Case No. 22-3464

In the United States Court of Appeals
for the Eighth Circuit

ANIMAL LEGAL DEFENSE FUND; PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; BAILING OUT BENJI; FOOD & WATER WATCH; and IOWA CITIZENS FOR COMMUNITY IMPROVEMENT,

Plaintiffs-Appellees

v.

KIM REYNOLDS, in her official capacity as Governor of Iowa, BRENNA BIRD, in her official capacity as Attorney General of Iowa, VANESSA STRAZDAS, in her official capacity as Cass County Attorney, CHUCK SINNARD, in his official capacity as Dallas County Attorney, and ANTHONY JANNEY, in his official capacity as Washington County Attorney,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Iowa

RESPONSE BRIEF OF APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ARGUMENT

Iowa Code § 727.8A creates a new crime, an element of which is recording. Numerous courts, including this one, have held recording is protected by the First Amendment. Defendants argue the First Amendment does not apply because Iowa attached that speech restriction to a prohibition on non-expressive conduct, particularly trespass. No opinion, anywhere, provides such a rule. The Supreme Court and this Court explain the First Amendment applies in such circumstances.

As a result, Defendants must demonstrate § 727.8A is narrowly tailored by, among other things, producing evidence the restriction on speech was necessary. They make no attempt to carry that burden. Accordingly, Defendants have not justified any of the law's applications to speech. Section 727.8A is facially invalid.

Defendants try to evade this result through challenging standing and ripeness. They claim their (incorrect) merits arguments defeat Plaintiffs' standing. However, standing and the merits are distinct. The Court must assume Plaintiffs will prevail on the merits when it evaluates standing. Defendants also demand that to "ripen" their claims Plaintiffs produce facts this Court has held are unnecessary.

Given Defendants' plethora of false claims, the Court may benefit from oral argument of 15 minutes per side. However, because Defendants' arguments are contradicted by controlling caselaw, summary affirmance would also be appropriate.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees do not issue stock and have no parent corporations.

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I. JURISDICTIONAL STATEMENT

Plaintiffs agree that the district court possessed jurisdiction under 28 U.S.C. § 1331, *see, e.g.*, Joint Appendix ("J.A.") 9 (R. Doc. 1, at 7); Defendants timely filed a notice of appeal, J.A. 297–99 (R. Doc. 46); and the appeal was from a final judgment granting Plaintiffs' summary judgment. J.A. 295–96 (R. Docs. 43, 45). Thus, this Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1291.

However, Plaintiffs disagree this Court has jurisdiction to entertain Defendants' request it dismiss Plaintiffs' as-applied claims as unripe because Plaintiffs have not yet produced enough "details" about their planned activities. Defs.' Br. 32. Defendants did not move for summary judgment on this or any other issue and the denial of dismissal is only reviewable if the issue is "inextricably intertwined with an order that is properly before" the Court. *Missouri Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 299 n.4 (8th Cir. 2017). Whether Plaintiffs could produce sufficient evidence to support a plausible as-applied claim is not "inextricably intertwined" with the decision below granting Plaintiffs facial relief, or even the alternative basis for affirmance, that Plaintiffs are entitled to as-applied relief based upon the current record. If the Court determines facial relief is inappropriate, but the record is insufficient for as-applied relief, Plaintiffs are

entitled to develop that evidence. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).[1]

II. STATEMENT OF ISSUES

1. Whether Plaintiff Iowa Citizens for Community Improvement ("ICCI") and its members, who Defendants concede regularly engage in activities prohibited by § 727.8A, can challenge the law for violating the First Amendment.

    a. Most apposite cases: *Animal Legal Def. Fund ("ALDF") v. Vaught*, 8 F.4th 714 (*"Vaught"*) (8th Cir. 2021); *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011); *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963 (8th Cir. 2016); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc).

2. If the Court chooses to reach the issue, whether the other Plaintiffs have standing and ripe claims.

    a. Most apposite cases: *Vaught*, 8 F.4th 714; *Balogh v. Lombardi*, 816 F.3d 536 (8th Cir. 2016); *281 Care Comm.*, 638 F.3d 621; *United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007).

[1] Frequently, Defendants ask this Court to reverse the district court's grant of summary judgment and denial of the motion to dismiss, without explaining what order they seek. Thus, this jurisdictional defect may infect other aspects of Defendants' requested relief.

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3. Whether § 727.8A is subject to the First Amendment because it restricts recording, especially Plaintiffs' recordings.

   a. Most apposite cases: *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010); *ALDF v. Reynolds ("Reynolds")*, 8 F.4th 781 (8th Cir. 2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *ALDF v. Kelly ("Kelly")*, 9 F.4th 1219 (10th Cir. 2021).

4. Whether § 727.8A fails intermediate First Amendment scrutiny.

   a. Most apposite cases: *McCullen v. Coakley*, 573 U.S. 464 (2014); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969 (8th Cir. 2014).

5. Whether Plaintiffs are entitled to facial relief because Defendants have failed to justify any of § 727.8A's application to speech.

   a. Most apposite cases: *United States v. Stevens*, 559 U.S. 460 (2010); *Reynolds*, 8 F.4th 781; *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016); *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012).

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6. Whether, in the alternative, Plaintiffs are entitled to as-applied relief.

    a. Most apposite cases: *People for the Ethical Treatment of Animals, Inc. ("PETA") v. N. Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023); *Reynolds*, 8 F.4th 781; *Telescope Media Grp.*, 936 F.3d 740.

III. INTRODUCTION

Iowa Code § 727.8A criminalizes "committing a trespass as defined in section 716.7" and "knowingly plac[ing] or us[ing] a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property." Iowa Code § 727.8A. A first violation is an "aggravated misdemeanor," *id.*, a two-fold increase over the punishment for most trespasses under Iowa Code § 716.7, Iowa Code § 716.8(1). The penalty also exceeds that for a person "knowingly trespass[ing]" with "the intent to commit a hate crime." *Id.* § 716.8(3).

Section 727.8A is part of a concerted effort to suppress political advocacy—particularly animal rights advocacy. As Defendants' amicus documents, it is the third in a string of laws passed to prevent groups like Plaintiffs ALDF and PETA from gaining access to agribusinesses and documenting what they see, with each law enacted after the prior one was held unconstitutional. Pork Br. 3. Such laws prevent groups from "follow[ing] in the well-trodden footsteps of Upton Sinclair, … to conduct undercover animal-cruelty investigations and publicize what they" document. *PETA*, 60 F.4th 815 (discussing similar North Carolina law and challenge

involving overlapping Plaintiffs); *see also ALDF v. Reynolds*, 2019 WL 8301668, at *2 (S.D. Iowa Dec. 2, 2019) (explaining Iowa's laws "arose on the heels" of "investigations that brought critical national attention to Iowa's agricultural industry").

Iowa's first two laws mimicked statutes dubbed "Ag-Gag" laws in other states, targeting statements animal rights investigators use in their work. *See, e.g.*, Chip Gibbons, *Ag-Gag Across America*, Ctr. for Const. Rts. & Defending Rts & Dissent 13–18 (2017).[2] As with all such statutes that have been challenged, these Iowa laws were struck down, in whole or in part, for violating the First Amendment. *Reynolds* 8 F.4th 781 (holding Iowa's first Ag-Gag law partly unconstitutional and remanding for further proceedings, which remain pending); *ALDF v. Reynolds*, 591 F. Supp. 3d 397 (S.D. Iowa 2022) (striking down Iowa's second Ag-Gag law as viewpoint discriminatory), *appeal docketed* No. 22-1830 (8th Cir. Apr. 22, 2022); *see also Kelly*, 9 F.4th 1219 (striking down all challenged provisions of Kansas Ag-Gag law); *ALDF v. Wasden ("Wasden")*, 878 F.3d 1184 (9th Cir. 2018) (striking down Idaho Ag-Gag law in part); *ALDF v. Herbert ("Herbert")*, 263 F. Supp. 3d 1193 (D. Utah 2017) (striking down Utah Ag-Gag law in full).

[2] https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf.

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Section 727.8A follows the evolution of Ag-Gag laws by aiming at a different part of the investigatory process—recording—and expanding its reach to other industries—to obscure that the law is content based. *See* Gibbons, *supra*, at 18–21. Such laws have also been uniformly enjoined in whole or in part by every court that has considered them. *PETA*, 60 F.4th at 840–41 (enjoining aspects of all challenged provisions of North Carolina's law); *W. Watersheds Project v. Michael ("W. Watersheds Project I")*, 869 F.3d 1189 (10th Cir. 2017); *W. Watersheds Project v. Michael ("W. Watersheds Project II")*, 353 F. Supp. 3d 1176, 1180, 1191 (D. Wyo. 2018) (striking down Wyoming provisions that penalized data collection and trespass).

Defendants' effort to sustain § 727.8A is not only inconsistent with this precedent, but additional controlling authority from the Supreme Court and this Court, which they uniformly fail to address. Defendants concede § 727.8A chills Plaintiff ICCI's and its members' speech: It discourages them from "engaging in non-violent civil disobedience," involving entering and refusing to leave private property generally open to the public, such as office lobbies—a trespass—"while recording"—images and videos ICCI relies on to further its advocacy. Defs.' Br. 18. Nonetheless, Defendants contend ICCI lacks standing because the First Amendment does not cover § 727.8A's prohibition on recording. Defs.' Br. 20. However, an argument that "goes to the merits of a claim [] does not implicate the court's statutory

or constitutional power to adjudicate the case." *Vaught*, 8 F.4th at 721 (concerning Arkansas Ag-Gag).

For the first time on appeal, Defendants also suggest ICCI would still be inhibited if § 727.8 were enjoined. Thus, ICCI lacks redressability. Defs. Br. 25–26. This claim defies the record, as Defendants ultimately concede.

Defendants spend half their brief on the other Plaintiffs' standing. This is nothing but a distraction. Although they too have standing, only one plaintiff needs standing for a court to reach the merits. *Elder v. Gillespie*, 54 F.4th 1055, 1063 (8th Cir. 2022).

On the merits, in this Circuit "videos are … entitled to First Amendment protection." *Telescope Media Grp.*, 936 F.3d at 750–52. Contrary to Defendants' presentation, there is no exception to the First Amendment when the government ties a speech restriction to a conduct restriction, including unauthorized entry onto private property. Defs.' Br. 33–37. In this Court's words, where a statute "requires proof of other elements, including intent to commit an unauthorized act in the agricultural facility," if "persons may be prosecuted only because they" engage in speech, the law is subject to First Amendment scrutiny. *Reynolds*, 8 F.4th at 787.

Assuming § 727.8A only requires intermediate scrutiny—the lowest level of scrutiny any party contends applies—it fails. That review requires Defendants to show the government "look[ed] to less intrusive means of addressing its concerns"

before enacting the speech restriction *McCullen*, 573 U.S. at 492. While there are several other ways in which § 727.8A fails scrutiny, the only evidence Defendants produced to justify § 727.8A are internet articles they never suggest were considered prior to Iowa enacting the law. Defs.' Br. 44 n.5. Even then, that evidence does not demonstrate there was any need to restrict speech.

On this basis, § 727.8A is facially invalid. Defendants claim if there is any way in which the law could be constitutionally applied it should remain on the books, Defs.' Br. 38–39, but the Supreme Court has explained that, in the First Amendment context, the risk of chilling speech justifies facial relief. *Citizens United v. FEC*, 558 U.S. 310, 333 (2010). Moreover, this Court has declined to follow the so-called "no-set-of-circumstances" test for facial validity. The test is not if there is any circumstance the law *could* "pass constitutional muster," but if it "satisf[ies] [] scrutiny." *Reynolds*, 8 F.4th at 787. As Defendants fail to carry their burden to show any instance in which § 727.8A passes intermediate scrutiny, it is facially invalid.

Section 727.8A is also facially invalid because it is overbroad. Where Defendants "make[] no effort to defend" a statute's applications to speech, the provision is overbroad and cannot stand. *Stevens*, 559 U.S. at 481. Here, Defendants affirmatively concede the statute will prohibit newscasts from rail accidents and everyday citizens from recording misconduct. Defs.' Br. 47–48. A law that attacks

such core First Amendment freedoms must fall. The decision below should be affirmed.

IV. STATEMENT OF THE CASE

A. Iowa Code § 727.8A chills Plaintiffs' speech in three ways.

Defendants at times characterize all Plaintiffs as engaged in "undercover investigations," where § 727.8A suppresses their ability to document concerns related to "food safety, animal welfare, worker safety, and environmental" issues. Defs.' Br. 6. In actuality, this is but one of three ways in which § 727.8A limits Plaintiffs' speech.

ICCI explains the statute inhibits its non-violent civil disobedience. These actions involve staff and members going to open areas of political offices and businesses, protesting, and refusing to leave when asked. J.A. 59–60 (R. Doc. 23-3, at 5–6). As a result, dozens of its members and staff have been charged under Iowa's generic trespass law, § 716.7. *Id.*

ICCI records the protesters. J.A. 60 (R. Doc. 23-3, at 6). Doing so documents any misconduct against participants by police officers or others. *Id.* The images and videos also further ICCI's advocacy. *Id.* ICCI distributes them to traditional media, sends them to officials it is seeking to influence, and uses them at its events to recruit members. *Id.*

Thus, due to § 727.8A, ICCI has planned fewer protests. In particular, it has declined to pursue specific protests connected with its campaign against factory farms that it was considering in Dallas, Cass, and Washington Counties, where Defendants are the charging officials. J.A. 61–62 (R. Doc. 23-3, at 7–8).

Numerous ICCI members, including its member declarants—who have participated in ICCI's actions in the past and even been charged with trespass as a result—will not participate in ICCI's actions involving recording because of § 727.8A's heightened penalties. J.A. 61, 71–76 (R. Doc. 23-3, at 7, 17–22). This means ICCI has planned fewer actions. J.A. 62 (R. Doc. 23-3, at 8). Given the import of recording the protests, ICCI only trusts certain members to record, such as the member declarants. J.A. 61 (R. Doc. 23-3, at 7).

But ICCI explains if § 727.8A were struck down, it would return to planning the same number of protests it previously did. Its member declarants state that they would engage in and record protests where they refuse requests to leave. They would accept the risk of punishment under Iowa's generic trespass law, as they have in the past. J.A. 62–63 (R. Doc. 23-3, at 8–9); *see also* J.A. 71-76 (R. Doc. 23-3, at 17–22).

Plaintiffs ALDF, PETA, and Bailing Out Benji ("BoB") demonstrate § 727.8A chills them from engaging in undercover investigations. They state they were developing such investigations in Iowa prior to it enacting § 727.8A. J.A. 80–

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81, 89, 91, 98–99 (R. Doc. 23-3, at 26–27, 35, 37, 44–45). These investigations involve making audio and visual recordings to document the mistreatment of animals. J.A. 79–80, 87–88, 95–97 (R. Doc. 23-3, at 25–26, 33–34, 41–42). The organizations present these recordings to authorities to press for charges under animal cruelty laws, to legislators and regulators to demonstrate the need for policy reforms, and to the public through various media challenges to create pressure for change. J.A. 78, 80, 87, 90, 96–97, 101–02 (R. Doc. 23-3, at 24, 26, 33, 36, 42–43). Yet, ALDF, PETA, and BoB ceased planning investigations in Iowa due to § 727.8A. J.A. 81, 91, 99 (R. Doc. 23-3, at 27, 37, 45). They do not believe their investigations constitute a trespass, but Defendants have declared such investigators trespassers, leading ALDF, PETA, and BoB to fear charges under the law. J.A. 82–84, 92, 100–01 (R. Doc. 23-3, at 28–30, 38, 46–47).

Finally, Plaintiff Food & Water Watch ("FWW") explains it does not engage in civil disobedience or undercover investigations, but it relies on the images and videos produced by those activities. J.A. 105–07 (R. Doc. 23-3, at 51–52). FWW has incorporated information gathered from undercover investigations into books, reports, and legal filings. *Id.* Were that information gathering not silenced by § 727.8A, it would do so again. J.A. 107–08 (R. Doc. 23-3, at 53–54). Moreover, FWW is currently working with ICCI to promote regulation of factory farms in Iowa,

and, were ICCI's protests not silenced, FWW would use ICCI's recording of its civil disobedience in those efforts. J.A. 108–09 (R. Doc. 23-3, at 54–55).

PETA, ALDF, and BoB also detail that in addition to the harms caused by § 727.8A suppressing their investigations, they too rely on information suppressed by § 727.8A. PETA incorporated information, images, and videos from other groups in its advocacy and hopes to use such materials produced by ICCI and others. J.A. 89 (R. Doc. 23-3, at 35). ALDF and BoB rely on other animal rights groups' undercover investigations and the related recordings in their advocacy. J.A. 84, 102 (R. Doc. 23-3, at 30, 48).

B. Defendants failed to demonstrate any need for discovery.

Although Defendants filed a motion to delay Plaintiffs' motion for summary judgment based on Defendants' purported need for additional information, their filings confirm they do not dispute any relevant facts. Before the district court, Defendants stated no discovery was necessary regarding ICCI's standing. Instead, they solely pressed their legal argument that ICCI's First Amendment claim does not implicate a "legally recognized interest." J.A. 231 (R. Doc. 30, at 2).

Regarding the other Plaintiffs, Defendants identified three factual issues they contended justified discovery: (i) the basis for ALDF's, PETA's, and BoB's fear of being charged under § 727.8A; (ii) the details of their planned undercover investigations; and (iii) whether they should fear suit under another law, which

criminalizes "Food Operation Trespass," Iowa Code §716.7A. *See* J.A. 217–18 (R. Doc. 26-2, at 2–3).

Yet, regarding the first issue, before the district court and this Court Defendants conceded, "the State has identified Plaintiffs' undercover investigations as trespass." J.A. 238 (R. Doc. 34, at 10); *see also* Defs.' Br. 23. Defendants have also repeatedly stated a person who otherwise has permission to be on the property, but "enters into an area that they lack authorization" to be and makes a recording "may run afoul of Iowa's general criminal trespass statute," J.A. 37 (R. Doc. 19, at 31), which could extend to people who simply use a recording device without permission, Defs.' Br. 48 & n.8; *see also id.* at 49. ALDF's, PETA's, and BoB's investigators thus risk being charged under § 727.8A. Moreover, Defendants refused to make a binding representation that Plaintiffs' undercover investigations do not constitute a trespass and that their investigators could not be charged under § 727.8A. J.A. 269 (R. Doc. 37-1, at 2).

On the second issue, Defendants have failed to cite a single case establishing the relevance of specifics regarding ALDF's, PETA's, and BoB's desired investigations. As discussed below, this is because the caselaw holds that irrelevant.

Lastly, before this Court, Defendants have failed to meaningfully press any claim that Plaintiffs might be chilled by § 716.7A. Defendants mention the statute only once, in a string cite. Defs.' Br. 16. This makes sense. Section 716.7A is limited

to trespasses at "food operations." Iowa Code § 716.7A. Thus, it can have no bearing on BoB's investigations of puppy mills, dog auctions, and pet stores, J.A. 95 (R. Doc. 23-3, at 41), or ALDF's or PETA's investigations of animal facilities such as laboratories or roadside zoos, J.A. 80, 87 (R. Doc. 23-3, at 26, 33).

C. The decision below.

In denying Defendants' motion to dismiss and granting Plaintiffs summary judgment, the district court considered and rejected each of Defendants' arguments. On standing, the court recognized "[o]nly one plaintiff with standing" is necessary and focused on ICCI. J.A. 282 (R. Doc. 40, at 10). It naturally disregarded as baseless the suggestion ICCI's claim that § 727.8A violates its First Amendment rights does not concern a "legally recognized interest." *Id.* It further explained that while, before it, Defendants did not contest traceability or redressability, Defendants did not dispute § 727.8A's penalties are keeping ICCI from carrying out its civil disobedience and "Defendants are the individuals charged with enforcing the Act" against ICCI and its members. *Id.* Thus, by definition, ICCI's injury is traceable to Defendants and "an injunction against enforcement … would redress" ICCI's harm. *Id.* ICCI's standing also resolved all "'ripeness issues.'" *Id.* (quoting *Vaught*, 8 F.4th at 721 n.*).

Regarding the merits, the district court explained that by criminalizing recording, Iowa Code § 727.8A infringes on First Amendment speech in two ways.

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Recordings like Plaintiffs' are a form of expression. J.A. 285 (R. Doc. 40, at 13) (citing *Telescope Media Grp.*, 936 F.3d at 751). Moreover, "[t]he Supreme Court has recognized that occasionally the exercise of one's free speech rights is a process." *Id.* (citing *Citizens United*, 558 U.S. at 336). To protect free speech, the First Amendment protects the "different stages" that are predicates to speech, as well as speech itself. *Id.* (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011)). Thus, even if recording is not speech, because it is a necessary predicate to producing motion pictures and videos, which are speech, the act of recording is protected. J.A. 286 (R. Doc. 40, at 14).

The court also rejected Defendants' claim that because trespass is not protected under the First Amendment, the government can join a speech restriction to a prohibition on trespass and evade the Constitution. "A statute that regulates protected speech must meet First Amendment muster, whether or not it also regulates conduct." J.A. 286–87 (R. Doc. 40, at 14–15) (collecting cases). Also, there is no exception to the First Amendment for speech that occurs on private property. "[E]xempting private property from any First Amendment review could result in the criminalization of core free speech, such as criticism of a politician." J.A. 288 (R. Doc. 40, at 16). Moreover, "[t]he Supreme Court has previously invalidated laws which regulate speech on private property." *Id.* (citing *Watchtower Bible & Tract*

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Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 154 (2002)); *see also id.* at 288–89 (collecting additional cases).

Assuming § 727.8A only warrants intermediate scrutiny, the district court further held it fails that test. Among other reasons, "there is next to nothing in the record to allow the Court to find that the State narrowed the Act appropriately," and the "burden rests on the state" to produce such evidence. J.A. 292 (R. Doc. 40, at 20) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002)).

As a result, § 727.8A is facially invalid. The district court detailed that the so-called no-set-of-circumstances test "'is correctly understood not as a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework.'" J.A. 293 (R. Doc. 40, at 21) (quoting *Bruni*, 824 F.3d at 363). Therefore, because Defendants did not justify any of the law's applications to speech under the requisite level of scrutiny, it is facially invalid.[3]

V. STANDARD OF REVIEW

This Court reviews a "grant of summary judgment de novo," inquiring whether the movant "is entitled to judgment as a matter of law." *Mayorga v. Marsden Bldg. Maint. LLC*, 55 F.4th 1155, 1160 (8th Cir. 2022). Whether further

[3] Based on this holding, the court did not reach Plaintiffs' separate argument for facial invalidity, that the law was overbroad. *See* J.A. 284 (R. Doc. 40, at 12).

discovery was warranted before summary judgment is reviewed for "abuse of discretion." *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014). It is not an abuse of discretion to have proceeded to summary judgment where the party seeking discovery fails to identify "documents or specific facts" that could have altered the outcome. *Id.* at 896.

VI. SUMMARY OF ARGUMENT

Plaintiffs are groups Defendants: (i) concede engage in activities restricted by § 727.8A; (ii) have threatened with enforcement of § 727.8A based on their activities; or (iii) depend on the information those activities gather. Thus, each Plaintiff has standing to challenge § 727.8A. Defendants' assertion Plaintiffs lack standing to raise their First Amendment claims because Defendants disagree with Plaintiffs' First Amendment arguments is foolish. Defendants' suggestion Plaintiffs' injuries are not redressable because they could be charged under another statute with lesser penalties is both illogical and directly contradicted by the record.

Section 727.8A's prohibition on recording is either a restriction on pure speech or a necessary predicate to speech, both of which are subject to the First Amendment. The Supreme Court, this Court, and others have explained, contrary to Defendants' claims, the fact that a law regulates conduct and speech—even if by doing so it purportedly protects privacy and property—does not negate the need for First Amendment review.

Defendants do not point to anything that justifies § 727.8A's restriction on speech in any instance. Therefore, § 727.8A fails First Amendment scrutiny, and is facially invalid.

Defendants' contention Plaintiffs cannot prevail without providing additional information fails to identify facts that could alter the analysis. After Defendants filed their opening brief, a court awarded as-applied relief in another Ag-Gag challenge. It did so based on an essentially identical record to that presented here, contradicting Defendants' claim that further fact development is needed in this case. *PETA*, 60 F.4th at 821. Moreover, with this record, broader relief is called for under this Circuit's precedent.

VII. ARGUMENT

A. All Plaintiffs have standing, and the issues are ripe.

Although ICCI and ALDF, PETA, and BoB engage in different activities, they have each established § 727.8A chills their speech. They are all reasonably suppressing their expressions in response to the statute, which is enforceable by Defendants against them. That establishes First Amendment standing. FWW, ALDF, PETA, and BoB have also shown the law is denying them access to information, which separately provides them standing. Defendants' ripeness argument identifies no missing facts needed to ripen these claims.

i. Legal framework.

Where plaintiffs "self-censor[]" due to "an actual and well-founded fear that the law will be enforce[d] against them," that establishes a First Amendment injury-in-fact. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). That injury is not just the risk of future harm, but an "ongoing" actual harm. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016). Where a person "risk[s] punishment for his conduct … he will refrain from engaging in it," and the objective of the First Amendment is a free marketplace of ideas. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Thus, intimidating would-be speakers creates an actionable injury. The injury is then traceable to and redressable against the people who can enforce the law causing the self-censorship. *Vaught*, 8 F.4th at 721 (citing *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019)).

Separate and apart from proceeding based on a law's chilling effect, "putative recipients of speech" also have First Amendment rights. *Wecht*, 484 F.3d at 202. If a law is an "obstacle to the [plaintiff's] attempt to obtain" information, that plaintiff also suffers an injury-in-fact that allows it to bring a First Amendment claim against those creating the obstacle. *Id.*

ii. ICCI's standing is not truly in dispute.

In light of the above, Defendants effectively concede ICCI's and its members' standing. Defendants focus on ALDF's, PETA's, and BoB's statements that they

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believe their *undercover investigations* should not be regarded as trespasses and subject to § 727.8A, but Defendants and ICCI agree ICCI's *civil disobedience* involves trespass and recording, subjecting it and its members to prosecution under § 727.8A. Defendants likewise do not contest that ICCI and its members have "ceased conducting" civil disobedience due to § 727.8A's "additional penalties." Defs.' Br. 14–15; *see also id.* at 27. Defendants also admit ICCI has "fair[ly]" alleged the prohibition on recording implicates its "protected speech." *Id.* at 20.[4]

Nothing more is needed to establish an injury-in-fact. "[T]he plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *281 Care Comm.*, 638 F.3d at 627.

Defendants' claim that ICCI's injury is not actionable because § 727.8A does not restrict First Amendment protected activities, Defs.' Br. 18–20, improperly interjects merits arguments into the standing analysis. "In assessing a plaintiff's Article III standing, [courts] must assume that on the merits the plaintiffs would be successful in their claims.'" *Am. Farm Bureau Fed'n*, 836 F.3d at 968; *see also Vaught*, 8 F.4th at 721.

[4] Defendants also do not contest that ICCI can represent its members' interests. *E.g.*, *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532–33 (8th Cir. 2005).

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Defendants' precedent says nothing different. It explains the standing requirement that a plaintiff's injury relate to a legally cognizable right means a plaintiff must present a "nonfrivolous legal challenge, alleging an injury to a protected right such as free speech." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc); *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018) (Defendants' authority citing *Initiative & Referendum Inst.*, 450 F.3d at 1093); *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014) (Defendants' authority, which relies *on Initiative & Referendum Inst.*, 450 F.3d at 1093). Defendants' case *Citizen Center* actually rejects the argument the plaintiffs there lacked standing, explaining so long as a statute possibly restricts something a plaintiff "has a legal right to" do the case cannot be dismissed on the basis it does not implicate a legally cognizable right. *Citizen Ctr.*, 770 F.3d at 910.

Defendants' alternative reading, that if some of the regulated activities could be charged under a separate criminal statute that does not implicate protected interests (like generic trespass), the challenged statute with its additional elements cannot implicate a protected interest, is nonsense. Defs.' Br. 19–20. If true, one could never challenge a law criminalizing speeding with a pro-life bumper sticker because speeding is a crime that does not implicate protected interests.

Regarding traceability and redressability, Defendants concede they are "charged with enforcing" Iowa Code § 727.8A against ICCI. *Id.* at 25. That is

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sufficient. "When government action or inaction is challenged by a party" who could be subject to that action, there is "little question" a judgment against the government officials charged with those activities "will redress" the harm. *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (cleaned up).

Defendants now insist that because ICCI and its members could be charged under the generic trespass statute their injuries from § 727.8A cannot be redressed. But ICCI and its members explain they have been willing to risk the generic trespass law's lesser penalties in the past and would do so again in the future. J.A. 61–63, 72, 74, 76 (R. Doc. 23-3, at 7–9, 18, 20, 22). Defendants recognize it is only § 727.8A's higher penalties that keeps ICCI and its members from "engag[ing]" in their desired activities in the future. Defs.' Br. 27. "That a favorable decision will relieve a discrete injury," here the suppression of speech, "satisfies the redressability requirement." *Minnesota Citizens Concerned for Life*, 113 F.3d at 131. A party "need not show that a favorable decision will relieve his every injury," such as preventing any punishment. *Id.*

Indeed, even partial redress is redress. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). Thus, if this suit removed one barrier to Plaintiffs proceeding, even if there were others—which Defendants concede there are none for ICCI—the suit

would still provide redress. *ALDF v. Kelly*, 434 F. Supp. 3d 974, 993 (D. Kan. 2020), *aff'd Kelly*, 9 F.4th 1219.[5]

iii. ALDF, PETA, and BoB have chill standing.

Although not necessary for the Court to proceed to the merits, *Elder*, 54 F.4th at 1063, Defendants are also incorrect ALDF, PETA, and BoB lack standing because they believe their investigations "avoid[] trespass." Defs.' Br. 15–16; *see also id.* at 21. As long as there is "some reason to fear[] prosecution" that logically leads people to self-censor, there is First Amendment standing. *St. Paul Area Chamber of Com. v. Gaertner,* 439 F.3d 481, 486 (8th Cir. 2006). Thus, this Court has explained a plaintiff need not "allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *281 Care Comm.*, 638 F.3d at 629. A plaintiff must only demonstrate it "wish[es] to engage in conduct that could reasonably be interpreted" as falling within the statute. *Id.* at 628.

Here, Defendants do not dispute that they previously declared ALDF's, PETA's, and BoB's undercover investigations would violate Iowa's generic trespass law, which would also subject them to § 727.8A. Defs.' Br. 23. Such statements

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[5] Defendants' authority, Defs.' Br. 27, concerns instances where the plaintiffs did not challenge aspects of the law—nor even suggest they could be challenged—that stood as a barrier to the plaintiff proceeding if the plaintiffs prevailed. *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Harp Advert. Illinois, Inc. v. Vill. of Chicago Ridge*, 9 F.3d 1290, 1291 (7th Cir. 1993).

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"underscore" the reasonableness of ALDF's, PETA's, and BoB's fear of enforcement. *281 Care Comm.*, 638 F.3d at 630.

Defendants also state it is "not clear" when the investigations would violate the law. Defs.' Br. 49; *see also id.* at 48 & n.8; § IV(B), *supra*. Even "contradictory assertions" as to whether plaintiffs could be charged under the challenged law—let alone Defendants' efforts to leave open the door for prosecution—creates "an objectively reasonable fear of legal action that chills [] speech." *Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016).

Further still, following Defendants' argument below that ALDF, PETA, and BoB lack standing because they do not reasonably fear § 727.8A, ALDF, PETA, and BoB asked Defendants to disclaim that they would wield § 727.8A against the investigations. J.A. 269 (R. Doc. 37-1, at 2). Defendants refused. The enforcing party's decision not "to disavow an intent to pursue" plaintiffs under the law also establishes they are reasonably chilled. *Vaught*, 8 F.4th at 721; *see also St. Paul Area Chamber of Com.*, 439 F.3d at 485 (similar).

Defendants' other standing arguments related to ALDF's, PETA's, and BoB's chilled investigations just repeat their incorrect claims against ICCI. Defendants' claim that a prohibition on recording and trespassing is not governed by the First Amendment is a merits, not standing argument. *Am. Farm Bureau Fed'n*, 836 F.3d at 968; *see also Vaught*, 8 F.4th at 721 (similar); *Initiative & Referendum Inst.*, 450

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F.3d at 1093 (similar). Defendants' claim that enjoining § 727.8A would not provide redress ignores that ALDF, PETA, and BoB state they would risk the lesser penalty under Iowa's generic trespass law, but they are chilled by § 727.8A's heightened penalty for engaging in speech. J.A. 84, 92, 99–101 (R. Doc. 23-3, at 30, 38, 45–47).

iv. FWW, ALDF, PETA, and BoB have standing as would-be recipients of speech.

Although again unnecessary to reach the merits, Plaintiffs further have standing as would-be recipients of speech. So long as there is "reason to believe [another person] is willing to speak and is being restrained from doing so" by the challenged law, would-be recipients of that chilled speech have standing. *Wecht*, 484 F.3d at 202 (quoting *FOCUS v. Allegheny Cty. Ct. of Common Pleas*, 75 F.3d 834, 838–89 (3d Cir. 1996)); *see also, e.g.*, *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 491–92 (4th Cir. 2008). Because the First Amendment protects "communication," it affords rights to both the communication's "sources and to its recipients." *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988).

FWW, ALDF, PETA, and BoB explain they have received and used recordings now criminalized by § 727.8A in their advocacy, and would do so again absent § 727.8A's chill on such recordings. J.A. 84, 89, 102, 105–09 (R. Doc. 23-3, at 30, 35, 48, 51–55). Thus, because § 727.8A is undermining their ability "to receive the message," all these Plaintiffs have standing. *In re Application of Dow*, 842 F.2d at 607.

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Defendants claim that if ICCI, PETA, ALDF, and BoB have not provided enough details to establish the chill on their activities, no Plaintiff can have recipient standing. Defs.' Br. 24 n.2. Incorrect. Would-be recipients do not need to prove how a third-party will act, rather they have standing if they produce the information in their possession: that there has been speech they relied on in the past and there now is an obstacle to that expression. *In re Application of Dow Jones*, 842 F.2d at 607.

v. Plaintiffs' claims are ripe.

Defendants acknowledge that "Plaintiffs identified many varied locations and facilities that they wish to investigate," but argue that unless Plaintiffs provide "details about how they would gain access" and "specific[s] of how they intend to record once there," their claims are not ripe. Defs.' Br. 29. Despite stating this argument applies to ICCI, it is unclear how. ICCI explains its civil disobedience occurs at sites generally open to the public and involves recording images and sound with standard cameras. J.A. 59–60 (R. Doc. 23-3, at 5–6). Nor is it apparent how Defendants' ripeness argument undermines Plaintiffs' standing as recipients of speech. Regardless, Defendants' suggestion Plaintiffs must effectively be in the process of violating the statute and detail the steps they are undertaking is wrong.

The en banc Tenth Circuit explained it "cannot be right" that First Amendment claims are "too speculative and conjectural … for judicial resolution" unless plaintiffs provide "specific plans" for violating a statute. *Initiative & Referendum*

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Inst., 450 F.3d at 1088–89. "A plaintiff who alleges a chilling effect asserts that the very existence of some statute discourages, or even prevents, the exercise of his First Amendment rights." *Id.* "Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Id.* "It makes no sense to require plaintiffs simultaneously to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'" *Id.* As the court in a challenge to another Iowa Ag-Gag law explained, "it is not necessary for Plaintiffs to provide concrete operational blueprints—who, what, when, and where—for activities they do not intend to conduct" because of the law's chill. *ALDF v Reynolds*, 297 F. Supp. 3d 901, 915 (S.D. Iowa 2018) (citing *Initiative & Referendum Inst.*, 450 F.3d at 1089); *see also Herbert*, 263 F. Supp. 3d at 1200 (similar).

Applying *Initiative & Referendum Institute* to undercover investigations conducted by one of these same Plaintiffs, this Court determine it had standing if it showed it had "previous success" in engaging in the restricted investigations and explained those investigations are now chilled. *Vaught*, 8 F.4th at 719 (citing *Initiative & Referendum Inst.*, 450 F.3d at 1089). This also resolved all "ripeness issues." *Id.* at 721 n.*; *see also PETA v. Stein*, 737 F. App'x 122, 130 (4th Cir. 2018) (unpublished) (cited by *Vaught* and similar).

Defendants' caselaw only confirms Plaintiffs' claims are ripe. In *Project Veritas Action Fund v. Rollins*, the plaintiff did not seek relief based on the investigations it intended to conduct, but rather asked the court to enjoin the law from applying in circumstances under which the plaintiff "g[ave] no indication that it intends to investigate[.]" 982 F.3d 813, 843 (1st Cir. 2020). The court explained that had the plaintiff based its request for relief on its "plan of recording," then the pre-enforcement challenge would have been ripe. *Id.* at 842. However, because Project Veritas sought an injunction against a universe of investigations far broader than those in which it planned to engage, the claims were unripe. *Id.* at 843–44. *Elend v. Basham* similarly explained "we are not even given a description of Plaintiffs' past conduct from which to infer they might act in a similar manner in the future," and thus the plaintiffs failed to establish a chill on their desired speech or that their claim was ripe. 471 F.3d 1199, 1209 (11th Cir. 2006). Here Plaintiffs provide details about their repeated past activities leading them to fear Iowa Code § 727.8A and preventing similar acts in the future. Thus, under this Court's controlling caselaw as well as Defendants' out-of-circuit precedent, Plaintiffs' claims are ripe.[6]

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[6] As noted above, this Court also lacks jurisdiction to consider Defendants' request to dismiss Plaintiffs' as-applied claims as unripe. *See* § I, *supra*.

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B. Section 727.8A infringes on First Amendment freedoms.

This Court, consistent with numerous others, recognizes § 727.8A's restriction on recordings infringes on First Amendment rights in two ways. Penalizing recordings like Plaintiffs' punishes pure expression. Further, the act of recording is protected because it is necessary to produce other forms of expression. There is not a single case supporting Defendants' claim that a statute restricting both non-expressive conduct and speech is exempt from the First Amendment. Nor, despite Defendants' suggestion, is there any carve-out to the First Amendment for speech on private property. To the contrary, the Supreme Court, this Court, and others have applied the First Amendment to laws that restrict speech and non-expressive conduct, including when the restriction applies only on private land and is meant to protect privacy and property.

i. Section 727.8A restricts First Amendment-protected speech.

In this Court, where recordings are meant to "convey a message designed to affect public attitudes and behavior," that is, when they are intended to "serve as a medium for the communication of ideas," they are "in a word, speech." *Telescope Media Grp.*, 936 F.3d at 751 (quotation marks omitted). "[I]t cannot be doubted that motion pictures" are speech, but the form of the video or its length does not matter; if the video reveals a point of view, it is speech. *Id*. "[E]ditorial judgment and control" over the recording, even if incomplete, help demonstrate the recording is

meant to convey a message. *Id.* But, at bottom, recordings designed to "affect public attitudes and behaviors" are "speech that is entitled to First Amendment protection." *Id.* 750–51.

Another circuit considering Plaintiffs' undercover investigations similarly "dispose[d] of [the] claim that the act of creating audiovisual recording is not speech," reasoning videos are "inherently expressive" because they reflect decisions of what to record and how to present the images. *Wasden*, 878 F.3d at 1203. Thus, a restriction on Plaintiffs' recordings barred "purely expressive activity" and was ultimately unconstitutional. *Id.* at 1204.

As a result, because § 727.8A restricts Plaintiffs' recordings, it restricts pure speech. Plaintiffs explain, and Defendants do not dispute, Plaintiffs design their recordings to advance their advocacy—developing the recordings to influence the public, to obtain prosecutions, and for lobbying. ICCI instructs its recorders to "focus on the protestors, their chants, their statements, and their experiences." J.A. 60 (R. Doc. 23-3, at 6). It selects those images because it has learned they are "particularly effective tools" to "educate other Iowans about ICCI's activities and goals" and thereby "increase participation" in its activities and "motivate others to join its work." *Id.*

PETA explains it "instruct[s] its investigators to capture photos and videos to document illegal conduct inside the facility." J.A. 90–91 (R. Doc. 23-3, at 36–37).

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It targets these images because it uses the recordings to seek "corrective action" through prosecutions, regulatory enforcement, and public attention. *Id*.

BoB similarly explains its investigators work "to document and expose the neglect and mistreatment of dogs in puppy mills." J.A. 96–97 (R. Doc. 23-3, at 42–43). It aims for such images because they are important "to educate the public" and policymakers. *Id*.

Section 727.8A restricts recordings over which Plaintiffs exercise editorial control and that are designed to communication a message to change attitudes and behaviors. Under controlling authority, it restricts pure speech.

ii. Section 727.8A restricts predicates to speech that are protected under the First Amendment.

This Court also recognizes recordings are protected under the First Amendment because even if recording "might be mere conduct," this does not exempt laws penalizing recording from the First Amendment's protections. *Telescope Media Grp.*, 936 F.3d at 752. The government can no more regulate actual expression than the conduct involved in "creating, distributing, or consuming speech." *Brown*, 564 U.S. at 792 n.1. "Laws enacted to control or suppress speech may operate at different points in the speech process[,]" and to protect speech courts must protect the sources of speech. *Citizens United*, 558 U.S. at 336. Just as the state could not restrict "the physical movements of a brush" or "the mechanical operation of a printing press," it cannot regulate "positioning a camera, setting up

microphones, and clicking and dragging files on a computer screen." *Telescope Media Grp.*, 936 F.3d at 751.

For these reasons, Defendants' case, *Ness v. City of Bloomington*, held photography and video recording protected. 11 F.4th 914, 923 (8th Cir. 2021). *Ness* explained the recording at issue was a step in "news gathering" because the recorder planned to post her images to her "internet blog and Facebook page." *Id.* Therefore "[t]he acts of taking photographs and recording videos are entitled to First Amendment protection because they are an important stage of the speech process that ends with the dissemination of information." *Id.*

Defendants argue that since *Ness* discussed the objective of the recordings, recordings with other objectives must be unprotected. Defs.' Br. 34. Even were that the case, Plaintiffs generate their recordings to disseminate the information in manners similar to the plaintiff in *Ness*. J.A. 60, 80, 87 (R. Doc. 23-3, at 6, 26, 33) (Plaintiffs discussing self-publishing the information, and providing the recordings to legacy media). Indeed, the Fourth Circuit recently explained PETA's and ALDF's investigations amount to "newsgathering." *PETA*, 60 F.4th at 821. Moreover, Plaintiffs detail they also share the videos with government officials to lobby for political change. J.A. 60, 80, 84 (R. Doc. 23-3, at 6, 26, 30). Such an objective is particularly worthy of First Amendment protection. *W. Watersheds I*, 869 F.3d at 1197.

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Separately, courts have noted the need to protect "recording police encounters" as this creates a "record" of the conduct, which "contributes to discussion[s] about governmental affairs." *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023). This is yet another purpose of ICCI's recordings. J.A. 60 (R. Doc. 23-3, at 6).

Regardless, Defendants misstate the law. The "value of the recording may not be immediately obvious," and nonetheless the First Amendment applies. *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017). Because recordings *could* be used for speech and the public is entitled to "the opportunity to decide" in the future "to put any recording to expressive use," the government cannot ban "the act of creating that material." *Id.*; *see also Citizens United*, 558 U.S. at 336; *Brown*, 564 U.S. at 792 n.1.

For this reason, Defendants' effort to salvage part of § 727.8A by distinguishing between "plac[ing]" a recording device—an act for which they indicate without any support it is impossible to demonstrate the recording will be used for expression—and "us[ing]" a camera—an act which they at least concede it is possible the recording could be part of communication—does not follow. *See* Defs.' Br. 50 n.9. Indeed, another circuit has subjected "placing an unattended camera" to First Amendment scrutiny as it is part of "newsgathering." *PETA*, 60 F.4th at 828.

Moreover, recent media coverage demonstrates placed recording devices can be essential to capturing images necessary to further policy debates, particularly regarding animal welfare. Nicholas Kristof, *Spy Cams Show What the Pork Industry Tries to Hide*, N.Y. Times, Feb. 4, 2023.[7] Thus, even if recording was not inherently protected as speech or a predicate to speech, and a party needed to demonstrate the recording could be used to generate expressions, Defendants are wrong that a placed recording device cannot be used in that manner.

In sum, § 727.8A requires First Amendment scrutiny because, if it does not restrict pure expression, it penalizes predicates to speech.

iii. The First Amendment covers speech restrictions connected to prohibitions on non-expressive conduct.

Defendants err in suggesting they can drag § 727.8A out from under the First Amendment because speech is only "[one] element" of the crime that also has other elements. Defs.' Br. 36. Nor do they get any traction from their assertion that any restrictions on speech are "incidental" as compared to § 727.8A's conduct prohibitions—leaving aside the fact that speech and trespass are both distinct

[7] https://www.nytimes.com/2023/02/04/opinion/meat-pork-animal-farm.html.

elements required for each application of § 727.8A. *Id.* If a statute covers First Amendment protected activities, the First Amendment applies.

There is "no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone." *Bartnicki v. Vopper*, 200 F.3d 109, 121 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001). If speech is an element of a prohibition, it requires First Amendment review. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012).

Moreover, the Supreme Court explained that even if (unlike here) a law "*generally* functions" only as a "regulation of conduct," if there are circumstances in which the regulated activity would encompass protected speech, the law must be subject to First Amendment scrutiny. *Holder*, 561 U.S. at 27. In *Holder*, the law criminalized support for terrorist organizations, which the government portrayed as a "conduct" restriction that "only incidentally burdens [] expression." *Id.* at 27. The Court held the government's argument irrelevant to whether the First Amendment applied. Courts must determine if the law restricts speech and, if so, apply the appropriate First Amendment scrutiny. *Id.* at 26–28; *see also Telescope Media Grp.*, 936 F.3d at 756 (similar).

iv. There is no exception to the First Amendment for speech made in connection with a trespass.

Defendants' related argument, that because § 727.8A regulates "a person who has committed a trespass" and their "concurrent recording" it is free from First

Amendment review, does nothing to change the result. Defs.' Br. 36. As Defendants' own authority explains, focusing on the fact that § 727.8A regulates trespass overlooks a "distinction [] of great constitutional import": The "First Amendment does not guarantee physical access" and thus does not restrict criminalizing unauthorized entry; but that fact does not address laws that regulate non-expressive conduct like trespass and also provide for "'differential treatment of individuals who create speech,'" which require First Amendment review *Kelly*, 9 F.4th at 1238 (Defendants' authority) (quoting *W. Watersheds Project I*, 869 F.3d at 1197, another of Defendants' authority). Put another way, "'When a criminal prohibition includes multiple elements, some of which are unquestionably conduct (such as trespassing), the statute may still fall under the First Amendment if other elements target speech.'" *PETA*, 60 F.4th at 826 (quoting *Kelly*, 9 F.4th at 1228)). "'To determine if [a law is] subject to scrutiny under the First Amendment … the question is not whether trespassing is protected conduct,'" but whether the law's other restrictions prohibit activities that "'qualif[y] as protected speech.'" *Kelly*, 9 F.4th at 1228 (quoting *W. Watersheds Project I*, 869 F.3d at 1194–96).

"[W]e must go through the exercise of determining whether the Act clears the First Amendment bar; we cannot presume it constitutional and then deny [] relief because the First Amendment confers no special privileges" to engage in the unprotected conduct like trespass. *PETA*, 60 F.4th at 824 (concerning law

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prohibiting speech and unauthorized access). This is particularly the case as the First Amendment has "never exempted speech because of its location." *Id.* at 822.

Indeed, in *Reynolds*, this Court considered a prohibition on making a "false statement" when that statement is made "with an intent to commit an act not authorized by the owner" of a facility, "knowing that the act is not authorized." 8 F.4th at 787–88. This Court held the prohibition on false statements implicated First Amendment protected speech and the additional elements were insufficient to remove the statute from First Amendment review. *Id.* at 787.

Numerous other courts have likewise explained the mere fact a law may protect property, including by prohibiting entry to or unauthorized speech on private property, does not limit the First Amendment's application.

- In *Watchtower Bible & Tract Society*, a municipality required a permit to "go[] in and upon private residential property" to promote "any cause," which the Supreme Court recognized would provide "important" protections for "the prevention of fraud, the prevention of crime, and the protection of residents' privacy," but the Court held the rule unconstitutional because it unduly burdened speech on that property. 536 U.S. at 154, 165–66 (cleaned up).

- *Wasden* stated a law prohibiting a person to enter "a private agricultural facility" and without consent "mak[e] audio or video recordings," "protect[ed] both property and privacy," but struck down the law as inconsistent with the "First Amendment right to film." 878 F.3d at 1203–05.

- *Herbert*, in holding a similar provision unconstitutional, explained, "[i]f a person's First Amendment rights were extinguished the moment she stepped foot on private property, the State could, for example, criminalize any criticism of the Governor … . This runs directly afoul of the First Amendment[.]" 263 F. Supp. 3d at 1209.

- *Kelly* held a prohibition on recording at a facility "without the effective consent of the owner and with the intent to damage the enterprise" unconstitutional. 9 F.4th at 1235–36.

- *Western Watersheds I*, contrary to Defendants' presentation, held "[t]he fact that one aspect of the challenged statutes concerns private property does not defeat the need for First Amendment scrutiny" and then applied the First Amendment to laws that prohibited trespass to get to "adjacent property" on which the person wished to engage in speech. 869 F.3d at 1194–95. On remand the district court held it immaterial whether that "adjacent property" was open public land or also trespassed upon private property because the "speech interest" did not vary by location. *W. Watersheds II*, 353 F. Supp. 3d at 1190 n.7.

Defendants tack on that this Court must craft some way to protect private conversations. Defs.' Br. 37. But the Seventh Circuit has explained that is done through applying the appropriate First Amendment scrutiny. An "eavesdropping statute" must pass First Amendment review because holding it "does not implicate the First Amendment *at all*" would undermine newsgathering. *ACLU of Ill.*, 679 F.3d at 597. Moreover, § 727.8A penalizes other recordings. ICCI is captured by the law even though it records in areas open to the public, instructs its recorders to focus on *its* members who are there to be recorded, and even directs the recorders to *not* film others. J.A. 60 (R. Doc. 23-4, at 6).

To the extent Defendants' caselaw does not directly undermine their claims as detailed above, it is inapposite. Defendants' additional cites concern instances where the law regulated conduct "without regard to whether or not" the person was

"engaging in speech." *Kelly*, 9 F.4th at 1237–38. The authority does not address whether the government can regulate speech and conduct. *Id.* (discussing *Lloyd Corp., v. Tanner*, 407 U.S. 551, 567 (1972)); *see also Herbert*, 263 F. Supp. 3d at 1208 (discussing *Lloyd*, *Hudgens v. NLRB*, 424 U.S. 507 (1976), *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

The cases themselves explain they stand for the proposition that potential speakers are not exempt from laws that do *not* regulate speech because the violator might later engage in First Amendment protected activities. *Bartnicki*, 532 U.S. at 532 n.19 (explaining reporters are not exempt from laws against theft, as part of holding another law's application to reporters unconstitutional (citing *Branzburg*, 408 U.S. at 691); *Hudgens*, 424 U.S. 507 (generic trespass law can be applied to would-be picketers); *Lloyd*, 407 U.S. 551 (same for would-be hand billers); *see also Branzburg*, 408 U.S. at 682 (holding reporters required to respond to grand jury subpoenas because the First Amendment allows the "average citizen" to be subpoenaed). This authority shows the First Amendment is not a defense to laws that do not implicate the First Amendment. But it does not "permit[] *the government* to proscribe speech," even "in nonpublic areas." *PETA*, 60 F.4th at 823 (discussing *Lloyd*).

In sum, Iowa is no freer to regulate recording and trespass than it could pass a special burglary statute for perpetrators who espouse communist sentiments while

entering a home. Whether that speech restriction is needed to achieve a legitimate end is part of the First Amendment analysis. But both laws are subject to First Amendment review.[8]

C. Section 727.8A fails First Amendment scrutiny.

Because the First Amendment applies, the law must satisfy scrutiny. Defendants argue § 727.8A is justified for "[t]he protection of property from interference." Defs.' Br. 43. Their amicus adds the law is needed to protect against the introduction of "animal diseases" on farms. Pork Br. 3, 6. These rationales fail to satisfy intermediate scrutiny—that the law is "narrowly tailored to serve a significant governmental interest," *McCullen*, 573 U.S. at 477—the lowest level of scrutiny any party claims applies, *see* Defs.' Br. 42.

While Defendants try to shift the burden to Plaintiffs, *id.* at 33, to meet this test Defendants were required to produce evidence that § 727.8A's restriction on speech was necessary. Neither they nor their amicus produced any. Moreover, by its plain text, the law is both over- and underinclusive. This too demonstrates the law is

[8] Defendants repeatedly characterize § 727.8A as a sentencing enhancement to Iowa's generic trespass law without trying to explain what bearing they believe this label has on the First Amendment's applicability or citing any authority that speaks to the issue. Defs.' Br. 15, 22, 23. Factually, Defendants' presentation is misleading. Section 727.8A is a distinct crime that would be charged separately from generic trespass. Regardless, Defendants' label does nothing to change the need for First Amendment review. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 650 (4th Cir. 1995) (state can "target[] the proscribable elements" not "expressive elements of conduct" (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 477 (1993)).

not sufficiently tailored. In fact, the law's restriction on speech is so disconnected from its purported objectives, this Court can conclude § 727.8A's real function is to attack speech and thus it cannot be said to serve a legitimate, let alone a significant interest. Thus, it fails both prongs of intermediate scrutiny.[9]

i. Defendants were required and failed to produce evidence to sustain § 727.8A.

"To meet the requirement of narrow tailoring" under intermediate scrutiny, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 573 U.S. at 495. That is, the state must show it "seriously undertook to address the problem with less intrusive" restrictions on speech, including that "it considered different methods" than the one it employed, and those were proven to be ineffective. *Id.* at 494. As the Fourth Circuit has explained, it is "nonnegotiable" that there be "actual evidence in the legislative record that lesser restrictions will not do." *PETA*, 60 F.4th at 831; *see also*, *e.g.*, *Bruni*, 824 F.3d at 367, 369 (similar).

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[9] Plaintiffs allege in their Complaint that the legislative record will establish § 727.8A is content-based or viewpoint discriminatory and subject to strict scrutiny. J.A. 8–9 (R. Doc. 1, at 6–7). Because Defendants admitted the legislative record lacked evidence justifying the law, Plaintiffs agreed to make their arguments under intermediate scrutiny, without waiving their right to seek discovery into the statute's history and purpose should the law satisfy intermediate scrutiny. R. Doc. 23-1, at 3 n.2.

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Accordingly, in an early decision applying *McCullen*, this Court determined an "ordinance[] prohibit[ing] solicitation or distribution in the city's roadways" satisfied intermediate scrutiny because the "record here includes testimony" demonstrating the need for the restriction on speech. *Traditionalist Am. Knights of the Ku Klux Klan*, 775 F.3d at 971, 975. In particular, the Court highlighted that to substantiate the need for the law, the municipality hired an expert to study "safety risks created by solicitation and distribution in active roadways," who "sufficiently demonstrate[d] the safety concerns arising from the distribution of materials on the roadways," and that led to the ordinance's restriction on speech. *Id.* at 975, 978.

Here, in contrast, Defendants point to nothing in the legislative record to justify § 727.8A. In fact, despite moving to delay summary judgment to allow for discovery, Defendants never sought to produce evidence justifying the law. *See* Fed. R. Civ. P. 56(d) (requiring movant to specify the particular reasons summary judgment should be delayed). In their papers requesting to postpone summary judgment they never suggested they would or could produce a single piece of evidence showing the legislature considered alternatives to restricting speech or made any effort to document that § 727.8A's speech restriction was warranted. *See* J.A. 216–18 (R. Doc. 26-2).

Instead, here, as they did below, Defendants point to two news articles seemingly located through internet searches during the course of this litigation that

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discuss the activities of a single organization. Defendants claim the articles reveal "instances of individuals trespassing … and conducting recording." Defs.' Br. 44–45 & n.5. They argue that this, combined with ICCI's statements about its desire to engage in civil disobedience, demonstrates Iowa's existing trespass law is an insufficient deterrent and justifies § 727.8A. *Id.* at 46.

However, "[t]he government's justification 'must be genuine, not hypothesized or invented post hoc in response to litigation.'" *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)); *see also Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) (discussing the Religious Land Use and Institutionalized Persons Act, which applies First Amendment scrutiny, stating "post-hoc rationalizations aren't the stuff of summary judgment victories").

Regardless, Defendants' argument is self-defeating. If Iowa's trespass law is not a meaningful deterrent, the obvious way to address that concern is to increase the penalties for trespass, not to penalize speech. Expanding the trespass law would actually better achieve the stated objective, as it would increase the deterrent on all trespassers, not just recorders. Defendants do not demonstrate that people who trespass and record are less likely to be deterred by a generic trespass law, or more likely to trespass than others. In fact, the evidence in the record establishes the opposite. ICCI's declarations explain its members are deterred by § 727.8A's level

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of punishment, not because Iowa passed a statute targeting recording. J.A. 61, 72, 74, 76 (R. Doc. 23-3, at 7, 18, 20, 22).

Defendants' amicus asserts that trespassers with cameras are more likely to present a biosecurity risk to farms than other trespassers. Pork Br. 11–12. Even if an amicus could justify a law for the state, this argument fares no better. It lacks any supporting evidence. Moreover, the amicus elsewhere admits biosecurity is placed at risk by diseases carried on "clothes [or] equipment along with food products." *Id.* at 9–10. Thus, if farm biosecurity were the concern motivating § 727.8A, to address that issue the statute would need to address any trespasser, not just those with cameras. What is more, § 727.8A is not limited to trespasses where there are biosecurity concerns. As a result, it encompasses ICCI's civil disobedience in open office lobbies. Thus, the claim that § 727.8A is needed for biosecurity also establishes the law is not tailored. *See Herbert*, 263 F. Supp. 3d at 1212–13 (rejecting biosecurity as a justification for Utah's Ag-Gag law).

ii. Section 727.8A is over- and underinclusive.

The illogical nature of § 727.8A also provides a basis to hold the law unconstitutional independent of the government's failure to produce evidence. If "a substantial portion of the burden on speech does not serve to advance the State's" goals, a law is overinclusive and not properly tailored. *Simon & Schuster*, 502 U.S. at 122, n.* (cleaned up); *see also Comite de Jornaleros de Redondo Beach v. City of*

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Redondo Beach, 657 F.3d 936, 948–49 (9th Cir. 2011) (en banc) (ban on in-street solicitation was overinclusive and failed intermediate scrutiny when goal was only to stop solicitation that blocked traffic). Likewise, if the law does not capture a significant amount of the non-speech harms it seeks to address then it is underinclusive and not properly tailored. *Showtime Ent., LLC v. Town of Mendon*, 769 F.3d 61, 75–76 (1st Cir. 2014) (law targeting adult entertainment businesses underinclusive and failed intermediate scrutiny because it was meant to address aesthetic and traffic concerns).

Taking Defendants at their word that § 727.8A is designed to protect property from unwanted intrusion, the law's plain text shows it is over- and underinclusive. There is no need to restrict recordings to protect unauthorized entry. Again, Iowa's trespass law could be amended to deter the unwanted conduct. At the same time, by focusing on entry and recording, the law leaves property incompletely protected except if the intrusion is by someone who is recording.

Defendants point out that laws like Iowa's "peeping tom" statute fails to cover Plaintiffs' unwanted entries, but this only confirms § 727.8A's problems. Defs.' Br. 47. "Peeping tom" statutes are aimed at preventing an activity where recording is an integral component of the harm. Thus, the laws are tailored to achieve their aims. The threat of unauthorized intrusion onto property—what Defendants claim is being

targeted here—is not limited to people who engage in recording nor does the state need to regulate recording to prevent intrusion.

Defendants passingly mention the purported need to protect trade secrets. Defs.' Br. 43. But even if the Court were to treat that as the rationale for § 727.8A, the law is not tailored. Trade secrets can be stolen without them being recorded (they could be transcribed by hand or printed out) and not all recording is of trade secrets.

In purporting to prevent entry onto or theft of property, but doing so only when it involves recording, Iowa has not protected property, it has merely unnecessarily restricted speech. Section 727.8A cannot stand.

iii. Section 727.8A lacks a legitimate purpose.

Plaintiffs do not dispute that the alleged aim of protecting property can be a significant state interest. Thus, in some instances such an objective could carry Defendants' burden on this portion of the intermediate scrutiny analysis. However, given the above, the Court should not accept § 727.8A was truly passed for that end and thus it cannot be said to serve a proper purpose.

When another law "would have precisely the same beneficial effect" and the government still enacted a restriction on speech, courts can conclude the statute's real purpose is to show "special hostility towards" the restricted speech, which is unacceptable. *R.A.V.*, 505 U.S. at 396. This is particularly the case if the government

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is unable to produce evidence the speech restriction was necessary. *Buehrle v. City of Key West*, 813 F.3d 973, 979 (11th Cir. 2015).

In this case, what record exists demonstrates enhancing the penalties for generic trespass would have better served Iowa's goals. Thus, it establishes § 727.8A's real purpose is to restrict recording (speech). That is an improper objective and thus the law fails intermediate scrutiny.

D. Section 727.8A is facially unconstitutional.

That Defendants have failed to demonstrate a single instance in which § 727.8A passes First Amendment scrutiny is enough to hold the law facially invalid. Moreover, it is overbroad, a separate and independent basis to strike it down facially.

i. Laws that fail First Amendment scrutiny are facially invalid.

Defendants, drawing from the so-called "no-set-of-circumstances" test, insist if they can describe an instance in which it might be appropriate to regulate trespass and recording, § 727.8A must stay on the books. Defs.' Br. 39. False. The question is whether Defendants have shown § 727.8A, as enacted, can ever pass scrutiny. If not, the law is facially invalid.

The test for facial validity is not whether there are any circumstances "in which application of the statute" could be valid, but whether there are instances the challenged law satisfies "the relevant constitutional test." *Bruni*, 824 F.3d at 363. If the government has not carried its burden in any instance, the law is facially invalid.

Id.; *see also Citizens United*, 558 U.S. at 331 (distinction between facial and as-applied cases does not result in different burdens on plaintiffs). Indeed, the Supreme Court has "often considered facial challenges simply by applying the relevant constitutional test to the challenged statute." *Bruni*, 824 F.3d at 363; *see also Doe*, 667 F.3d at 1124 (collecting Supreme Court authority merely relying on scrutiny). "[W]here a statute fails the relevant constitutional test … it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid," which is what is meant by the no-set-of-circumstances language. *Doe*, 667 F.3d at 1127.

Accordingly, in considering another iteration of Iowa's Ag-Gag laws, this Court held that because a provision "proscribe[d] speech that is protected by the First Amendment and d[id] not satisfy strict scrutiny," it was invalid. *Reynolds*, 8 F.4th at 787. In reaching this conclusion, the Court "assum[ed]" there were applications of the provision that could "pass constitutional muster." *Id.* However, because the state had failed to demonstrate any circumstance in which the law survived scrutiny, this Court affirmed the grant of facial relief. *Id.*

Thus, § 727.8A cannot stand. Defendants fail to establish a single instance in which § 727.8A survives First Amendment review, particularly as they present nothing to establish the state considered alternatives to suppressing speech. As a result, the law is facially invalid. This remedy is what will prevent Defendants from

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maintaining the unconstitutional law on their books and chilling speech. Thus, it is also the sensible outcome. *Citizens United*, 588 U.S. at 333; *see also Sec'y of State of Md.*, 467 U.S. at 956.

ii. Section 727.8A also fails facially because it is overbroad.

"In the First Amendment context" there is also "a second type of facial challenge;" laws "may be invalidated as overbroad." *Stevens*, 559 U.S. at 473. Defendants never discuss the contours of this doctrine, but it provides an independent basis to affirm the decision below in full.

The Supreme Court recently explained that where, as here, there are clear "alternative mechanisms" to achieving the law's "goal[]," the statute both "lack[s] [] tailoring" and is overbroad. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387–2389 (2021). In those circumstances, there will always be "a substantial number of its applications" that are unconstitutional as compared to the law's legitimate applications. *Id.* at 2389. Accordingly, for the reasons stated above, § 727.8A should fall as overbroad.

Separately, the Court has also stated that where "the Government makes no effort to defend" numerous applications of the law to protected speech, it is overbroad. *Stevens*, 559 U.S. at 473. That too is true of § 727.8A. It is a trespass under Iowa law to be on rail or utility property that is otherwise open to the public if one is standing on the property rather than crossing over it. Iowa Code

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§ 716.7(2)(a)(5)–(6). Thus, § 727.8A creates new, special penalties for news broadcasts that report on accidents and environmental concerns from these sites. Likewise, it is a trespass when a person refuses an oral request to leave property. Iowa Code § 716.7(2)(a)(2)(a). Therefore, the videos members of the public share showing business personnel discriminating against or abusing customers would expose those good Samaritans to § 727.8A's penalties if the store personnel merely say the person needs to stop recording and exit. This is to say nothing of § 727.8A criminalizing recording sit-ins or other protests that are now a regular part of the political process.

Defendants fully concede Plaintiffs' point that § 727.8A could be used to suppress videos of train derailments. Defs.' Br. 47–48. They similarly appear to admit the customer who continues to record after being asked to stop would be subject to § 727.8A. *Id.* at 47 n.7. Defendants further state that if that person films in an open area but there is just a "no photography" sign posted somewhere on the premises, the recorder could be liable. *Id.* at 49. Defendants even acknowledge if a person enters any area they do not already have a "right to enter" and records—for example, a patron who goes into a stock room after they hear noise and documents illegal activities—they could be charged. *Id.* at 48 n.8.

Defendants' only retort is to return to their claim, without authority, that the government can create special penalties for speech if some of the regulated conduct

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"is already prohibited by law." *Id.* at 48. Defendants' incorrect legal premise is addressed above. § VII(B)(iii)-(iv), *supra*. But their use of the claim here underscores both their error and the need for facial relief. Under Defendants' reasoning, a statute that created special penalties for speaking while jaywalking should survive because jaywalking is a crime. However, even if some talking while crossing the street increases the risk of accidents, such a law would be struck down as overbroad. The government cannot prohibit debate and expression, even if it happens to be occurring while crossing against a red light.

Here, Defendants have created a new crime covering standard aspects of the nightly news and political discourse. They further concede the law can reach increasingly common forms of whistleblowing, maybe even if the recorder reasonably does not know their images are unauthorized. They have purportedly done this all for the narrow purpose of deterring unauthorized entry. Section 727.8A is overbroad.

E. Alternatively, § 727.8A cannot be applied to Plaintiffs' speech.

Defendants are sure to point out that after they filed their opening brief, the Fourth Circuit held the North Carolina Ag-Gag law unconstitutional, but only to the extent it covered the plaintiffs' desired conduct. Such a result, however, would not be consistent with this Court's precedent. And, even if the Court were to follow

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PETA on remedy, it still should hold § 727.8A unconstitutional as applied to Plaintiffs' desired activities.[10]

PETA explained its narrower relief by emphasizing the Fourth Circuit had not yet held "all recording is protected" speech. 60 F.4th at 836. Moreover, the panel concluded it did not need to determine whether the law at issue had "non-speech" applications to relieve the chill on the *PETA* plaintiffs' speech. *Id.* at 838. Therefore, after holding the law was "unconstitutional when applied to bar newsgathering activities" the plaintiffs that engage in undercover investigations "wish[] to conduct," the Fourth Circuit "sever[ed] th[ose] application[s] from the remainder of the Act" and declined to grant facial relief. *Id.*

However, this Court, unlike the Fourth Circuit, has already determined recordings like those regulated by § 727.8A are speech. *Telescope Media Grp.*, 936 F.3d at 751–52. Because it has already held recording is either speech or a protected predicate to speech, under this Court's precedent there is no application of § 727.8A

[10] To argue for as-applied relief, Defendants cite the district court opinion in *PETA* that was reversed in part and affirmed in part by the Fourth Circuit. Defs.' Br. 41. Defendants rely on a proposition rejected by the Fourth Circuit, that if a statute has "legitimate applications" it is facially valid. *Id*. The Fourth Circuit confirmed Plaintiffs' view that "a long line of cases invalidates statutes by simply applying the relevant constitutional test." *PETA*, 60 F.4th at 834. It declined to follow this precedent not for the reasons stated in Defendants' brief, but for prudential reasons discussed below, which are inapplicable here.

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that does not implicate First Amendment-protected activities. *Id.* Therefore, unlike in *PETA*, there is no issue to be left open through a narrower ruling.

Further still, this Court has held that where a state law fails First Amendment scrutiny it should not stand. This is the case even if the statute encompasses potentially constitutional applications, if it "is not limited" to those applications, and the state has failed to demonstrate it can justify the law's breadth under the requisite test. *Reynolds*, 8 F.4th at 787.

Yet were the Court to consider a narrower remedy, *PETA* confirms the Court should not delay entering such relief based on Defendants' assertion that further facts are necessary. This court "may affirm the judgment on any grounds supported by the record." *Land v. Washington Cnty.*, 243 F.3d 1093, 1095 (8th Cir. 2001). *PETA*, based on an equivalent record to the one here, explained that a remedy must at least be crafted to alleviate the statute's demonstrated "chill[] [on] First Amendment freedoms" such as "newsgathering activities." 60 F.4th at 841. Regardless of whether all recordings are protected by the First Amendment, Plaintiffs' recordings of police encounters and to use in advocacy, are plainly protected. *See* § VII(B)(i)–(ii), *supra*. None of Defendants' stated concerns about exactly how Plaintiffs will trespass or what instruments they will use to record alter this conclusion. The purposes of Plaintiffs' recordings are not in dispute. Thus, were the Court to deny

facial relief, it should still prevent § 727.8A's application to Plaintiffs. *See PETA*, 60 F.4th at 829–30.

VIII. Conclusion.

In sum, Plaintiffs have standing to challenge § 727.8A, and the law requires and fails First Amendment scrutiny. Accordingly, the district court should be affirmed, and § 727.8A should be declared unconstitutional and enjoined. Under controlling authority, it is facially invalid. But even if the Court were to determine a narrower remedy is warranted, the record establishes § 727.8A should be held unconstitutional and Defendants should be enjoined from enforcing it against Plaintiffs and their desired activities.

April 12, 2023

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I HEREBY CERTIFY that on the April 12, 2023, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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