. Pen. Code Ann. § 30.06(a)(1). Illinois penalizes trespass at airports and at athletic fields and stages where the trespasser presents false uniforms, documents, credentials, or identities. 720 Ill. Comp. Stat. §§ 5/21-7(a), -9(a) to (a-5).

Because of the unique circumstances surrounding these types of properties, states have significant interests in regulating trespassers. For animal agriculture, trespassers who gain access through misrepresentation put the safety of workers and animals at risk and increase the likelihood of transmission of deadly (and costly) zoonotic diseases.[2] The United States has reason to protect its secure facilities and the President; California, to protect its celebrities from the prying eyes of the paparazzi; New Hampshire, to protect against escaping felons; Arizona, to protect critical infrastructure; Texas, to protect the peace of a home from unwanted deadly weapons; and Illinois, to protect athletes and performers from stalkers or disgruntled fans.

When trespass statutes punish access acquired through false statements, or when trespassers are

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[2] *See, e.g.,* Expert Report of William James, D.V.M, M.P.H. at 4, *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah Jan. 29, 2016), ECF No. 88-1; Expert Report of David A. Pyle, D.V.M. at 6-7, *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah Jan. 29, 2016), ECF No. 89-1.

likely to gain access for the purpose of uncovering information on an issue of public concern, state trespass laws and the privacy interests they protect may collide with the putative trespassers' First Amendment rights. As discussed in Section II below, the Court's First Amendment jurisprudence has so far not grappled with the general right to exclude guaranteed by private property, nor the special rights to exclude that states must extend in particular situations. States need guidance when faced with this perfect storm where property rights and the First Amendment collide.

The Court should grant the petition for certiorari in this case to recognize the important private property interests at stake and provide that guidance.

II. The Court should grant certiorari to clarify the scope of protection for false speech.

As described above, many attempts by various states to protect the inherent right of private property owners to exclude others include prohibitions on trespassers' ability to gain consent to access a property through false pretenses, false statements, or other falsities. Other attempts, like the animal agricultural protections in the Kansas statute, place limits on information gathering that some claim are protected by the First Amendment.

Lower courts have attempted to apply the Court's holding and multiple opinions in *Alvarez* to these situations, with varying outcomes. This "limited and sometimes hazy precedent," *Reynolds*, 8 F.4th at 788 (Grasz, J., concurring), exacerbated by a new circuit split interpreting the case, prevents states from legislating effectively in these realms. What exactly *Alvarez* means remains unclear. So states and courts are

left unsure whether trespass causes a "legally cognizable harm" that renders trespass by deception unprotected false speech under the First Amendment. And because states have a significant interest in both protecting their citizens' private property *and* First Amendment rights, the Court should grant certiorari in this case.

A. Courts of appeals have reached conflicting conclusions about what part of *Alvarez* is binding.

The Court addressed whether false speech is protected speech in *Alvarez*. But the Court issued a fragmented opinion that is difficult to decipher. The Eighth, Ninth, and Tenth Circuits each interpret the decision differently.

The defendant in *Alvarez* violated the Stolen Valor Act when he falsely claimed he received the medal of honor. 567 U.S. at 713-14. The defendant challenged this statute on the grounds that it violated the Free Speech Clause. *Id* at 714. A plurality of four justices held that false speech is not protected in cases involving "defamation, fraud, or some other legally cognizable harm associated with a false statement." *Id.* at 719. The plurality determined the false speech targeted by the Stolen Valor Act did not have such a harm and applied strict scrutiny to strike down the provision. *Id.* at 726. Justice Breyer concurred in the judgment but would have applied intermediate scrutiny to false statements about easily verifiable facts. *Id.* at 730–31 (Breyer, J., concurring).

It is unclear which parts of the *Alvarez* decision are binding. Generally, when the Court "decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court

may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). But this applies only when one opinion is a logical subset of the other. *See, e.g., Reynolds*, 8 F.4th at 785. Otherwise, the only binding aspect is the specific result. *See id.*; *United States v. Davis*, 825 F.3d 1014, 1022 (9th Cir. 2016). Because neither opinion invalidating the statute is a logical subset of the other, the Eighth, Ninth, and Tenth Circuits all struggled to discern *Alvarez's* binding aspect.

1. The Eighth Circuit

In *Reynolds*, Iowa passed a statute that, in part, criminalized access to an agricultural production facility by false pretense. *Reynolds*, 8 F.4th at 783. The court first analyzed *Alvarez's* plurality and concurring opinions to determine the controlling law per *Marks*. *Id.* at 784-85. But the Eighth Circuit found that neither opinion is a logical subset of the other. *Id.* at 785. The court noted the "*Alvarez* concurrence is arguably narrower than the plurality opinion because it applied intermediate scrutiny rather than exacting scrutiny." *Id.* At the same time, "the concurrence suggested more broadly that all false factual statements receive *some* protection under the First Amendment, while the plurality indicated that certain false speech is outside the First Amendment." *Id.* The court thus decided that "the only binding aspect of the decision is its specific result." *Id.*

The *Reynolds* court then examined the reasoning in the *Alvarez* plurality that constitutionally unprotected false speech is that "derive[d] from cases discussing defamation, fraud, or some other legally

cognizable harm." *Id.* at 786 (quoting *Alvarez*, 567 U.S. at 719). The *Reynolds* concurrence noted that "[t]he *Alvarez* decision . . . is of limited guidance" and "[u]ltimately, the Supreme Court will have to determine whether such laws can be sustained." *Id.* at 788–89 (Grasz, J., concurring). The partial dissent in *Reynolds* agreed that neither the *Alvarez* plurality nor the concurring opinion is a logical subset of the other but argued that the plurality should be the binding aspect because it offers the least change to the law and the circuit court should decide the case in a way that would have commanded the votes of five justices. *Id.* at 789-91 (Gruender, J., concurring and dissenting in part).

2. The Ninth Circuit

In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit struck down a law that prohibited entry into an agricultural facility by misrepresentation but upheld a portion that prohibited obtaining employment with an intent to harm the agricultural facility. 878 F.3d at 1190, 1205. The court examined *Alvarez* for the controlling law and determined that false speech can be criminalized "if made 'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm.'" *Id.* at 1194 (quoting *Alvarez*, 567 U.S. at 719, 723). In its analysis of this provision, the court seemingly ignored the harm exception and only examined whether the speech was made for material gain. *See id.* at 1194–99.

The *Alvarez* concurrence, however, never mentioned any requirement of material gain. That opinion merely stated that some of the previous statutes that limit false speech "sometimes . . . require[e] proof of

specific harm to identifiable victims; sometimes . . . specify[] that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes . . . limit[] the prohibited lies to those that are particularly likely to produce harm." *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring). Besides incorrectly suggesting that the plurality and concurrence agreed on certain points, the Ninth Circuit failed to perform a *Marks* analysis at all.

3. The Tenth Circuit

In the underlying case, the panel majority struck down a law that, in relevant part, prohibited certain actions in an animal facility with intent to damage the enterprise conducted at the facility. App. 5-6. The court stated they "need not engage in a *Marks* analysis" because both opinions agree that false speech is not categorically unprotected and "[b]oth opinions also agree restrictions on false factual statements that cause legally cognizable harm tend not to offend the Constitution." App. 24. But the *Alvarez* concurrence never mentioned legally cognizable harm. The concurrence merely stated that previous unprotected false speech statutes sometimes require specific, tangible, or likely-to-occur harm. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring). Nonetheless, the Tenth Circuit applied the test from the plurality which requires a legally cognizable harm. App. 27-28.

* * *

Of these three federal appellate courts that examined *Alvarez* to determine the appropriate legal standard for false speech, only the Eighth Circuit conducted a *Marks* analysis. The *Reynolds* majority and partial dissent correctly determined that neither opinion is a logical subset of the other. The Ninth and Tenth

Circuits adopted differing language from the *Alvarez* plurality without acknowledging whether it is the binding aspect of a fragmented opinion.

As shown by the three separate approaches, *Alvarez* offers no clear and binding guidance. So states remain unsure how to protect property rights that bump up against potential free speech rights.

B. Courts of appeals diverge on the definition of "legally cognizable harm" in applying *Alvarez*.

Even if the plurality is the binding aspect of *Alvarez*, states are still unsure what constitutes a "legally cognizable harm" in assessing whether false speech is deserving of protection. The circuits are again split on the issue and, most important to the issue presented, whether trespass is a legally cognizable harm.

In *Reynolds*, the Eighth Circuit defined legally cognizable harm by whether there is an available cause of action and whether the harm is comparable to that of invasion of privacy or the costs of vexatious litigation. *Reynolds*, 8 F.4th at 786. The partial dissent suggested that this Court uses the term legally cognizable harm as "an injury that supports standing to pursue a cause of action." *Id.* at 792 (Gruender, J., concurring in part and dissenting in part). Because a cause of action existed for trespass and there has been significant historical protection for the right to exclude, all three members of the panel held that trespass is indeed a legally cognizable harm. *Id.* at 786; *see also id.* at 792 (Gruender, J., concurring in part and dissenting in part) (agreeing with the panel majority that trespass is a legally cognizable harm).

In *Wasden*, the Ninth Circuit failed to properly

define legally cognizable harm. The majority suggested only that trespass is not such a harm and examined whether the trespass would violate the state's criminal code. *Wasden*, 878 F.3d at 1195–96. The dissent looked to the common law tort of trespass and the importance of a property owner's right to exclude in determining that trespass is a legally cognizable harm. *Id.* at 1209–10 (Bea, J., concurring and dissenting in part).

In *Kelly*, the Tenth Circuit struggled to define what a legally cognizable harm is. But "*[w]hatever legally cognizable harm is*," the panel majority held "it cannot be harm from protected, true, speech." App. 30 (emphasis added). The panel majority suggested that "*Alvarez* envisions legally cognizable harm as that imminently caused by the speech." *Id.* at 28. The majority first suggested that trespass is not a legally cognizable harm when looking only at the harm from disseminating information derived from the trespass, *id.* at 30, but then suggested it does not "express any opinion" whether "trespass alone is a legally cognizable harm under *Alvarez*." *Id.* at 40. The dissent pointed out that trespass is in fact a legally cognizable harm because "[t]he authority of the owner of property to control who can be on the property is a fundamental and ancient right." *Id.* at 58 (Hartz, J., dissenting). Moreover, the dissent reasoned, "[e]ntry into property, or remaining on the property, without the permission of the owner is an invasion of the legal rights of the owner; such entry or remaining is a legally cognizable harm to the owner—namely, trespass." *Id.* at 58-59.

Even if the plurality opinion from *Alvarez* is binding, and false speech is unprotected only when accompanied by a legally cognizable harm, states do not know what this means for trespass. The three

appellate courts that have addressed the issue provide differing or unworkable definitions and are split on whether trespass is such a harm.

C. States have a significant interest in knowing what types of speech are protected.

The freedom of speech under the First Amendment is a fundamental right necessary for both freedom and democracy. But it is not limitless and sometimes competes with other guaranteed rights. That's the case here. To safeguard the fundamental rights of its property owners to exclude others while also preserving the freedom of speech, states need to know what type of false speech is protected or unprotected on private property. The Court's precedents do not do this.

States know that they have no obligation to provide special access to otherwise off-limits areas just because a person wants to exercise her First Amendment rights to gather information or speak about an issue of public concern. *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974). They also know that First Amendment protections do not generally apply to speech on private property, even if the private property has some public characteristics. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-70 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976). And they know that they cannot punish the *dissemination* of truthful information about a public concern, even if the information was illegally collected by a third party. *Bartnicki v. Vopper*, 532 U.S. 514, 529, 535 (2001). But states do not know whether they can aid property owners by preventing those attempting to access private property through misstatements. And they do not know whether the person's attempts to exercise other constitutional rights affect the

State's ability to restrict private property access.

The Eighth, Ninth, and Tenth Circuits all have their own recently developed legal standards for false speech because the standard under *Alvarez* is unclear. Laws that are permissible in one state will likely be unconstitutional in another, and vice versa. This creates an impossible task for states who wish to comply with the First Amendment.

The Court should grant certiorari to clarify the correct legal standard for false speech and give a working definition for legally cognizable harm.

III. The Court should clarify whether criminal trespass statutes with "intent to harm" elements are viewpoint discriminatory.

Finally, the Court should grant certiorari to clarify whether criminal trespass statutes that contain "intent to harm" elements constitute content or viewpoint discrimination. States and their citizens need clarity on how broad or narrow states must tailor statutes that protect private property owners' rights to exclude deceptive trespassers.

Judge Hartz's dissent and Kansas's petition explain why the Kansas Act's "intent to damage" element is not viewpoint discrimination under the First Amendment. Pet. 23–25; App. 69–79. In short, it is because the intent or motive requirements permissibly "single[] out" conduct "thought to inflict greater individual and societal harm." *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993). And a state's "desire to redress these perceived harms provides an adequate explanation" for motive and intent requirements "over and above mere disagreement" with anyone's viewpoints. *Id.* at 488. Indeed, such laws are "quite

common." *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996).

The panel majority reached the opposite conclusion despite *Mitchell's* guidance. That's reason enough for this Court to grant certiorari and reverse the decision. But, to be fair, the circuits do not agree on *Mitchell's* application to intent-to-harm requirements in statutes like Kansas's Act.

The panel majority, for instance, said *Mitchell* does not apply at all because the intent-to-damage requirement targets speech, not conduct, "advancing a specific viewpoint." App. 46. This reasoning backed the panel into an odd position—admitting the State could punish *all* deceptive entry onto private property but invalidating the Act for focusing only on those most likely to damage the property owners. App. 27 (stating "while it may be permissible to punish all entry onto private property by deception, the Act becomes impermissibly viewpoint discriminatory by choosing to punish only entry by deception with the intent to damage the facility"). In short, the limiting intent-to-damage requirement *creates* the First Amendment problem.

The Ninth Circuit, on the other hand, has suggested that intent-to-harm requirements may be necessary to save a statute like the Act from free speech violations. *Wasden*, 878 F.3d at 1198. The court noted an Idaho statute that broadly proscribed lying to gain entry on agricultural property "criminalizes innocent behavior" and was "staggering[ly]" overbroad. *Id.* at 1195. To make this provision the least restrictive for First Amendment purposes, the court wondered why Idaho "could not narrow the subsection by requiring specific intent or by limiting criminal liability to statements that cause a particular harm" as the State had

done in another provision of the statute prohibiting deceptive employment. *Id.* at 1198. The court never mentions *Mitchell* but honors its reasoning.

Finally, the Eighth Circuit recently analyzed an Iowa law that, in relevant part, prohibited any false statements, made with intent to commit an unauthorized act, as part of the employment process at an agricultural production facility. *Reynolds*, 8 F.4th at 783. The court held this specific provision was too broad under the First Amendment and unnecessarily criminalized even immaterial falsehoods that would have no bearing on securing employment. *Id.* at 787. The intent-to-harm requirement did not solve the overbreadth problem because some people with the requisite intent could still be prosecuted for making immaterial falsehoods. *Id.* The court did not, and probably did not need to, mention *Mitchell* given the particular overbreadth problem with Iowa's statute.

As these decisions demonstrate, states are left in a Catch-22: Include an intent element and be subject to a claim of viewpoint discrimination; Omit an intent element and be subject to claims of overbreadth.

The Court should grant certiorari to reaffirm or clarify how an intent-to-harm requirement in a criminal trespass statute affects First Amendment concerns under *Mitchell.*

CONCLUSION

The Court should grant Kansas's petition for writ of certiorari to the Tenth Circuit.

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Appendix A

States authorizing an award of nominal damages for trespass without additional proof of harm.

Alabama: *Webb v. Knology, Inc.*, 164 So. 3d 613, 619–20 (Ala. Civ. App. 2014).

Alaska: *Brown Jug, Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Loc. 959*, 688 P.2d 932, 938 (Alaska 1984).

California: *Costerisan v. Tejon Ranch Co.*, 62 Cal. Rptr. 800, 802 (Cal. Ct. App. 1967).

Colorado: *Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 684 (Colo. App. 2008).

District of Columbia *Wood v. Neuman*, 979 A.2d 64, 72–73 (D.C. 2009).

Florida: *Fletcher v. Fla. Publ'g Co.*, 319 So. 2d 100, 104 (Fla. Dist. Ct. App. 1975), *quashed on other grounds*, 340 So. 2d 914 (Fla. 1976).

Hawaii: *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492, 499 (1954).

Illinois: *Chi. Title Land Tr. Co. v. JS II, LLC*, 977 N.E.2d 198, 219–20 (Ill. App. Ct. 2012).

Kansas: *Fergus v. Faith Home Healthcare, Inc.*, No. 18-cv-2330-JWL, 2019 WL 3817961, at *10 (D. Kan. Aug. 14, 2019) (citing *Gross v. Cap. Electric Line Builders, Inc.*, 253 Kan. 798, 800 (1993).

Kentucky: *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 54–55 (Ky. 2007);

Louisiana: *Britt Builders, Inc. v. Brister*, 618 So. 2d 899, 903 (La. Ct. App. 1993).

Maine: *Medeika v. Watts*, 957 A.2d 980, 982 (Me. 2008).

Massachusetts: *Dilbert v. Hanover Ins. Co.*, 825 N.E.2d 1071, 1077 (Mass. App. Ct. 2005).

Minnesota: *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012).

Mississippi: *Reeves v. Meridian S. Ry., LLC*, 61 So. 3d 964, 968–69 (Miss. Ct. App. 2011).

Missouri: *Crook v. Sheehan Enters., Inc.*, 740 S.W.2d 333, 335 (Mo. Ct. App. 1987).

Montana: *Davis v. Westphal*, 405 P.3d 73, 81–82 (Mont. 2017).

Nebraska: *George Rose Sodding & Grading Co. v. City of Omaha*, 193 N.W.2d 556, 558 (Neb. 1972).

Nevada: *Parkinson v. Winniman*, 344 P.2d 677, 678 (Nev. 1959).

New Hampshire: *Case v. St. Mary's Bank*, 63 A.3d 1209, 1216 (N.H. 2013).

New Jersey: *Ross v. Lowitz*, 120 A.3d 178, 188 (N.J. 2015).

New Mexico: *Holcomb v. Rodriguez*, 387 P.3d 286, 291 (N.M. Ct. App. 2016).

New York: *Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 129 (N.Y. App. Div. 2014).

North Dakota: *Kuntz v. Leiss*, 952 N.W.2d 35, 36–37 (N.D. 2020).

Ohio: *Smith v. A.B. Bonded Locksmith, Inc.*, 757 N.E.2d 1242, 1246 (Ohio Ct. App. 2001).

Oklahoma: *Stites v. Duit Constr. Co., Inc.*, 992 P.2d 913, 916 (Okla. Civ. App. 1999).

Oregon: *Rhodes v. Harwood*, 544 P.2d 147, 159 (Or. 1975) (en banc).

Pennsylvania: *Carter v. May Dep't Store Co.*, 853 A.2d 1037, 1041 (Pa. Super. Ct. 2004).

Rhode Island: *Gingras v. Richmond*, 329 A.2d 189, 190 (R.I. 1974).

South Carolina: *Snow v. City of Columbia*, 409 S.E.2d 797, 802 (S.C. Ct. App. 1991).

South Dakota: *Hoffman v. Bob L., Inc.*, 888 N.W.2d 569, 577 (S.D. 2016).

Tennessee: *Price v. Osborne*, 147 S.W.2d 412, 413 (Tenn. Ct. App. 1940).

Texas: *Gen. Mills Restaurants, Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 833 (Tex. Ct. App. 2000), *abrogated on other grounds by Env't Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).

Utah: *Purkey v. Roberts*, 285 P.3d 1242, 1247–48 (Utah Ct. App. 2012).

Vermont: *Jones v. Hart*, 261 A.3d 1126,1147 (Vt. 2021).

Virginia: *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 233 (Va. 1946).

Washington: *Bradley v. Am. Smelting & Refin. Co.*, 709 P.2d 782, 787 (Wash. 1985) (en banc).

West Virginia: *EQT Prod. Co. v. Crowder*, 828 S.E.2d 800, 806 (W.Va. 2019).

Wisconsin: *Grygiel v. Monches Fish & Game Club, Inc.*, 787 N.W.2d 6, 19 (Wis. 2010).

Wyoming: *Bellis v. Kersey*, 241 P.3d 818, 824–25 (Wyo. 2010).

Appendix B

States authorizing punitive damages against trespassers who do not cause additional harm to the property.

Alabama: *Webb v. Knology, Inc.*, 164 So. 3d 613, 619–20 (Ala. Ct. App. 2014).

Arizona: *Goodman v. 12 Univ. LLC*, No. 2 CA-CV 2020-0034, 2020 WL 6878883, at *7–8 (Ariz. Ct. App. Nov. 23, 2020) (unpublished).

Colorado: *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1234 (Colo. 2001).

Delaware: *Williams v. Manning*, No. 05C-11-209-JOH, 2009 WL 960670, at *12 (Del. Super. Ct. Mar. 13, 2009) (unpublished).

District of Columbia: *Wood v. Neuman*, 979 A.2d 64, 72–73 (D.C. 2009).

Florida: *Fletcher v. Fla. Publ'g Co.*, 319 So. 2d 100, 112 (Fla. Dist. Ct. App. 1975), *quashed on other grounds*,340 So. 2d 914 (Fla. 1976).

Georgia: *Woodstone Townhouses, LLC v. S. Fiber Worx, LLC*, 855 S.E.2d 719, 730 (Ga. Ct. App. 2021).

Hawaii: *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492, 496 (1954).

Idaho: *Akers v. D.L. White Constr., Inc.*, 320 P.3d 428, 440–42 (Idaho 2014).

Illinois: *Chi. Title Land Tr. Co. v. JS II, LLC*, 977 N.E.2d 198, 220 (Ill. App. Ct. 2012).

Indiana: *True Temper Corp. v. Moore*, 299 N.E.2d 844, 846–47 (Ind. Ct. App. 1973).

Kansas: *Ultimate Chem. Co. v. Surface Transp. Int'l, Inc.*, 658 P.2d 1008, 1012 (Kan. 1983).

Maine: *Sebra v. Wentworth*, 990 A.2d 538, 543 (Me. 2010).

Maryland: *Staub v. Staub*, 376 A.2d 1129, 1133 (Md. Ct. Spec. App. 1977).

Massachusetts: *Kraft Power Corp. v. Merrill*, 981 N.E.2d 671, 684–85 (Mass. 2013).

Michigan: *Kelly v. Fine*, 92 N.W.2d 511, 512 (Mich. 1958).

Minnesota: *Brantner Farms, Inc. v. Garner*, No. C6-01-1572, 2002 WL 1163559, at *3 (Minn. Ct. App. June 4, 2002) (unpublished).

Mississippi: *Patterson v. Holleman*, 917 So. 2d 125, 135 (Miss. Ct. App. 2005).

Missouri: *Bare v. Carroll Elec. Coop. Corp.*, 558 S.W.3d 35, 49 (Mo. Ct. App. 2018).

Nevada: *Droge v. AAAA Two Star Towing, Inc.*, 468 P.3d 862, 880 n.17 (Nev. Ct. App. 2020).

New Hampshire: *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 68 (N.H. 1972).

New Jersey: *Giordano v. Solvay Specialty Polymers USA, LLC*, 522 F.Supp.3d 26, 38–39 (D. N.J. 2021).

New Mexico: *North v. Pub. Serv. Co. of N.M.*, 608 P.2d 1128, 1129 (N.M. Ct. App. 1980).

New York: *Arcamone-Makinano v. Britton Prop., Inc.*, 156 A.D.3d 669, 673 (N.Y. App. Div. 2017).

North Carolina: *Maint. Equip. Co., Inc. v. Godley Builders*, 420 S.E.2d 199, 203–04 (N.C. Ct. App. 1992).

North Dakota: *Adams v. Canterra Petroleum, Inc.*, 439 N.W.2d 540, 546 (N.D. 1989).

Ohio: *Apel v. Katz*, 697 N.E.2d 600, 608–09 (Ohio 1998).

Oklahoma: *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983).

Oregon: *Rhodes v. Harwood*, 544 P.2d 147, 158–59 (Or. 1975).

Pennsylvania: *Gavin v. Loeffelbein*, No. 341 EDA 2016, 2019 WL 3731757, at *9 (Pa. Super. Ct. Aug. 8, 2019) (unpublished).

Rhode Island: *Russell v. Kalian*, 414 A.2d 462, 464–65 (R.I. 1980).

South Carolina: *Greene-Mackey v. Bevins*, No. 2018-001372, 2021 WL 2822419, at *1 (S.C. Ct. App. July 7, 2021) (citing *Clark v. Cantrell*, 529 S.E.2d 528, 533 (S.C. 2000)) (unpublished).

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Tennessee: *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W2d 632, 641 (Tenn. 1996).

Texas: *Wilen v. Falkenstein*, 191 S.W.3d 791, 800 (Tex. Ct. App. 2006).

Utah: *Purkey v. Roberts*, 285 P.3d 1242, 1248 (Utah Ct. App. 2012).

Vermont: *Fly Fish Vt., Inc. v. Chapin Hill Ests., Inc.*, 996 A.2d 1167, 1173–77 (Vt. 2010).

Virginia: *Hamilton Dev. Co. v. Broad Rock Club, Inc.*, 445 S.E.2d 140, 143–44 (Va. 1994).

Washington: *Bradley v. Am. Smelting and Refin. Co.*, 709 P.2d 782, 791 (Wash. 1985).

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Wyoming: *Goforth v. Fifield*, 352 P.3d 242, 250 (Wyo. 2015).