No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Kan. Stat. Ann. § 47-1827(b), (c), and (d) violate the Free Speech Clause of the First Amendment by criminalizing trespass by deception at animal facilities with intent to damage the enterprise.

PARTIES TO THE PROCEEDING

Petitioners are Laura Kelly, in her official capacity as Governor of Kansas, and Derek Schmidt, in his official capacity as Attorney General of Kansas.

Respondents are Animal Legal Defense Fund; Center for Food Safety; Shy 38, Inc.; and Hope Sanctuary.

STATEMENT OF RELATED PROCEEDINGS

- *Animal Legal Defense Fund v. Kelly*, No. 18-2657 (D. Kan.) (Jan. 22, 2020)

- *Animal Legal Defense Fund v. Kelly*, No. 20-3082 (10th Cir.) (Aug. 19, 2021)

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The Governor and Attorney General of Kansas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 9 F.4th 1219. Pet. App. 1-83. The United States District Court for the District of Kansas's Memorandum and Order is reported at 434 F. Supp. 3d 974. Pet. App. 84-131.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its decision on August 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The provisions of Kan. Stat. Ann. § 47-1827 that are at issue here provide:

> (b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other

property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.

(c) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility:

(1) Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;

(2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;

(3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or

(4) enter an animal facility to take pictures by photograph, video camera or by any other means.

(d)(1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person:

(A) Had notice that the entry was forbidden; or

(B) received notice to depart but failed to do so.

(2) For purposes of this subsection (d), "notice" means:

> (A) Oral or written communication by the owner or someone with apparent authority to act for the owner;
>
> (B) fencing or other enclosure obviously designed to exclude intruders or to contain animals; or
>
> (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

Kan. Stat. Ann. § 47-1826 provides, in relevant part:

> (e) "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:
>
> (1) Induced by force, fraud, deception, duress or threat;
>
> . . . .

Kan. Stat. Ann. § 47-1826 and § 47-1827 are reprinted in their entirety in the appendix to this petition. Pet. App. 132-36.

STATEMENT OF THE CASE

1. This case concerns the constitutionality of the Kansas Farm Animal and Field Crop and Research Facilities Protection Act, Kan. Stat. Ann. § 47-1825 *et seq*., which the Kansas Legislature first adopted in 1990. Among other things, the Act provides criminal penalties for trespassing at animal facilities with intent to damage the enterprise. Kan. Stat. Ann. § 47-1827(b)-(d). In 2012, the Kansas Legislature amended the Act's definition of "effective consent" to clarify that consent to enter an animal facility is not effective if it has been induced by fraud or deception. *See* Kan. Stat. Ann. § 47-1826(e)(1).

2. Respondents are a group of organizations that seek to access animal facilities, or to rely on information obtained from such access, to further their animal rights agenda. Pet. App. 88-92. They plan to gain access to animal facilities by deception and then use their access to surreptitiously gather information. Pet. App. 89-91. They candidly admit that their representatives will lie about their affiliations if asked by the owners of the facilities. Pet. App. 89.

Respondents filed this action in December 2018 against the Governor and Attorney General of Kansas, alleging that the Act violates the Free Speech Clause of the First Amendment. Pet. App. 84-85. They sought a declaratory judgment and a permanent injunction. Pet. App. 5-6.

On cross-motions for summary judgment, the district court first held that Respondents had standing to challenge subsections (b), (c), and (d) of

Kan. Stat. Ann. § 47-1827.[1] Pet. App. 103-12. All three of these subsections make it illegal to commit certain actions without the effective consent of the owner and with intent to damage the enterprise conducted at an animal facility. Subsection (b) prohibits acquiring or exercising control over an animal facility, animal, or other property of an animal facility with intent to deprive the owner of the facility, animal, or property. Subsection (c) prohibits entering an animal facility not open to the public to take photographs or record videos or to commit other violations of the Act. And subsection (d) prohibits entering or remaining at an animal facility by a person who has notice that entry is forbidden or who refuses to leave after being asked.

Turning to the merits, the district court held that Kan. Stat. Ann. § 47-1827(b), (c), and (d) violate the First Amendment. Pet. App. 118-30. The court concluded that these provisions "regulate[ ] speech and speech-creating activity that are within the ambit of the First Amendment." Pet. App. 121-23. The court then held that these provisions are viewpoint-discriminatory restrictions on speech because the law "targets negative views about animal facilities" and does not prohibit the same

[1] The district court held that Respondents lacked standing to challenge the remaining provisions of the Act, including a provision making it illegal to damage or destroy an animal facility, animal, or other property and a provision authorizing civil suits for damages. Pet. App. 99-103, 114-18.

conduct "if the person has the intent to *benefit* the enterprise." Pet. App. 125-26.

3. Petitioners appealed to the Tenth Circuit, which affirmed in a 2-1 decision.

a. After summarizing the legal background, the panel majority separately analyzed subsections (b), (c), and (d) of the statute and concluded that all three subsections violate the First Amendment. Pet. App. 24-55.

The majority began by concluding that these provisions regulate speech because the definition of "effective consent" excludes consent obtained by deception. Pet. App. 26, 32, 35. The court also held that subsection (c) implicates speech under the Tenth Circuit's decision in *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), because it prohibits entering an animal facility without effective consent "to take pictures by photograph, video camera or by any other means," Kan. Stat. Ann. § 47-1827(c)(4), which the court described as "speech-creating activity." Pet. App. 24, 32 & n.13.

The panel majority then determined that all of these provisions discriminate on the basis of viewpoint because they only apply to individuals who act with intent "to damage the enterprise conducted at the animal facility," not to individuals who intend "to laud the facility" or who act with "neutral reasons." Pet. App. 26-27, 32-33, 35, 40 ("[The Act] treats differently trespassers who have negative intentions towards the enterprise carried on at an

animal facility from those with positive or neutral intentions."). Because the intended damage might result from "disseminating true information," the court held that an intent to damage is not a legally cognizable harm that would separate protected from unprotected speech under this Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012). Pet. App. 29-30. Given its conclusion that the Act discriminates on the basis of viewpoint, the court found it unnecessary to determine whether the speech is protected or unprotected generally. Pet. App. 28, 33

b. Judge Hartz dissented. He began by rejecting Respondents' argument that lying to obtain access to property is protected speech. Pet. App. 57-68. He explained that under *Alvarez*, false statements that cause legally cognizable harm are unprotected by the First Amendment and that trespass is a legally cognizable harm. Pet. App. 57-63. Judge Hartz acknowledged that his view conflicted with the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), which concluded that trespass is not a sufficient harm by itself to render false speech unprotected, but he found Judge Bea's dissent in *Wasden* more persuasive. Pet. App. 64-66.

Judge Hartz also rejected the majority's suggestion that lying to obtain access to an agricultural facility does not cause a legally cognizable harm because the harm would only arise from the dissemination of true information. Pet. App. 66-67. Instead, he noted:

> The right to privacy, which is one of the principal interests underlying trespass law, protects people from disclosure of the truth about them. . . . The failure of the panel majority opinion to acknowledge this fundamental privacy interest leads it to base much of its analysis on the false premise that the First Amendment protects violations of property rights and privacy motivated by a desire to uncover and promulgate the truth.

Pet. App. 67-68.

Judge Hartz then turned to the alleged viewpoint discrimination in the statute's intent-to-damage requirement. "Why," he asked, "cannot the State do what States so often do and decide that it sees no point in punishing a venial trespass—that is, one with no intent to harm?" Pet. App. 69. This intent-to-damage requirement performs "the perfectly constitutional task of filtering out conduct that [the State] believes need not be covered by [the] statute." Pet. App. 69 (quoting *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996)) (alterations in original). Requiring the State to also criminalize trespass with intent to benefit the enterprise would, in the dissent's view, put the First Amendment "at odds with common sense." Pet. App. 69.

The dissent went on to explain that the First Amendment only protects against viewpoint discrimination based on the content of the message communicated. Pet. App. 69-71. And the only speech at issue under the Kansas Act is the deception that induces consent to enter the facility. Pet. App. 71.

But the Act does not discriminate based on the viewpoint expressed by that speech. Pet. App. 71-72. In fact, "[t]hat speech is more likely to be laudatory of the facility ('I've heard great things about this business and would like to make it my career') than critical." Pet. App. 71. Because "the Kansas Act applies regardless of whether the deceptive speech is critical or laudatory of the animal facility," "the Act is viewpoint neutral." Pet. App. 72.

Unlike viewpoint discrimination based on the content of the speech, Judge Hartz would have held that discrimination on the basis of intent or motive does not pose First Amendment problems. Pet. App. 72-79. His analysis rested on this Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which held that a statute's use of a motive requirement to single out "conduct [that] is thought to inflict greater individual and societal harm" does not constitute First Amendment viewpoint discrimination. Pet. App. 73-78. While the panel majority attempted to distinguish *Mitchell* because it involved a conduct-based offense, Judge Hartz noted that "the gist of the Kansas Act *is* conduct-based—the entry onto another's property." Pet. App. 77.

Finally, Judge Hartz was "not persuaded that subsection (c)(4) of the Kansas Act violates the First Amendment by prohibiting 'enter[ing] an animal facility to take pictures by photograph, video camera or by any other means,' unless one has the consent of the owner." Pet. App. 82. Because private property owners have a right to forbid others from taking photographs or videos on their property, he reasoned

that a State can protect this aspect of private property rights. Pet. App. 83.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted to resolve a conflict among the federal courts of appeals on whether the First Amendment prohibits States from criminalizing trespass by deception at animal facilities. Even apart from this conflict, this issue—which lies at the intersection of longstanding private property rights and the First Amendment's Free Speech Clause—is an important question this Court should address. And the Tenth Circuit got the answer to this important question wrong. Petitioners therefore ask the Court to grant a writ of certiorari.

I. The Circuits Are Divided on Whether the First Amendment Prohibits States from Criminalizing Trespass by Deception at Agricultural Facilities.

In conflict with the Tenth Circuit's decision below, the Ninth Circuit has held that an intent-to-harm element in a statute prohibiting obtaining employment by deception at an animal facility does not discriminate on the basis of viewpoint. In fact, the Ninth Circuit struck down a trespass-by-deception provision that did not include an intent-to-harm requirement as overbroad, indicating that an intent-to-harm requirement may be constitutionally necessary. The Eighth Circuit, by contrast, has upheld a law prohibiting trespass by deception, consistent with Judge Hartz's dissent from the Tenth

Circuit's decision and Judge Bea's dissent from the Ninth Circuit's decision.

A. The Ninth Circuit upheld an employment provision with an intent-to-harm requirement while striking down a trespass provision because it did not contain a similar requirement.

In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), the Ninth Circuit held that Idaho Code § 18-7042(1)(a), which made it illegal to "enter[ ] an agricultural facility by . . . misrepresentation," violated the First Amendment. The court determined that under this Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), false speech is proscribable only if the speech is "associated with a material benefit to the speaker." *Wasden*, 878 F.3d at 1195. And the court held that entry onto property, by itself, is not a material gain sufficient to render false speech unprotected. *Id.*

The Ninth Circuit majority seemed particularly concerned about the statute's alleged overbreadth. Claiming that the statute "criminalizes innocent behavior," the majority offered the example of a teenager who misrepresents his identity to obtain a reservation at an exclusive restaurant to impress his friends. *Id.* The majority stated that there was no reason Idaho could not limit the statute to individuals with a specific intent to harm, noting that Idaho had done so in a different provision of the statute addressing employment. *Id.* at 1198. Thus, the Ninth Circuit majority indicated that an intent-to-harm requirement—which the Tenth Circuit

found violated the First Amendment—might be necessary to render a trespass-by-deception law constitutional.

Judge Bea dissented from this aspect of the majority's decision. He began by noting that the Idaho statute criminalized entry to a facility, not pure speech. *Wasden*, 878 F.3d at 1207 (Bea, J., dissenting in part and concurring in part). Thus, he did not believe "that a First Amendment analysis is at all necessary." *Id.* But even if the First Amendment does apply, he reasoned that trespass is a legally cognizable harm sufficient to make the speech unprotected under *Alvarez*. *Id.* at 1208-13. After all, an unauthorized entry alone is enough to support nominal and punitive damages because it infringes on the property owner's right to exclude. *Id.* at 1209-10.

While the Ninth Circuit found Idaho's entry-by-misrepresentation provision unconstitutional, it upheld another provision of the Idaho statute that made it illegal to obtain "employment with an agricultural production facility by . . . 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 § 18-7042(1); *Wasden*, 878 F.3d at 1201-03. The majority reasoned that the statute's intent-to-harm requirement sufficiently "cabins the prohibition's scope" to render it constitutional. 878 F.3d at 1201.

Like Respondents here, the plaintiffs in *Wasden* argued that an intent-to-harm requirement

discriminates on the basis of viewpoint. *Id.* at 1202. But the Ninth Circuit was not persuaded by that argument. *Id.*

The Ninth Circuit's holding that an intent-to-harm requirement does not discriminate on the basis of viewpoint directly conflicts with Tenth Circuit's decision here. But even more concerning is the Ninth Circuit's suggestion that an intent-to-harm requirement may be necessary to make a trespass-by-deception law constitutional. This puts States like Kansas in a dilemma. If the Kansas Legislature were to remove the "intent to damage the enterprise" element from the Kansas statute to address the Tenth Circuit's concerns, doing so would create constitutional infirmities under the Ninth Circuit's analysis. This Court's review is necessary to resolve this conflict.

B. The Eighth Circuit recently upheld an Iowa law that criminalizes obtaining access to an agricultural facility by false pretenses.

Just days before the Tenth Circuit's decision, the Eighth Circuit upheld an Iowa trespass provision similar to the Idaho trespass provision that the Ninth Circuit found unconstitutional. *See Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021). The statute made it illegal to "[o]btain[ ] access to an agricultural production facility by false pretenses." *Id.* at 783 (quoting Iowa Code § 717A.3A(1)(a) (2012)).

Judge Colloton's majority opinion began by analyzing this Court's decision in *Alvarez* in an attempt to determine the controlling rule under *Marks v. United States*, 430 U.S. 188 (1977). But because the "concurring opinion is not a logical subset of the plurality's rationale, or vice-versa," the majority determined that "it is not possible to discern a holding in the case." *Reynolds*, 8 F.4th at 785. "Without a single rationale from *Alvarez* that can be identified as a holding in the case," the court explained that "the only binding aspect of the decision is its specific result." *Id.*

Despite this uncertainty about the holding of *Alvarez*, the majority concluded that "intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment." *Id.* at 786. And the court concluded that trespass to private property is a legally cognizable harm given the historical protection of private property rights. *Id.* Rejecting the district court's holding that trespass by itself is not a legally cognizable harm because it may only result in nominal damages, the Eighth Circuit noted that "[e]ven without physical damage to property arising from a trespass, [nominal] damages may compensate a property owner for a diminution of privacy and a violation of the right to exclude—legally cognizable harms." *Id.*

Judge Grasz "hesitantly" concurred, noting that *Alvarez* "is of limited guidance" and opining that "[u]ltimately, the Supreme Court will have to determine whether such laws can be sustained." *Reynolds*, 8 F.4th at 788 (Grasz, J., concurring).

Judge Gruender concurred in part and dissented in part. He agreed with the majority that Iowa's trespass provision did not violate the First Amendment. *Reynolds*, 8 F.4th at 792-94 (Gruender, J., concurring in part and dissenting in part). But he disagreed with the majority's *Marks* analysis and offered additional support for why the trespass provision is constitutional.[2] *Id.* at 789-94.

On the *Marks* question, Judge Gruender agreed that "in *Alvarez*, neither the plurality nor the concurrence is a logical subset of the other." *Id.* at 789. But rather than limiting the decision to its specific result, he offered two other methods to determine the controlling rule. First, he suggested that the controlling opinion in *Alvarez* might be the "opinion that offers the least change to the law," which he identified as the plurality opinion. *Id.* at 790-91. Alternatively, he suggested that the case could be resolved in a way that would have commanded the votes of five Justices in *Alvarez*. *Id.* Because he determined that both the *Alvarez* plurality and the dissenters would have upheld Iowa's law, he concluded that the law does not violate the First Amendment. *Id.*

The Eighth Circuit's decision upholding Iowa's trespass provision directly conflicts with the Ninth Circuit's decision in *Wasden*. While the Tenth Circuit's majority opinion acknowledged the Eighth

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[2] Judge Gruender dissented from the majority's holding that a separate employment provision of the Iowa law violated the First Amendment, a holding that is not relevant here. *Id.* at 794-95.

Circuit's decision in a footnote and described its holding as "not inconsistent," Pet. App. 40 n.17, the Tenth Circuit held that damage intended by individuals who trespass by deception is not a legally cognizable harm under *Alvarez* because it may result from the dissemination of true information. Pet. App. 28-30. But as Judge Hartz noted in disagreeing with this proposition, "the right to privacy, which is one of the principal interests underlying trespass law, protects people from disclosure of the truth about them." Pet. App. 66-67. The Eighth Circuit likewise found that trespass constitutes a legally cognizable harm because of "a diminution of privacy and a violation of the right to exclude." *Reynolds*, 8 F.4th at 786. Thus, there is a real friction between the Eighth Circuit's decision and the majority opinion here.

II. This Case Presents an Important Issue Concerning Property Rights and the First Amendment's Protection of False Speech Following *Alvarez*.

Review is also warranted because this case presents "an important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c), namely the extent, if any, to which the First Amendment prevents States from criminalizing trespass by deception.

"The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)); *id.* ("[T]he right to exclude is 'universally held to be a fundamental element of the

property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979))). "For centuries, Anglo-American law has affirmed this central feature of property—the right to exclude others—in the 'general rule' that 'our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave.'" *Wasden*, 878 F.3d at 1206 (Bea, J., dissenting in part and concurring in part) (quoting *Florida v. Jardines*, 569 U.S. 1, 8 (2013)).

Whether the First Amendment sanctions interference with this fundamental property right is a question of significant importance. Given the fractured nature of this Court's decision in *Alvarez*, lower courts have struggled to determine the controlling rule from that decision. *See Reynolds*, 8 F.4th at 785 ("[I]t is not possible to discern a holding in the case."); *id.* at 788-89 (Gratz, J., concurring) ("The *Alvarez* decision, for the reasons noted in the court's opinion, is of limited guidance here."); *id.* at 789-91 (Gruender, J., concurring in part and dissenting in part) (offering an alternative *Marks* analysis). This has led to uncertainty as to whether trespass, by itself, constitutes a "legally cognizable harm" or "material gain" sufficient to render trespass by deception unprotected. *Compare Reynolds*, 8 F.4th at 786 (concluding that trespass is a legally cognizable harm), *and* Pet. App. 57-63 (Hartz, J., dissenting) (same), *and Wasden*, 878 F.3d (Bea, J., dissenting in part and concurring in part) (same), *with Wasden*, 878 F.3d at 1195-98 (holding that entry to property alone is not a sufficient material

gain), *and Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1201-06 (D. Utah 2017) (holding that entry to property by deception is not, by itself, a legally cognizable harm).

Even if trespass by deception is unprotected, this case also presents the important question of whether limiting the prohibition to trespassers who intend to harm the victim constitutes First Amendment viewpoint discrimination. Although Petitioners disagree with the Ninth Circuit's suggestion that proof of an intent to damage may be required to criminalize deceptive trespass, they agree that an intent-to-damage requirement helps to narrow the scope of the crime to the most culpable trespassers. While every violation of the right to exclude should be considered a legally cognizable harm, the Tenth Circuit's holding would require States that wish to criminalize trespass by deception to include what Judge Hartz described as "venial trespass" within the scope of that criminal prohibition. Pet. App. 69. That would put the First Amendment "at odds with common sense." Pet. App. 69.

This important issue implicates the validity of a number of state laws. In addition to the Idaho, Iowa, and Kansas laws that have already been reviewed by the federal courts of appeals, several other states have laws that specifically criminalize trespass at animal facilities or that criminalize trespass by deception at commercial properties more generally. For example:

- An Alabama statute makes it unlawful to "[o]btain access to an animal or crop facility by

false pretenses for the purpose of performing acts not authorized by that facility." Ala. Code § 13A-11-153(3).

- Arkansas provides a civil cause of action against a person who "knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area." Ark. Code Ann. § 16-118-113(b). This includes a person who "[r]ecords images or sound occurring within an employer's commercial property and uses the recording in a manner that damages the employer." Ark. Code Ann. § 16-118-113(c)(2).

- Montana law provides criminal penalties for a person "who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility" to "enter or remain on the premises of an animal facility if the person: (i) had notice that entry was forbidden; or (ii) received notice to depart but failed to do so." Mont. Code Ann. § 81-30-103(2)(f).

- North Carolina imposes liability for "intentionally gain[ing] access to the nonpublic areas of another's premises and engag[ing] in an act that exceeds the person's authority to enter those areas." N.C. Gen. Stat. Ann. § 99A-2(a). Acts that exceed a person's authority include recording images or sound without authorization and "[k]nowingly or intentionally placing on the employer's

premises an unattended camera or electronic surveillance device and using that device to record images or data." N.C. Gen. Stat. Ann. § 99A-2(b).

- North Dakota law provides that "[n]o person may without the effective consent of the owner, and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility, if the person had notice that the entry was forbidden or received notice to depart but failed to do so." N.D. Cent. Code Ann. § 12.1-21.1-03.

- A Utah statute makes it a crime to "obtain[ ] access to an agricultural operation under false pretenses," Utah Code Ann. § 76-6-112(2)(b), although a federal district court held this law unconstitutional in *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017), a decision that was not appealed.

Given the importance of the constitutional question and the unsettled state of the law, this Court should grant review to clarify that the First Amendment does not protect the use of deception to trespass on private property.

III. The Tenth Circuit's Decision Is Wrong.

In addition, the Tenth Circuit's holding that Kan. Stat. Ann. § 47-1827(b), (c), and (d) violate the First Amendment is wrong under the best reading of this Court's precedents. As an initial matter, the Kansas statute regulates conduct—trespassing at animal

facilities—not speech. But even if the statute did regulate speech, the use of deception to trespass is not protected under the First Amendment. Nor is the statute viewpoint discriminatory.

A. The Kansas law does not regulate speech.

Kan. Stat. Ann. § 47-1827(b), (c), and (d) do not criminalize deception. They criminalize trespassing without effective consent. This is conduct, not speech. And so, as Judge Bea noted in his Ninth Circuit dissent, a First Amendment analysis is unnecessary. *Wasden*, 878 F.3d at 1207-08 (Bea, J., dissenting in part and concurring in part).

Of course, an examination of speech will often be required to determine whether a person had consent to enter. But this would be true even if the statute did not exclude consent obtained by deception from the definition of "effective consent." Even then, it would still be necessary to review the content of any communication to determine whether the owner gave permission to enter or not. This evidentiary use of speech to determine whether consent has been given does not implicate the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); *Hill v. Colorado*, 530 U.S. 703, 721 (2000) ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."). What the Kansas statute punishes is conduct undertaken without consent, not speech

itself. A person may engage in as much deceptive speech as the person wishes without violating the Kansas statute as long as the person does not proceed to trespass at an animal facility. A violation occurs only when the person engages in prohibited conduct.

B. Trespass by deception is not protected speech.

Even if trespass by deception were a form of speech, it would be unprotected by the First Amendment. As the Eighth Circuit correctly held, *Alvarez* allows States to punish false speech that results in a legally cognizable harm, and a violation of the right to exclude—a fundamental aspect of private property rights—should be considered a sufficient harm.

This remains true even when the trespasser intends to take photographs or video recordings. The right to exclude encompasses a private property owner's ability to prevent these actions from occurring on that person's property. And, as this Court has previously held, the First Amendment provides no license to violate private property rights. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."). Because there is no right to take photographs or video recordings on private property without the owner's consent, Kan. Stat. Ann. § 47-1827(c) does

not violate the First Amendment by punishing those who trespass in order to engage in this behavior.

C. The "intent to damage" element in the Kansas statute does not constitute First Amendment viewpoint discrimination.

Contrary to the Tenth Circuit's holding, the "intent to damage the enterprise" requirement in Kan. Stat. Ann. § 47-1827 does not unconstitutionally discriminate on the basis of viewpoint. This provision is viewpoint neutral in that it is not based on the viewpoint of the allegedly protected speech—the deception used to gain entry—and it appropriately focuses criminal prohibitions on the most culpable conduct.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court held that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of viewpoint discrimination exists." *Id.* at 388. False speech is unprotected under *Alvarez* when it causes harm. And so it is appropriate to limit the statute to conduct most likely to be harmful—trespass with the intent to damage.

Unlike a law that discriminates based on the message expressed, a motive or intent requirement properly focuses criminal sanctions on conduct "thought to inflict greater individual and societal harm." *See Mitchell*, 508 U.S. at 487-88. Thus, *Mitchell* held that a sentencing enhancement for intentionally selecting a victim because of a

protected characteristic like race did not violate the First Amendment by punishing a person's beliefs. *Id.* at 487-90.

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), further illustrates this principle. *Dinwiddie* addressed the constitutionality of the federal Freedom of Access to Clinic Entrances Act (FACE), which among other things imposes criminal liability on anyone who:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1). The defendant argued this statute was content based because it did not outlaw all threats or intimidation, only those made with a certain motive—because the victim obtains or provides reproductive health services. Relying on *Mitchell*, the Eighth Circuit rejected this argument, holding that "[w]hat FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute." 76 F.3d at 923.

Kansas could have criminalized all trespass without effective consent at animal facilities, but the Legislature properly included an intent requirement to limit the Act to trespasses likely to cause the

greatest harm—those undertaken with intent to damage the victim. In fact, the Ninth Circuit believed that an intent-to-damage requirement might be constitutionally necessary in these circumstances to prevent criminalizing "innocent" conduct. Wasden, 878 F.3d at 1195. While Petitioners disagree that such a requirement is necessary, it is permissible for a criminal statute to focus on the most culpable conduct, crimes committed with intent to harm the victim. Surely the First Amendment does not require States to expand the scope of criminal liability and overcriminalize less culpable behavior. As Judge Hartz noted, that would be a "bizarre result" indeed. Pet. App. 69.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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