No. 22-3464

In the United States Court of Appeals
for the Eighth Circuit

ANIMAL LEGAL DEFENSE FUND, *et al.*,

Plaintiffs/Appellees,

vs.

KIMBERLY K. REYNOLDS, in her official capacity as Governor of Iowa, *et al.*,

Defendants/Appellants.

Appeal from the United States District Court
For Southern District of Iowa
Stephanie M. Rose, District Judge
No. 4:21-cv-00231-SMR-HCA

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SUMMARY OF THE CASE

In 2021, Iowa enacted a Trespass-Surveillance statute to protect Iowan's property rights and right to privacy. The statute prohibits a person, while committing a trespass, from knowingly placing or using a camera or electronic surveillance device to record data or images.

Plaintiffs challenge the constitutionality of Iowa's Trespass-Surveillance statute on First Amendment grounds, but Plaintiffs lack standing. Even if Plaintiffs have standing, the statute survives First Amendment scrutiny because it regulates conduct, not speech. Moreover, the statute is narrowly tailored and content neutral—and it is not facially unconstitutional under the First Amendment. The District Court denied Defendants' Motion to Dismiss and granted Plaintiffs' Motion for Summary Judgment. Defendants appeal the Court's grant of summary judgment to Plaintiffs and denial of Defendants' Motion to Dismiss.

This appeal raises significant issues between the intersection of property rights, the right to privacy, the First Amendment. Defendants respectfully request 15 minutes per side for oral argument as the criteria in Fed. R. App. P. 34 (a)(2)(A)-(C) are not present.

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JURISDICTIONAL STATEMENT

Plaintiffs' federal constitutional claims were filed under 42 U.S.C. § 1983 and §1988 and the Declaratory Judgment Act, 28 U.S.C. § 2201, and hence the District Court possessed jurisdiction under 28 U.S.C. § 1331.

On December 7, 2021, the District Court entered an order denying Defendants' Motion for Denial or Continuance of Plaintiffs' Motion for Summary Judgment Pending Discovery pursuant to Fed. R. Civ. P. 56(d). (App. 235; R. Doc. 31.) On September 26, 2022, the District Court issued an order denying Defendants' Motion to Dismiss and granting Plaintiffs' Motion for Summary Judgment. That order held that: (1) Plaintiffs had standing to bring their claims; (2) Iowa's Trespass-Surveillance statute regulates speech, not conduct; and (3) the statute did not survive intermediate scrutiny under the First Amendment and thus is facially unconstitutional. (App. 273; R. Doc. 40.)

The District Court issued a Permanent Injunction on October 24, 2022. (App. 295; R. Doc. 43.) The District Court entered final judgment on October 25, 2022. (App. 296; R. Doc. 45.) Defendants filed a timely Notice of Appeal. (App. 297; R. Doc. 46.) This Court has jurisdiction

pursuant to 28 U.S.C. § 1291, which provides for appellate jurisdiction over a final judgment entry from a United States District Court.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THERE WERE NO GENUINE DISPUTES OF MATERIAL FACT THAT PRECLUDED SUMMARY JUDGMENT.

Authorities

Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 799 (8th Cir. 2006)

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Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Iowa Code § 727.8A

Iowa Code § 716.7(2)(a)

II. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING PLAINTIFFS HAVE STANDING TO PURSUE THEIR CONSTITUTIONAL CLAIMS AND FAILING TO DISMISS PLAINTIFFS' AS APPLIED CLAIMS BECAUSE THEY WERE NOT RIPE.

Authorities

Citizen Center v. Gessler, 770 F.3d 900 (10th Cir. 2014)

Animal Legal Def. Fund v. Reynolds, 8 F.4th 781 (8th Cir. 2021)

Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 799 (8th Cir. 2006)

Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020)

Iowa Code § 727.8A

Iowa Code § 716.7(2)(a)

III. WHETHER THE DISTRICT COURT PROPERLY CONCLUDED IOWA'S TRESPASS-SURVEILLANCE STATUTE REGULATES SPEECH AND NOT CONDUCT.

Authorities

Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47 (2006)

Animal Legal Defense Fund. v. Wasden, 878 F.3d 1184 (9th Cir. 2018)

Animal Legal Defense Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021)

Western Watersheds v. Michael, 869 F.3d 1189 (10th Cir. 2017)

Iowa Code § 727.8A

IV. WHETHER THE DISTRICT COURT PROPERLY CONCLUDED IOWA'S TRESPASS-SURVEILLANCE STATUTE WAS UNCONSTITUTIONAL ON ITS FACE.

Authorities

United States v. Salerno, 481 U.S. 739 (1987)

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)

McCullen v. Coakley, 573 U.S. 464, 486–87 (2014)

Iowa Code § 727.8A

STATEMENT OF THE CASE

In 2021, the Iowa Legislature passed, and the Governor signed, H.F. 775[1] ("Trespass-Surveillance statute"), codified as Iowa Code §727.8A. Iowa's Trespass-Surveillance statute provides that:

> A person committing a trespass as defined in section 716.7 who knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property commits an aggravated misdemeanor for a first offense and a class "D" felony for a second or subsequent offense.

Iowa Code §727.8A.

Plaintiffs Animal Legal Defense Fund, *et al.* (collectively, "Plaintiffs"), are organizations that want to conduct "undercover investigations" at primarily "factory farms and slaughterhouses" related to food safety, animal welfare, worker safety, and environmental concerns and allege they are affected by the enactment and threatened enforcement of the Trespass-Surveillance statute. (App. 3-5; R. Doc. 1, at 1-3, ¶¶ 2–3, 8.) Plaintiffs filed a Complaint on September 26, 2021, naming the Iowa Governor, Iowa Attorney General, and County

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[1] H.F. 775 contained a separate provision, which Plaintiffs are not challenging (App. 3; R. Doc. 1, at 1, ¶ 1 n.1), that prohibits a person from taking unauthorized samples from agricultural property, animals, or crops, codified at Iowa Code section 716.7A.

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Attorneys for Cass, Dallas and Washington Counties (collectively, "Defendants") as Defendants, all in their official capacities, specifically alleging the statute violates Plaintiffs' First Amendment right to free speech, both facially and as-applied, and the statute is also overbroad. (App. 24-26; R. Doc. 1, at 22-24, ¶¶ 98–99, 105–106.)

On October 8, 2021, Defendants moved to dismiss the Complaint on the grounds that Plaintiffs lacked standing to challenge the law and their as-applied constitutional claims were not ripe. (App. 30; R. Doc. 16, at 2.) Defendants also argued that, standing and ripeness aside, the Court should dismiss Plaintiffs' Complaint because they failed to state a claim upon which relief can be granted. *Id.* Plaintiffs then moved for summary judgment on November 12, 2021. (App. 39; R. Doc. 23.)

On November 17, 2021, Defendants filed a Motion for Denial or Continuance of Plaintiffs' Motion for Summary Judgment Pending Discovery pursuant to Fed. R. Civ. P. 56(d), alleging Plaintiffs' summary judgment motion should be denied, or at least continued, until discovery could occur to address factual disputes concerning Plaintiffs' standing, ripeness, the nature and scope of their conduct and the applicability of the First Amendment, and the nature and scope of their requested

injunctive relief under their as-applied constitutional claims. (App. 204-05; R. Doc. 26, at 2–3 ¶¶ 5–7.) On December 7, 2021, the District Court entered an order denying Defendants' motion seeking denial or continuance of Plaintiffs' summary judgment motion pending discovery. (App. 235; R. Doc. 31.) The Court's order explained that Defendants could raise specific discovery issues in their resistance to the summary judgment motion. *Id.*

After each party's respective dispositive motions were fully briefed, on September 26, 2022, the Court issued an Order on Defendants' Motion to Dismiss and Plaintiffs' Motion for Summary ("Order"), granting Plaintiffs' Motion for Summary Judgment and denying the Defendants' Motion to Dismiss. (App. 273; R. Doc. 40.) The District Court concluded that Plaintiffs had standing to bring their claims. (App. 282; R. Doc. 40, at 10.) The Court further held that Iowa's Trespass-Surveillance statute regulated speech—not conduct—protected by the First Amendment. (App. 282-87; R. Doc. 40, at 10–15.) Finally, the Court held the statute was facially unconstitutional under the First Amendment because it did not survive intermediate scrutiny. (App. 289-93; R. Doc. 40, at 17-21.)

On October 24, 2022, the District Court entered an order declaring Iowa Code section 727.8A unconstitutional under the First Amendment and permanently enjoining and prohibiting the State from enforcing the statute. (App. 295; R. Doc. 43.)

SUMMARY OF THE ARGUMENT

Extensive problems remain concerning the Plaintiffs' standing, redressability, and ripeness. Indeed, there also remain genuine disputes of material fact concerning Plaintiffs' standing that should have prevented the District Court from granting summary judgment, and the Court erred in holding otherwise. First, the Court erred in concluding Plaintiffs had standing because Plaintiffs have not demonstrated the Trespass-Surveillance statute invades their legally protected interests or that the alleged harm Plaintiffs will suffer is "qualitatively and temporally concrete," as well as "distinct and palpable, as opposed to merely abstract." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Second, the Court erred when it concluded the relief requested will redress Plaintiffs' alleged injuries. Finally, the District Courted failed to dismiss Plaintiffs' as-applied claims because they were not ripe.

Even assuming that Plaintiffs have standing, the District Court erred when it held Iowa's Trespass-Surveillance statute was facially unconstitutional under the First Amendment. The Trespass-Surveillance statute regulates conduct, not speech. Even if the statute regulated speech, it is not facially unconstitutional because Plaintiffs bear the burden of demonstrating that there are no circumstances in which the law would be valid. They have not met that burden. Finally, the statute is content-neutral and is narrowly tailored to significant governmental interests.

ARGUMENT

I. GENUINE DISPUTES OF MATERIAL FACT CONCERNING PLAINTIFFS' STANDING PRECLUDED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT.

A. Standard of Review

This Court reviews a district court's summary judgment determinations de novo using the same standard as the district court. *Lager v. Chicago Northwestern Transp. Co.*, 122 F.3d 523, 524 (8th Cir. 1997). That requires determining whether the record demonstrates that there are genuine issues as to any material fact and whether Plaintiffs are entitled to judgment as a matter of law. *Id.*

Standing functions as a "'threshold question' a litigant invoking federal jurisdiction must satisfy before the court may hear the case." *Jackson v. Abendroth & Russell, P.C.*, 207 F.Supp.3d 945, 950 (S.D. Iowa 2016) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish standing, a plaintiff must at a minimum show (1) an injury-in-fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision in court. *ABF Freight Sys., Inc. v Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury-in-fact element requires a plaintiff to establish "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 959 (quoting *Lujan*, 504 U.S. at 560).

Where a plaintiff has asserted First Amendment claims, the injury-in-fact element can be satisfied if the plaintiff "is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Republican Party of Minn., Third Congressional Dists. v. Klobouchar*, 381 F.3d 785, 792 (8th Cir. 2004). A plaintiff establishes an injury in fact "where he alleges 'an

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intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The "overbreadth doctrine 'allow[s] litigants whose own speech could constitutionally be regulated to challenge overly broad regulations which affect them.'" *Sisney v. Kaemingk*, 15 F.4th 1181, 1194 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022) (quoting *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006)). Despite those slightly broader grounds for standing, "[u]nder no circumstances . . . does the overbreadth doctrine relieve a plaintiff of [his] burden to show constitutional standing." *Id.* Therefore, Plaintiffs must also still satisfy the remaining *Lujan* elements—causation and redressability—for their facial challenges. *Advantage Media*, 456 F.3d at 799–802.

B. The District Court erred when it failed to address Defendants' arguments that genuine disputes of material fact existed concerning Plaintiffs' standing and discovery of those matters was warranted

The District Court failed to address Defendants' summary judgment arguments explaining that there remain genuine disputes of

material fact that precluded standing and summary judgment—and warranted discovery. (R. Doc. 34, at 5–8); (App. 282; R. Doc. 40, at 10.)

Plaintiffs lacked standing to challenge Iowa's Trespass-Surveillance statute because their injuries are too speculative and hypothetical. For example, Plaintiffs provided no details about how their investigations could be considered trespass under Iowa Code section 716.7(2)(a). Violation of that section of the code is required to apply Iowa's Trespass-Surveillance statute. (R. Doc. 19, at 7–10.) Without pleading that the purportedly unconstitutional statute will prohibit their intended behavior, Plaintiffs fail to plead injury.

Plaintiffs also failed to satisfy redressability. (R. Doc. 19, at 10–11.) Plaintiffs only violate the Trespass-Surveillance statute if they first engage in trespass under Iowa Code section 716.7(2)(a). That is a separate and independent criminal statute. Plaintiffs do not challenge Iowa's traditional and longstanding trespass crime as unconstitutional. To the extent that Plaintiffs contend that the Trespass-Surveillance statute must be set aside as unconstitutional for chilling conduct, it is not clear why that conduct—criminal under a different provision already—will proceed if they win.

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Either way, Plaintiffs still stand to be criminally charged for trespass. Plaintiffs do not plead facts demonstrating that, even in the absence of the Trespass-Surveillance statute, Plaintiffs would still engage in conduct that violates Iowa's general criminal trespass law. *Id.* And trespass is "an ancient cause of action that is long recognized in this country." *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021) ("*ALDF*") (citing *United States v. Jones*, 565 U.S. 400, 404–05 (2012) and 3 William Blackstone, Commentaries *209).

Plaintiffs attempted to cure their standing deficiencies in their Motion for Summary Judgment. Plaintiffs relied on facts and statements from their members, providing explanations on how or why their investigations or conduct would constitute trespass under Iowa's general criminal trespass statute, as well as statements that Plaintiffs would risk engaging in conduct that violates Iowa's general criminal trespass law in the absence of the Trespass-Surveillance statute. (App. 45-50; R. Doc. 23-2, at 3–8, ¶¶ 15, 18–20, 25–26, 29, 31, 36, 39, 44, and 45.)

Plaintiffs contend that they are content to suffer the penalties of civil disobedience under the traditional trespass statute, but do not want to suffer the additional penalties that attach to the Trespass-Surveillance

statute. (R. Doc. 23-1, at 7.) In that way, these would-be misdemeanants seek to set the penalty for the crimes that they are threatening to commit. Plaintiffs argue that they are willing to violate minor crimes and suffer the potential penalties but not willing to do so if the penalties are higher. They essentially asserted that because of the enhanced penalties (aggravated misdemeanor) for violations of the Trespass-Surveillance statute compared with the penalties for violation of Iowa's general criminal trespass law (simple misdemeanor), they have ceased conducting their investigations or civil-disobedience. (R. Doc. 23-1, at 7.) They continue that they would be fine to suffer the simple misdemeanor penalty if the Trespass-Surveillance statute is enjoined. *Id.* Even then, Plaintiffs contend that sometimes their investigations will not violate the trespass statute—which, if true would avoid liability under either statute. (R. Doc. 23-1, at 8-9.)

Plaintiffs' lack of commitment to lawbreaking under the traditional trespass statute creates a genuine issue of material fact. *See Sisney,* 15 F.4th at 1194 ("Generally, when confronting a constitutional problem in a law, courts should 'limit the solution' by enjoining enforcement of 'any problematic portions while leaving the remainder intact.'") (quoting *Free*

Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010)). If the conduct avoids trespass, and thus avoids violating the Trespass-Surveillance statute, then there is no need for a judicial remedy. *Id.* at 1195*; see Advantage Media*, 456 F.3d at 801–02 (concluding that a favorable decision on the plaintiff's overbreadth claim would not redress the plaintiff's injury because the plaintiff's speech "would still violate other . . . provisions"). Plaintiffs' purported fear of prosecution under the Trespass-Surveillance statute—fear that conveniently failed to extend to other statutes that may simultaneously prohibit Plaintiffs' conduct with similar enhanced penalties—also raises a question of genuine fact. *See*, *e.g.*, Iowa Code §§ 716.7A, 717A.3A(1)(a), 717A.3B; (R. Doc. 34, at 7.) Assuming that standing is met for motion-to-dismiss purposes, exploring the exact contours of Plaintiffs' complaint is necessary before setting aside a federal statute at the summary judgment stage.

Finally, to establish standing Plaintiffs listed various specific unlawful activities they plan to execute, including non-violent civil disobedience. (R. Doc. 34, at 7–8.) But to the extent that they believe any or all of those activities do not constitute criminal trespass, they are

not at risk of prosecution under the statute they seek to enjoin. In that way, they fail to demonstrate standing. And if there is an open question as to the applicability of the statute that could be answered by fact finding, they should be denied summary judgment.

The District Court erred in concluding the Plaintiffs have standing, and then compounded that error by limiting its analysis to Defendants' motion to dismiss, rather than also including analysis of Defendant's response to Plaintiff's motion for summary judgment. (R. Doc. 34, at 6-15); (App. 282; R Doc. 40, at 10.) Rather than take all of the facts in the complaint as true, the District Court should have also determined at the summary judgment stage whether evidence in the record justified finding standing—and it did not. (App. 235; R. Doc. 31); (App. 282; R. Doc. 40, at 10.)

Plaintiffs lack standing. Even if this Court disagrees on the record as it currently exists, it should remand with an order for limited discovery as to whether standing exists. Through determining whether Plaintiffs actually intend to violate this or any other law, the District Court can then decide whether the relief of setting aside the Trespass-Surveillance statute as unconstitutional will provide a remedy to Plaintiffs.

II. THE DISTRICT COURT ERRED WHEN IT CONCLUDED PLAINTIFFS HAVE STANDING AND FAILED TO DISMISS PLAINTIFFS' AS-APPLIED CLAIMS BECAUSE THEY WERE NOT RIPE.

A. Plaintiffs' alleged injuries do not occur to a legally recognized interest and are too speculative and hypothetical

1. Plaintiff Iowa Citizens for Community Improvement

Even if the District Court's analysis of standing at summary judgment was correct, it was incorrect in finding that Plaintiff Iowa Citizens for Community Improvement ("ICCI") satisfied the injury-in-fact element for standing. The District Court's sole basis for concluding ICCI satisfied the injury element for standing was based on a partial reading of one sentence in Defendants' motion to dismiss brief. (App. 34; R. Doc. 19, at 9); (App. 282; R. Doc. 40, at 10.)

ICCI's basis for its alleged injury was that the Trespass-Surveillance statute prohibited its members from engaging in non-violent civil disobedience (trespass) while recording. (R. Doc. 23-1, at 6–7.) In their motion to dismiss brief, Defendants stated "[w]hile Plaintiff ICCI may have suffered an injury by not being able to engage in trespass and record said trespass under Iowa's Trespass Surveillance statute, a plaintiff must suffer an injury to a legally recognized interest." (App. 34;

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R. Doc. 19, at 9) (emphasis added). Committing a trespass is not a legally cognizable interest—thus recording while committing a trespass is still not a legally cognizable interest. *Id.*; (R. Doc. 34, at 12-13.)

The District Court failed to address whether ICCI's alleged injury occurred to a legally recognized interest, and instead took the first half of the sentence from Defendants' motion to dismiss brief ("ICCI may have suffered an injury by not being able to engage in trespass and record said trespass") and concluded Defendants conceded Plaintiffs have standing. (App. 282; R. Doc. 40, at 10.) The entirety of the District Court's analysis is as follows: "[a]s Plaintiffs point out, this concession by Defendants establishes an injury-in-fact for standing purposes." *Id*. But there was no concession because ICCI's allegation of injury that the statute has made it more difficult for ICCI to commit a crime—trespass—and subsequently conduct recordings is not a legally recognized interest capable of being injured. *See*, *e.g.*, *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018) (stating asylum seekers challenging a restriction on asylum would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise, because said right is not a legally cognizable interest); *Citizen Center v. Gessler*,

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770 F.3d 900, 910 (10th Cir. 2014) ("For example, a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime."); *see also* Wright & Miller, 13A Federal Practice and Procedure § 3531.4 (3d ed.) ("The injured interest must be one that the courts will recognize for standing purposes."). ICCI asserts that it wishes to engage in allegedly protected speech through recording. Fair enough. But the right to engage in protected speech does not carry within it the right to otherwise violate neutral laws that do not implicate speech at all, like that prohibiting trespass.

2. Remaining Plaintiffs

The District Court continued to find that each remaining Plaintiff also had standing but there was little analysis to support such finding. (App. 282; R. Doc. 40, at 10 n. 2 ("The Court does, however, find that all Plaintiffs established an injury in fact, traceability, and redressability in both the Complaint, and the summary judgment record.").) The Court's Order did not respond to any of Defendants' specific arguments about why the remaining Plaintiffs lacked standing because they could not satisfy the injury or redressability elements.

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Plaintiffs Animal Legal Defense Fund ("ALDF"), People for the Ethical Treatment of Animals, Inc. ("PETA"), Bailing Out Benji ("BOB") and Food and Water Watch ("FWW") (collectively referred to in this subsection as "remaining Plaintiffs") have not satisfied the injury element for standing.

The remaining Plaintiffs claim their speech is chilled but also expressly state they do not believe their investigators engage in criminal trespass under Iowa Code section 716.7(2)(a). (R. Doc. 23-1, at 8 ("ALDF, PETA, and BOB do not believe that in producing their political speech they are engaging in trespass."); R. Doc. 23-1, at 9 ("ALDF, PETA and BOB explain that if § 727.8A were struck down they would not be deterred by the penalties under Iowa's generic trespass law because they do not believe they trespass…").) That is a conundrum for challenging the Trespass-Surveillance statute, because violating Iowa Code section 716.7(2)(a) is an element of the offense. *See* Iowa Code § 727.8A. Plaintiffs rest their purported chill on two conclusions: 1) they believe that "if any of the facilities ALDF, PETA, or BOB enter have a 'no photography sign posted,' it is arguable their recording would amount to trespass"; and 2) they contend that the State has allegedly "repeatedly

labeled ALDF, PETA and BOB's investigators trespassers." (R. Doc. 23-1, at 8.)

Plaintiffs' first rationale contradicts their own statements. It was Plaintiffs—not Defendants—who asserted whistleblowers would be in violation of Iowa's general trespass law, stating that "Iowa Code § 727.8A could also be used to punish . . . workers who use a phone or camera to gather proof of unsafe conditions or managers' derogatory comments." (App. 7; R. Doc. 1, at 5 ¶ 20.)

Iowa's general trespass statute does not apply to a whistleblower who is using a camera to document unsafe conditions—even if the employer posted a "no photography" sign. (R. Doc. 19, at 31.) Alternatively, if a worker using a phone or camera without permission is considered a trespass, then Iowa's Trespass-Surveillance statute enhances the penalty for conduct that is already illegal. If the remaining Plaintiffs prefer that interpretation of the statute, then they do not risk suffering an injury to a legally cognizable interest. *See* Wright & Miller, § 3531.4; s*ee also Gessler*, 770 F.3d at 910.

Plaintiffs' contention that the State repeatedly labels the remaining Plaintiffs' investigators to be trespassers is also unavailing, and relies on

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inaccuracies and mischaracterizations. (App. 50-51; R. Doc. 23-2, at 8-9 ¶¶ 47, 49.) The one example where Plaintiffs correctly identify that the State referred to an investigator as committing a trespass rises in the context of a different statute. *See Animal Legal Def. Fund v. Reynolds*, 353 F.Supp.3d 812 (2019) ("*Reynolds I*"). That involved Iowa's Ag-Fraud statute, section 717A.3A, which prohibits accessing agricultural production facilities through false pretenses. Unlike the traditional trespass here, for which the Trespass-Surveillance statute adds an additional penalty, that statute created a new offense. Despite that, the Eighth Circuit concluded that using false pretenses to obtain access to facilities did not regulate speech protected by the First Amendment. *See ALDF*, 8 F.4th at 785–86.

Here, Iowa's Trespass-Surveillance statute applies where the person commits an underlying trespass as defined by Iowa's general criminal trespass statute. But the logic of *ALDF* should apply equally here. To uphold that statute, this Court analogized access through false pretenses to trespass. *ALDF*, 8 F.3d at 786. Here, to commit the crime, trespass itself is a necessary element. Iowa's Trespass-Surveillance statute enhances the penalty for conduct that is already illegal, and

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therefore, the remaining Plaintiffs do not suffer an injury to a legally cognizable interest. *See* Wright & Miller, § 3531.4; *see also Gessler*, 770 F.3d at 910.

The remaining Plaintiffs did not provide any additional facts or details to explain how or why their investigators' methods of obtaining employment or access could be considered a trespass under Iowa Code section 716.7(2)(a). Nor did they provide any examples of past prosecution for trespass by the State of Iowa or any Iowa Counties for undercover investigations using the means or manner they claim to pursue.

Plaintiffs' claims are too remote and speculative for purposes of the imminence requirement for standing, or, in the alternative, the claimed injury does not occur to a legally recognized interest.[2] Accordingly,

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[2] Plaintiff FWW stated it suffers an injury because its inability to receive recordings from the other Plaintiffs violates its First Amendment rights. (R. Doc. 23-1, at 10-11.) Like the remaining Plaintiffs, FWW provides no additional details to explain how or why the investigators' methods of obtaining employment or access could be considered a trespass under Iowa Code section 716.7(2)(a). Moreover, FWW cannot bootstrap standing if the parties that face the direct effects of the statute fail to have standing themselves. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (stating the First Amendment does not confer a license on news reporters or their sources to violate valid criminal laws, even if the violation could result in the discovery of newsworthy information).

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Plaintiffs lacks standing and the District Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion to Dismiss should be reversed.

B. Plaintiffs have not plead sufficient facts to satisfy redressability

Plaintiffs establish redressability by showing a more than "merely speculative" chance that a court can grant relief to redress a plaintiff's injury. *Advantage Media*, 456 F.3d at 801 (citing *Planned Parenthood of Mid–Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998)). Here, Plaintiffs fail to meet that burden. Even if the Trespass-Surveillance statute is unconstitutional, Plaintiffs failed to establish an injunction prohibiting the Defendants from enforcing the statute would redress Plaintiffs' injuries, and the District Court erred when it concluded otherwise.

Defendants are charged with enforcing the Trespass-Surveillance statute, so the District Court reasoned that an injunction against such enforcement would redress Plaintiffs' alleged injury. (App. 282; R. Doc. 40, at 10.) The Trespass-Surveillance statute requires that an underlying "trespass" has occurred under Iowa Code section 716.7. *See* Iowa Code § 727.8A. As a result, Plaintiffs violate the Trespass-

Surveillance statute if their investigations or activities involve a criminal trespass. *Id.* Thus, even if the Trespass-Surveillance statute is enjoined, Plaintiffs' investigations are still unlawful under Iowa's general criminal trespass statute and the same Defendants may prosecute them.

The remaining Plaintiffs cannot demonstrate redressability because a misunderstanding of the law dictates their behavior. The remaining Plaintiffs contend that if section 727.8A is enjoined, they will not be deterred by the criminal trespass statute. Their explanation includes that they believe their investigations do not violate the criminal trespass statute. (R. Doc. 23-1, at 9 ("they do not believe they trespass.").) If true, then their investigations *also* do not violate the Trespass-Surveillance statute—because a necessary element is violating criminal trespass. Plaintiffs misunderstanding of these two laws as a Venn-diagram that covers two separate crimes with an area of overlap undermines their entire litigation posture. Instead, Trespass-Surveillance is only a subset of general criminal trespass. *See* Iowa Code § 727.8A. Sussing out the tension in their statements can be difficult, because Plaintiffs contend that their investigations fail to violate Iowa's criminal trespass statute. (R. Doc. 23-1, at 9.)

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Although ICCI stated it would engage in trespass in the absence of Iowa Code section 727.8A, intent to violate a law cannot give rise to standing.[3] *See Advantage Media*, 456 F.3d at 801–02 (holding that plaintiff failed to satisfy redressability requirement when challenging sign ordinances because plaintiff's proposed sign would still be unlawful under separate ordinances); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290, 1292 (7th Cir. 1993) (no standing to challenge sign code's ban on off-premises signs where proposed sign also violated unchallenged zoning restrictions).

Accordingly, Plaintiffs' alleged injuries will not be redressed by the relief they seek and, therefore, lack standing. The District Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion to Dismiss should be reversed.

C. Plaintiffs' as-applied constitutional challenge is not ripe

Plaintiffs' as-applied constitutional claims are not ripe. "The ripeness doctrine prevents courts 'through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

[3] Plaintiff FWW fails to satisfy the redressability requirement for the same reasons previously set forth herein. *See* Section II.A.2, n. 2 of this Brief, at 23.

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administrative policies, and also [protects] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 796 (8th Cir. 2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

Ripeness requires courts to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Labs*, 387 U.S. at 149. To decide ripeness, courts consider: "(1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development." *Id.* at 796–97.

Plaintiffs' claims and remedy requested in their as-applied challenge are broad in their scope. Plaintiffs identified many varied locations and facilities that they wish to investigate or to engage in non-violent civil disobedience, including "animal facilities", "puppy mills", "pet stores", "puppy mill auctions", "political and corporate sites", "construction site[s]", "Wells Fargo", and "Senator Grassley's office." (App. 10-16; R. Doc. 1, at 8-14, ¶¶ 35–54.) In effect, Plaintiffs appear to

seek a facial challenge through other means. Plaintiffs do not provide details about how they would gain access to the various facilities they seek to investigate, nor do they outline the specifics of how they intend to record once there. Nor do the Plaintiffs plausibly contend that they will be charged with criminal trespass for their actions. Despite that, they seek a broad injunction setting aside an entire statute as unconstitutional.

When presented with a similarly broad claim and request for injunctive relief, the First Circuit rejected as unripe Project Veritas Action Fund's ("Project Veritas") as-applied constitutional challenge to a Massachusetts statute that prohibited recording another person's words secretly and without consent. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 841–44 (1st Cir. 2020).

There, Project Veritas asserted the Massachusetts statute was unconstitutional under the First Amendment insofar as it "bars the secret recording of individuals who lack[ ] any reasonable expectation of privacy" and "bar[s] [] the secret, nonconsensual audio recording of government officials discharging their duties in public spaces." *Id.* With respect to the former challenge, Project Veritas defined "reasonable

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expectation of privacy" as "a circumstance in which the parties to the communication may reasonably expect that the communication may not be overheard or recorded." *Id.* at 842. The court stated the "vague yet sweeping definition, however, is problematic from the perspective of the ripeness inquiry. It fails to ensure that the 'contours' of this challenge to Section 99 are 'sharply defined.'" *Id.* (citing *Stern v. U.S. Dist. Ct.*, 214 F.3d 4, 10 (1st Cir. 2000)).

The court raised concerns that Project Veritas' challenge was merely conjectural and that it was unclear any of its activities would be prohibited under the statute. *Id.* That court was also concerned about the breadth of Project Veritas' claim concerning recording government officials because the organization defined the phrase "government officials" as broadly as it could imagine, explaining that it intended to refer to "officials and civil servants." *Id.* at 843. Moreover, the court's concern about the hypothetical nature of the claims and proposed conduct was "compounded by the fact that the First Amendment analysis might be appreciably affected by the type of government official who would be recorded." *Id.* (identifying the difference in First Amendment concerns

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between the recording of a mayor's speech in a public park and the recording of a grammar-school teacher interacting with her students).

Similarly, in *Elend v. Basham*, 471 F.3d 1199 (11th Cir. 2006), the court rejected a First Amendment claim from protesters on ripeness grounds. In *Elend*, the plaintiffs had been arrested for trespass after protesting a visit by President George W. Bush and refusing to relocate their protest to a designated protest zone near the venue of the President's visit. *Id.* at 1203. Those plaintiffs filed a lawsuit claiming the forced relocation of their protest violated the First Amendment and, because they would protest in the future, requested an injunction to prohibit any further constitutional violations. *Id.* at 1203–04. The Eleventh Circuit concluded the claims were not ripe because both the injuries alleged and prospective future relief requested were too speculative and remote to present a live case-or-controversy given that plaintiffs did not provide any "limitation on the universe of possibilities of when or where or how [any future] protest might occur." *Id.* at 1209.

Here, Plaintiffs' as-applied claims and requested relief present similarly broad descriptions of proposed conduct. Without a more definite plan, their as-applied challenge is unripe. The hypothetical and

undefined methods Plaintiffs will use to access private property, to gain employment with a business, or to engage in civil disobedience is amorphous at best. This attempt to boot-strap an as-applied challenge through what is in effect a facial challenge to a statute's application is inappropriate. Those amorphous details combined with the breadth of locations Plaintiffs intend to engage in and the potentially different First Amendment application based on each circumstance counsel against a broad as-applied challenge—in effect seeking facial relief from the suit for the parties—here.

Plaintiffs' as-applied constitutional claims are not ripe. Accordingly, those claims should be dismissed.

III. THE DISTRICT COURT ERRED WHEN IT CONCLUDED IOWA CODE SECTION 727.8A REGULATES SPEECH PROTECTED BY THE FIRST AMENDMENT.

A. Standard of Review

Plaintiffs claim Iowa Code section 727.8A violates the Speech Clause of the First Amendment to the United States Constitution. (App. 24-26; R. Doc. 1, at 22–24.) Constitutional claims are subject to de novo review. *Escudero-Corona v. I.N.S.*, 244 F.3d 608, 614 (8th Cir. 2001).

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First Amendment challenges involve a three-step analysis: first, whether the speech is protected by the First Amendment; second, if the speech is protected, the proper standard of review; and third, applying the applicable law to the facts of the case. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Plaintiffs must satisfy each factor to succeed on their claim. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984)

B. Committing a trespass and recording is conduct unprotected by the First Amendment

Using or placing a camera or other electronic surveillance device while committing a trespass does not transform the prohibited trespass and accompanying conduct into protected speech. The First Amendment only protects "conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66 (2006). Conduct does not generate First Amendment protection "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Iowa's Trespass-Surveillance statute prohibits the act of using or placing a camera or electronic surveillance device to make recordings

while committing a trespass. Iowa Code § 727.8A. A "common law trespass 'symbolizes nothing.'" *Animal Legal Defense Fund. v. Wasden*, 878 F.3d 1184, 1207–08 (9th Cir. 2018) ("*Wasden*") (Bea, J., dissenting); *see also Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014), *abrogated on other grounds by NIFLA v. Becerra*, 138 S.Ct. 2361, 2371-72 (2018), ("[a]n act that 'symbolizes nothing,' even if employing language, is not 'an act of communication' that transforms conduct into First Amendment speech.") (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126–27 (2011)).

While the Eighth Circuit has held video recording can occasionally be protected speech, it is has not held that recording while committing a criminal trespass is protected speech. In *Ness v. City of Bloomington*, this Court stated that "[i]f the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the 'speech process,' and thus qualifies itself as speech protected by the First Amendment" but "if the photography or recording is unrelated to an expressive purpose, or if the ordinance prohibits conduct that imposes incidental burdens on speech, then the act of recording may not receive First Amendment protection." 11 F.4th 914, 923 (8th Cir. 2021).

The District Court concluded that Iowa's Trespass-Surveillance statute regulates speech and not conduct, stating that the act of recording is the initial step in the speech process and necessary predicates to protected speech are also protected by the First Amendment. (App. 286-87; R. Doc. 40, at 14–15.) The District Court further held that the recording element of the statute implicates the First Amendment because speech is implicated by a law even if the law generally functions as a regulation of conduct. *Id.*

The District Court's analysis is wrong. The First Amendment does not protect a person's speech that occurs on property that the person does not have the authority to be present on. *See Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1236 (10th Cir. 2021) ("To the extent the speech at issue is the recording, it may be unprotected because it occurs on the property of another."); *Western Watersheds v. Michael*, 869 F.3d 1189, 1194 (10th Cir. 2017) ("[I]ndividuals generally do not have a First Amendment right to engage in speech on the private property of others."); *see also ALDF*, 8 F.4th at 786 (holding the First Amendment does not protect intentionally false speech used to obtain access to private property because it imposes a legally cognizable harm—trespass). By

operation of law, a person who has committed a trespass lacks the authority to be present on the property, and the First Amendment does not protect any concurrent recording.

In addition, the Supreme Court has consistently held the First Amendment does not allow information gatherers to disregard trespass laws. *See Bartnicki*, 532 U.S. at 532 n.19 (stating that the First Amendment does not confer a license on news reporters or their news sources to violate valid criminal laws, even if the violation could result in the discovery of newsworthy information); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (stating "[t]he constitutional guarantee of free expression has no part to play" where picketers entered a shopping center to picket a retail store); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("This Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."); *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (recognizing "[a journalist] has no special privilege to invade the rights and liberties of others").

Nonetheless, even if there is some speech element to the conduct proscribed by section 727.8A, the burden on any speech is incidental. The

statute does not regulate specific words or the editing, publication or distribution of records or speech. The statute only prohibits recording while committing a trespass.

Plaintiffs presented no authority below that demonstrated First Amendment protection for committing a crime and then being able to make recordings. To hold otherwise would create a protected action in recording criminal activity as expressive conduct protected by the First Amendment. Moreover, leaving a recording device to capture images or data later is conduct—not speech—that could also violate Iowa Code sections 727.8 and 808B.2(1), which make it unlawful for a person to record a conversation for which they are not present and do not have the speakers' consent.

Because recording while committing a trespass or leaving a recording device is not speech or expressive conduct protected by the First Amendment, Iowa's Trespass-Surveillance statute does not regulate conduct protected by the First Amendment, and the District Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion to Dismiss should be reversed.

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IV. THE DISTRICT COURT ERRED WHEN IT CONCLUDED IOWA CODE SECTION 727.8A WAS UNCONSTITUTIONAL ON ITS FACE

A. Iowa's Trespass-Surveillance statute validly applies in at least some circumstances and should not be facially enjoined

Even assuming Iowa's Trespass-Surveillance statute regulates "speech" under the First Amendment, the statute is not facially unconstitutional because it has a plainly legitimate sweep. To succeed in a facial challenge to Iowa's Trespass-Surveillance statute, Plaintiffs must establish "'that no set of circumstances exists under which [§ 727.8A] would be valid,' *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any 'plainly legitimate sweep,' *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgment) (internal quotation marks omitted)." *United States v. Stevens*, 559 U.S. 460, 472 (2010).

Facial challenges are disfavored for several reasons including that they "often rest on speculation;" they run contrary to the principle of judicial restraint that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which is to be applied;" and that they may prevent laws "embodying the will of

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the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008).

The District Court needed to find that the statute may never be applied before granting an injunction that includes a facial challenge, but did not do so. (App. 292-93; R. Doc. 40, at 20–21.) The District Court incorrectly explained that it only needed to analyze the statute under the proper level of scrutiny before setting aside the statute as unconstitutional. *Id.*

The District Court's Order does not apply the correct standard for facial challenges under Supreme Court precedent. The District Court relies upon *Wash. State Grange*, to caution against speculating about hypothetical or imaginary cases when analyzing a facial challenge (App. 293; R. Doc. 40, at 21), however the Supreme Court did not suggest courts should not consider foreseeable applications of the law.

In *Wash. State Grange*, the Supreme Court analyzed a facial challenge to Washington's recently enacted election process for primaries and general elections. 552 U.S. at 448. The Court warned district and appellate courts from attempting to overzealously overturn statutes

through finding clever hypotheticals or imaginary violations. *Id.* at 450–51. The Court emphasized the importance of judicial restraint in attempting to avoid setting aside as unconstitutional acts of Congress. *Id*. (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

Moreover, although the District Court relies upon *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *City of Chicago v. Morales*, 527 U.S. 41 (1999), to support its claim that *Salerno* did not create a separate test for facial challenges, in *Wash. State Grange*, the Court stated "[w]hile some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" 552 U.S. at 449 (citing *Glucksberg*, 521 U.S. at 739-40).

Here, Iowa's Trespass-Surveillance statute has a plainly legitimate sweep. The statute prevents persons from trespassing, including onto private property such as businesses closed to the public and residential dwellings, and then using or placing a camera or electronic surveillance device to record data, information, conduct or communications. A person who trespasses by breaking into someone's home to use or place a camera or electronic surveillance device to photograph or record the person

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without their consent would violate the statute and the First Amendment does not protect that activity. *See ALDF*, 8 F.4th at 786 (explaining the history of trespass and its application to some speech-related circumstances).

In addition, a business competitor who trespasses onto a competing business, closed to the public, to use a camera to capture images to obtain trade secrets violates the statute. Iowa Code § 727.8A. That activity is not protected by the First Amendment. There are many clearly constitutional applications of the Trespass-Surveillance statute. *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F.Supp.3d 547, 570–71 (M.D.N.C 2020) ("*PETA*") (rejecting a First Amendment facial challenge to a statute that prohibited accessing nonpublic areas of an employer's premises and capturing information, including data or records, because there were a myriad of legitimate applications of the statute).

Plaintiffs cannot demonstrate there are no set of facts in which Iowa's Trespass-Surveillance statute can be validly applied or that the statute lacks any plainly legitimate sweep. Accordingly, the District

Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion to Dismiss should be reversed.

B. Iowa's Trespass-Surveillance statute is narrowly tailored to substantial governmental interests

1. Iowa's Trespass-Surveillance statute advances substantial governmental interests

A content-neutral regulation[4] that has an incidental impact on speech is subject to intermediate scrutiny. *See Peterson v. City of Florence*, 727 F.3d 839, 843 (8th Cir. 2013) (citing *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994)). The Eighth Circuit has held that to survive intermediate scrutiny, a content-neutral time, place, or manner regulation must be:

> narrowly tailored to serve a substantial governmental interest and leaves open ample alternative channels for communicating the speech. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. An ordinance is narrowly tailored if it "'promotes a substantial interest that would be achieved less effectively absent the regulation' and the means chosen does not 'burden substantially more speech than is necessary to further' the city's content-neutral interest." *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1221 (8th Cir.1997) (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746).

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[4] Plaintiffs' Motion for Summary Judgment did not argue Iowa's Trespass-Surveillance statute was content-based, and assumed, for purposes of the Motion, that the statute was content-neutral and subject to intermediate scrutiny. (R. Doc. 23-1, at 14.)

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Peterson, 727 F.3d at 843.

The protection of both private and public property and the right to privacy from invasion through trespass and subsequent recording are substantial governmental interests. The protection of property from interference, even by those who seek to engage in speech protected by the First Amendment, has been deemed a substantial governmental interest. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374–77 (1997) (holding that protecting property rights from protestors was a significant enough governmental interest to justify an appropriately tailored injunction); *PETA*, 466 F.Supp.3d at 577 (recognizing that protecting property rights is a significant governmental interest) (citing *McCullen v. Coakley*, 573 U.S. 464, 486–87 (2014)); *see also Phelps-Roper v. City of Manchester*, 697 F.3d 678, 691–93 (8th Cir. 2012) (holding the right to privacy of funeral attendees is a substantial governmental interest). Related to property rights is the protection of propriety information or trade secrets, which is also a substantial governmental interest. *See Wasden*, 878 F.3d at 1200–01 (the court, applying a "more searching" application of rational basis review, held the

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concern about theft of trade secrets or propriety information was a legitimate governmental interest).

The District Court below did not address whether the State's interests are "substantial," but instead, focused only on whether the statute was sufficiently tailored to the interests. Because there have been no arguments or holdings to the contrary below, those interests are substantial.[5]

2. Iowa's Trespass-Surveillance statute is narrowly tailored to protect substantial governmental interests

Iowa's Trespass-Surveillance statute is narrowly tailored to the significant interests it aims to protect and the District Court erred in concluding otherwise. The statute is focused only on those situations

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[5] There have been several instances in the past two years that involve the trespass and subsequent recording of activity within a business, notwithstanding existing trespass laws, that demonstrate real concern. In both 2019 and 2020, individuals trespassed onto a farm, broke into a hog confinement building, and recorded animals and conditions therein. Animal Rights Group Claims Animal Neglect at Farm of Iowa Senator Who Backed Ag Gag Law (Dec. 26, 2020), available at https://www.desmoinesregister.com/story/money/agriculture/2020/01/24/animal-rights-group-claims-neglect-pigs-iowa-farm-ag-gag-supporter/4545787002/; Activists Arrested After Chaining Themselves Outside Iowa Facility Where Pigs Euthanized (June 1, 2020), available at https://www.desmoinesregister.com/story/money/agriculture/2020/06/01/activists-protesting-pig-euthanasia-arrested-charged/5308820002/.

where a person has committed a trespass and makes recordings or leaves an electronic surveillance device. To be narrowly tailored, the law "'need not be the least restrictive or least intrusive means of' serving the government's interests." *McCullen*, 573 U.S. at 486 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* (quoting *Ward*, 491 U.S. at 799).

The District Court faulted the State for an alleged "dearth of evidence" to support the stated interests and the statute's tailoring. (App. 291-92; R. Doc. 40, at 19–20.) The Court also held that other laws existed that could protect the same interests but did not contain speech elements. *Id.* Finally, the District Court held the statute was overinclusive, agreeing with Plaintiffs that the statute would reach certain reporters, business customers recording wrongdoing, whistleblowers, and railroad hobbyists. *Id.*

Despite the District Court's contention of insufficient evidence, the State offered several instances of individuals trespassing on private property and conducting recordings. (R. Doc. 34, at 20, n. 4.) Moreover,

ICCI itself asserted that Iowa's existing trespass law will not deter its members from committing trespasses and making recordings in the future. (R. Doc. 23-1, at 6–8.) Courts in other states, rejecting First Amendment defenses, have recognized trespass claims for conduct similar to that proscribed by the Trespass-Surveillance statute. *See Planned Parenthood Federation of America, Inc., v. Center for medical Progress*, 51 F.4th 1125, 1133-35 (9th Cir. 2022) (holding the First Amendment does not shield organization from damages for committing a trespass and subsequently surreptitiously recording reproductive health care providers); *Democracy Partners v. Project Veritas Action Fund*, 285 F.Supp.3d 109, 118–20 (D.D.C. 2018) (holding trespass claim should not be dismissed because defendant obtained employment/internship with defendant by fraudulent misrepresentations and then subsequently conducted surreptitious recordings in nonpublic areas); *Council on American-Islamic Relations Action Network, Inc., v. Gaubatz*, 793 F. Supp. 2d 311, 344–45 (D.D.C. 2011) (holding trespass claim should not be dismissed because defendant obtained employment/internship with defendant by fraudulent misrepresentations and then subsequently conducted surreptitious recordings in nonpublic areas).

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Although the District Court relied on several Iowa statutes to support its claim that other laws exist that address the stated purposes of the Trespass-Surveillance statute, Iowa Code sections 709.21 (invasion of privacy—nudity) and 716.7(2)(a)(7) ("peeping tom law"), those laws are limited to instances where the recording was solely related to sexual gratification or those areas within a residential dwelling where a person would have a reasonable expectation of privacy.[6] (App. 292; R. Doc. 40, at 20.) Those statutes do not protect Iowans to the same degree as the Trespass-Surveillance statute outside the home.

For the District Court's hypothetical reporters, railroad hobbyists or business customers who seek to record alleged wrongdoing, their presence on railroad tracks or public utilities without consent or their continued presence at the business after being asked to leave[7] is already

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[6] Iowa Code section 716.7(2)(a)(7) is further limited because "trespass" is defined as only those instances where the person is standing on the real property of the victim and recording them through the dwelling window, and arguably does not apply where a nefarious photographer trespasses onto third-party property to take the photographs.

[7] Plaintiffs' example of a business customer who uses their phone to record alleged wrongdoing would not violate section 727.8A because the commission of an initial trespass is required, which would require that, prior to the recording, the business owner had asked the customer to leave, but the customer refused to comply.

a trespass under Iowa Code section 716.7(2)(a). Regardless of a person's desire for information or photographs, the First Amendment does not allow information gatherers to disregard trespass laws. *See* Section III.B. of this Brief, at 32-36. Here, the Trespass-Surveillance statute is essentially only enhancing the penalty for conduct that is already prohibited by law—using a camera on a railroad or public utility property without consent or at a business' property after being asked to leave but remaining thereon (all of which constitute trespass).

The District Court and Plaintiffs are mistaken that whistleblowers would be subject to the Trespass-Surveillance statute because merely using a camera or electronic surveillance device an employee brought onto an employer's property likely does not qualify as a trespass for purposes of Iowa's general trespass law.[8] Neither the District Court nor Plaintiffs provided any examples of whistleblowers who record conduct without permission of their employer being prosecuted for criminal trespass.

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[8] However, anyone—including a whistleblower—who enters an area that they lack authorization or the legal right to enter and then leaves a recording device may run afoul of Iowa's general criminal trespass statute or one-party consent statute. *See* Iowa Code § 716.7(2)(a)(4), §727.8 and §808B.2(1).

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Moreover, Iowa's trespass law requires the individual to "wrongfully" use an inanimate object without permission of the property owner, and it is not clear using a camera would be "wrongful" for purposes of the statute in the absence of a direct and specific notice of the prohibition from the employer directly to the employee. *See* Iowa Code § 716.7(2)(a)(4). If a future court holds otherwise, a challenge could be brought on those facts. Criminal laws are narrowly interpreted, and it is not clear even if the employer had a "no photography" sign posted that the employee would have received sufficient notice to establish the requisite intent to for their use to be "wrongful". *See State v. Ahitow*, 544 N.W.2d 270, 273–74 (Iowa 1996) (holding that a narrow interpretation of a criminal statute was "dictated by the rule of statutory interpretation that criminal statutes must be narrowly construed."). Regardless, enhancing penalties for conduct that is already illegal—using a camera on an employer's property without consent (trespass)—does not demonstrate over-inclusiveness.

Iowa's Trespass-Surveillance statute leaves open ample alternative channels for communicating the speech. The statute does not prohibit the recording or placement of a recording device in the absence of an

underlying trespass. The statute does not prohibit the publication of anything that is recorded. To the extent that this Court finds that recording while trespassing is speech, Iowa's Trespass-Surveillance statute is a reasonable time, place and manner restriction that satisfies intermediate scrutiny. Accordingly, the District Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion to Dismiss should be reversed.[9]

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[9] Under Iowa's Trespass-Surveillance statute, a person who trespasses and either knowingly "places" or "uses" a camera or electronic recording device while on the trespassed property commits an aggravated misdemeanor. *See* Iowa Code § 727.8A. Should this Court determine the prohibition on the "use" of a camera or electronic surveillance device while committing a trespass violates the First Amendment, the Court may sever the offending portions from the statute and leave the remainder intact. *See State v. Louisell*, 865 N.W.2d 590, 599 (Iowa 2015) ("Severing constitutionally infirm provisions is appropriate if it does not substantially impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent, and if the remaining portion of the enactment can be given effect without the invalid provision") (internal citations and quotation marks omitted); *see also* Iowa Code § 4.12 (recognizing severability as applicable to all Iowa Acts or statutes). This would preserve section 727.8A's prohibition on "placing" a camera or leaving a camera unattended to capture or record images or data on the trespassed property.

CONCLUSION

Plaintiffs lack standing to bring their claims, and Plaintiffs' as-applied claims are not ripe. Even assuming that Plaintiffs have standing and that their claims are ripe, the Trespass-Surveillance statute regulates conduct and not speech. Finally, even if the statute regulates speech, it is not facially unconstitutional and is narrowly tailored to serve substantial governmental interests. Accordingly, Appellants-Defendants respectfully request this Court reverse the District Court's September 26, 2022 ruling denying Appellants-Defendants' Motion to Dismiss and granting Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume requirements limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9394 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Century Schoolbook font.

This brief has been scanned for viruses and is virus free.

/s/ Jacob J. Larson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of February, 2023, I electronically filed the foregoing paper with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Jacob J. Larson
JACOB J. LARSON
Assistant Attorney General

CERTIFICATE OF MAILING

I further certify that on February ___, 2023, I mailed by First-Class Mail, postage prepaid, ten (10) copies of the foregoing paper to the Eighth Circuit Clerk of Court, and 1 copy thereof to the respective counsel for the Appellees:

/s/ Jacob J. Larson
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