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, ET AL.,
Respondents.

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

REPLY BRIEF OF PETITIONERS

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General

BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
DWIGHT R. CARSWELL
Deputy Solicitor General
SHANNON GRAMMEL
Deputy Solicitor General
KURTIS K. WIARD
Assistant Solicitor General

120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

Contrary to Respondents' claims, the Tenth Circuit's decision below conflicts with the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), and also implicates a conflict between the Eighth and Ninth Circuits. While Respondents argue that review is not warranted because no court has addressed a state law exactly like the Kansas Farm Animal and Field Crop and Research Facilities Protection Act, the debate over the constitutionality of agricultural facility trespass-by-deception laws has matured to the point where this Court should address the important issues presented, which concern the extent to which the First Amendment sanctions interference with private property rights. This case is also a good vehicle for addressing these issues, which the Tenth Circuit erroneously resolved.

I. Lower Courts Are Conflicted on the Constitutionality of Laws Criminalizing Trespass by Deception at Agricultural Facilities.

As explained in the Petition, the Tenth Circuit's decision below conflicts with the Ninth Circuit's decision in *Wasden*. Pet. 11-13. Respondents claim that there is no conflict because both cases struck down trespass provisions, while the Ninth Circuit upheld an employment-by-deception provision that does not exist in Kansas law. Br. in Opp. 9-13. But the Ninth Circuit's analysis in upholding Idaho's employment provision, which contained an intent-to-

harm element, conflicts with the Tenth Circuit's holding that an intent-to-harm element renders Kansas's trespass law unconstitutional. *Compare Wasden*, 878 F.3d at 1201-02, *with* Pet. App. 25-35.

Respondents incorrectly claim that "neither the Ninth Circuit's analysis nor its holding turned on" the intent-to-harm element in Idaho law. Br. in Opp. 10. The Ninth Circuit explicitly cited the intent element as a reason for upholding the employment provision, explaining that "subsection (c) limits criminal liability to only those who gain employment by misrepresentation *and* who have the intent to cause economic or other injury to the agricultural production facility, which further cabins the prohibition's scope." *Wasden*, 878 F.3d at 1201. The Ninth Circuit also confirmed the importance of the intent requirement when analyzing the Idaho trespass provision, which it found to be unconstitutionally overbroad: "We see no reason . . . why the state could not narrow [the trespass provision] by requiring specific intent or by limiting criminal liability to statements that cause a particular harm. Idaho did exactly that with subsection (c), which covers misrepresentation 'with the intent to cause economic or other injury.'" *Id.* at 1198. Thus, the intent-to-harm requirement—which would be unconstitutional under the Tenth Circuit's analysis—was vital to the Ninth Circuit's analysis in upholding Idaho's employment provision.

And, despite Respondents' claim to the contrary, Br. in Opp. 11, the Ninth Circuit did, in fact, reject the conclusion that an intent-to-harm requirement

discriminates on the basis of viewpoint. After discussing the statute's intent element, the court wrote: "We are also not persuaded by ALDF's arguments that the statute was enacted solely to suppress a specific subject matter or viewpoint." *Wasden*, 878 F.3d at 1202. The court then cited *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992), which the Tenth Circuit repeatedly relied on in striking down Kansas's law here. *Wasden*, 878 F.3d at 1202; Pet. App. 17, 27, 31, 54 ("Kansas may not discriminate between speakers based on the unrelated issue of whether they intend to harm or help the enterprise." (citing *R.A.V.*, 505 U.S. at 384)); *see also* Br. in Opp. 24 (citing this portion of *R.A.V.* in support of Respondents' viewpoint discrimination argument). The Ninth Circuit accordingly rejected the same *R.A.V.*-based viewpoint discrimination argument that the Tenth Circuit accepted.

Respondents are also wrong that the intent requirement in Idaho law, which the Ninth Circuit upheld, is materially different than the intent requirement in Kansas law. Br. in Opp. 11-12. The Idaho law prohibits obtaining employment by misrepresentation with "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 § 18-7042(1)(c). That is substantially similar to the intent requirement in the Kansas law, which prohibits trespass by deception "with the intent to damage the enterprise conducted at the animal facility." Kan. Stat. Ann. § 47-1827(c), (d); *see also* Kan. Stat. Ann. § 47-1827(b) (same). While the Ninth

Circuit construed Idaho's separate restitution clause not to cover reputational damage based on the text of that particular provision, *Wasden*, 878 F.3d at 1202, the court did not adopt the same construction of the intent requirement, as the district court confirmed on remand. *See Animal Legal Defense Fund v. Wasden*, 312 F. Supp. 3d 939, 942 (D. Idaho 2018) ("The Ninth Circuit separately addressed the intent element of subsection (c), but it did not narrow the statutory language. . . . The Ninth Circuit *did* narrow the statute's restitution clause . . . , but the Court is not persuaded by plaintiffs' argument that the Ninth Circuit meant to apply this narrowing concept to subsection (1)(c).").

The Ninth Circuit's analysis of Idaho's employment provision therefore conflicts with the Tenth Circuit's analysis of the Kansas law. Worse yet, the Ninth Circuit's analysis of Idaho's separate trespass provision (while incorrect in Petitioners' view) suggests that removing the intent-to-harm element from Kansas law to comply with the Tenth Circuit's holding would actually *create* a constitutional problem. As noted above, the Ninth Circuit found the Idaho trespass provision unconstitutionally overbroad and indicated that an intent-to-harm element, like the one contained in the employment provision, might be necessary to render it constitutional. *Wasden*, 878 F.3d at 1198. This conflict puts States like Kansas in a dilemma that this Court should resolve.

Respondents also fail to acknowledge the very real tension between the Tenth Circuit's decision below

and the Eighth Circuit's decision in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021). The Tenth Circuit held that the damage intended by trespassers at animal facilities does not constitute a legally cognizable harm that would render speech unprotected under this Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), because it could result from "disseminating true information." Pet. App. 28-30. But the Eighth Circuit held that trespass is a legally cognizable harm because it interferes with property rights, including privacy and the right to exclude. *Reynolds*, 8 F.4th at 786. And, as Judge Hartz noted in his dissent, these rights protect property owners from the discovery and dissemination of even true information about them. Pet. App. 66-67. Thus, the intended damage that the Tenth Circuit held was insufficient to constitute legally cognizable harm under *Alvarez* is part of the harm that trespass law is designed to prevent and that, under the Eighth Circuit's analysis, renders trespass a legally cognizable harm.

In addition, there is a clear split between the Eighth and Ninth Circuits. Respondents claim that there is no conflict because both circuits "agree on a basic precept of *Alvarez*—that intentionally false speech may be regulated when it causes a legally cognizable harm." Br. in Opp. 16. But the Ninth Circuit held that trespass alone is not a legally cognizable harm, *Wasden*, 878 F.3d at 1195-96, while the Eighth Circuit held that it is. *Reynolds*, 8 F.4th at 786.

II. This Case Is a Good Vehicle to Resolve the Important Issues Presented.

This case presents questions of significant importance to the States. *See generally* Amicus Br. of Utah and 10 Other States. The confusion created by conflicting lower court decisions and continuing uncertainty about the meaning of this Court's decision in *Alvarez* has left States unsure how to best protect property rights while also complying with the First Amendment.

Respondents argue that *Alvarez* is not implicated by this case. Br. in Opp. 18. But the Tenth Circuit applied *Alvarez* to conclude that the harm intended by trespassers at animal facilities is not a legally cognizable harm that renders speech unprotected. Pet. App. 28-30. And while the Tenth Circuit stated that it was not addressing whether trespass itself is a legally cognizable harm under *Alvarez*, that question was briefed and argued by the parties. *See* Brief of Appellant at 22-26, *Animal Legal Defense Fund v. Kelly*, No. 20-3082 (10th Cir.) (arguing that false speech to obtain access to property is not protected under *Alvarez*); Brief of Appellee at 26-30, *Animal Legal Defense Fund v. Kelly*, No. 20-3082 (10th Cir.) (arguing that "mere access gained by deception, without more, does not constitute the type of legally cognizable harm contemplated by *Alvarez*"). If the Tenth Circuit's viewpoint discrimination holding is reversed, whether trespass is a legally cognizable harm—the question that has divided the Eighth and Ninth Circuits—will then be squarely presented here. Thus, this case presents the opportunity to

resolve two conflicts, the conflict between the Ninth and Tenth Circuits regarding an intent-to-harm requirement and the conflict between the Eighth and Ninth Circuits as to whether trespass is a legally cognizable harm.

Respondents argue that review is not warranted because Kansas law differs from agricultural trespass laws adopted in other States.[1] Br. in Opp. 17. But one of the features of our system of federalism is that States "may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *see also Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). States should not be required to exactly copy other States' laws in order to obtain review from this Court when a lower court strikes down a law addressing important issues like the protection of property rights under the Constitution. While the state laws are each somewhat different in this area, there is a common

[1] Respondents point particularly to Kan. Stat. Ann. § 47-1827(c)(4), which makes it illegal to trespass by deception "to take pictures by photograph, video camera or by any other means." Br. in Opp. 17. But this is just one of several provisions in the Kansas statute. The Tenth Circuit also found Kan. Stat. Ann. § 47-1827(b), (c)(1)-(3), and (d) unconstitutional. While this Court is perfectly capable of assessing the constitutionality of Kan. Stat. Ann. § 47-1827(c)(4), *see* Pet. App. 82-83 (Hartz, J., dissenting) (explaining why the provision is constitutional), any potential concerns about this provision do not justify refusing to consider the remainder of the law.

thread connecting the cases—the clash of property rights and the First Amendment—and the legal questions are well defined for this Court's review. An opinion addressing the constitutionality of Kansas's law would offer valuable guidance in assessing similar laws in other States. *See* Pet. 18-20 (identifying these laws).

Nor is there any reason to delay addressing these important questions. This Court already has the benefit of several lower court opinions on this subject, including two thoughtful dissenting opinions from Judge Bea on the Ninth Circuit and Judge Hartz on the Tenth Circuit. And the fact that "states are continuing to consider new legislation and amend existing laws," Br. in Opp. 1, is a reason to grant certiorari, not deny it. States deserve to know whether a law like Kansas's is permissible rather than to be left guessing how to protect property rights consistent with the Constitution.

III. The Tenth Circuit's Decision Is Wrong.

Respondents' attempt to defend the Tenth Circuit's decision on the merits falls short. As an initial matter, Kansas's law criminalizes conduct—trespassing without effective consent—not speech. *See* Kan. Stat. Ann. § 47-1827(b), (c), (d). While consent is ineffectual if it was induced by fraud or deception, *see* Kan. Stat. Ann. § 47-1826(e), the same is true with common law trespass. *See* Restatement (Second) of Torts, § 173 comment b, § 892B; *see also Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 844 (Kan. Ct. App. 1979) ("If the purported consent

was fraudulently induced, there was no consent."). It is still the conduct, not the speech itself, that is punished. For instance, if an animal rights activist lies during the application process but turns down the job and never enters the property without effective consent, the statute is not violated.

Respondents suggest that the Kansas law "must be concerned with a harm other than trespass" because Kansas already has a general law prohibiting trespass. Br. in Opp. 26. But States may choose to enact special laws prohibiting trespass at certain facilities because of the unique harms posed by trespass at those facilities. *See* Amicus Br. of Utah *et al.* at 9 (citing examples of special trespass laws for nuclear facilities and correctional institutions, among other places). The Kansas Legislature reasonably determined that the property rights of agricultural facilities deserve special protection. That does not transform a prohibition of trespass into a regulation of speech.

Even if Kansas's law did regulate speech, Respondents are wrong in claiming that it discriminates on the basis of viewpoint. Br. in Opp. 23-26. As explained in the Petition and in Judge Hartz's dissent, the law applies regardless of the viewpoint expressed by the allegedly protected speech. Pet. 23; Pet. App. 69-72 ("[T]he Kansas Act applies regardless of whether the deceptive speech is critical or laudatory of the animal facility . . . ."). Respondents pose a hypothetical where one person seeks to gain access by deception to harm an animal facility and is subject to the Kansas law, while

another makes "a similarly deceptive statement" with a different intent and is not. Br. in Opp. 24. But this hypothetical demonstrates that there is no viewpoint discrimination; the deceptive statement—which is the only speech at issue—may be exactly the same in these two scenarios. The distinction between the two individuals is not based on the content of their speech.

In any event, individuals who intend to damage an animal facility may not necessarily have anti-animal facility viewpoints. For example, an employee of a competitor animal facility, who has pro-animal facility views, may trespass at an animal facility to steal trade secrets or harm the competition. The statute penalizes trespass with an intent to harm, regardless of viewpoint.

Wisconsin v. Mitchell, 508 U.S. 476 (1993), demonstrates that an intent-to-harm requirement does not violate the First Amendment. Despite the fact that criminal defendants who select their victims based on race will often have racist viewpoints, *Mitchell* held that a sentencing enhancement based on racial motivation does not constitute viewpoint discrimination. *Id.* at 487. Likewise, the fact that individuals who intend to damage an animal facility may often (but not always) have anti-animal facility viewpoints does not render an intent-to-harm requirement viewpoint discriminatory. Respondents' attempt to distinguish *Mitchell*, *see* Br. in Opp. 25, is unconvincing because the intent-to-harm requirement in Kansas law targets conduct—

trespass—and has nothing to do with the viewpoint expressed by the allegedly protected speech.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
DWIGHT R. CARSWELL
Deputy Solicitor General
SHANNON GRAMMEL
Deputy Solicitor General
KURTIS K. WIARD
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
brant.laue@ag.ks.gov

Counsel for Petitioners