No. 21-760

IN THE

Supreme Court of the United States

LAURA KELLY, in her official capacity as Governor of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of Kansas,

Petitioners,

v.

ANIMAL LEGAL DEFENSE FUND; CENTER FOR FOOD SAFETY; SHY 38, INC.; HOPE SANCTUARY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Kansas's "Ag-Gag" law, Kan. Stat. Ann §§ 47-1825 *et seq.*, criminalizes accessing an animal facility by deception and with "the intent to damage the enterprise conducted at the animal facility." Under this provision, an undercover investigator who enters an animal facility with the intent to expose food safety and animal welfare violations is guilty of a crime. Any person who lies about her identity and enters the same facility with the intent to laud its practices is not. Nor is a person who obtains access to the facility by deception but has no intent one way or the other to help or hurt the enterprise, say an undercover reporter who plans to write an article comparing different animal facilities. The Tenth Circuit held in this case that the statute thus "places pro-animal facility viewpoints above anti-animal facility viewpoints," Pet. App. 27, and is subject to strict scrutiny under the First Amendment. Because Kansas made no effort to justify its Ag-Gag law under that standard, the court held the statute unconstitutional.

The question presented is:

Whether the Tenth Circuit correctly held that Kan. Stat. Ann. §§ 47-1827(b), (c), and (d) violate the First Amendment because they criminalize speech on the basis of viewpoint?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents Animal Legal Defense Fund, Center for Food Safety, Shy 38, Inc., and Hope Sanctuary hereby certify that they have no parent corporations, and that no publicly-held company owns ten percent or more of the stock of any Respondent.

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INTRODUCTION

This case involves a straightforward application of this Court's longstanding viewpoint discrimination precedents to a Kansas statute that criminalizes speech. In its petition for certiorari, Kansas contends that the decision implicates a circuit split about the constitutionality of so-called "Ag-Gag" laws and the meaning of this Court's decision in *United States v. Alvarez,* 567 U.S. 709 (2012). But the Tenth Circuit's decision does not conflict with the decision of any other court of appeals. And this case has little to do with *Alvarez*, because the Tenth Circuit's analysis rests on uncontroversial and well-settled principles regarding viewpoint discrimination, not on the First Amendment's protections for false speech as examined in *Alvarez*.

This Court's review would be inapt for other reasons as well. Around a dozen states have enacted—and some have amended—a wide array of differing Ag-Gag laws in recent years. The lower courts are currently wrestling with constitutional challenges to several of these provisions, and the decisions issued to date have relied on different legal theories. The Tenth Circuit's decision in this case is so far the only circuit opinion to have focused on a state law's viewpoint discrimination. It thus presents a poor vehicle for this Court's assessment of any broader range of Ag-Gag issues. Review at this stage would also be premature, as the litigation in other cases is ongoing and states are continuing to consider new legislation and amend existing laws.

The Tenth Circuit's decision in this case is also correct. Kansas's Ag-Gag law plainly regulates speech, and not just conduct. And it criminalizes speech based on viewpoint: If a speaker lies on a job application with the intent to "damage the enterprise"—falsely stating, say, that she does not belong to an animal welfare group—she has committed a crime. But if another speaker likewise gains access to the facility by deception but lacks any such intent—say, an industry supporter who wants to produce a puff piece about the facility's practices—she has not. That viewpoint discrimination subjects the statute to strict scrutiny, a standard that Kansas has not attempted to satisfy. The Tenth Circuit thus correctly concluded that Kansas's Ag-Gag statute is unconstitutional.

The Court should deny certiorari.

STATEMENT OF THE CASE

Undercover investigations at animal facilities reveal important matters of public concern

This case is about speech—specifically speech on a matter of public concern accorded the highest order of First Amendment protection. Respondent Animal Legal Defense Fund (ALDF) commissions undercover investigations of factory farms, slaughterhouses, and other animal production facilities, publicly disseminates information obtained from those investigations, and uses this information to support animal welfare reform efforts. Pet. App. 88. Respondents Center for Food Safety, Shy 38, Inc., and Hope Sanctuary use information from whistleblowers and ALDF

investigations to support their own organizations' missions, including public education. Pet. App. 88.

ALDF's investigators apply for jobs at animal facilities. Pet. App. 9, 89. Those facilities typically ask job applicants whether they are affiliated with an animal rights group. Dist. Ct. Dkt. No. 1, ¶ 78 n.19 (Compl.). The investigators sent on ALDF's behalf are honest about their qualifications, but deny that they are working with an animal rights organization. Pet. App. 9, 89. The investigators then perform their job functions, but also record video or take photographs with hidden cameras that can be operated with no or virtually no effort, so the investigators can fulfill their facility-assigned tasks. Pet. App. 9, 89-90; CA10 Appx. II at 28. Respondents use the resulting pictures and video for public education and to alert public officials to any animal mistreatment, worker safety, or food safety issues that come to light. Pet. App. 9-10, 90-92.

Such investigations have exposed abuses so severe as to prompt state and federal officials to issue food recalls, pursue civil and criminal charges, and seize animals. Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. Colo. L. Rev. 655, 695 (2018). They have also stirred public outrage yielding new farm animal welfare legislation and changes in consumer behavior. *See, e.g., id.*; Nicholas Kristof, *The Ugly Secrets Behind the Costco Chicken*, N.Y. Times (Feb. 6, 2021), https://tinyurl.com/356kvzp5.

Kansas enacts its Ag-Gag law to chill speech

In 1990, Kansas enacted the Farm Animal and Field Crop and Research Facilities Protection Act, Kan. Stat. Ann. §§ 47-1825 *et seq*. The statute criminalizes among other things "enter[ing] an animal facility," including "to take pictures by photograph [or] video camera," without "the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility." Kan. Stat. Ann. § 47-1827(b)-(d). The legislative history leaves no doubt that the law was intended to prevent animal-rights investigations; when signing the bill, then-Governor Mike Hayden touted the legislation as a direct "response to … damage caused by radical elements of the animal-rights movement." Compl. Exh. C; *see* Compl. ¶¶ 65-66.

As originally written, Kansas's Ag-Gag law stated that it is criminal to gain access to a facility by force or threat. 1990 Kan. Sess. Laws, ch. 192, §§ 2(e)(1), 3. In 2012, around the time that many other states were enacting Ag-Gag laws, Kansas amended the definition of "effective consent" to specify that a person could also violate the law by gaining consent through fraud, deception, or duress. 2012 Kan. Sess. Laws, ch. 125, § 41. The legislative history of this amendment again confirms that Kansas legislators targeted "animal rights activists with an anti-agriculture agenda" who "lied on job applications" to "take undercover video." Pet. App. 27. It viewed the "amendment [as] a tool that can be used against people using fraud to gain access to farms." *Id.* In particular, "[t]he change to exclude 'fraud, deception, or duress' from the definition of 'effective consent' clarifies that the animal

activists concealing their identity or lying on a job application cannot avail themselves [of] the defense that they were given permission to work on or enter the facility." CA10 Appx. I at 78.

The district court strikes Kansas's Ag-Gag law under the First Amendment

Seeking to engage in undercover investigations in Kansas, Respondents brought a First Amendment challenge against the state's Ag-Gag law. Compl. On summary judgment, the district court struck § 47-1827(b)-(d) as unconstitutional.

The district court first found as a threshold matter that Respondents lacked standing to challenge subsection (a) of Kansas's Ag-Gag law, which prohibits destroying or physically damaging an animal facility, because Respondents had no intention to engage in such conduct. Pet. App. 103. Respondents did have standing, however, to challenge subsections (b)-(d) as they had "stated a desire to engage in conduct which [each subsection] proscribes and face[] a credible threat of prosecution under that subsection." Pet. App. 105; *see* Pet. App. 108-14.

The district court then held that the Ag-Gag law violates the First Amendment because it regulates speech, is viewpoint discriminatory, and does not meet strict scrutiny. The district court rejected Kansas's argument that § 47-1827 regulates only conduct and not speech. Pet. App. 122-23. The court explained that the statute "plainly regulate[s] speech" in two ways. First, it "limits what [Respondents] may or may not say" when attempting to gain access to an animal

facility. Pet. App. 122. Second, it prohibits the "creation" of speech in the form of pictures and videos. Pet. App. 122-23. The court determined that § 47-1827 is a content-based and viewpoint-discriminatory restriction on speech, because it "only applies to speech that is made with intent to damage the enterprise conducted at an animal facility," Pet. App. 123-24, and "plainly targets negative views about animal facilities," Pet. App. 126. Accordingly, the court applied strict scrutiny. Because Kansas did "not attempt to justify" its Ag-Gag law under strict scrutiny, Pet. App. 129, the court invalidated it, Pet. App. 130.

The Tenth Circuit affirms based on viewpoint discrimination

The Tenth Circuit affirmed. Pet. App. 6. The court of appeals first reiterated that Kansas's statute regulates speech, and not just conduct. Pet. App. 24, 26, 32, 35, 37-38. It noted that this ruling was consistent with the opinions of two other circuits that have considered the question in the context of other states' Ag-Gag laws. *See* Pet. App. 26; *see also* Pet. App. 40 n.17.

The court of appeals then held that the Ag-Gag statute is viewpoint discriminatory because it prohibits only speech made with the intent "to damage the enterprise conducted at the animal facility." Pet. App. 26, 32, 35. The court explained that even if Kansas might be able to prohibit all entry by deception into an animal facility, it could not selectively prohibit entry by deception only with an intent to damage the facility. Pet. App. 27. As the court put it, quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391 (1992), Kansas could not "license one side of a debate to fight

freestyle, while requiring the other to follow Marquis of Queensberry rules." Pet. App. 54. For these reasons, the court applied strict scrutiny, which Kansas again had not attempted to satisfy. *Id.* On this basis, the Tenth Circuit agreed with the district court that the Kansas Ag-Gag law is unconstitutional. Pet. App. 55. Judge Hartz dissented, arguing that the statute does not infringe upon protected speech and effects no viewpoint discrimination. Pet. App. 57, 69-70.

REASONS FOR DENYING CERTIORARI

I. The Tenth Circuit's Opinion Does Not Conflict With Any Other Circuit Precedent.

Kansas urges this Court to grant review to resolve a supposed circuit conflict among the Eighth, Ninth, and Tenth Circuits. But there is no such conflict because the respective state laws that these decisions address are very different from one another, and because the Tenth Circuit's decision below turns on viewpoint discrimination and the cited Eighth and Ninth Circuit decisions do not. The Eighth and Ninth Circuits focus instead on this Court's ruling in *United States v. Alvarez,* 567 U.S. 709 (2012), addressing the First Amendment's protections for false speech, the scope of which the Tenth Circuit repeatedly stated was unnecessary to resolve in order to determine the validity of Kansas's Ag-Gag law. Certiorari is unwarranted.

1. The petition rests on an asserted conflict between the Tenth Circuit's decision in this case and the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The

Ninth Circuit there addressed Idaho's Ag-Gag law, which criminalizes "interference with agricultural production." Idaho Code Ann. § 18-7042(1). As relevant here, the Idaho crime is defined as knowingly: (1) "enter[ing] an agricultural production facility by force, threat, misrepresentation or trespass," or (2) "[o]btain[ing] employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers." Idaho Code Ann. § 18-7042(1)(a), (c).

The Ninth Circuit analyzed both the access provision and the employment provision under the Supreme Court's decision in *Alvarez*. The Supreme Court held there that the federal Stolen Valor Act, which made it a crime to falsely claim receipt of certain military decorations or medals, violated the First Amendment. *Alvarez*, 567 U.S. at 713-15. Justice Kennedy, writing for himself, Chief Justice Roberts, and Justices Ginsburg and Sotomayor, authored a plurality opinion explaining that the law was a "content-based speech regulation" that failed to satisfy "exacting scrutiny." *Id.* at 715. Justice Breyer, joined by Justice Kagan, wrote an opinion concurring in the judgment and taking the view that "the statute works First Amendment harm" because "the Government c[ould] achieve its legitimate objectives in less restrictive ways." *Id.* at 730 (Breyer, J., concurring). Justice Alito dissented, joined by Justices Scalia and Thomas.

The Ninth Circuit understood *Alvarez* to permit regulation of intentionally false speech made "'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm.'" *Wasden*, 878 F.3d at 1194 (quoting *Alvarez*, 567 U.S. at 723, 719). The court then applied that framework to Idaho's access provision, concluding that its proscription on entry by misrepresentation was an impermissible restriction on speech. The court reasoned that the statute covered much more than false speech "with a material benefit to the speaker." *Id.* at 1195. Rather, the access restriction covered lies that "do not inflict any material or legal harm on the deceived party." *Id.* at 1196. It therefore swept in "innocent behavior" that rendered the "overbreadth of th[e] subsection … staggering." *Id.* at 1195. The court also concluded that Idaho's access "provision … regulates protected speech while 'target[ing] falsity and nothing more.'" *Id.* at 1196 (alteration in original) (quoting *Alvarez*, 567 U.S. at 719).

By contrast, the Ninth Circuit upheld the Idaho provision that imposed criminal penalties for obtaining employment by misrepresentation because the court interpreted a false statement in that context to be a "lie made for material gain." *Id.* at 1201. The court noted that "the Supreme Court [in *Alvarez*] singled out offers of employment" as a context in which false speech could be permissibly regulated. *Id.* at 1202.

There is no conflict between this case and *Wasden*. To start, obviously, the Tenth Circuit's opinion striking Kansas's access provision is perfectly consistent with the Ninth Circuit's decision in *Wasden*

striking Idaho's access provision. Kansas does not address this consistency.

Instead, Kansas maintains that the Tenth Circuit's decision here on Kansas's access provision conflicts with the Ninth Circuit's decision upholding Idaho's employment provision. It dwells on the fact that both provisions include an intent element. *Compare* Kan. Stat. Ann. § 47-1827(b), (c), (d) (with the intent "to damage the enterprise"), *with* Idaho Code Ann. § 18-7042(1)(c) ("with the intent to cause economic or other injury to the facility's operations"); *see* Pet. 12-13; *see also* Utah Amicus Br. 19-21. And it posits that having one court invalidate an access provision with an intent element, and another court uphold an employment provision with an intent element, creates a "dilemma" for the state about how it should go about fixing its Ag-Gag law's constitutional defect. Pet. 13.

But the intent elements to which Kansas points create no conflict because neither the Ninth Circuit's analysis nor its holding turned on that language. *Wasden* upheld the Idaho employment provision because it was an employment provision, not because it had an intent element. The Ninth Circuit reasoned that false statements made to obtain "offers of employment" are a "category of speech" that this Court in *Alvarez* "explicitly" "singled out" as permissible to regulate because, in the Ninth Circuit's view, such statements "constitute[] … lie[s] made for material gain." *Wasden*, 878 F.3d at 1201-02 (citing *Alvarez*, 567 U.S. at 723). Because the *Wasden* court read *Alvarez* to permit states to criminalize gaining offers of employment by misrepresentation, and because it

understood the Idaho employment provision to do exactly that, the court concluded that the provision was constitutional. The provision's intent language did not drive the analysis.

In stark contrast, as the Tenth Circuit explained, it had no opportunity to rule on whether the Kansas Ag-Gag law would be a permissible speech restriction if it covered "false speech made to secure a material gain, i.e., employment." Pet. App. 36 n.14. Unlike the Idaho Ag-Gag law, the Kansas Ag-Gag law contains no separate employment provision. And in any event, Kansas "forfeited the argument … by not raising that argument in its opening brief." *Id.*

Conversely, and even more importantly, the Ninth Circuit did not address the point that the Tenth Circuit found dispositive here: whether the intent element in Idaho's employment provision rendered the law viewpoint discriminatory. The Ninth Circuit discussed the statute's intent requirement merely in passing, noting that the intent element narrowed the employment provision by guaranteeing that it protects against harms analogous to state-law "breach of the covenant of good faith and fair dealing." *Wasden*, 878 F.3d at 1201-02. To the extent that *Wasden* discussed viewpoint discrimination at all, it did so in its analysis of a different provision of the Idaho statute, a monetary restitution clause, Idaho Code Ann. §§ 18-7042(4), 19-5304. The court rejected an argument that the restitution clause discriminated against those who seek to reveal misconduct at animal facilities, as it interpreted Idaho's law to not cover "reputational and publication damages." *Wasden*, 878 F.3d at 1202. The Tenth Circuit, in contrast, unequivocally read the

Kansas Ag-Gag law's "intent to damage the enterprise" element to encompass intent to cause harm via adverse publicity and reputational injury. Pet. App. 29-30. As a matter of state law, the Tenth Circuit in this key respect thus construed the Kansas Ag-Gag law very differently from how the Ninth Circuit construed the applicable Idaho provisions.

Kansas also purports to see a conflict between the Tenth Circuit's analysis here and *Wasden*'s analysis of Idaho's intent-less access provision. Pet. 11-12. But the Ninth Circuit *struck* that provision just as the Tenth Circuit did here, eliminating any plausible claim of a conflict.

Kansas argues that the Ninth and Tenth Circuits are nevertheless in conflict because the *Wasden* court suggested that an intent element might cure the constitutional defect in Idaho's access provision. Pet. 11; *Wasden*, 878 F.3d at 1198. But Kansas again overlooks material differences between the Kansas and Idaho statutes and between the constitutional doctrines the two courts applied. As discussed, the constitutional defect *Wasden* identified was the Idaho provision's broad sweep, not viewpoint discrimination. And that analysis was driven by the specific contours of Idaho's Ag-Gag law. Idaho's access provision "include[d] property that is generally open to the public." 878 F.3d at 1195. By contrast, Kansas's provision criminalizing "[e]nter[ing] an animal facility" specifies that the facility must be "not then open to the public." § 47-1827(c)(1). The Ninth Circuit's conclusion that Idaho's access provision was "overbr[oad]" hinged largely on how this lack of a requirement that the property be closed to the public risked

"criminaliz[ing] innocent behavior." *Wasden*, 878 F.3d at 1195. Indeed, the court emphasized that it was "unsettled by the sheer breadth" of the Idaho law, as it could cover "grocery stores, garden nurseries, restaurants that have an herb garden or grow their own produce, llama farms that produce wool for weaving, beekeepers, a chicken coop in the backyard, a field producing crops for ethanol, and hardware stores." *Id.* at 1197. And the court explained that its concerns regarding the expansive reach of the Idaho access provision were confirmed by the particular contours of Idaho's background trespass law and the specific legislative history underlying the enactment of Idaho's Ag-Gag law. *Id.* at 1195-98.

In short, the Tenth Circuit's decision in this case striking Kansas's Ag-Gag law does not conflict with the Ninth Circuit's decision in *Wasden* striking certain provisions of Idaho's Ag-Gag law and upholding others. The two decisions address very different state-law provisions raising distinct constitutional concerns. And the Ninth Circuit certainly never suggested that, in order to be constitutional, a state Ag-Gag law must contain an intent requirement that is viewpoint discriminatory.[1]

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[1] The Ninth Circuit in *Wasden* also struck down the provision in Idaho's Ag-Gag law prohibiting a person from entering an agricultural production facility and making an audio or video recording. Idaho Code Ann. § 18-7042(1)(d); *Wasden*, 878 F.3d at 1203-04. This "Recordings Clause" was "a content-based restriction" that "prohibit[ed] the recording of a defined topic—'the conduct of an agricultural production facility's operations.'" *Wasden*, 878 F.3d at 1203-04. Kansas does not argue that there

2. Kansas also argues that there is "friction" between the Tenth Circuit's decision here and the Eighth Circuit's decision in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021). Pet. 16. Friction, short of an actual conflict, is no basis for review. That is particularly so where the Eighth Circuit decision that Kansas points to upheld one statutory provision but also invalidated another. 8 F.4th at 787-88.

In any event, the perceived "friction" is imaginary. The Eighth Circuit in *Reynolds* addressed a challenge to Iowa's Ag-Gag law criminalizing "agricultural production facility fraud." The provision proscribed: (a) "Obtain[ing] access to an agricultural production facility by false pretenses," or (b) "Mak[ing] a false statement or representation as part of an application or agreement to be employed at an agricultural production facility," and the person "knows the statement to be false" and makes it "with an intent to commit an act not authorized by the owner of the" facility. Iowa Code Ann. § 717A.3A(1)(a)-(b). The Eighth Circuit upheld the access provision because, applying *Alvarez*, it understood the Iowa law to permissibly proscribe false speech that, in the court's view, caused legally cognizable harm in the form of trespass to private property. *Reynolds*, 8 F.4th at 786. But the court invalidated Iowa's employment provision because it contained no materiality limitation; it encompassed a job applicant's false statements that were wholly

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is any conflict between *Wasden*'s analysis of Idaho's Recordings Clause and the Tenth Circuit's decision here. Pet. 10-13.

immaterial to the ultimate employment decision and thus caused no harm. *Id.* at 787-88.

There is no friction between the Tenth Circuit's decision in this case and the Eighth Circuit's decision in *Reynolds*. The Tenth Circuit here struck Kansas's Ag-Gag law because it requires an "intent 'to damage the enterprise conducted at the animal facility,'" and that requirement leads the Kansas law to effect improper viewpoint discrimination. Pet. App. 25. The Iowa access provision that the Eighth Circuit upheld in *Reynolds* contains no intent requirement and instead proscribes obtaining access to an agricultural production facility by false pretenses regardless of one's intent. Iowa Code Ann. § 717A.3A. The Tenth Circuit thus addressed a materially different state law implicating a different legal analysis.

The Tenth Circuit here expressly distinguished the Eighth Circuit's decision on that basis. The Tenth Circuit stated that its decision holding the Kansas Ag-Gag law unconstitutional is "not inconsistent" with the Eighth Circuit's decision upholding the Iowa access provision in *Reynolds* because, in the Tenth Circuit's view, *Reynolds* did not "consider a statute that is viewpoint discriminatory." Pet. App. 40 n.17. And two of the three *Reynolds* panelists made the same point. In a separate concurrence in *Reynolds*, Judge Grasz stated that, "[g]oing forward," courts would need to determine whether Iowa's access provision is "applied to punish speech that … is tied to political or ideological messages." *Reynolds*, 8 F.4th at 788 (Grasz, J., concurring). Judge Gruender, concurring and dissenting in part, observed similarly that "a statute criminalizing the expression of 'incorrect' opinions

on politically charged topics would be constitutionally problematic," but "d[id] not believe that [such concerns] are implicated in this case" because neither Iowa's access provision nor its employment provision "draws a further content-based distinction in addition to the distinction between truth and falsity." *Id.* at 794 n.3 (Gruender, J., concurring in part and dissenting in part).

There is also no inconsistency between the Tenth Circuit's determination here that the Kansas Ag-Gag law is unconstitutional and the Eighth Circuit's determination in *Reynolds* that the Iowa employment provision is unconstitutional, as the petition effectively concedes. *See* Pet. 15 n.2 (stating that the Iowa employment provision "is not relevant here"). And as noted, the Eighth Circuit held Iowa's employment provision unconstitutional because it contained no materiality requirement. In contrast, the Kansas Ag-Gag law contains no discrete employment provision at all, much less one with that particular flaw.

3. The petition also suggests that there is a conflict between the Eighth Circuit's decision in *Reynolds* and the Ninth Circuit's decision in *Wasden*. Pet. 15. But those two circuits, and the Tenth Circuit here, all agree on a basic precept of *Alvarez*—that intentionally false speech may be regulated when it causes a legally cognizable harm. *See* Pet. App. 28; *Reynolds*, 8 F.4th at 786; *Wasden*, 878 F.3d at 1194. And the Tenth Circuit found it unnecessary to address the scope of *Alvarez*, while the Eighth and Ninth Circuits differ only in applying that teaching to the state-specific laws at issue. For example, as discussed above, the Ninth Circuit in striking Idaho's access provision

emphasized what the court saw as that provision's substantial "breadth," 878 F.3d at 1197, and the Eighth Circuit in striking Iowa's employment provision focused on that provision's lack of a materiality element, 8 F.4th at 787. And even if there were an actual conflict between the Eighth and the Ninth Circuits, which there is not, that would be no reason to grant certiorari from a Tenth Circuit decision addressing a very different state law and striking it down based on viewpoint discrimination, a basis that neither the Eighth Circuit nor the Ninth Circuit relied on.

II. This Case Is An Unsuitable Vehicle And Offers No Opportunity To Clarify *Alvarez*.

This case is also a poor vehicle for the Court's review. The Kansas statute contains distinctive features that make it especially vulnerable to First Amendment challenge. In particular, the "intent to damage" element of the Kansas law makes it significantly different from other state laws in a way that strongly supports a conclusion that the law is viewpoint discriminatory. *See supra* 13, 15. And the Kansas statute's particular prohibition on entering a facility "to take pictures by photograph, video camera or by any other means" specifically curtails First Amendment protected activity. *See supra* 13 n.1. The Tenth Circuit's conclusion that the statute violates the First Amendment thus rests on the Kansas law's distinctive features and the court's distinctive reasoning.

This case is also an inapt vehicle for clarifying the scope of the First Amendment's protections for false

speech and for resolving any uncertainty that remains on that topic after *Alvarez*. The petition claims that lower courts need guidance on how to apply *Alvarez*. *See, e.g.*, Pet. 17. But the Tenth Circuit's decision is not an appropriate vehicle for addressing any such uncertainty, because the court's conclusion rests entirely on its analysis that the Kansas statute is viewpoint discriminatory. The Tenth Circuit explicitly stated that it did not need to address the scope of *Alvarez* to conclude that the Kansas law discriminates against speech on the basis of viewpoint. Pet. App. 24, 40 n. 17. It explained that the First Amendment's prohibition of viewpoint discrimination is separate and independent from the question of the scope of protection that exists for false speech. As the court of appeals emphasized, "we consider a statute that is viewpoint discriminatory, implicating strict scrutiny without regard to whether the speech it prohibits is protected or unprotected." Pet. App. 40 n. 17. This case thus does not properly tee up any generally applicable issue regarding the bounds of *Alvarez*.

Amici separately assert that the Court should take up this case to resolve lingering confusion about "which parts of the *Alvarez* decision are binding." Utah Amicus Br. 12. As noted (at 9-10, 14-15), no part of *Alvarez* is in question here, because the Tenth Circuit's holding rests on viewpoint discrimination. The Tenth Circuit expressly stated that to the extent its analysis implicated *Alvarez*, it invoked "only" two uncontroversial points on which "the plurality and concurring opinions in *Alvarez* are in accord": the propositions "that restrictions on false statements of fact can be subject to First Amendment scrutiny requiring the government to provide a justification,"

and that "restrictions on false factual statements that cause legally cognizable harm tend not to offend the Constitution." Pet. App. 24. The Tenth Circuit stated that "[t]hose two propositions are the only ones from *Alvarez*" invoked in its analysis. *Id.* (explaining why the court found it unnecessary to apply *Marks v. United States*, 430 U.S. 188 (1977), to determine the scope of *Alvarez*). This case accordingly offers no opportunity to address "which parts" of *Alvarez* "are binding," Utah Amicus Br. 12—just as it offers no opportunity to address *Alvarez*'s application to laws targeting false speech more generally.

III. This Court's Review Would Be Premature.

Several states to date have enacted Ag-Gag laws. *See* Pet. 18-20. These laws differ significantly from each other in text, scope, and focus. While some of them specifically prohibit image or sound recording, others focus on mere presence at a facility. *Compare, e.g.*, N.C. Gen. Stat. Ann. § 99A-2(b) (prohibiting "record[ing] images or sound"), *with* Ala. Code § 13A-11-153(3) (prohibiting access generally). Some statutes require that the entrant intend to damage the facility, while others prohibit access regardless of intent. *Compare, e.g.*, Mont. Code Ann. § 81-30-103(2)(f) (requiring intent to damage), *with* Iowa Code Ann. § 717A.3A (not requiring intent to damage). Some do not require a false or deceptive statement. *See* Iowa Code Ann. § 727.8A (prohibiting trespass and "knowingly plac[ing] or us[ing] a camera or electronic surveillance device that transmits or records images or data"). And some state Ag-Gag provisions are criminal in nature, while others merely provide civil remedies. *Compare, e.g.*, Idaho Code Ann. § 18-7042

(criminal offense), *with* Ark. Code Ann. § 16-118-113 (making one civilly "liable to the owner or operator of the commercial property for any damages sustained"). In assessing any of these statutes for purposes of the First Amendment, the distinctive features of a particular provision may materially affect the applicable constitutional analysis.

Moreover, these laws are currently in flux. For example, in 2021, Iowa adopted yet another iteration of an Ag-Gag law, making it a crime to "commit a trespass as defined in Section 716.7" and "knowingly place[] or use[] a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property." Iowa Code Ann. § 727.8A.

Several of these provisions are currently in active litigation in the lower courts. For instance, the Fourth Circuit recently heard oral argument in a challenge to North Carolina's Ag-Gag statute. *PETA v. N.C. Farm Bureau*, No. 20-1776 (4th Cir.) (argued Oct. 27, 2021). There is active district court litigation challenging Ark. Code Ann. § 16-118-113. *See ALDF v. Vaught*, No. 4:19-cv-00442 (E.D. Ark.); *ALDF v. Vaught*, 8 F.4th 714 (8th Cir. 2021) (remanding for district court proceedings). And there is also ongoing district court litigation challenging both a second Iowa Ag-Gag statute and Iowa's newly enacted law restricting recording while trespassing. *See ALDF v. Reynolds*, No. 4:19-cv-00124 (S.D. Iowa) (challenging Iowa Code Ann. § 717A.3B); *ALDF v. Reynolds*, No. 4:21-cv-00231-RP-HCA (S.D. Iowa) (challenging Iowa Code Ann. § 727.8A).

Kansas acknowledges the "unsettled state of the law," Pet. 20, but presents no good reason—other than the fact that it lost this particular case—for the Court to take up the issue now. Similarly, amici fail to grapple with the state of the law or explain why the orderly development of the issues in the courts of appeals should be cut off. Instead, they ask the Court to "provide states guideposts to help them proactively protect their citizens' private property rights"—in other words, a playbook for how states can criminalize speech. Utah Amicus Br. 1. Here especially—where the issues are novel and potentially complex, and the implications of a constitutional ruling are significant—the Court should follow its usual practice of permitting the "courts of appeals to explore" the issues and "waiting for a conflict to develop" before granting review. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

IV. The Tenth Circuit's Decision Is Correct.

Review is also unwarranted because the Tenth Circuit's decision is correct.

1. The court of appeals properly concluded as a threshold matter that Kansas's Ag-Gag law implicates the First Amendment. *See* Pet. App. 24-25. Kansas insists that its Ag-Gag law does not regulate speech and merely regulates conduct—"trespassing without effective consent." Pet. 21. But as the Tenth Circuit correctly determined, the Kansas statute regulates speech in multiple ways. Pet. App. 24-25. And that conclusion is fully consistent with the decisions of both the Eighth and Ninth Circuits, which likewise explained that a law regulating access to a facility by

false pretenses or misrepresentation concerns speech, and not just conduct. *See Reynolds*, 8 F.4th at 784; *Wasden*, 878 F.3d at 1194.

First, the Kansas statute regulates what a person may say to gain access to an animal facility. The Ag-Gag provisions apply when someone gains access to the facility "without the effective consent of the owner." Kan. Stat. Ann. § 47-1827(b)-(d). And the statute specifies that consent is not effective if "[i]nduced by … deception." *Id.* § 47-1826(e)(1). The statute's prohibitions therefore apply if a person makes a particular kind of statement—here, a deceptive statement—to obtain access to an animal facility.

Second, the Kansas statute applies only if someone gains access to an animal facility without effective consent to perform certain acts, such as taking photographs or video recording, *and* does so "with the intent to damage the enterprise" conducted at the facility. *Id.* § 47-1827(b)-(d). As the court of appeals explained, the statute thus targets speech critical of the animal facility. Pet. App. 26-27. In that way, the intent requirement of Kansas' Ag-Gag law reflects the state's effort to restrict a person's speech after the person has gained access to an animal facility.

Third, subsection (c) regulates speech-creation activities. "This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech

process."). The Kansas statute regulates speech-creation by prohibiting a person who lacks effective consent of the owner and has the intent to damage the enterprise from "enter[ing] an animal facility to take pictures by photograph, video camera or by any other means." Kan. Stat. Ann. § 47-1827(c)(4).

In these respects, the Kansas Ag-Gag statute differs from many of the statutes that Utah identifies in its amicus brief (at 9), which target pure conduct, irrespective of any accompanying speech. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4902 (defining "criminal trespass on a commercial nuclear generating station" as "[e]ntering or remaining unlawfully" within a commercial nuclear generating station, with no reference to speech); Miss. Code Ann. § 97-17-95 (criminalizing "willfully enter[ing] or trespass[ing] within the premises" of a nuclear facility, with no reference to speech); N.H. Rev. Stat. Ann. § 635:2(III)(b) (defining criminal trespass at a correctional facility as "knowingly enter[ing] or remain[ing]" at the facility, with no reference to speech).

2. The Tenth Circuit was correct in concluding that the Kansas statute is impermissibly viewpoint discriminatory because it criminalizes acquiring access to an animal facility, without effective consent, to carry out certain acts only when there is "intent to damage the enterprise conducted at the animal facility." Kan. Stat. Ann. § 47-1827(b)-(d).

Laws that "proscrib[e] speech … because of disapproval of the ideas expressed" are "presumptively invalid." *R.A.V.*, 505 U.S. at 382. This is true regardless of whether the speech falls within the "categories of

expression" that may otherwise "be regulated because of their constitutionally proscribable content," like obscenity and defamation. *Id.* at 383 (emphasis omitted). Even when the speech is "proscribable on the basis of one feature," it is a "commonplace" proposition that the government may not then proscribe the speech on the basis of the viewpoint expressed. *Id.* at 385. For example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.* at 384 (emphasis omitted).

The Kansas statute applies to a person who obtains control or access by deception with the intent to expose and speak out against any wrongdoing observed at the facility, but not to a person who makes a similarly deceptive statement without the intent to criticize the facility's operation. Pet. App. 26-27. The latter scenario could include, for example, a journalist who plans to write a story objectively comparing and contrasting the practices of various animal facilities, with no intention or expectation of helping or harming any facility. Or a food writer who tours facilities to research an upcoming book about the food system and might enter an agricultural facility with similarly neutral intent. Or an actor researching a role about a character who works at a chicken farm; he lies about his reasons for applying for the job and works there for a few weeks before quitting. Or a scientist who lies to gain access to a variety of properties to measure water quality along the length of a river. All of these examples involve people who engage in the same basic conduct as ALDF's investigators—they gain access to an animal facility by deception—but they do not intend to engage in speech with an anti-animal facility

viewpoint and therefore are not covered by Kansas's Ag-Gag law and are not subject to criminal liability.

As the Tenth Circuit explained, the text of the Kansas Ag-Gag law thus demonstrates that the law "places pro-animal facility viewpoints above anti-animal facility viewpoints." Pet. App. 27. The legislative history of the Kansas Ag-Gag law confirms this conclusion. As noted above (at 4), the state legislature amended the law in 2012—by defining "effective consent" to exclude consent by fraud or deception—in response to the fact that "[i]n some states, animal rights activists with an anti-agriculture agenda have lied on job applications in order to gain access to farms or ranches and take undercover video." Pet. App. 27. That amendment, according to the legislature, "is a tool that can be used against people using fraud to gain access to farms." *Id.* Whether or not the state could categorically prohibit gaining access to an animal facility by deception, it cannot prohibit doing so *only* with the intent to damage the enterprise conducted at the facility. *R.A.V.*, 505 U.S. at 384.

Kansas's Ag-Gag law thus regulates speech made with a particular viewpoint. That distinguishes it from a statute like that in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (cited at Pet. 23-24), which regulated *conduct* undertaken with a particular motive. *Id.* at 487 (explaining that the statute was "aimed at conduct," not "expression"); *see* Pet. App. 53 (*Mitchell* applies only to "conduct-based offense[s]," while "the Kansas statute is speech-based."). Moreover, unlike the "bias-inspired conduct" at issue in *Mitchell*, deceptive statements made to gain access to an animal facility with the intent to expose wrongdoing at the

facility do not "inflict greater individual and societal harm" than statements made without that viewpoint. *Mitchell*, 508 U.S. at 487-88.

Because Kansas's Ag-Gag law targets speech and is viewpoint discriminatory, it is subject to strict scrutiny. "Kansas has not attempted to meet its burden under that standard," and the statute is unconstitutional. Pet. App. 25.

3. As the Tenth Circuit also recognized, Kansas's statute does not protect facility owners from harm that arises merely from trespass. Pet. App. 40. Indeed, Kansas (like other states) already has a law criminalizing trespass. Kan. Stat. Ann. § 21-5808. So the statute must be concerned with a harm other than trespass; otherwise, the statute would be superfluous.

Instead, the Kansas Ag-Gag law seeks to protect a narrow slice of business interests from the effects of true speech about the enterprise. It does so by criminalizing entry by deception with the intent to damage the enterprise conducted at the animal facility, including by taking photographs and videorecording. The intent requirement makes clear that it is the harm from bad publicity and exposure to criminal and civil charges for food safety, worker safety, and animal welfare violations that the statute seeks to forestall. Pet. App. 26-27, 29-30.

That is significant for purposes of analyzing whether the speech is protected by the First Amendment. The earlier false statements that enable access are attenuated from the damage to the facility caused by the later true statements regarding the conduct of

the enterprise. The harm that comes later is a result of true speech regarding activities taking place at the facility that is separate from the misrepresentation that allowed entry into the facility. As the Tenth Circuit observed, "the harm trespass laws protect against—entry into property—is not the harm at issue in the [Ag-Gag] Act's intent requirement." Pet. App. 50. Rather, "under the Act, deceptive trespass is actionable only if made with the intent to harm the facility. Thus, the entry onto the owner's property is not the relevant harm." Pet. App. 50-52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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