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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiffs - Appellees,

v.

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

Defendants - Appellants.

No. 20-3082

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ATLANTIC MEDIA, INC.; THE COLORADO FREEDOM OF INFORMATION COALITION; FIRST LOOK MEDIA WORKS, INC.; FREEDOM OF THE PRESS FOUNDATION; THE INTERNATIONAL DOCUMENTARY ASSOCIATION; THE INVESTIGATIVE REPORTING WORKSHOP; THE KANSAS INSTITUTE FOR GOVERNMENT TRANSPARENCY; THE KANSAS PRESS ASSOCIATION; THE KANSAS SUNSHINE COALITION FOR OPEN GOVERNMENT; THE MEDIA INSTITUTE; MEREDITH CORPORATION; MPA - THE

ASSOCIATION OF MAGAZINE MEDIA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE NEWS LEADERS ASSOCIATION; POLITICO LLC; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; THE SOCIETY OF ENVIRONMENTAL JOURNALISTS; THE SOCIETY OF PROFESSIONAL JOURNALISTS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF UTAH; ENRIQUE ARMIJO; ASHUTOSH BHAGWAT; ERWIN CHEMERINSKY; HEIDI KITROSSER; HELEN NORTON; JONATHAN PETERS; JOSEPH THAI; ALEXANDER TSESIS; REBECCA TUSHNET; UNITED FARM WORKERS OF AMERICA,

Amici Curiae.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:18-CV-02657-KHV)

Brant M. Laue, Deputy Solicitor General (Derek Schmidt, Attorney General of Kansas; Jeffrey A. Chanay, Chief Deputy Attorney General; Toby Crouse, Solicitor General of Kansas; Dwight R. Carswell, Assistant Solicitor General, with him on the briefs), Office of Attorney General, Topeka, Kansas, for Defendants – Appellants.

Alan K. Chen, Civil Rights & Civil Liberties Strategic Litigation Project, University of Denver Sturm College of Law, Denver, Colorado (Matthew Strugar, Law Office of Matthew Strugar, Los Angeles, California; Michael D. Moss, Foley & Mansfield, P.L.L.P., Overland Park, Kansas; Justin Marceau, Of Counsel, Animal Legal Defense Fund, Civil Rights & Civil Liberties Strategic Litigation Project, University of Denver Sturm College of Law, Denver, Colorado; Kelsey Eberly, Alene Anello, Animal Legal Defense Fund, Cotati, California; David S. Muraskin, Public Justice, P.C., Washington, D.C.; George A. Kimbrell, Portland, Oregon, with him on the briefs), for Plaintiffs – Appellees.

George Wiszynski, Association General Counsel; Joey Hipolito, Assistant General Counsel; Joshua Shreve, Law Fellow, UFCW International Union, Washington, D.C., and Todd J. McNamara, McNamara & Shechter, LLP, Denver, Colorado, filed an amicus brief in support of appellees on behalf of the United Food and Commercial Workers International Union.

Lisa Hoppenjans, First Amendment Clinic, Washington University in St. Louis School of Law, St. Louis, Missouri, filed an amicus brief in support of appellees on behalf of First Amendment Scholars.

Vanessa Shakib, Advancing Law for Animals, Redondo Beach, California, and Mario Martinez, Martinez Aguilasocho & Lynch, APLC, Bakersfield, California, filed an amicus brief in support of appellees on behalf of United Farm Workers of America.

Lauren Bonds, Sharon Brett, ACLU Foundation of Kansas, Overland Park, Kansas, and John M. Mejia, Leah Farrell, Jason M. Groth, ACLU Foundation of Utah, Salt Lake City, Utah, filed an amicus brief in support of appellees on behalf of the American Civil Liberties Foundation of Kansas and the American Civil Liberties Union Foundation of Utah.

Steven D. Zansberg, Ballard Spahr, LLP, Denver, Colorado, filed an amicus brief in support of appellees on behalf of The Reporters Committee for Freedom of the Press and 18 Media Organizations.

Before **HARTZ**, **MURPHY**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

The Kansas Farm Animal and Field Crop and Research Facilities Protection Act (the "Act") criminalizes certain actions directed at an animal facility without effective consent of the owner of the facility and with intent to damage the enterprise of such facility. The Act provides that consent is not effective if induced through deception. Animal Legal Defense Fund ("ALDF") wishes to perform investigations by planting ALDF investigators as employees of animal facilities. Once employed,

these investigators would document abuse of animals that ALDF would then publicize. Because investigators would be willing to lie about their association with ALDF, ALDF fears its investigations would run afoul of the Act. ALDF therefore took preemptive action and sued the Governor of Kansas, Laura Kelly, and the Attorney General of Kansas, Derek Schmidt, in their official capacities, seeking declaratory and injunctive relief on the ground that the Act violates the First Amendment's Free Speech Clause.

The parties filed cross-motions for summary judgment. The district court granted both motions in part. It determined ALDF had standing to challenge only three subsections of the Act, Title 47, sections 1827(b), (c), and (d) of the Kansas Statutes Annotated. Subsection (b) forbids acquiring or exercising control over an animal facility without effective consent of the owner and with intent to damage the enterprise; subsection (c) forbids recording, attempting to record, or trespassing to record on an animal facility's property without effective consent of the owner and with intent to damage the enterprise; and subsection (d) forbids trespassing on an animal facility without effective consent of the owner and with intent to damage the enterprise. The district court held these provisions were unconstitutional.

Following the decision on the cross-motions for summary judgment, ALDF moved for a permanent injunction against enforcement of the relevant subsections of the Act. The district court granted its request. Kansas appeals from both the order on the cross-motions for summary judgment and the order granting a permanent

injunction, arguing the district court erred in holding the relevant subsections of the Act unconstitutional.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. Subsections (b), (c), and (d) of the Act concern speech because they include deception as a possible element and are viewpoint discriminatory because they apply only to persons who intend to damage the enterprise of an animal facility. Because the "intent to damage the enterprise conducted at the animal facility" requirement, *e.g.* § 47-1827(c), is a broad element that does not delineate protected from unprotected speech, Kansas must satisfy strict scrutiny. It has not attempted to do so.

I. BACKGROUND

A. The Act

The Act has four sections: a short title, § 47-1825; a definitions section, § 47-1826; an operative section, § 47-1827; and a civil remedy section, § 47-1828. In relevant part, the operative section provides:

> (a) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, damage or destroy an animal facility or any animal or property in or on an animal facility.
>
> (b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.
>
> (c) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility:

> (1) [e]nter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;
>
> (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;
>
> (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or
>
> (4) enter an animal facility to take pictures by photograph, video camera or by any other means.
>
> (d)(1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person:
>
> (A) [h]ad notice that the entry was forbidden; or
>
> (B) received notice to depart but failed to do so.

Kan. Stat. Ann. § 47-1827.[1]

"Consent is not effective," for purposes of the Act, if "[i]nduced by force, fraud, deception, duress or threat." *Id.* § 47-1826(e)(1). The inclusion of fraud, deception, and duress was the result of a 2012 amendment. 2012 Kan. Sess. Laws 962, ch. 125 § 41 (H.B. 2596). These prohibitions are backed with criminal penalties, Kan. Stat. Ann. § 47-1827(g), in addition to the civil remedy, *id.* § 47-1828.

B. Factual History[2]

ALDF is a national non-profit organization that seeks in part to expose wrongdoing at animal facilities. App., Vol. II at 149. ALDF conducts undercover

[1] We are unaware of any Kansas court decision interpreting these provisions.

[2] The facts are drawn from the district court's opinion and are undisputed on appeal.

operations through investigators who seek employment at animal facilities. Although these investigators do not falsify qualifications, they will not reveal their association with ALDF or their purpose in seeking a job; if asked directly, the investigators will falsely state they were not sent by an animal rights organization.

Once employed by an animal facility, investigators wear hidden cameras, often in violation of posted notices forbidding recording. An investigator may accept a supervisory position through which she might exercise authority over, or temporarily close off a portion of, a facility to record conditions without being caught. Although investigators do not take animals or property or intentionally cause any physical harm to the facility or animals, the investigators' actions could uncover conditions warranting public officials' seizing and removing animals. ALDF will seek that result if an investigator uncovers evidence ALDF believes warrants criminal investigation or removal of animals for their welfare.

In addition, ALDF will provide information and recorded images to the media and the public. ALDF specifically intends for pecuniary harm to come to animal facilities it exposes as engaging in animal cruelty, unsafe working conditions, food safety violations, or other misconduct. ALDF means to cause this harm by precipitating government regulation and enforcement or lawful actions by private individuals, such as boycotts and civil lawsuits.

ALDF does not currently conduct these undercover investigations in Kansas because it fears both it and its investigators would face criminal prosecution under the

Act if it were to do so. But, if the injunction remains in place, ALDF plans to perform at least one undercover investigation in Kansas.

Center for Food Safety ("CFS"), Hope Sanctuary, and Shy 38, Inc. ("Shy 38") are non-profit animal rights and food safety groups. If ALDF conducts undercover investigations in Kansas, it will share the results with CFS, Hope Sanctuary, and Shy 38. Those organizations will use the results to further their respective missions.

C. Procedural History

ALDF[3] sued in the District of Kansas seeking a declaration that the operative section of the Act violated the First Amendment and an injunction barring its enforcement. The parties filed cross-motions for summary judgment.

The district court granted in part and denied in part both motions. It held ALDF lacked standing to challenge subsection (a) of the operative provision because ALDF investigators would not cause physical damage to an animal, animal facility, or any property of an animal facility. The district court also held that no other plaintiff had standing to challenge subsection (a) and no plaintiff had standing to challenge the civil remedy provision. ALDF does not cross appeal these holdings. Thus, §§ 47-1827(a) and 47-1828 are not before us for review.

The district court held, however, that ALDF had standing to challenge subsections (b), (c), and (d) of the operative provision. And because CFS, Hope Sanctuary, and Shy 38 have a "right to listen," the district court held they, too, had a right to challenge those

[3] We attribute the plaintiffs' collective arguments to "ALDF."

subsections based upon ALDF's desire to engage in the proscribed conduct and ALDF's plan to report findings to them. App., Vol. II at 169–70. Kansas[4] does not appeal these holdings on standing.

On the merits, the district court determined subsections (b), (c), and (d) of the operative provision (1) regulate speech (not merely conduct), (2) which is protected, (3) in a content-based and viewpoint-discriminatory manner. The district court therefore applied strict scrutiny. Kansas did not try to meet its burden under this standard, and the district court held that even if Kansas had provided an argument, the relevant subsections were not narrowly tailored. Following the summary judgment order and entry of judgment, ALDF moved for an injunction, which Kansas opposed. The district court granted the injunction. Kansas then filed this appeal.

II. DISCUSSION[5]

On appeal, Kansas argues the district court erred in holding subsections (b), (c), and (d) of the Act were unconstitutional for three alternative reasons: (1) they

[4] We recognize "the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state itself." *Guttman v. Khalsa*, 669 F.3d 1101, 1126 (10th Cir. 2012). For ease, therefore, we refer to the defendant officials as "Kansas."

[5] "[W]henever standing is unclear, we must consider it *sua sponte* to ensure there is an Article III case or controversy before us." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) (en banc), *aff'd on other grounds sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Thus, although Kansas has not appealed the district court's determination that ALDF had standing to challenge subsections (b), (c), and (d), we have examined the district court record and opinion and assured ourselves that ALDF does indeed have standing. We therefore need not consider the other plaintiffs' standing—ALDF's standing means there is a case or controversy properly before us. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d

forbid conduct—entry—not speech; (2) they forbid only false speech made with the intent to inflict damage, which is not protected; and (3) they are content- and viewpoint-neutral. ALDF disagrees on all three points.[6]

We "review de novo a district court's grant of summary judgment." *Carolina Cas. Ins. Co. v. Burlington Ins. Co.*, 951 F.3d 1199, 1207 (10th Cir. 2020). Like the district court, we "view the facts and draw reasonable inferences in the nonmovant's favor." *Id.* If doing so reveals no genuine dispute of material fact and we determine the movant was entitled to judgment as a matter of law, we affirm. *Id.*

"We review entry of an injunction for abuse of discretion." *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1164 (10th Cir. 2013). A district court abuses its discretion where its decision rests on "an erroneous view of the law or on a clearly

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25, 29 n.1 (10th Cir. 2013) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." (alteration in original) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47, 52 n.2 (2006))).

[6] In addition to the named parties, five amici curiae have submitted briefs. "[O]urs is a party-directed adversarial system and we normally limit ourselves to the arguments the parties before us choose to present." *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016). "[T]o the extent that amici's contentions illuminate the contours of the parties' respective positions or explicate the real-world, industry and regulatory implications of the legal issues before us" we consider them. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1178 n.4 (10th Cir. 2012). But this court disfavors amicus briefs "presenting arguments forgone by the parties themselves or effectively and unilaterally expanding the word limits established by rule for a favored party." *Ackerman*, 831 F.3d at 1299. Because no special circumstances exist justifying reaching issues raised solely by amici, *see Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000), we do not consider lines of argument beyond those in the parties' briefing, including whether the Act violates associational rights, the right to petition the government, or the National Labor Relations Act.

erroneous assessment of the evidence." *Husky Ventures, Inc. v. B55 Invs., Ltd.*, 911 F.3d 1000, 1011 (10th Cir. 2018). As a practical matter, only the district court's view of the law is at issue in this case—Kansas does not argue the district court's factual findings are clearly erroneous. Nor does it argue a permanent injunction would be inappropriate if the district court's conclusion that the Act violates the First Amendment is correct.

A. Legal Framework

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I; *see also Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2017) (noting the First Amendment's Free Speech Clause is "applicable to the States under the Due Process Clause of the Fourteenth Amendment"). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (alteration in original) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). But, "the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). And there exist categories of unprotected speech, or speech entitled to only diminished protection. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011). The sum of this precedent, as relevant to this case, is that if a law targets protected speech in a content-based manner, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."

Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

1. Speech Versus Conduct

Speech for First Amendment purposes includes "the spoken or written word" as well as "conduct [that] possesses sufficient communicative elements." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Non-expressive conduct does not fall within the scope of the First Amendment. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). 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. *See W. Watersheds Project v. Michael*, 869 F.3d 1189, 1194 (10th Cir. 2017).

One type of First Amendment activity relevant to this case is the creation and dissemination of information. In *Western Watersheds Project*, this court considered statutes proscribing entering private land without permission to collect "resource data" or to access adjacent land to collect "resource data." *Id.* at 1193. The district court rejected the plaintiffs' arguments because there was no right to engage in speech on private property of others. *Id.* at 1193–94. The plaintiffs appealed the decision with respect to the portion of the laws proscribing trespass over private lands for resource data collection on other lands. *Id.* at 1193. "To determine if such provisions are subject to scrutiny under the First Amendment," we stated, "the

question is not whether trespassing is protected conduct, but whether the act of collecting resource data on public lands qualifies as protected speech." *Id.* at 1194. It does. *Id.* at 1195–96 ("We conclude that plaintiffs' collection of resource data constitutes the protected creation of speech.").

In reaching this conclusion, we recognized a significant volume of precedent from the Supreme Court and other circuit courts protecting the creation of information in order to protect its dissemination. *Id.* at 1196 (citing, *e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793 n.1 (2011); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)). The activities proscribed by the provisions at issue in *Western Watersheds Project* "fit comfortably in the speech-creation category recognized in these cases." *Id.* "An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter." *Id.* We held the restricted activities fell "within the ambit of the First Amendment." *Id.* at 1197. *Western Watersheds Project* thus unambiguously holds that recording—and even more specifically, recording of animals or the conditions in which they live—is speech-creation and, consequently, is not mere conduct. *Id.* ("The challenged statutes apply specifically to the creation of speech, and thus we conclude they are subject to the First Amendment.").

2. Content and Viewpoint Neutrality

Content and viewpoint neutrality are "distinct but related limitations that the First Amendment places on government regulation of speech." *Reed*, 576 U.S. at 168. "Content-based regulations 'target speech based on its communicative content.'" *Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371 (quoting *Reed*, 576 U.S. at 163). A law is content-based where it "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). And even a facially content-neutral law is considered content-based if it "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (second alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. at 781, 791 (1989)). "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Id.* at 168 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995)).

Some categories of speech may "be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)," but they are not "categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."

R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (emphasis in original). "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 388. But "[t]he government may not regulate use" of unprotected speech "based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386. "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384 (emphasis in original).

The petitioner in *R.A.V.* burned a cross in a Black family's yard. *Id.* at 379. The City of St. Paul charged him under an ordinance that forbade symbols, including "a burning cross," "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The Supreme Court concluded this ordinance was unconstitutional. *Id.* at 391. Although it was limited to "fighting words," the prohibition was not coterminous with that category: "Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered." *Id.* And the ordinance allowed fighting words to be used by "those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *Id.* (emphasis in original). "St. Paul has no such authority to license one

side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

Until now, we have not had opportunity to apply this portion of *R.A.V.* in this context.[7] Our sibling circuits' application of this precedent, however, is instructive.

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[7] In *United States v. Strandlof*, we cited *R.A.V.* for the proposition that "'[c]ontent discrimination,' even within a class of 'proscribable speech,' is presumptively unconstitutional because it may 'impose special prohibitions on those speakers who express views on disfavored subjects.'" 667 F.3d 1146, 1168 (10th Cir. 2012) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)). We said there the Stolen Valor Act did not impermissibly suppress ideas under this standard. *Id.* *Strandlof* was subsequently abrogated by *United States v. Alvarez*, 567 U.S. 709 (2012); in response, we vacated our prior opinion and judgment, 684 F.3d 962 (10th Cir. 2012). We discuss *Alvarez* and the Stolen Valor Act in section II.A.3, *infra*.

In *United States v. Magleby*, we applied the portion of *R.A.V.* which noted "content-based distinction within a class of proscribable speech is permissible when the basis of the distinction is the same as the basis for proscribing the class of speech as a whole." 420 F.3d 1136, 1144 (10th Cir. 2005) (citing *R.A.V.*, 505 U.S. at 388). And in *United States v. Heineman*, we examined *Virginia v. Black*, 538 U.S. 343 (2003), a fractured Supreme Court opinion. 767 F.3d 970, 975 (10th Cir. 2014). In doing so, we recounted the portion of *Black* which explained the holding of *R.A.V. Id.* at 977.

Most of our remaining cases that cite to *R.A.V.* do so only for more general principles of First Amendment law. *See 303 Creative LLC v. Elenis*, ___ F.4th ___, No. 19-1413, 2021 WL 3157635, at *26 (10th Cir. July 26, 2021) (Tymkovich, C.J., dissenting) (citing *R.A.V.* for the definition of content-based laws); *Pahls v. Thomas*, 718 F.3d 1210, 1229 (10th Cir. 2013) (citing *R.A.V.* for the proposition that viewpoint- and content- discriminatory prohibitions on speech are presumptively unconstitutional); *Weise v. Casper*, 593 F.3d 1163, 1169 (10th Cir. 2010) (same); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 (10th Cir. 2007) (same), *rev'd on other grounds* 555 U.S. 460 (2009); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42, 43 n.15 (10th Cir. 2013) (same, specifically in the context of prior restraint); *Klen v. City of Loveland*, 661 F.3d 498, 510 (10th Cir. 2011) (citing Justice White's concurrence in *R.A.V.* for its discussion of "fighting words"); *Cannon v. City & County of Denver*, 998 F.2d 867, 873 (10th Cir. 1993) (same); *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv.'s Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999) (citing *R.A.V.* for the proposition that words may violate a prohibition on conduct); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (same, citing a different Supreme Court case citing *R.A.V.*) *overruled on other grounds by Nat'l R.R.*

We briefly discuss several cases which illustrate the application of *R.A.V.* in contexts analogous to the present.

In *Holloman ex rel. Holloman v. Harland*, a student sued his former teacher for violating his Free Speech rights by punishing him for raising his fist instead of reciting the Pledge of Allegiance. 370 F.3d 1252, 1259 (11th Cir. 2004). The Eleventh Circuit recognized that teachers may constitutionally "proscribe student expression that materially and substantially disrupts the class." *Id.* at 1281. But they may not "punish such expression based on the fact that [they] disagree[] with it." *Id.* The Eleventh Circuit held summary judgment was not appropriate because the record there contained statements that "would allow a jury to conclude that [the teacher's] actions were motivated by her disagreement with and offense at the unpatriotic views" expressed by the student. *Id.*

In *Chaker v. Crogan*, the Ninth Circuit encountered a statute that, in the context of an investigation into a complaint of peace officer misconduct, "criminalize[d] knowingly false speech critical of peace officer conduct, but [left]

Passenger Corp. v. Morgan, 536 U.S. 101 (2002); *United States v. Wheeler*, 776 F.3d 736, 745 (10th Cir. 2015) (citing *R.A.V.* for the explanation as to why true threats are unprotected speech); *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1286 n.12 (10th Cir. 2020) (citing *R.A.V.* as an illustration of the point that "the First Amendment often extends its protection to activity we may not like."). The remaining citations are for even more general propositions. *See Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020) (citing *R.A.V.* for the proposition that cases should be read narrowly rather than broadly); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000) (citing *R.A.V.* for the proposition that certain claims are more properly considered under the First Amendment than the Fourteenth Amendment).

unregulated knowingly false speech supportive of peace officer conduct." 428 F.3d 1215, 1217 (9th Cir. 2005). It was "clear that the state may prohibit knowingly false speech made in connection with the peace officer complaint process." *Id.* at 1225. But the speech was unprotected due to its false nature and connection with the complaint process, not because it was critical of the officer. *Id.* at 1226. "Like the ordinance at issue in *R.A.V.*, [the law at issue in *Chaker*] regulate[d] an unprotected category of speech, but single[d] out certain speech within that category for special opprobrium based on the speaker's viewpoint." *Id.* at 1227. The Ninth Circuit held this was impermissible viewpoint discrimination. *Id.* at 1228.

And in *Valle Del Sol Inc. v. Whiting*, the Ninth Circuit dealt with an Arizona law that forbade day labor solicitation from a motor vehicle. 709 F.3d 808, 814 (9th Cir. 2013). Applying *R.A.V.*, the Ninth Circuit noted there was no constitutional issue with Arizona barring pedestrians and motorists from blocking traffic. *Id.* at 823. "But . . . it may not, consistent with the First Amendment, use a content-based law to target individuals for lighter or harsher punishment because of the message they convey while they violate an unrelated traffic law." *Id.*

3. Protected Versus Unprotected Speech

As stated, some types of speech are not protected from being banned due to their proscribable content. *R.A.V.*, 505 U.S. at 382–84. These categories include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Stevens*, 559 U.S. at 468 (internal citations omitted). The case at bar does not involve

one of those categorically unprotected areas, but rather mainly concerns the degree of protection afforded to false speech.

In *United States v. Alvarez*, the Supreme Court held the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), was incompatible with the First Amendment's guarantee of free speech. 567 U.S. 709 (2012). The case produced no majority opinion. Four justices, in a plurality opinion authored by Justice Kennedy, rejected the principle "that false statements, as a general rule, are beyond constitutional protection." *Id.* at 718 (plurality opinion). The plurality determined that false speech in addition to "some . . . legally cognizable harm associated with a false statement" may make speech unprotected, but "a measure, like the Stolen Valor Act, that targets falsity and nothing more" targeted protected speech. *Id.* at 719, 723 (plurality opinion).

Two justices concurred in the judgment; Justice Breyer authored the concurrence. The concurrence disagreed with the plurality's "strict categorical analysis." *Id.* at 730 (Breyer, J., concurring in the judgment). Instead, it would have determined how exactingly to scrutinize the law by considering the danger it posed to suppressing valuable ideas. *Id.* at 732 (Breyer, J., concurring in the judgment). The concurrence would have applied intermediate scrutiny in analyzing the Stolen Valor Act because "false factual statements are less likely than true factual statements to make a valuable contribution," but the "regulation can nonetheless threaten speech-related harms." *Id.* (Breyer, J., concurring in the judgment). The concurrence thus agreed that false factual statements could be entitled to some protection. *Id.* at 732–34 (Breyer, J., concurring in the judgment). And, like the plurality, the concurrence

did not question the constitutionality of forbidding false speech plus legally cognizable harm. *Id.* at 734 (Breyer, J., concurring in the judgment) (noting the prevalence and longstanding nature of statutes proscribing "certain kinds of false statements" by "requiring proof of specific harm to identifiable victims; . . . specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; [or] . . . limiting the prohibited lies to those that are particularly likely to produce harm"). Because a more finely tailored statute could have significantly reduced the threat of First Amendment harm while still achieving the Stolen Valor Act's important objective, the concurring justices agreed the Stolen Valor Act was unconstitutional. *Id.* at 739 (Breyer, J., concurring in the judgment).

"[W]here 'a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds.'" *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting *Marks v. United States,* 430 U.S. 188, 193 (1977)). But if "the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing 'the common denominator of the Court's reasoning,' then *Marks* becomes 'problematic.'" *Id.* (quoting *King v. Palmer*, 950 F.2d 771, 781–782 (D.C. Cir. 1991) (en banc)).

We need not engage in a *Marks* analysis here, however, because the plurality and concurring opinions in *Alvarez* are in accord on the points relevant to Kansas's

argument.[8] They agree that restrictions on false statements of fact can be subject to First Amendment scrutiny requiring the government to provide a justification. *Alvarez*, 567 U.S. at 729 (plurality opinion); *id.* at 732–34, 737 (Breyer, J., concurring in the judgment). Both opinions also agree restrictions on false factual statements that cause legally cognizable harm tend not to offend the Constitution. *Id.* at 719 (plurality opinion); *id.* at 734–36 (Breyer, J., concurring in the judgment). Those two propositions are the only ones from *Alvarez* necessary for our analysis.

B. Application

Subsections (b), (c), and (d) of the operative section involve speech rather than merely conduct because they regulate what may be permissibly said to gain access to or control over an animal facility. Subsection (c) also directly proscribes recording, which we have held is speech-creating activity within the ambit of the First Amendment. All three subsections specifically forbid speech that is made with the intent "to damage the enterprise conducted at the animal facility." §§ 1427(b), (c), (d). For the reasons we now explain, we hold this is viewpoint discriminatory. Because the intent to damage the enterprise element present in all three subsections does not necessarily constitute the sort of harm required for false speech to be unprotected under *Alvarez*, we conclude the viewpoint discrimination on this basis

[8] To the extent the concurring opinion in *Alvarez* allows false statements of fact to receive lesser scrutiny based upon reasons other than falsity alone, Kansas has not made an argument that its reasoning should apply in this case.

subjects the relevant subsections of the Act to strict scrutiny. Kansas has not attempted to meet its burden under that standard; we therefore affirm.

1. Subsection (b)

Subsection (b) of the operative section provides:

> (b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.

Kan. Stat. Ann. § 47-1827(b). By use of the term "effective consent," which following the 2012 amendment excludes consent obtained through deception, *id.* § 47-1826(e)(1), subsection (b) forbids certain conduct depending upon what a person says to obtain consent. And subsection (b) proscribes that conduct only when taken with intent to damage the facility and the enterprise carried on therein.

The Act operates in relevant part only when someone makes a false statement to obtain consent to gain control of property, and only when that control is with the intent to deprive the owner of the property or to damage the facility.[9] In reviewing a similar provision, the Ninth Circuit concluded it could not "be characterized as simply proscribing conduct." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184,

[9] Kansas argues the three provisions at issue "are all premised on and proscribe entering an animal facility." Appellant Br. at 7. In its view, this means the provisions are directed at conduct rather than speech; we analyze this contention in subsection III.B.4.a, *infra*. It is not evident, however, that subsection (b) includes a requirement of entry. A person could presumably exercise control over an animal facility by directing, via telephone or email, employees of the facility to take action. Kansas provides no argument that subsection (b) otherwise relates to conduct rather than speech.

1194 (9th Cir. 2018). We agree. The Act's broad proscriptions include prohibiting speech, such as a statement made to obtain the consent of the owner of an animal facility to exercise control over it. The Act thus regulates not only what ALDF investigators may or may not do, but what they "may or may not *say*." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (emphasis in original).

There can be no question that subsection (b) is viewpoint discriminatory in operation. The text of the statute alone shows it is meant to protect animal facilities. A person who lies to acquire or exercise control over an animal facility intending to expose wrongdoing violates subsection (b). But a person who tells the same lie to gain the same control intending to laud the facility or for neutral reasons does not.

Indeed, the legislative history of the 2012 amendment includes express hostility to the sort of investigations ALDF wishes to perform:

> In some states, animal rights activists with an anti-agriculture agenda have lied on job applications in order to gain access to farms or ranches and take undercover video, some of which is believed to be staged. This amendment is a tool that can be used against people using fraud to gain access to farms.

App., Vol. I at 198. This confirms what the text of the law alone demonstrates: the Act places pro-animal facility viewpoints above anti-animal facility viewpoints.

Recall that even unprotected speech may not "be made the vehicle[] for content discrimination unrelated to [its] distinctively proscribable content." *R.A.V.*, 505 U.S. at 383–84. That is, while it may be permissible to punish all entry onto private property by deception, the Act becomes impermissibly viewpoint

discriminatory by choosing to punish only entry by deception with the intent to damage the facility. In defending the Act, Kansas argues that not "all views of animal facilities must stand on an equal footing" because "positive views have no possibility of inflicting harm to the enterprise." Appellant Br. at 26. But this is constitutionally significant only if the intent to damage the enterprise delineates the border between protected and unprotected speech. Here, the Act focuses not on the alleged legally cognizable harm from trespass, but on the subsequent harm from the intent to harm the facility once on the property.[10] Accordingly, we need not—and therefore do not—determine whether the speech at issue in subsection (b) is protected or unprotected generally. Our inquiry narrows to one question: is the speech unprotected because it is false speech made with intent to damage the enterprise of an animal facility?

Under *Alvarez*, false speech that causes harm is not entitled to the full force of First Amendment protection. 567 U.S. at 719, 723 (plurality opinion); *id.* at 734–36 (Breyer, J., concurring in the judgment). But the intent to damage the enterprise requirement does not make the false speech here unprotected because not all intents to damage the enterprise of an animal facility are cognizable harms under *Alvarez*.

Alvarez envisions legally cognizable harm as that imminently caused by the speech—the plurality discusses defamation and fraud as paradigmatic legally

[10] The Supreme Court recently discussed the importance of a property owner's right to exclude in the context of the Takings Clause. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072–73 (2021). Because the Act is not focused on the right to exclude generally, but only on the right to exclude persons with certain viewpoints, we have no occasion to consider the impact of the Supreme Court's statements in *Cedar Point Nursery* on the *Alvarez* harm analysis.

cognizable harms, which it distinguishes from "a measure, like the Stolen Valor Act, that targets falsity and nothing more." *Id.* at 719 (plurality opinion). In the case of defamation and fraud, the harm is caused directly by the speech. *See id.* at 734 (Breyer, J., concurring in the judgment). The plurality further distinguishes false statements made to government officials in connection with official matters, perjury, which by its nature "threatens the integrity of judgments that are the basis of the legal system," and false representations that one speaks for the government, prohibitions of which "protect the integrity of Government processes, quite apart from merely restricting false speech." *Id.* at 719–21 (plurality opinion). The *Alvarez* concurrence similarly distinguishes these categories of prohibition as "limit[ed in] the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm." *Id.* at 734 (Breyer, J. concurring in the judgment).

The damage to the enterprise intended from ALDF's investigations does not flow directly from deceiving the animal facility owner into allowing entry. Damage occurs only if the investigators uncover evidence of wrongdoing and share that information, resulting in other actors choosing to take further actions. This is too attenuated from the false speech to be the sort of harm *Alvarez* is concerned with. It is not like defamation, where the false speech directly causes reputational harm; fraud, where the false speech causes someone to hand over a thing a value; or

perjury, lies to the government, or impersonating a government official, where the speech itself harms our institutions. Rather, there are numerous further causal links between the false speech and the animal facility suffering damage.[11]

Whatever legally cognizable harm is, it cannot be harm from protected, true, speech. The damage Kansas fears is that animal facilities may face "negative publicity, lost business[,] or boycotts." Appellant Br. at 22. But these harms would be accomplished by ALDF disseminating true information—to the extent that information is injurious, it does not cause legally cognizable harm. *Cf. Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1353–54 (7th Cir. 1995) (holding "public exposure of misconduct" did not constitute an "injurious act" for purposes of a statute forbidding recording a conversation for purposes of doing injurious acts.). Although the information from which the harm flows would not be obtainable without the false statement used to gain entry to the facility, the false statement itself does not directly cause the harm.[12] Simply put, the "harm" Kansas seeks to avoid is the type of harm that is not only legally non-cognizable but legally protected: that

[11] This distinguishes *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), on which Kansas heavily relies. That case was recognized by the plurality in *Alvarez* as a paradigmatic fraud case. *Alvarez*, 567 U.S. at 719; *see also Telemarketing Assocs.*, 538 U.S. at 624 ("Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.").

[12] Recall that Kansas does not punish all deceptive entry, but only such entry by a person with a certain viewpoint—the intent to harm the animal facility. *See* Kan. Stat. Ann. § 47-1827(b).

arising out of true speech on a matter of public concern. *Lane v. Franks*, 573 U.S. 228, 235 (2014) (describing such speech as "at the heart of the First Amendment").

Because we hold that the intent to damage the enterprise element does not demarcate the line between protected and unprotected speech, subsection (b) is subject to strict scrutiny regardless of whether the speech is unprotected for another reason. *See R.A.V.*, 505 U.S. at 383–84, 395–96. Under this standard, the government must show a challenged regulation "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 576 U.S. at 171. Kansas does not attempt to meet its burden under this standard, nor has it at any point in this litigation. We therefore affirm the district court's decision with respect to subsection (b).

2. Subsection (c)

Subsection (c) concerns video recording and photography. It provides:

> No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility:
>
> (1) [e]nter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;
>
> (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;
>
> (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or
>
> (4) enter an animal facility to take pictures by photograph, video camera or by any other means.

Kan. Stat. Ann. § 47-1827(c).

Regarding deception, subsection (c) regulates speech for the same reason as subsection (b). By incorporating the definition of effective consent from § 47-1826(e)(1), subsection (c) makes what is said or not said essential to whether a person has committed a crime.

Subsection (c) also implicates speech under *Western Watersheds Project*. This subsection forbids recording or attempting to record video and photographic images of animals. In *Western Watersheds Project*, we held "[a]n individual who photographs animals or takes notes about habitat conditions is creating speech." 869 F.3d at 1196. That holding applies equally to this case.[13]

Subsection (c) is viewpoint discriminatory for the same reason as subsection (b). A person violates the Act only if her recordings are intended to damage the enterprise, say by exposing animal cruelty or safety violations. But neither a person who gains access through fraud to make a laudatory video nor a person who makes a video solely to demonstrate he was able to lie his way onto the premises would come within the Act's reach.

Once again, this conclusion means we need not determine whether the speech is protected or unprotected generally. Instead, we need consider only whether it is unprotected due to the intent to damage the enterprise element. And our analysis that

[13] ALDF argues video and photo recording, in addition to being speech-creating activity, is expressive conduct within the ambit of the First Amendment in its own right; Kansas argues it is not. We do not reach this issue because *Western Watersheds Project* compels the conclusion that the recordings at issue here are speech-creating activity regardless.

the intent to damage the enterprise element covers harms that are not relevant for *Alvarez* purposes applies with more force in this context. Because subsection (c) is directed at recordings, clearly one of the "harms" it is directed at is the subsequent publication of those recordings. But dissemination of true information cannot be a legally cognizable harm for purposes of *Alvarez*. *Cf. Desnick*, 44 F.3d at 1353–54 (holding publicization of true information did not constitute harm for purposes of a state tort statute).

To the extent the speech at issue is the recording, it may be unprotected because it occurs on the property of another. *W. Watersheds Project*, 869 F.3d at 1194. ("[I]ndividuals generally do not have a First Amendment right to engage in speech on the private property of others."). But the intent to damage the enterprise element does not relate to it being unprotected for this reason, and subsection (c) does not neutrally bar all recording on private property belonging to animal facilities. Again, a recording surreptitiously made to highlight the positive aspects of an animal facility does not violate subsection (c). Therefore, subsection (c) is subject to strict scrutiny as a viewpoint-discriminatory regulation regardless of whether it regulates protected or unprotected speech. Even if Kansas may ban recordings on private property or trespass-through-deception, it may not limit the scope of the prohibition due to favor or disfavor of the message. *R.A.V.*, 505 U.S. at 391 (holding the government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

Again, Kansas makes no attempt to show the sort of compelling governmental interest or narrow tailoring which would allow for viewpoint discrimination. We affirm the district court's declaration and injunction with respect to subsection (c).

3. Subsection (d)

Subsection (d) is concerned with trespass to animal facilities. It provides in relevant part:

> (d)(1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person:
>
> (A) [h]ad notice that the entry was forbidden; or
>
> (B) received notice to depart but failed to do so.

Kan. Stat. Ann. § 47-1827(d).

Our foregoing analyses apply to subsection (d). Like subsections (b) and (c), the incorporation of deception in the phrase "effective consent" results in speech being implicated, not conduct alone. By its terms, subsection (d) is viewpoint discriminatory against those who intend to damage the enterprise at the animal facility. The Act does not simply penalize all entry by deception; it penalizes only entry by deception with the intent to harm the facility. The intent to damage the enterprise element does not constitute harm for *Alvarez* purposes as discussed above, so subsection (d) may not draw a line between proscribable and unproscribable speech based upon that element. Kansas makes no attempt to show that it meets strict scrutiny. Accordingly, we affirm the district court's holding regarding this subsection as well.

4. Kansas's Further Arguments

Kansas makes three arguments that warrant further discussion. First, it argues the First Amendment does not create a right to trespass, so none of the provisions at issue are speech. Second, it urges us to follow the partial dissent in *Wasden*, which considered *Alvarez* inapposite, resulting in none of the provisions constituting speech, or alternatively considered mere trespass a harm for *Alvarez* purposes. Finally, it argues *Western Watersheds Project* should be understood to mean the prohibition on recording in subsection (c) does not implicate speech. None of these contentions alter our reasoning; we explain why in turn.[14]

a. Trespass

Supreme Court precedent establishes that the First Amendment does not guarantee physical access to facilities. *See, e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality opinion) (holding a media organization had "no special right of access" to a county jail); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972) ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private

[14] The *Alvarez* plurality instructed that "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment." 567 U.S. at 723. But Kansas forfeited the argument that the speech at issue here is unprotected as false speech made to secure a material gain, i.e., employment, by not raising that argument in its opening brief. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). We express no view as to that argument.

property used nondiscriminatorily for private purposes only."). Kansas's statement that Supreme Court precedent rejects a "right to trespass" under the First Amendment is accurate, but, as we shall explain, inapposite to the case before us. Appellant Br. at 12.

In the cases establishing this principle, First Amendment activity was the motive for accessing private property, rather than the means, as here. *See Houchins*, 438 U.S. at 15 ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *Lloyd Corp.*, 407 U.S. at 567 ("The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling."). And the laws at issue in this line of cases, typically trespass laws or the government's right to exclude as a property owner, did not discriminate between persons who engaged in identical conduct based upon why they did so. *See id.* at 555–56. The parties in those cases were therefore attempting to raise their intention to speak or publicize information as a defense to a generally applicable law violated without regard to whether or not they were engaging in speech (or reporting).[15] Here, Kansas proscribes conduct—entry with consent—where consent was obtained through false speech.

[15] To be clear, the state's role in enacting a neutral trespass law is to enforce property owners' rights to exclude people from their property. The property owners themselves need not be viewpoint neutral in making decisions on who to exclude.

This distinction is of great constitutional import: private actions to recover for trespass utterly independent of speech do not raise the same concerns as criminal offenses that have as an element the use of false speech. *See Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017) (noting, persuasively, that a line of reasoning similar to that presented by Kansas "confuses two related but distinct concepts: a landowner's ability to exclude from her property someone who wishes to speak, and the government's ability to jail the person for that speech"). We have previously distinguished "a First Amendment right to be exempt from an otherwise generally applicable law" from a state's "differential treatment of individuals who create speech." *W. Watersheds Project*, 869 F.3d at 1197. As in *Western Watersheds Project*, the law at issue here is not one that treats like conduct alike. Only those who deceive with intent to harm are within its ambit.

b. Wasden *dissent*

Kansas cites Judge Bea's partial dissent in *Wasden* for the proposition that trespass is conduct rather than speech. Judge Bea analogizes trespass through deception to fraud, larceny by trick, and false pretenses. *Wasden*, 878 F.3d at 1207–08 (Bea, J., dissenting). He thought *Alvarez* inapplicable and noted the state's "political branches could enact a general criminal trespass law that includes in its definition of 'trespass' entry obtained by fraud or misrepresentation." *Id.* He therefore did not detect a problem with the prohibition applying only to certain facilities, namely agricultural production facilities. *Id.* at 1208. But if *Alvarez*

applied, Judge Bea would have held the trespass constituted a legally cognizable harm. *Id.* at 1208–09.

We respectfully disagree with Judge Bea's view that *Alvarez* is inapplicable. In *Alvarez*, the plurality recognized fraud, defamation, and the like still involve speech. 567 U.S. at 717 (plurality opinion) (listing categories of unprotected speech); *see also Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech."). We thus read *Alvarez* not to suggest that falsity plus harm makes a statement not speech for First Amendment purposes; rather we read it to hold that falsity plus harm makes the statement not *protected* speech. *See* 567 U.S. at 721–22 (plurality opinion) (noting "there are instances in which the falsity of speech bears upon whether it is protected" but "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected").[16]

As we discuss above, the Supreme Court has recognized that a viewpoint-discriminatory regulation of unprotected speech is entitled to the same exacting scrutiny as content-based regulation of protected speech. Unlike the statute at issue in *Wasden*, Idaho Code Ann. § 18-7042, the Act on its face targets specific views about animal facilities. Given that under *Alvarez* false statements are speech, Kansas had

[16] The *Alvarez* concurrence eschews the "strict categorical analysis" utilized by the plurality and the dissent. 567 U.S. at 730 (Breyer, J., concurring in the judgment). But it also concludes the Stolen Valor Act "works First Amendment harm," so we do not take it to suggest that false speech is not speech at all, or even that false speech combined with harm is not speech. *Id.* (Breyer, J., concurring in the judgment).

the burden to provide a compelling governmental interest and demonstrate that the statute was narrowly tailored, a burden that it has not attempted to carry.

This means that we need not—and thus, do not—express any opinion as to Judge Bea's reasoning that trespass alone is a legally cognizable harm under *Alvarez*. *See Wasden*, 878 F.3d at 1208–09 (Bea, J., dissenting). Even if trespass constituted a legally cognizable harm such that deception to trespass was not protected speech, the Act does not neutrally forbid trespass-through-deception. Rather, it treats differently trespassers who have negative intentions towards the enterprise carried on at an animal facility from those with positive or neutral intentions. Because that discrimination is distinct from and not coterminous with any legally cognizable harm arising from trespass, strict scrutiny remains the applicable standard.[17]

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[17] While this case was pending, the Eighth Circuit decided a case on the constitutionality of a similar statute. *Animal Legal Def. Fund v. Reynolds*, ___ F.4th ___, No. 19-1364, 2021 WL 3504493 (8th Cir. August 10, 2021). The Eighth Circuit held a provision forbidding gaining access to an agricultural production facility through false pretenses did not implicate protected speech because trespass is a legally cognizable harm. *Id.* at *3. As explained above, our holding is not inconsistent with this proposition. Indeed, two of the panelists in *Reynolds* took care to note that the statute there did not facially implicate viewpoint discrimination. *See id.* at *5 (Grasz, J., concurring) ("Going forward, a key question will be whether access-by-deceit statutes will be applied to punish speech that has instrumental value or which is tied to political or ideological messages."); *id.* at *10 n.3 (Gruender, J., concurring in part and dissenting in part) (explaining that the statute at issue there did not "draw[] a further content-based distinction in addition to the distinction between truth and falsity" while one that did so "would trigger strict scrutiny (if not render the statute unconstitutional *per se*) even assuming the government could target a broader category of false speech without triggering any First Amendment scrutiny at all." (citing *R.A.V.*, 505 U.S. at 388)). Unlike the Eighth Circuit, we consider a statute that is viewpoint discriminatory, implicating strict scrutiny without regard to whether the speech it prohibits is protected or unprotected. That is, even assuming trespass alone provides legally cognizable harm, as held by the Eighth Circuit, the viewpoint

c. Recordings as speech

Kansas also argues *Western Watersheds Project* supports its argument that subsection (c) of the Act does not implicate speech by forbidding recordings. Kansas argues this court "accepted the [district] court's conclusion" in that case that two subsections of the statutes at issue did not violate the First Amendment because they forbade speech-creating activity on private property. Appellant Br. at 19–20. Here, unlike in the appealed subsections in *Western Watersheds Project*, Kansas asserts, "there is no *public* land issue." *Id.* at 21 (emphasis in original).

The statutes at issue in *Western Watersheds Project* penalized individuals who, without permission, entered private land to collect resource data (subsection (a)), entered private land and collected resource data (subsection (b)), or crossed private land to access other land to collect resource data (subsection (c)). Wyo. Stat. Ann. §§ 6-3-414, 40-27-101 (2016).[18] The district court rejected the plaintiffs' challenge to all three subsections; the plaintiffs appealed only subsections (c). *Western Watersheds Project*, 869 F.3d at 1193.

Kansas's argument depends on the assumption that this court approved the district court's resolutions as to subsections (a) and (b) in *Western Watersheds Project*. But those provisions were not before us there. We did state "[a]lthough

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discriminatory nature of the statute here renders it subject to strict scrutiny—a standard Kansas did not attempt to meet.

[18] The statutes were identically worded, save for the fact that Wyo. Stat. Ann. § 6-3-414 provided for criminal liability while Wyo. Stat. Ann. § 40-27-101 provided for civil liability.

subsections (a) and (b) of the statutes govern actions on private property, the district court was mistaken in focusing on [private-property First Amendment] cases with respect to subsections (c)." *Id.* at 1194. The first clause of this sentence, however, does not hold the district court was correct to apply that precedent to subsections (a) and (b); the decision had not been appealed regarding those provisions.

At any rate, the statement on which Kansas relies refers to "Supreme Court precedent holding that individuals generally do not have a First Amendment right to engage in speech on the private property of others." *Id.* Thus, the statement concerns whether the recordings were protected or unprotected speech, not whether they were speech at all. And even if the recordings in subsection (c) of the Act are unprotected speech because they occur on private property, the viewpoint-discriminatory nature of the statute does not track the private versus public property distinction. As a result, strict scrutiny remains the appropriate standard.[19]

[19] Like the dissent, we do not think *Western Watersheds Project* demands we hold recordings on private property without the owner's consent are protected speech. Indeed, we rely on only one holding of *Western Watersheds Project*: "An individual who photographs animals or takes notes about habitat conditions is creating speech" and thus such activities fall "within the ambit of the First Amendment." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196–97 (10th Cir. 2017). The dissent does not suggest any disagreement with this proposition. To be sure, in an appropriate case, we may need to decide whether to extend our holding in *Western Watersheds Project* to the situation in which recording is performed on private property without consent. The dissent implies it would not do so. However, there is no need to decide that issue here, and accordingly, we do not. *Western Watersheds Project* holds that recording animals is speech and we have determined the Act is viewpoint discriminatory. Thus, the Act is subject to strict scrutiny under *R.A.V.*, even if the speech is unprotected, because it occurred on private property without consent. *See R.A.V.*, 505 U.S. at 395–96.

C. The Dissent's Argument

The district court relied on *R.A.V.*, as does ALDF on appeal. Kansas argues only that the district court was mistaken because "the distinction between 'pro-animal facility' speech and 'anti-animal facility' speech is entirely subsumed in the basis for proscribing the speech itself." Appellant Br. at 29. We explain above why that argument cannot succeed. The dissent, however, makes a new argument on Kansas's behalf. According to it, because the requirement of intent-to-harm is an intent requirement not dependent on the specific deceptive statement made by ALDF's investigators, the statute is not viewpoint discriminatory.

As an initial matter, even if we thought the dissent were correct, we would not reverse on this basis. "[O]urs is a party-directed adversarial system and we normally limit ourselves to the arguments the parties before us choose to present." *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016). Appellants must present arguments for error that warrant reversal. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). Kansas's proffered arguments here having failed, we would not reverse on a legal theory it does not assert.[20] *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (explaining that it is not the place of courts to

[20] We have the "discretion to raise and decide issues sua sponte, even for the purpose of reversing" since failure to preserve "binds only the party, not the court." *Margheim v. Buljko*, 855 F.3d 1077, 1088 (10th Cir. 2017) (quotation marks omitted). But "this discretion should be exercised only sparingly." *Id.* The dissent does not explain why we should act sua sponte here, and we decline to do so.

argue on behalf of parties). In addition to this procedural disagreement, however, we do not agree with the dissent on the merits for the reasons we now explain.

The dissent suggests that because the Act does not discriminate based upon the message communicated in the deceptive statements themselves, it is not content or viewpoint discriminatory. It then suggests a statute cannot create a First Amendment issue based solely on a motive or intent requirement. We disagree with the dissent's reading.

The dissent primarily relies on *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). There, the Supreme Court faced the question of whether a penalty enhancement for selecting an assault victim based on the victim's race violated the First and Fourteenth Amendments. *Id.* at 479. Specifically, the statute at issue "enhance[d] the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all." *Id.* at 485. *R.A.V.* did not compel striking down this law for two reasons. First, "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, 'speech' or 'messages'), the statute in [*Mitchell* was] aimed at conduct unprotected by the First Amendment." *Id.* at 487 (quoting *R.A.V.*, 505 U.S. at 392). Second, the statute at issue "single[d] out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm," which was "adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases." *Id.* at 487–88.

As the dissent notes, this court has considered *Mitchell* only once in a similar context, in *Ward v. Utah*, 398 F.3d 1239 (10th Cir. 2005).[21] The State of Utah charged the plaintiff in that case with disorderly conduct after he burned a mink stole during an animal rights protest and sought an enhancement from a misdemeanor to a felony "because he allegedly acted 'with the intent to intimidate or terrorize another person.'" *Id.* at 1244 (quoting Utah Code Ann. § 76-3-203.3). After the charges against him were dropped, the plaintiff sued the State of Utah seeking a declaration that Utah Code Ann. § 76-3-203.3 violated the Constitution. *Id.* at 1243. In ruling on that issue, we noted that although the intent element "places restrictions on a person's ability to speak," the statute proscribed only true threats, which are unprotected speech. *Id.* at 1249. Like *Mitchell*, we explained, the statute in *Ward*, "require[d] the commission of a primary, conduct-based offense prior to its application" and so was "aimed at conduct unprotected by the First Amendment and therefore is not unconstitutionally overbroad." *Id.* at 1249–50. We also stated that "as in *Mitchell*, the inclusion of a motive element d[id] not render th[e] statute constitutionally infirm." *Id.* at 1250.

[21] We have cited *Mitchell* in two other cases, but neither bears on the issue presently before us. In *United States v. Chavez-Morales*, 894 F.3d 1206, 1214 (10th Cir. 2018), we cited *Mitchell* for the proposition that motive is an important factor for sentencing judges to consider. In *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999), *overruled on other grounds by National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), we cited *Mitchell* in describing a district court's explanation that Title VII does not violate the First Amendment, a proposition with which we agreed.

The most salient distinction between *Mitchell* and *Ward* and the instant case is that neither of the former cases involves a law that (1) targets speech and (2) contains an intent requirement that covers an intent to engage in protected speech advancing a specific viewpoint. *See Mitchell*, 508 U.S. at 487–88 (explaining the law at issue targeted only conduct and had an adequate justification aside from targeting speech); *Ward*, 398 F.3d at 1249–50. As we have explained, the prohibition on deception here targets disfavored speech. *Supra*, sections II.B.1–3.

The dissent would extend *Mitchell* and its progeny to create a per se rule that laws that directly discriminate based on the words uttered (or expressions made) are viewpoint discriminatory, but "laws that discriminate based on intent or motive" are not. Dissent Op. at 16. But the cases it cites in support do not endorse such an approach. Nor should they: doing so undermines the right to free speech by allowing the government to criminalize the inchoate desire to express a view where it cannot criminalize the expression.

To explain why, it is helpful to consider some hypothetical prohibitions that would be allowed under the dissent's theory. The dissent agrees that under *R.A.V.* a statute that "prohibit[s] false statements critical of agricultural facilities while not prohibiting false statements praising agriculture facilities" would be content (presumably, viewpoint) discriminatory. Dissent Op. at 21. This is clearly true. *See Chaker*, 428 F.3d at 1217, 1227–28 (holding that under *R.A.V.* a law that "criminalize[d] knowingly false speech critical of peace officer conduct, but [left] unregulated knowingly false speech supportive of peace officer conduct" violated the

freedom of speech). But consider a variation on this hypothetical: a law prohibiting making any utterance with the intention to criticize an agriculture facility. Under the dissent's proposed rule, this would not offend the First Amendment's prohibition on viewpoint discrimination. After all, the content of the utterance would not be important—any utterance would do. Yet the purpose and effect of such law would be identical to the one the dissent admits would be unconstitutionally viewpoint discriminatory.

This conflict remains even if the dissent's rule is applied to speech unprotected by the First Amendment.[22] Consider the ordinance the Supreme Court struck down in *R.A.V.*, which forbade fighting words "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). Suppose instead it forbade "fighting words made with *intent to* arouse anger on the basis of race, color, creed, religion, or gender." According to the dissent, this small change would be sufficient to mandate a different result.

It is true that the Supreme Court discusses "the underlying message expressed" in defining content and viewpoint discrimination. *Id.* at 386. The motivating force for this doctrine, however, is "the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 387 (quoting *Simon &*

[22] The dissent does not quarrel with our conclusion that false speech is speech, whether or not protected by the First Amendment.

Schuster, 502 U.S. at 116). Under the dissent's position, as long as the government frames a law as proscribing a person's thoughts instead of the actual expression, those thoughts and the corresponding expression can be driven from the marketplace. We respectfully disagree that this is acceptable under the First Amendment.

The dissent also suggests our holding implicates all intent requirements. Not so. The dissent's own examples—burglary's intent to commit a felony, fraud's intent to defraud, and threat's intent to threaten—clearly demonstrate the difference.

Burglary is a paradigmatic example of an intent requirement that "single[s] out conduct that 'is thought to inflict greater individual or societal harm.'" *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (quoting *Mitchell*, 505 U.S. at 487–88). "Burglary is dangerous because it 'creates the possibility of a violent confrontation'" and the Supreme Court instructs that when "an intruder is both unlawfully present inside a building or structure and has a requisite intent to commit a crime" this danger is present. *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) (quoting *Taylor v. United States*, 495 U.S. 575, 588 (1990)). Nothing about the intent requirement is related to a particular viewpoint. Not so here. Kansas seeks to punish more harshly trespass accomplished through deception for viewpoint discriminatory reasons. That it cannot do under the First Amendment, even if purportedly on the basis that it "inflict[s] greater individual or societal harm,'" *Dinwiddie*, 76 F.3d at 923 (quoting *Mitchell*, 505 U.S. at 487–88). Therefore, it may not criminalize trespass-through-deception only if committed with the intent to expose wrongdoing.

The dissent suggests the intent requirement in speech offenses—specifically, fraud and threats—demonstrate that intent requirements cannot violate the First Amendment. When the government prohibits threatening, it is to prevent the harm directly caused by the threat—the fear suffered by the target of that threat. Requiring an intent to threaten in such a case "reflects the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). Similarly, when the government prohibits fraud, it is to prevent the harm directly caused by the false statements relied upon to the detriment of a third party. *Alvarez*, 567 U.S. at 735 (Breyer, J., concurring in the judgment). It is the harm intentionally and directly caused by the speech in both examples that makes the speech unprotected.

These intent requirements are neutral because they draw the line between protected and unprotected speech. *See R.A.V.*, 505 U.S. at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."). The intent element here is not. The dissent would hold that trespass through deception is unprotected speech. It contends, "the core interest that trespass seeks to protect is the right of the owner to control access to its property." Dissent Op. at 9. So, the dissent continues, an intent to undermine the owner's right to exclude by deceiving the owner into allowing entry, is unprotected speech like fraud, which the government may proscribe. *See Telemarketing Assocs.*, 538 U.S. at 612 ("[T]he First Amendment does not shield fraud."). But the harm trespass laws

protect against—entry into property—is not the harm at issue in the Act's intent requirement.[23] Indeed, under the Act, deceptive trespass is actionable only if made with the intent to harm the facility. Thus, the entry onto the owner's property is not

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[23] The dissent would inject yet another issue not asserted by the parties, by arguing the right to privacy is implicated as a legally cognizable harm. But "the omission of an issue in an opening brief generally forfeits appellate consideration of that issue." *Home Loan Inv. Co. v. St. Paul Mercury Ins. Co.*, 827 F.3d 1256, 1268 (10th Cir. 2016) (quotation marks omitted). Kansas's opening brief mentions privacy only in explanatory parentheticals after case citations and never argues the right to privacy constitutes a harm here. This was inadequate to trigger our review. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). We therefore decline to address this theory.

Moreover, this new privacy theory would not change the outcome. The invasion-of-privacy torts set out in the Restatement (Second) of Torts (Am. L. Inst. 1977)—which Kansas follows, *Froelich v. Adair*, 516 P.2d 993, 995–96 (Kan. 1973)—use a negligence, rather than intentionality, standard for the harmfulness of the information disclosed, and further require that the speech not be on a matter of public concern. The legal harm most analogous to the harm the dissent discusses—the tort of publicity given to private life—requires that the information publicized "be highly offensive to a reasonable person." Restatement (Second) of Torts § 652D (Am. L. Inst. 1977). It also requires the matter publicized be "not of legitimate concern to the public." *Id.* The first requirement recognizes that "[c]omplete privacy does not exist in this word" and so some "minor and moderate annoyance" must be tolerated; the second reiterates constitutional and common law principles by noting "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." *Id.* § 652D cmts. c, d. These requirements distinguish the intent-to-harm element here. The dissent criticizes our reliance on this tort, stating we suggest "the *only* legally protected privacy interests are those protected by the common-law tort of invasion of privacy." Dissent Op. at 11 n.5 (emphasis added). Not so. We discuss the tort of publicity given to private life to illustrate our position because it is the closest privacy protection against the specific harm the dissent references, dissemination of private information.

The dissent asks, "Whatever happened to invasion of privacy?" Dissent Op. at 10. Our answer is "nothing." It is still a valid interest, but like all other interests, it may not be protected by discriminating among viewpoints to the extent it involves speech. In other words: even if the dissent were correct that the speech here was unprotected as an invasion of privacy, the Act's viewpoint discriminatory nature would still make the Act unconstitutional.

the relevant harm.[24] The Act proscribes intents to harm by, for example, releasing true information or urging a lawful boycott—content discrimination unrelated to the reason why trespass-through-deception is, according to the dissent, proscribable. Accordingly, the intent element in fraud and threat statutes are simply improper comparators.[25]

We have explained that *Mitchell* applies where there is "the commission of a primary, conduct-based offense" and "the statute is aimed at conduct unprotected by

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[24] The dissent undercuts its theory by suggesting that those who enter with no intent to harm commit a merely "venial trespass." Dissent Op. at 12. If, as the dissent suggests and we assume, a violation of the right to exclude is a legally cognizable harm, then one who deceives his way onto property is not engaging in a slight offense—he just lacks the further intent to harm proscribed by the Act. The dissent states the right to exclude "is a fundamental and ancient right," Dissent Op. at 3; it seems incongruous with this position to view violation of that right as "venial." To be sure, a state may gradate harms through differing punishment, but if it decides subsequent protected speech makes a trespass more harmful due to the viewpoint expressed, the state's ability to criminalize this behavior runs up against the First Amendment. That is what Kansas has done here.

[25] Our dissenting colleague notes there may also be First Amendment arguments in favor of *requiring* intent for such statutes. That is doubtlessly true. For example, in considering a statute proscribing transmitting threats across state lines, this court held an intent requirement was mandated by the First Amendment. *Heineman*, 767 F.3d at 981–82 ("[I]t may be worth protecting speech that creates fear when the speaker intends only to convey a political message. . . . When the speaker does not intend to instill fear, concern for the effect on the listener must yield."). The intent element mandated, however, was in essence the line between protected and unprotected speech. *Id.* at 975. Here, it is not. That line is drawn instead based upon the speaker's viewpoint. In our view, the dissent goes astray in failing to recognize that the intent to harm element does not track the very legal interests it identifies as underlying trespassory harm. *See* Dissent Op. at 20 (comparing, in our view incorrectly, the broad intent to harm element in the Act with the intent to frighten element in threat statutes).

the First Amendment." *Ward*, 398 F.3d at 1249. The dissent attempts to apply this precedent to the Act, but it does not have a primary, conduct-based offense. Instead, the Kansas statute is speech-based and therefore infringes on protected First Amendment speech. Under such circumstances, *R.A.V.* is the controlling precedent, not *Mitchell*.[26]

Finally, the dissent has no answer for our conclusion that the text and legislative history of the Act evince Kansas's desire to limit the ability of ALDF and like organizations to engage in true speech critical of animal facilities. The dissent would allow Kansas to do so because it has targeted the disfavored viewpoint as an intent requirement. We reject this approach because it elevates form over substance and permits Kansas to do just what the First Amendment prohibits: "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," *R.A.V.*, 505 U.S. at 391.

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The government may not make unprotected speech a "vehicle[] for content discrimination unrelated to [its] distinctively proscribable content." *Id.* at 383–84. Even if deception used to obtain consent to enter is unprotected speech due to the entry upon private property, Kansas may not discriminate between speakers based on

[26] To the extent the dissent suggests that an intent requirement may be met by a speech-based offense such as threats or harassment, and the intent requirement heightens the harm from such offense, we do not necessarily disagree. But the fact remains those statutes are aimed at conduct unprotected by the First Amendment, while the statute here seeks to stifle protected, but disfavored, speech.

the unrelated issue of whether they intend to harm or help the enterprise. *See id.* at 384. But that is the effect, and stated purpose, of the provisions at issue. And the statute is not limited to false speech lacking constitutional protection. Instead, it punishes entry with the intent to tell the truth on a matter of public concern. Absent a compelling governmental interest and showing of narrow tailoring—which Kansas has not attempted to provide—the challenged subsections of the Act cannot stand.[27]

III. CONCLUSION

We **AFFIRM** the district court's declaration that Kansas Statutes Annotated §§ 47-1827 (b), (c), and (d) violate the First Amendment. We also **AFFIRM** the district court's injunction forbidding the Governor and Attorney General of Kansas from enforcing those portions of the Kansas Farm Animal and Field Crop and Research Facilities Protection Act.

[27] The dissent suggests we should limit the district court's injunction by severing deception as a means of vitiating effective consent and subsection (c) to the extent it implicates speech under *Western Watersheds Project*. We do not think it appropriate to engage in a severability analysis where Kansas, as the appellant, has not made any argument that the scope of the district court's injunction is too broad. *See Salehpoor v. Shahinpoor*, 358 F.3d 782, 785 (10th Cir. 2004) (holding this court will not "manufacture a party's argument on appeal when it has failed in its burden to draw our attention to the error below" (quotation marks omitted)). The issue is not properly before us.

20-3082, *Animal Legal Defense Fund, et al. v. Kelly, et al.*

HARTZ, **J**., Circuit Judge, dissenting

I respectfully dissent. I express no view on the policy behind the Kansas Farm Animal and Field Crop and Research Facilities Protection Act, Kan. Stat. Ann. § 47–1827 (the Kansas Act). The task of this court is to decide only whether that statute is unconstitutional on the grounds raised in this appeal. And I see no merit to those grounds.

First, a preliminary matter. Even if the majority opinion is correct on the constitutional issues, the remedy imposed is unjustified. The majority opinion identifies only two respects in which the Kansas Act concerns or implicates speech. It states that "[s]ubsections (b), (c), and (d) of the Act concern speech because they include deception as a possible element and are viewpoint discriminatory because they apply only to persons who intend to damage the enterprise of an animal facility." Maj. Op. at 5. The opinion further states that "[s]ubsection (c) also implicates speech [because it] forbids recording or attempting to record video and photographic images of animals." Maj. Op. at 28. I infer from this that the allegedly unconstitutional flaws in the Kansas Act could be cured if this court excised from it the word *deception* and the paragraph of subsection (d) referring to photographs and videos. I would think that severability doctrine would counsel us to limit our grant of relief to those excisions. *See Barr v. Am. Ass'n of Pol. Consultants, Inc*., 140 S. Ct. 2335, 2350 (2020) (plurality opinion of Kavanaugh, J.) ("The Court's cases have . . . developed a strong presumption of severability."); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) ("Generally

speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." (internal quotation marks omitted)); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[T]he normal rule is that partial, rather than facial, invalidation is the required course." (internal quotation marks omitted)); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1199 (9th Cir. 2018) (striking "the offending term 'misrepresentation'" in similar statute). And this presumption of severability should be that much stronger when federalism concerns suggest minimizing the amount of state law that is invalidated.

But I do not think that even those excisions are necessary. To begin with, I must address, and reject, Plaintiffs' argument (which the majority opinion neither accepts nor rejects) that lying to obtain access to property is protected speech. Plaintiffs rely on the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), which held unconstitutional the Stolen Valor Act of 2005, 18 U.S.C. § 704(b). That statute made it a criminal offense to falsely claim to have been awarded certain military honors, such as the Medal of Honor. The Court majority (in a plurality opinion of four Justices and a concurring opinion of two) said that the government cannot prohibit false statements solely because they are false. But there is still plenty of ground for prohibiting harmful false statements. I agree with the panel majority opinion that the Supreme Court majority held that prohibitions of "false factual statements that cause legally cognizable harm tend not to offend the Constitution." Maj. Op. at 21.

Plaintiffs contend that an owner of property suffers no legally cognizable harm when someone obtains consent to enter the property by deception. That contention is plainly wrong. The authority of the owner of property to control who can be on the property is a fundamental and ancient right. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (reconfirming the gist of the following authorities); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (the "right to exclude" is "universally held to be a fundamental element of the property right" (internal quotation marks omitted)); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others." (citing 2 William Blackstone, Commentaries, ch. 1)); 2 William Blackstone, Commentaries, *2 (property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

Entry into property, or remaining on the property, without the permission of the owner is an invasion of the legal rights of the owner; such entry or remaining is a legally cognizable harm to the owner—namely, trespass.[1] *See, e.g.*, *Oliver v. United States*, 466

[1] Subsection (b) of the Kansas Act does not speak in terms of entry. It states: "No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility . . . ." In district court Plaintiffs stated that their investigators "will not physically remove an animal or an animal facility's property, but they could exercise control over an animal facility by accepting a supervisory role or closing off part of a

U.S. 170, 183 n.15 (1984) ("The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders."). The owner can bar someone from entry or require the departure of a person who has lost approval. The generally recognized common law on the subject is summarized in the Restatement (Second) of Torts (the Restatement), Chapter 7, entitled "Invasions of the Interest in the Exclusive Possession of Land and Its Physical Condition (Trespass on Land)." *See also* Restatement of the Law (Fourth) Property, Tentative Draft No. 2, Vol. 2 § 1.1 ("An actor is subject to liability to another for trespass to land if the actor intentionally: (a) enters or causes entry of a tangible thing or a person onto land in the other's possession, or (b) remains on land in the other's possession, or (c) fails to remove a tangible thing that the actor is duty-bound to remove from land in the other's possession.").

To be sure, the owner's right to control access to its property is not an absolute one. It must yield to the police power of the government to deal with emergencies, investigate crime, and examine regulated businesses. *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2079; *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) ("[P]olice may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury."); *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (requiring a warrant for administrative inspection).

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facility to covertly take photographs." *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 991 (D. Kan. 2020). I do not see why the analysis of these elements would differ from the analysis of the trespass required in subsections (c) and (d). For simplicity, I will therefore speak only in terms of trespass.

Private persons also have certain privileges to enter another's land. *See generally* Restatement Chapter 8; *Cedar Point*, 141 S. Ct. at 2079. And businesses that serve the public are subject to various requirements, such as not discriminating on the basis of race or religion in deciding whom to serve. *See, e.g.*, 42 U.S.C. § 2000a; *cf. Cedar Point*, 141 S. Ct. at 2077 ("Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.").[2]

In general, however, one has a right to enter another's premises only if the owner consents. *See* Restatement §§ 167, 330 (defining *licensee* as one who has the possessor's consent). Businesses serving the public generally welcome visitors to the public portions of their property. Employees are welcome to occupy their work areas.

It is on the issue of consent that Plaintiffs advance a remarkable proposition. They would have us undermine established principles by declaring that a property owner suffers no legally cognizable harm if someone obtains consent to enter through deception. They do not argue that the owner could not require the liar to leave the premises once the lie is discovered. Nor do they argue that the owner would have to admit someone who told the truth and disclosed a purpose that the owner would find objectionable. But, in

[2] The National Labor Relations Act also limits an employer's right to exclude organizational activities on the employer's premises. *See Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 532 (1992) ("§ 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property."). But that limitation is "highly contingent." *Cedar Point*, 141 S. Ct. at 2077.

their view, so long as the lie is undetected, the liar is not violating the legal rights of the owner by remaining on the premises.

The common law does not adopt Plaintiffs' illogical view. The Restatement's treatment of trespass states in black letter: "The rules stated in § 892B as to consent induced by misrepresentation or mistake apply to entry or remaining on land." Restatement § 173. Section 892B states that consent is not effective if induced by mistake caused by a misrepresentation. *See* § 892B(2). Comment b to § 173 provides examples pertinent to trespass, one of which is: "A conscious misrepresentation as to the purpose for which admittance to the land is sought, may be a fraudulent misrepresentation of a material fact." In other words, entry of land through such a misrepresentation violates the legal rights of the landowner. This has also long been the view of the Kansas Court of Appeals regarding the common law of trespass. *See Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 844 (Kan. Ct. App. 1979) ("If the purported consent was fraudulently induced, there was no consent.").

Moreover, the clear import of *Alvarez* is that a fraudulently obtained consent to enter another's property, particularly the type of entry desired by Plaintiffs, is not protected by the First Amendment. In distinguishing language from earlier Supreme Court cases declaring that false statements are valueless, the *Alvarez* plurality opinion said: "These quotations all derive from cases discussing defamation, fraud, or *some other legally cognizable harm associated with a false statement, such as an invasion of privacy* or the costs of vexatious litigation." 567 U.S. at 719 (emphasis added); *see also id.* at 734 (Breyer, J., concurring) (distinguishing false statements that are not protected by

the First Amendment because they "cause harm to a specific victim of an emotional-, dignitary-, or *privacy*-related kind." (emphasis added)). Thus, an invasion of privacy is a legally cognizable harm. And surely entry upon another's property to conduct an investigation (snooping around) is a quintessential invasion of privacy. *See Rakas*, 439 U.S. at 143 n.12 ("One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." (citation omitted)); *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018) (recognizing "the expectation of privacy that comes with the right to exclude").[3] True, different jurisdictions may have different trespass laws. A State may decide that obtaining consent to enter property through deception is not tortious.[4] But that is obviously not the case with Kansas.

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[3] Of course, privacy interests are only one of several interests the law of trespass is meant to vindicate. *See Oliver*, 466 U.S. at 183 ("[T]respass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest.").

[4] A few federal courts, following the lead of *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), have rejected trespass claims against journalists for obtaining consent to enter premises through misrepresentation. The rationale for the decisions is that "[t]here was no invasion . . . of any of the specific interests that the tort of trespass seeks to protect." *Id.* at 1352. I am not sure what that means. Surely privacy is an interest protected by trespass law. Also, the results in those cases can probably be better justified on other grounds, such as the absence of a duty to disclose one's purpose when dealing with a business that is open to the public and thereby impliedly grants consent to enter to all who wish to do so. For example, in *Desnick* itself the alleged misrepresentation was "a misleading omission to disclose [the investigators'] purposes" in entering an ophthalmic clinic open to the public. *Id.* at 1353. (This would also explain why a food critic does not trespass on restaurant premises by concealing her purpose when ordering a meal—a frequently provided example to support

I recognize that my view is contrary to that of one federal circuit court to address the constitutional issue. The Ninth Circuit in *Wasden* struck the word *misrepresentation* in a provision of an Idaho statute similar to the Kansas Act that prohibited entry into "an agricultural facility by force, threat, misrepresentation or trespass." 878 F.3d at 1194–99. (It upheld, however, prohibitions on obtaining records of, or employment with, an agricultural facility by misrepresentation.) The court read *Alvarez* as stating that false speech cannot be criminalized unless made "for the purpose of material gain or material advantage, or if such speech inflicts a legally cognizable harm." *Id.* at 1194 (internal quotation marks omitted). It explained that Idaho law does not require the intruder to have a purpose of material gain or material advantage and, at least as I understand the opinion, then went on to assert that there is no legally cognizable harm from entry effected through misrepresentation because entry into property with "intentions that if known to the owner of the property would cause him for lawful reasons to revoke his consent . . . does not infringe upon the specific interests trespass seeks to protect." *Id.* at 1196 (original ellipsis and internal quotation marks omitted). To repeat what I said in footnote 4, I am puzzled by the court's meaning of "specific interests trespass seeks to

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the proposition that there is no trespass when consent is obtained through misrepresentation. *See, e.g.*, *id.* at 1351.) On the other hand, it might be quite sensible to refrain from using trespass law to penalize inflicting an injury on another's premises when it is only fortuitous that the injurious conduct occurred on those premises, as when an investigator uses deception to obtain an interview with a subject (who makes embarrassing disclosures in the interview) and the interview takes place on the subject's premises only for the convenience of the subject. But it is unclear whether *Desnick* was limiting its notion of "the specific interests that the tort of trespass seeks to protect" to such circumstances, and other courts have certainly not limited the notion in that way. In any event, there is no need to explore further these inapposite cases.

protect." I would have thought that the core interest that trespass seeks to protect is the right of the owner to control access to its property. Deception prevents the owner from making an informed decision when exercising that right. How, then, could one say that deception does not infringe a legally protectable interest, the violation of which is a legally cognizable harm?

Judge Bea dissented on this issue in *Wasden*. What I find most compelling in his dissent is the survey of authority from Blackstone to the United States Supreme Court to the Idaho Supreme Court regarding the fundamental nature of a property owner's right to exclude others. *See id.* at 1206–09 (Bea, J., dissenting in part); *Florida v. Jardines*, 569 U.S. 1, 8 (2013) ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (K.B. 1765)). This point has not escaped the attention of at least one highly regarded scholar well-versed in the First Amendment:

> To elaborate on Judge Bea's opinion [in *Wasden*], the analysis of the majority does indeed carry many deeply problematic implications. Journalists and non-profit organizations engaged in muckraking do not enjoy any immunity from generally applicable laws. That is why the tort of intrusion has generally been held not to implicate First Amendment concerns. The notion that entry to a property owner's land through false pretenses negates consent, and therefore constitutes trespass, ought to qualify as such a generally applicable law. Under the framework of *Alvarez*, this is not a free-floating harmless "fib," but a palpable invasion of ancient property rights. The government is not entitled to enter property to conduct a search or investigation without observing constitutional limits on search and seizure, including the requirement of a search warrant. Journalists and non-profit organizations are under no compunction to obtain search warrants, but they are under a compunction to observe the generally applicable laws of trespass. *Alvarez* should not be read as a license for journalists and non-profits, or for that matter, corporate competitors, to break the law in pursuit of the perceived greater good, on the theory that the

> deceptions attendant to undercover investigations are innocent fibs that would be excused because the end justifies the means.

Rodney A. Smolla, 3 Smolla & Nimmer on Freedom of Speech § 24:6 (footnote omitted). For these reasons, I conclude that lies uttered to obtain consent to enter the premises of an agricultural facility are not protected speech. The Kansas Act's provision stating that consent obtained by deception is not effective consent is fully consistent with the First Amendment.

One additional point. The panel majority opinion suggests that any lying by Plaintiffs to obtain access to an agricultural facility would not cause "legally cognizable" harm, even if the facility were injured, because the harm would arise only from the dissemination of true information. I quote:

> Whatever legally cognizable harm is, it cannot be harm from protected, true, speech. The damage Kansas fears is that animal facilities may face "negative publicity, lost business[,] or boycotts." Appellant Br. at 22. But these harms would be accomplished by ALDF disseminating true information—to the extent that information is injurious, it does not cause legally cognizable harm.

Maj. Op. at 26.

I beg to differ. Whatever happened to invasion of privacy? Consider a trespass statute that replaces "agricultural facility" by "reproductive-health facility" and is meant to protect enterprises that perform abortions. Say a "pro-life" investigator lied to obtain access to the facility, perhaps as an employee. The investigator surreptitiously films the performance of abortions, showing how those who perform abortions treat and dispose of the aborted fetuses. The investigator also copies files of the facility containing the names of the patients, persons paying for procedures, and financial supporters. The files also

provide information on money paid to the facility for fetal tissue to be used in research. The investigator then publishes this information on the Internet. All the disseminated information is factually accurate. Is there really no legally cognizable harm? I think not. The right to privacy, which is one of the principal interests underlying trespass law, protects people from disclosure of the truth about them. And is that not essential to maintenance of a free society of imperfect human beings? The failure of the panel majority opinion to acknowledge this fundamental privacy interest leads it to base much of its analysis on the false premise that the First Amendment protects violations of property rights and privacy motivated by a desire to uncover and promulgate the truth.[5]

I now turn to the First Amendment flaw that the majority opinion finds in the Kansas Act—namely, that it discriminates based on viewpoint, since the Act is violated only if the false statement (to obtain consent) is made with the intent to damage (as opposed to laud) the agricultural enterprise. That opinion summarizes its view as follows:

> There can be no question that subsection (b) is viewpoint discriminatory in operation. The text of the statute alone shows it is meant to protect animal facilities. A person who lies to acquire or exercise control over an animal facility intending to expose wrongdoing violates subsection (b). But a person who tells the same lie to gain the same control intending to laud the facility or for neutral reasons does not.

[5] The majority opinion suggests that the only legally protected privacy interests are those protected by the common-law tort of invasion of privacy. *See* Maj. Op. at 45 n.23. The purpose of the recognition of that tort, however, is not to catalog all protections of privacy, but to supplement previously recognized protections, some of which, such as the law of trespass, predate the tort by centuries. I am not aware of any Supreme Court opinions that rely on considerations of privacy—such as those regulating searches under the Fourth Amendment—which look to the tort of invasion of privacy as the exclusive source of the interest to be protected.

Id. at 23; *see also id.* at 23–24 ("[W]hile it may be permissible to punish all entry onto private property by deception, the Act becomes impermissibly viewpoint discriminatory by choosing to punish only entry by deception with the intent to damage the facility.").

I cannot agree with the approach of the majority opinion. As just explained, there is no First Amendment flaw in a statute that prohibits nonconsensual entry into an animal facility, even if the statute (following the traditional rule) treats consent obtained by fraud or deception as ineffective. The majority opinion does not dispute that point. Why, then, cannot the State do what States so often do and decide that it sees no point in punishing a venial trespass—that is, one with no intent to harm? A judge is highly unlikely to impose a significant penalty on such a trespasser and may well chastise the prosecutor for bringing such a case. What this "motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that [the State] believes need not be covered by [the] statute. . . . [The] use of a motive requirement to single out conduct that is thought to inflict greater individual or societal harm is quite common." *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (citations and internal quotation marks omitted). To say that a statute violates the First Amendment prohibition against viewpoint discrimination by distinguishing between violators who intend to harm the trespass victim and those who do not is to put that Amendment at odds with common sense.

As I now hope to explain, the First Amendment, fortunately, and unsurprisingly, does not require such a bizarre result. The above-quoted statements in the majority

opinion reflect a misunderstanding of the First Amendment doctrine of viewpoint discrimination. Every statute prohibiting certain conduct in a sense discriminates against those who favor that conduct. Every statute, and there are more than a few, that prohibits certain conduct only when it is intended to be harmful likewise discriminates against those who engage in such conduct to cause harm. But that sort of discrimination is not First Amendment viewpoint discrimination. Although the term *viewpoint discrimination* might at first blush appear to refer to discrimination based on the viewpoint of an actor, the First Amendment doctrine has been limited to discrimination based on the content of the message communicated by the actor's speech. As we shall see, other types of discrimination (that is, discrimination not based on the content of the message communicated) do not come within the purview of the First Amendment protection of speech, although they may fail to pass muster under the Equal Protection Clause or some other constitutional provision.

At the outset it is important to recognize that viewpoint discrimination is a subset of content discrimination. *See Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) ("Government discrimination among viewpoints . . . is a more blatant and egregious form of content discrimination." (internal quotation marks omitted)). The content or viewpoint is the content or viewpoint of the *message communicated* by the speaker. As explained by Justice Kavanaugh:

> Above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

> The Court's precedents . . . restrict the government from discriminating in the regulation of expression on the basis of the content of that expression. . . .
>
> . . . .
>
> . . . *[A] law is content-based if a regulation of speech on its face draws distinctions based on the message a speaker conveys*. That description applies to a law that singles out specific subject matter for differential treatment.

Barr, 140 S. Ct. at 2346 (plurality opinion) (emphasis added) (citations and internal quotation marks omitted). The prohibition on content and viewpoint discrimination is concerned with the *message*, not the intent or motive of the speaker (although, of course, one can often infer the speaker's intent or motive from what the speaker says). Thus, a statute would discriminate based on viewpoint if it permitted statements favorable to livestock slaughterhouses but not statements unfavorable to them.

There is no such discrimination here. The only speech that may constitute an element of a violation of all the provisions of the Kansas Act is the misrepresentation that permits the speaker to enter the agricultural facility. That speech is more likely to be laudatory of the facility ("I've heard great things about this business and would like to make it my career") than critical. Indeed, if the person who sought entry expressed opposition to the treatment of the animals at the facility, entry would likely be denied. Crucially, the Kansas Act applies regardless of whether the deceptive speech is critical or laudatory of the animal facility, which is why the Act is viewpoint neutral in this respect.

In short, what Plaintiffs allege to be viewpoint discrimination has nothing to do with what is expressed. It concerns only the intent or motive for lying to obtain entry, and the requisite intent or motive is simply to harm the person whose rights are violated

by the trespass. This is old stuff. Many criminal statutes include as an element that the perpetrator intended such harm. Burglary is generally defined as breaking and entering with intent to commit a felony. This discriminates in favor of those who break and enter without such intent. The same holds true for "speech" offenses. An element of the offense of fraud is the intent to defraud. But no one has suggested that fraud statutes are viewpoint discriminatory under the First Amendment because they discriminate between those who utter the false statements with intent to defraud and those who do not.[6]

The reason for these intent requirements is the general view that criminal punishment should be reserved for those who intend the harm they commit. Indeed, intent may be a constitutional requirement in some circumstances. The Supreme Court recently held that a federal statute prohibiting publication of a threat in interstate commerce requires not only that the defendant have uttered a statement that would be reasonably understood as a threat but that the defendant intended the statement to be taken as a threat or at least knew that it would be taken as a threat. *See Elonis v. United States*, 575 U.S. 723 (2015). The Court's intent requirement did not create a First Amendment issue. On the contrary, the requirement mooted the alternative argument of

[6] To say that an intent requirement (in particular, a requirement of an intent to cause harm) cannot convert a statute that is compatible with the First Amendment into a statute that violates the First Amendment is not to say that an intent requirement can cure a statute that would otherwise violate the First Amendment. I am puzzled by the hypothetical in the panel majority opinion: "a law prohibiting making any utterance with the intention to criticize an agriculture facility." Maj. Op. at 42. It is hard for me to conceive of a provision more incompatible with the First Amendment than one that prohibits "any utterance." Adding the intent requirement does not make it less so.

the defendant that the statute was an unconstitutional abridgment of free speech if no such intent were required.

The Supreme Court itself has distinguished for First Amendment purposes between laws that discriminate based on the content of the message and laws that discriminate based on intent or motive. The Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), considered a state statute that increased the maximum sentence for a defendant who had committed battery if the defendant selected the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." *Id*. at 480 (internal quotation marks omitted). The defendant argued that "[b]ecause the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, . . . the statute violates the First Amendment by punishing offenders' bigoted beliefs." *Id*. at 485. In other words, the enhancement statute was allegedly invalid "because it punishe[d] the defendant's discriminatory motive, or reason, for acting." *Id.* at 487. The Court acknowledged that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." *Id.* at 485. And it recognized that the year before, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (an opinion discussed in more depth later in this dissent), the Court had invalidated under the First Amendment an ordinance that prohibited fighting words (which are ordinarily not protected by the First Amendment) only when they "'contain[ed] messages of "bias-motivated" hatred.'" *Mitchell*, 508 U.S. at 487 (quoting *R.A.V.*, 505 U.S. at 392) (ellipsis omitted). "But," it held, "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, 'speech' or 'messages'), the

statute in this case is aimed at conduct unprotected by the First Amendment." *Id.* (citation omitted). The Court pointed out that the statute "singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm." *Id.* at 487–88.

Several circuits have followed *Mitchell* in rejecting First Amendment challenges to the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994), which, in pertinent part, subjects to criminal and civil liability anyone who "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services"; or "(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." The courts rejected the defendants' arguments that "the statute's motive requirement . . . is . . . fatal to its constitutionality." *Terry v. Reno*, 101 F.3d 1412, 1420 (D.C. Cir. 1996). As Judge Richard Arnold explained, motive can be distinguished from message:

> In order for a statute to be facially content based, it must discriminate in favor of or against the message conveyed by speech or conduct. FACE's motive requirement does not discriminate against speech or conduct that expresses an abortion-related message. FACE would, for example, apply to anyone who blockades a clinic to prevent a woman from getting an abortion, regardless of the message expressed by the blockade. Thus, FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, "We are underpaid!" rather than "Abortion is wrong!"
>
> What FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not

> be covered by a federal statute. Congress enacted FACE to prohibit conduct that interferes with the ability of women to obtain abortions. FACE's motive requirement targets this conduct while ensuring that FACE does not federalize a slew of random crimes that might occur in the vicinity of an abortion clinic. Congress's use of a motive requirement to single out conduct that is thought to inflict greater individual or societal harm is quite common.

Dinwiddie, 76 F.3d at 923 (citations and further internal quotation marks omitted); *see id.* at n.7 (rejecting the defendant's argument that *Mitchell* applies only when motive is considered in sentencing); *see also, e.g.*, *Terry*, 101 F.3d at 1420–21 ("The Act's motive requirement . . . does not make the Access Act an instrument for the suppression of speech. It merely narrows the Act's reach.").

This court has applied *Mitchell* in similar fashion. In *Ward v. Utah*, 398 F.3d 1239 (10th Cir. 2005), we rejected a First Amendment challenge by a defendant convicted of disorderly conduct to a state statute that enhanced charges from misdemeanors to felonies. *See id.* at 1244. The pertinent part of the statute stated:

> (2) A person who commits any primary offense with the intent to intimidate or terrorize another person or with reason to believe that his action would intimidate or terrorize that person is guilty of a third degree felony.
>
> (3) "Intimidate or terrorize" means an act which causes the person to fear for his physical safety or damages the property of that person or another. The act must be accompanied *with the intent to cause a person to fear to freely exercise or enjoy any right secured by the Constitution or laws of the state or by the Constitution or laws of the United States.*

Id. at 1248 (emphasis added). We stated, "Just as in *Mitchell*, because [the statute] requires the commission of a primary, conduct-based offense prior to its application, the statute is aimed at conduct unprotected by the First Amendment and therefore it is not unconstitutionally overbroad." *Id.* at 1249–50. We then summarily rejected the aspect of

the First Amendment claim based on the above-italicized portion of the statute: "Further, as in *Mitchell*, the inclusion of a motive element does not render this statute constitutionally infirm." *Id.* at 1250; *see Columbus v. Fabich*, 166 N.E.3d 101, 114 (Ohio Ct. App. 2020) (city ethnic-intimidation ordinance did not violate First Amendment where "the triggering culpability element in the . . . ordinance [was] not the content of the fighting words, but rather, it [was] the motives, reasons or purposes for which the . . . words were uttered" (emphasis and internal quotation marks omitted)).

The panel majority opinion attempts to distinguish *Mitchell* and *Ward* on the ground that they required the commission of "a primary, conduct-based offense," whereas the Kansas Act is "speech-based." Maj. Op. at 47; *see id.* at 41. But the gist of the Kansas Act *is* conduct-based—the entry onto another's property. The Act protects the property owner's property rights and privacy. Yes, one element of a violation of the Kansas Act may be an oral utterance (a lie to obtain consent to enter) but that fact does not distinguish the Kansas Act from other statutes that have survived First Amendment challenge despite an intent requirement. The penalty-enhancement statute in *Mitchell*, *see* 508 U.S. at 480 n.1, applied to potentially speech-based crimes such as disorderly conduct and harassment, *see* Wis. Stat. Ann. §§ 947.01, 947.013, and the disorderly-conduct statute violated by the defendant in *Ward* prohibited "threatening behavior" and making "unreasonable noises," Utah Code Ann. § 76–9–102. Likewise, FACE, quoted above, prohibits "threat of force." 18 U.S.C. § 248.

The majority opinion's attempt to distinguish statutes that impose an intent requirement on a prohibition of threatening language illustrates the flaw in its analysis. The opinion states:

> When the government prohibits threatening, it is to prevent the harm directly caused by the threat—the fear suffered by the target of that threat. Requiring an intent to threaten in such a case reflects the basic principle that wrongdoing must be conscious to be criminal. . . .
>
> These intent requirements are neutral because they draw the line between protected and unprotected speech. *See R.A.V.*, 505 U.S. at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.").

Maj. Op. at 44 (further internal quotation marks omitted). As I have shown above, however, lying to obtain consent to enter another's property is not protected speech. It can properly be prohibited to protect a property owner's rights of property, including the right to privacy. Limiting the prohibition to those who intend to harm the property owner does not offend the First Amendment any more than limiting the prohibition on threats to those that are intended to frighten.

Moreover, I fail to see how the intent requirement in the Act amounts to a circumvention of the prohibition on imposing content or viewpoint discrimination on unprotected speech. *See id.* at 41–43. Here, the unprotected speech is the lie that enables the liar to obtain consent to enter an agricultural facility's premises. As mentioned earlier in this dissent, the lie is likely to express a favorable view of the facility, such as an explanation of why the owner should let the liar on the premises or even employ the liar. In any event, all lies are treated the same. A lie that expresses a bigoted sentiment is

treated no differently than one that expresses an enlightened sentiment. It is not at all apparent to me how the Act's requirement that the liar seek entry on the premises with the intent of injuring the facility drives any idea or viewpoint from the marketplace of ideas.

I conclude that if, as I concluded earlier, the prohibition of deception by the Kansas Act passes First Amendment muster, then addition of the intent/motive requirement creates no First Amendment flaw.

Nor is the Kansas Act subject to First Amendment scrutiny on the ground that it protects only one class of victims. Although the false statements to obtain consent to enter (which are otherwise unprotected speech) are prohibited only when they injure agricultural facilities, that is not a First Amendment issue. This follows from a portion of the analysis by the Supreme Court in *R.A.V.*, 505 U.S. 377, which will be summarized in the following discussion after some preliminary observations.

Granted, the State could not prohibit false statements critical of agricultural facilities while not prohibiting false statements praising agricultural facilities. That *would be* content discrimination. The law would discriminate based on what is said. This was the central teaching of *R.A.V.* Although there is no First Amendment prohibition on laws against fighting words, the Court overturned a city ordinance that prohibited only "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" *Id.* at 391. The statute discriminated based on content because "[d]isplays containing abusive invective, no matter how vicious or severe, are

permissible unless they are addressed to one of the specified disfavored topics." *Id.*

Further:

> [T]he ordinance [went] even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

Id. at 391–92.

The Court went on, however, to make clear that both the content discrimination and viewpoint discrimination resulted simply from discrimination based on what was said. The Court explained, "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . *messages* of bias-motivated hatred and in particular, as applied to this case, messages based on virulent notions of racial supremacy." *Id.* at 392 (second emphasis added) (internal quotation marks omitted). In short, the First Amendment problem with the ordinance was that fighting words were prohibited or not prohibited depending on the message uttered. In contrast, it is the Equal Protection Clause not the First Amendment that would govern the constitutionality of a law that prohibited fighting words directed at, say, Congress but not the state legislature

or department stores. No First Amendment concerns are raised by prohibitions on the use of fighting words that do not depend on the message conveyed by those words but only on whom the fighting words are directed at. *See In re M.S.*, 896 P.2d 1365, 1378–79 (Cal. 1995) (citing above language in *R.A.V.* regarding fighting words as support for constitutionality of criminal statute barring only those threats of force that interfere "with another person in his or her exercise of constitutional or statutory rights").

For the above reasons, I would reject the First Amendment challenges before us to the treatment of deceptive entry in the Kansas Act.

Finally, although the question is a more difficult one, I am not persuaded that subsection (c)(4) of the Kansas Act violates the First Amendment by prohibiting "enter[ing] an animal facility to take pictures by photograph, video camera or by any other means," unless one has the consent of the owner. Plaintiffs rely on this court's opinion in *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). But that opinion, in which I joined, is distinguishable. The Wyoming statute in that case prohibited crossing private land to access other land to record information. *See id.* at 1193. Our specific concern was when the "other land" was public property. *See id.* at 1194. Indeed, the district court had affirmed the constitutionality of the provision of the Wyoming statute that prohibited entering private land to record information on that land, and the plaintiffs had not appealed that ruling. *See id.* at 1193. The plaintiffs' complaint on appeal was that the statute would "prohibit them from engaging in protected speech that would be otherwise permissible on public property." *Id.* at 1194.

I am not suggesting that *Western Watersheds* requires us to hold that subsection (c)(4) of the Kansas Act is constitutional. But there is a fundamental distinction between the statutory provision we invalidated in that case and subsection (c)(4). An element of the offense in *Western Watersheds* was recording information on land whose owner (the federal government) had no objection to that being done. The Kansas Act, in contrast, forbids recording on property without the effective consent of the owner. Private owners of property have the right to prohibit others from taking photographs or videos on their property, even when they allow access to their property. *See* Restatement § 168 ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with."). It is not that unusual to see "No Photos" or "No Cameras" signs. If those restrictions on access to property do not implicate First Amendment rights, I fail to see why the State cannot vindicate the owner's prerogative by making it a crime to violate this private-property right. If the owner sees someone on the private premises taking photographs or videos and demands that person leave the premises, does it really violate the First Amendment if a police officer arrests, and a district attorney prosecutes, the person for refusing to leave? If Plaintiffs' analysis is correct, must we also invalidate statutes that prohibit recording conversations of another person without that person's consent (even though such recordings could be quite important in an undercover investigation)?

For the above reasons, I would affirm the Kansas Act against the challenges to the Act raised in this appeal.

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August 19, 2021

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RE: 20-3082, Animal Legal Defense Fund, et al v. Kelly, et al
Dist/Ag docket: 2:18-CV-02657-KHV

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Lauren Bonds
Sharon Brett

Alan K. Chen
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