IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., and IOWA CITIZENS FOR COMMUNITY IMPROVEMENTS, Plaintiffs, v. KIM REYNOLDS, in her official capacity as Governor of Iowa, BRENNA BIRD, in her official capacity as Attorney General of Iowa, VANESSA STRAZDAS, in her official capacity as Cass County Attorney, JEANNINE RITCHIE, in her official capacity as Dallas County Attorney, and NATHAN REPP, in his official capacity as Washington County Attorney, Defendants.	)	Case No. 4:21-cv-00231-SMR-HCA COMBINED ORDER ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

At issue in this case is whether Iowa Code § 727.8A (the "Act"), which imposes enhanced penalties for recording while trespassing, violates the First Amendment rights of two advocacy organizations: People for the Ethical Treatment of Animals ("PETA") and Iowa Citizens for Community Improvement ("ICCI"). The United States Court of Appeals for the Eighth Circuit has already upheld the Act against a facial challenge. *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071 (8th Cir. 2024) ("*ALDF II*"). Now, on the narrower question of PETA's and ICCI's as-applied challenges, the Court concludes that the Act withstands constitutional scrutiny.

This case brings into focus the intersection of First Amendment expression and longstanding protections for property rights. The Court holds that recording, as a means of gathering and preserving information for later dissemination, implicates First Amendment

interests. However, the Constitution's protection for such expressive activities operates differently when those activities occur during an unlawful trespass. The question is not whether Plaintiffs' recordings touch on matters of public concern—they undoubtedly do—but whether the State may, consistent with constitutional protections, enhance penalties for recordings when they occur during an unlawful trespass.

Applying intermediate scrutiny, as required for content-neutral regulations of expressive activity, the Court concludes that the Act's targeted approach directly advances Iowa's substantial interests in protecting property rights and privacy while leaving open ample alternative channels for Plaintiffs to disseminate their message through lawful means. On these facts, the Court holds that the Act withstands constitutional scrutiny as applied to these Plaintiffs.

I. BACKGROUND

A. Iowa Code Section 727.8A

In 2021, the Iowa legislature enacted the Act to impose additional criminal penalties for individuals who use recording devices while committing a criminal trespass. The law provides:

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

Iowa Code § 727.8A. The Act imposes penalties on persons who commit a "trespass" under Iowa law and designates a first offense of trespass-surveillance as an aggravated misdemeanor. *ALDF II*, 89 F.4th at 1075 (citing Iowa Code § 903.1(2)).

By deeming a violation as an aggravated misdemeanor, the Act provides for significantly enhanced criminal sanctions compared with the general trespass law, which is typically a serious misdemeanor. *See* Iowa Code § 716.8(1)–(3). A serious misdemeanor is punishable by a fine of

$400–$2,560 and no more than one year imprisonment, whereas an aggravated misdemeanor imposes a fine between $855–$8,540 and a maximum of two years' imprisonment. *See id*. § 903.1(1), (2).

The Act targets two distinct activities by trespassers. It penalizes a person who "places . . . a camera or electronic surveillance device" on property during a trespass ("Place Provision") and separately penalizes a person who "uses a camera or electronic surveillance device" while trespassing ("Use Provision"). *Id*. § 727.8A. These provisions are severable. *See ALDF II*, 89 F.4th at 1076. Only the Use Provision is at issue here—Plaintiffs lack standing to challenge the Place Provision because they have not alleged that they place cameras on properties while trespassing, but rather use cameras they bring with them. *Id*. at 1078–79.

B. Procedural History

This case returns to the Court on remand after the Eighth Circuit's decision in *ALDF II*. Plaintiffs argue that the Act violates the First Amendment by imposing enhanced penalties for recording while trespassing. Previously, the Court found the law violated the First Amendment on its face and permanently enjoined enforcement of the Act. *Animal Legal Def. Fund v. Reynolds*, 630 F. Supp. 3d 1105, 1121 (S.D. Iowa 2022) ("*ALDF I*"). Now with the benefit of the Eighth Circuit's guidance, the Court addresses Plaintiffs' narrower as-applied challenge.

In *ALDF I*, the Court granted Plaintiffs' motion for summary judgment and denied Defendants' motion to dismiss. The Court determined that the Act regulated protected speech, even when that speech occurred during trespass. Applying intermediate scrutiny, the Court concluded that the Act was not narrowly tailored to serve a substantial governmental interest and permanently enjoined its enforcement.

On appeal, the Eighth Circuit affirmed in part and reversed in part. *ALDF II*, 89 F.4th at 1074–75. The panel affirmed the Court's decision that Plaintiffs had standing to challenge the Use Provision of the Act, while determining they lacked standing to challenge the Place Provision. *Id*. at 1078–79. However, the Eighth Circuit reversed on the merits, holding that the Act's tailoring was sufficiently narrow to further legitimate governmental interests in protecting property rights and privacy, particularly when addressing the harm arising from electronic surveillance conducted during trespass. *See id*. at 1080–82. This was sufficient to survive intermediate scrutiny under a facial challenge. *Id*. at 1082.

The *ALDF II* court emphasized that recording during trespass heightens the invasion of privacy by transforming a momentary trespass into a perpetual intrusion, preserving and potentially disseminating what would otherwise remain a limited violation. *Id.* at 1082. The panel concluded that the Act is "narrowly tailored to target that harm and redress that evil," and therefore survives intermediate scrutiny. The court reversed the summary judgment and vacated the permanent injunction, before remanding for further proceedings on Plaintiffs' as-applied claims. *Id*.

C. Plaintiffs and Their Activities

Following remand, of the original five plaintiffs, only PETA and ICCI continue to pursue their First Amendment claims on an as-applied basis. The remaining plaintiffs have dismissed their claims. [ECF No. 57]. PETA and ICCI have distinct operational approaches that inform their as-applied challenges.

PETA alleges it has conducted undercover investigations nationwide, including in Iowa, and is now deterred from conducting similar investigations in Iowa due to the Act. PETA's investigations often require surreptitiously obtaining employment at a targeted facility to use a

hidden camera to document the events witnessed by its investigators. PETA sends these video recordings to law enforcement and media outlets to promote public and government action.

Unlike PETA, ICCI expressly alleges that its staff and members intentionally engage in civil disobedience involving trespass. ICCI members have previously been arrested for trespass during protests at various locations including construction sites, bank lobbies, and offices of elected officials. During these acts of civil disobedience, ICCI members record their own activities and their surroundings. They allege that these recordings are integral to its advocacy work because they are used to raise awareness of their issues, amplify their message, and document potential misconduct by authorities responding to their protests. ICCI alleges its members are now deterred from engaging in similar activities due to the heightened penalties imposed by the Act.

Defendants now seek to dismiss Plaintiffs' remaining claims. [ECF No. 62]. Plaintiffs resist the motion to dismiss and instead move for summary judgment in their favor. [ECF No. 65].

II. DISCUSSION

Before proceeding to the merits, the Court must be clear about what is—and is not—at issue in this as-applied challenge. Unlike a facial challenge, which tests the constitutionality of a statute by considering all of its applications, an as-applied challenge tests how a statute applies to a particular plaintiff under particular circumstances. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723–28 (2024) (discussing facial and as-applied challenges in the First Amendment context). This narrower focus requires careful attention to the particular circumstances of PETA's and ICCI's activities rather than hypothetical applications of the statute. When examining tailoring in this context, the Court must determine not whether the law is generally narrowly tailored in the abstract, but whether its application to these Plaintiffs' specific recording activities is sufficiently

tailored to serve the State's interests without unnecessarily burdening their expression. This distinction shapes both the standing analysis that follows and the subsequent constitutional inquiry.

A. Threshold Jurisdictional Issues

Plaintiffs and Defendants have each filed motions that address the same fundamental question—whether the Act's Use Provision violates the First Amendment when applied to Plaintiffs' specific activities. Defendants seek dismissal, contending that Plaintiffs lack standing, their claims are not ripe, and their recordings do not constitute protected speech. [ECF No. 62]. Defendants maintain that the statute nevertheless satisfies intermediate scrutiny, a conclusion the Eighth Circuit reached in rejecting the facial challenge. In their view, the as-applied challenge merely recycles arguments already found wanting in the facial challenge context.

Plaintiffs counter by moving for summary judgment, asserting that their recordings constitute protected First Amendment activity even when made while trespassing. [ECF No. 65]. They argue that such activities do not threaten privacy interest or property rights because they occur in areas conditionally open to the public. Accordingly, they urge that the Act does not safeguard the interests it purports to, rendering it unconstitutional when applied to their particular conduct. Both standing and the constitutional merits require analysis of the same factual record and legal principles. Rather than addressing each motion separately, the Court will analyze the threshold jurisdictional issues before turning to the substantive First Amendment question of whether the Act, as-applied to Plaintiffs' specific recording activities, survives constitutional scrutiny.

1. Standing and Ripeness

Two closely related jurisdictional doctrines—standing and ripeness—govern the Court's threshold inquiry. Both ultimately ask the same question in this First Amendment pre-enforcement

challenge: do Plaintiffs face a credible threat of prosecution for their intended course of conduct? *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014); *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 721 (8th Cir. 2021).

For standing, Plaintiffs must show injury, causation, and redressability. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). For ripeness, they must demonstrate that their claims are fit for judicial decision rather than contingent on future events. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). The analysis typically converges in the First Amendment context, where courts apply a relaxed standard recognizing that a credible threat of prosecution itself causes injury by chilling protected speech. *ALDF II*, 89 F.4th at 1077–78. This is because courts do not require a plaintiff to risk prosecution before seeking relief. *Susan B. Anthony List*, 573 U.S. at 159 ("An actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging a law.").

Defendants assert that Plaintiffs lack standing because they have not identified specific, constitutionally-protected activities that would violate the Act, rendering their claims premature and speculative. Plaintiffs respond that both the Court and the Eighth Circuit have already recognized their standing in the facial challenge to the Use Provision. They argue that the as-applied context does not change this determination.

Plaintiffs are correct that the distinction between facial and as-applied challenges concerns the scope of remedy rather than standing requirements. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (explaining that "the distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"). A plaintiff alleging a chill of free expression "by definition does not—indeed, should not—have a present intention to engage

in that speech at a specific time in the future." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

Here, both PETA and ICCI have provided concrete evidence of their intent to engage in conduct prohibited under the Act. ICCI's declarations establish that its members have previously engaged in civil disobedience involving recording, have been arrested for trespass during such actions, and are now deterred by the Act's heightened penalties. PETA contends its history of conducting nationwide undercover investigations, some within Iowa, has been curtailed by the Act's heightened criminal sanctions.

The Eighth Circuit has already determined that organizations like ICCI have standing to challenge the Use Provision when documenting civil disobedience activities in publicly accessible spaces after being instructed to leave. *ALDF II*, 89 F.4th at 1078 (holding that "because ICCI and its members have an arguable constitutional interest in recording themselves in this manner, the Use Provision's steep penalties chill their speech, which establishes an injury in fact.").

PETA likewise demonstrates standing, as its documented history of conducting undercover investigations at agricultural facilities establishes a concrete intent to engage in conduct arguably affected by the Act. Because PETA has shown that the Act's enhanced penalties chill its investigative activities involving recording, it sufficiently pleads an injury-in-fact traceable to the State's enforcement authority and redressable through the relief sought.

Redressability is also satisfied because eliminating the Act's enhanced penalties would alleviate the specific chill on expressive activities, even if ordinary trespass liability would remain. The Eighth Circuit has recognized that "a favorable decision will relieve the plaintiffs of a discrete injury, even if it does not relieve them of every injury." *Id*. (citation omitted).

The Court thus concludes that the jurisdictional prerequisites are satisfied. Plaintiffs have demonstrated standing to pursue their as-applied challenges, and the dispute presents a controversy sufficiently developed for judicial resolution. Having resolved these threshold inquiries, the Court will now examine the constitutional merits of Plaintiffs' First Amendment claims.

B. First Amendment Analysis

The First Amendment analysis proceeds in three steps. First, the Court must determine whether the Use Provision regulates expression protected by the Constitution. If it does, the next step is to identify the appropriate level of scrutiny. Finally, the Court must assess whether the provision satisfies that level of scrutiny as applied to Plaintiffs' particular recording activities. This framework guides the Court's analysis in resolving the issue at the heart of this case—whether the Use Provision violates the First Amendment as applied to Plaintiffs' specific recording activities.

1. Protected Expression: Recording as First Amendment Activity

The initial question in the First Amendment analysis is whether recording while trespassing constitutes protected expression. The Eighth Circuit assumed without deciding that it does. *See ALDF II*, 89 F.4th at 1080.

Two Eighth Circuit precedents establish that recording in general is protected First Amendment activity. In *Telescope Media Group v. Lucero*, the court rejected Minnesota's contention that its antidiscrimination law merely regulated conduct, holding instead that "videos are a form of speech" entitled to constitutional protection. 936 F.3d 740, 751 (8th Cir. 2019). The panel emphasized that the creation of videos, not merely their distribution, is protected because filmmakers exercise "editorial control and judgment" in producing their work. *Id*. (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). The Eighth Circuit found that videos

designed to "affect public attitudes and behavior" are a "medium for the communication of ideas," making them protected expression. *Id*. (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952)).

In *Ness v. City of Bloomington*, the Eighth Circuit recognized that First Amendment protection extended to recordings even when they lack inherent expressiveness, so long as they are created "to facilitate speech" by documenting matters of public concern that will later "inform the public." 11 F.4th 914, 923 (8th Cir. 2021). There, the court protected a resident's recording of activities in a public park to document alleged zoning violations—recognizing such documentation as "an important stage of the speech process." *Id*. Even though the resident was not a professional journalist, her "photography and recording is analogous to news gathering" and constituted "an important stage of the speech process that ends with the dissemination of information about a public controversy." *Id*.

These precedents inform the analysis in this case. ICCI members record their civil disobedience precisely to engage in what *Ness* recognized as "an important stage of the speech process." 11 F.4th at 923. Their recordings document both their protest message and potential misconduct by authorities—content that later "inform[s] the public" about matters of public controversy. *Id*. PETA's undercover investigations similarly fall within the First Amendment's ambit as recognized in *Telescope Media Group*, as they exercise "editorial control and judgment," to create recordings designed to "affect public attitudes and behavior" regarding animal treatment. 936 F.3d at 751. The fact that both organizations conduct this recording during trespass does not remove the activity from the ambit of First Amendment protection.

The Act targets recording specifically, not merely the underlying trespass. By singling out camera use for enhanced penalties, the statute implicates more than simple trespass; it regulates an

"important stage of the speech process." *Ness*, 11 F.4th at 923. When a statute imposes additional penalties on expression that occurs during otherwise unlawful conduct, it triggers First Amendment scrutiny. As the Tenth Circuit explained, "[w]hen 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." *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1227–28 (10th Cir. 2021).

The Supreme Court's decision in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) offers further guidance. In that case, the Supreme Court invalidated an ordinance that prohibited door-to-door canvassing without a permit—essentially restricting speech based on a speaker's unauthorized presence on private property. *Id*. at 154, 165–66. The *Watchtower Bible* Court recognized that while the government may have legitimate interests in regulating certain conduct on private property, those interests do not exempt speech restrictions from First Amendment scrutiny.

Importantly, Plaintiffs' recordings address matters of public controversy—the very speech the First Amendment most vigorously protects. *See Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (noting that speech on matters of public concern is "at the heart of the First Amendment's protection"). The public interest in the content of these recordings—which document matters of public controversy—further supports the conclusion that the Use Provision implicates protected First Amendment activity. That protection is not eliminated merely because the recordings may occur in the context of civil disobedience or undercover investigations.

The Act specifically targets recording—conduct the Eighth Circuit recognizes as protected expression. By deterring persons before they record, the provision raises First Amendment concerns by discouraging protected speech-creating activities. The fact that the Use Provision

specifically identifies camera and recording device use for enhanced penalties, separate from the trespass itself, indicates that it is the expressive activity, not merely the trespass, that the provision targets.

The Court's conclusion that the Use Provision implicates protected speech is consistent with numerous decisions addressing similar laws that implicate recording in agricultural facilities. *See, e.g., Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (holding that Idaho's law regulating audio and video recordings at agricultural facilities implicated protected speech); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017) (concluding that Utah's law restricted protected speech). Although the Act is broader in scope than these agriculture-specific statutes, the analysis of why recording constitutes protected expression remains applicable. Having determined that the Use Provision implicates protected expression, the Court must next identify the appropriate standard by which to evaluate its constitutionality.

2. Standard of Review: Content-Neutral Regulation Subject to Intermediate Scrutiny

The Use Provision is a "content-neutral time, place, and manner restriction." *ALDF II*, 89 F.4th at 1080. It applies with equal force regardless of the message or viewpoint the recording might convey—whether documenting animal welfare concerns, environmental conditions, labor practices, or any other subject. The Act's prohibition turns solely on the conduct of recording while trespassing, not on what the recording might express or advocate.

Such restrictions trigger intermediate scrutiny, requiring that the law (1) be "narrowly tailored to serve a significant governmental interest" and (2) "leave open ample alternative channels for communication." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citation omitted). Narrow tailoring demands that the regulation advance the government's interest more effectively

than would be possible without it, while not burdening substantially more speech than necessary. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The regulation need not be the least restrictive means available. *Id*. at 798–99.

Although the Eighth Circuit determined that the Use Provision survived a facial challenge under this standard, an as-applied challenge requires focused examination of how the law affects these Plaintiffs' particular activities. This requires examining whether the particular manner in which these Plaintiffs engage in recording while allegedly trespassing presents the harms the statute was designed to address, and whether the Use Provision restricts no more of their protected expression than necessary to further the State's legitimate interests. These principles guide the Court's consideration of whether the Use Provision satisfies the narrow tailoring requirement of intermediate scrutiny as-applied to the particular recording activities of PETA and ICCI.

3. Application of Intermediate Scrutiny

a. Governmental Interests in Property Rights and Privacy

The application of intermediate scrutiny begins by identifying the government's asserted justifications for the Use Provision. The Act serves two significant governmental interests—protecting property rights and privacy—both firmly established in constitutional jurisprudence and recognized by the Eighth Circuit. *ALDF II*, 89 F.4th at 1080. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

Trespassing violates property rights, which stand among the most fundamental interests protected under American law. The Eighth Circuit recognized that when trespassers document their unauthorized presence through recording devices, they transform what would otherwise be a

discrete, time-limited intrusion into something far more invasive. This electronic memorialization extends the violation beyond the moment of physical entry, potentially enabling unlimited viewings of private spaces and activities by unintended audiences. *ALDF II*, 89 F.4th at 1082. Such conduct represents a qualitatively different and more serious infringement than mere physical presence alone. The spectrum of potential harms—from compromised security measures to exposure of confidential operations to invasions of personal privacy—provides a substantial basis to conclude there is a significant governmental interest in this issue.

b. Narrow Tailoring Analysis

The Court concludes that the Use Provision is narrowly tailored to serve the State's significant interests in protecting property and privacy rights. Although Plaintiffs contend that their recordings occur in areas with limited privacy expectations, that the State failed to consider less restrictive alternatives, and that the Act restricts more speech than necessary, these arguments misapprehend the nature of property rights and overlook crucial distinctions between this case and precedents like *McCullen*. The Constitution permits greater regulation of expression when it intersects with unlawful conduct, which is precisely what the intermediate scrutiny standard recognizes. This limited scope targets the precise harm the Eighth Circuit identified—recording exacerbates privacy and property intrusions by creating a permanent record that transforms a temporary physical invasion into an enduring breach that transcends both time and space. This observation is crucial to the as-applied analysis because it directly addresses a key aspect of Plaintiffs' argument. When ICCI members remain on property after being asked to leave, or when PETA investigators record in non-public areas of facilities, they are in locations where they are unlawfully present. The Eighth Circuit explicitly found that this circumstance strengthens the government's interest in preventing recording.

Plaintiffs contend that their recordings do not raise privacy concerns because they take place in areas with limited expectations of privacy. But their position reflects a fundamental misunderstanding of property rights, which encompass not merely the exclusion of physical presence, but also the authority to control surveillance activities occurring on one's premises. Property owners retain the right to exclude even in spaces conditionally open to the public. This right extends beyond controlling physical presence; it includes the authority to regulate surveillance activities conducted on the property. *ALDF II*, 89 F.4th at 1082 ("[I]ndividuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom.") (alterations in the original) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

While Plaintiffs characterize their locations as having reduced privacy expectations—such as sidewalks, parks, and open lobbies—the Eighth Circuit's reasoning suggests that the property owner's right to exclude—and by extension, the right to control surveillance—remains robust even in conditionally accessible spaces once permission to remain has been revoked. The Supreme Court has never recognized a First Amendment right to record on private property when the property owner objects. This remains true regardless of how accessible the property might be to the public.

Moreover, Plaintiffs' focus on Fourth Amendment expectations of privacy misses the mark in this First Amendment context. When they invoke principles governing what "a person knowingly exposes to the public" or areas where there is "no reasonable expectation of privacy," they erroneously conflate distinct constitutional frameworks. [ECF No. 65-1 at 16]. The analysis does not turn on whether the recording would constitute an unreasonable search under the Fourth Amendment's privacy protections—a question that would indeed depend on reasonable

expectations of privacy in different physical settings. Rather, the pertinent question is whether the State has articulated a substantial governmental interest in protecting property owners from the qualitatively different and more invasive harm that occurs when trespassers compound their unlawful entry by creating an enduring electronic record of what they observe.

This distinction is critical. As the Eighth Circuit recognized, the mere physical presence of a trespasser represents a temporary violation of property rights. However, it is the permanent record created by a recording that transforms that limited intrusion into a perpetual invasion that can be infinitely reproduced, distributed, and viewed by parties unknown to the property owner. *ALDF II*, 89 F.4th at 1082.

Both PETA's investigations and ICCI's recordings implicate these property interests, even in spaces conditionally open to the public. ICCI's members purposefully remain after being asked to leave while continuing to record their activities. [ECF No. 65-2 ¶¶ 4, 10]. Similarly, PETA's recording activities, whether in customer-accessible areas or through employment-based investigations, involve surveillance the property owner has not authorized. The State's interest acquires particular force precisely because these recordings occur in spaces where the recorder has no legal right to be present.

The Eighth Circuit has previously upheld government restrictions on videotaping "even when the public has a general right to access the venue," noting that "it follows that the State's interests in preventing recording are even stronger when the public has no right to access the venue in the first place." *ALDF II*, 89 F.4th at 1082 (citing *Rice v. Kempker*, 374 F.3d 675, 678–79 (8th Cir. 2004)). This reasoning applies directly to the present case, where Plaintiffs seek to record while trespassing—that is, while unlawfully present on property where they have no right to be. Without doubt, trespassing is a legally cognizable injury because it harms the privacy and property

interests of property owners and other lawfully-present persons. Trespassers exacerbate that harm when they use a camera while committing their crime. The Act is tailored to target that harm and redress that evil.

Plaintiffs next contend that the State must produce a comprehensive evidentiary record, similar to the traffic safety report prepared in *Traditionalist American Knights of the Ku Klux Klan v. City of Desloge*, to demonstrate that less restrictive alternatives would be inadequate. 775 F.3d 969, 975 (8th Cir. 2014). This argument, however, misconstrues the applicable standard for content-neutral regulations, particularly when those regulations address expression occurring during an already unlawful act.

As the Eighth Circuit has previously explained, "a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of [the] legislation's necessity and fitness to achieve desired results." *Doe v. City of Minneapolis*, 898 F.2d 612, 617 (8th Cir. 1990) (quoting *Wall Distrib. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986)). Judicial review of such determinations "goes only to whether the legislative determination of justification and fitness is not facially without factual support." *Id*. Although a detailed site-specific analysis strengthened the government's position in *Traditionalist*, the absence of such a report does not render the Use Provision constitutionally deficient.

Plaintiffs' reliance on *McCullen* for the proposition that the State must prove it considered less restrictive alternatives is unpersuasive. 573 U.S. at 496. This case involves fundamentally different circumstances. *McCullen* struck down a law restricting speech in quintessential public forums—specifically, public sidewalks. *Id*. at 476. The Supreme Court recognized such areas as holding a "special position in terms of First Amendment protection." *Id*. Unlike the buffer zone law invalidated in *McCullen*, which operated in traditional public forums and burdened entirely

lawful speech, the Use Provision applies only during unlawful trespass. *Id*. at 476–77. In other words, the Massachusetts buffer zone law categorically excluded speakers from areas where they had a lawful right to be, while the Use Provision imposes an additional penalty only after someone has unlawfully entered private property.

This distinction is not merely incidental—it fundamentally alters the First Amendment analysis, as the government's interest in regulating expression that compounds an existing legal violation stands on significantly firmer constitutional ground. The Use Provision does not preemptively restrict lawful speech in public spaces, but rather imposes heightened penalties only when someone has already committed the unlawful act of trespass and then compounds that violation by recording. The State's interest in protecting private property from trespassers acting in this manner is more direct and substantial than the approach undertaken by Massachusetts when addressing public forum speech.

Moreover, the evidentiary burden operates differently when analyzing a statute that only restricts expression occurring during an already unlawful conduct. Here, the Act does not restrict speech in public forums where individuals have a right to be. Rather, it penalizes the compounding harm that occurs when trespassers record their unlawful presence. The State's interest in deterring this specific, combined harm of trespass-plus-recording is served directly by the Act's structure, which imposes enhanced penalties only when both elements are present.

Defendants have provided sufficient evidence to establish a real need for the Use Provision. They identify two examples of trespass and recording prior to enactment of the Act. [ECF No. 34 at 20 n. 4–5]. This evidence, coupled with the logical connection between recording and the enhanced invasion of privacy rights, satisfies Defendants' threshold evidentiary burden. The fact that the legislature specifically targeted the intersection of trespass and recording—rather than

recording generally—supports the tailored nature of its approach. In sum, the Use Provision directly addresses the specific harm caused by recording while trespassing. The evidence in the legislative record, including references to incidents of trespass and subsequent recording at agricultural facilities, provides sufficient support for the tailoring of the Act to the State's interests.

Defendants are not required to produce further statistical analyses or site-specific studies demonstrating why alternative, more limited approaches would fail to achieve its legitimate interests in protecting property rights and privacy during trespass. The Use Provision logically advances these interests, and the State is entitled to deference in its choice of regulatory approach under intermediate scrutiny. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 214 (1997) (noting that content-neutral regulations are "subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution") (cleaned up) (citation omitted).

Furthermore, the Use Provision does not restrict more speech than necessary, as it is limited to recording while trespassing and does not extend to the subsequent publication or distribution of recordings. This limitation ensures that the provision addresses only the harm arising from the act of surveillance during trespass. The structure of the Act—penalizing only the intersection of trespass and recording—demonstrates precision in addressing the specific harm identified by the Eighth Circuit, specifically, the exacerbation of privacy and property intrusions in permanent records of unlawful presence. *See ALDF II*, 89 F.4th at 1082.

Plaintiffs suggest that *Project Veritas v. Schmidt* supports their position that the Act's tailoring is insufficient because, unlike the Oregon statute, the Iowa law lacks certain exemptions. 125 F.4th 929 (9th Cir. 2025). This argument is unavailing. First, the Oregon statute broadly prohibits recordings made in public spaces, whereas the Act only applies during a trespass—which is inherently more limited in scope. Second, the tailoring analysis in *Project Veritas* focused not

on exceptions, but on the core prohibition's relationship to the governmental interest. The United States Court of Appeals for the Ninth Circuit concluded that requiring notice before recording, but not consent, was sufficiently tailored to protect privacy interests. *Project Veritas*, 125 F.4th at 956. Here, the Act is even more narrowly drawn, as it only applies to recording during already unlawful conduct. The Act is therefore appropriately tailored to target the specific harm and redress that evil.

c. Alternative Channels of Communication

Finally, the Court must analyze whether the Use Provision leaves open ample alternative channels for PETA and ICCI to convey their messages and accomplish their expressive goals. The relevant inquiry is not whether these alternatives are Plaintiffs' preferred methods of communication, but whether they remain able to effectively communicate their intended messages through other lawful means. *See Ward*, 491 U.S. at 802; *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (noting that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places.").

The alternative channels inquiry must account for the fundamental distinction between this case and cases like *McCullen*. Here, the Use Provision does not restrict speech in traditional public forums where First Amendment protections reach their apex. Rather, it applies only after an individual has crossed the threshold into unlawful conduct by trespassing on private property. This distinction proves dispositive. Although speakers in public forums deserve robust protection for their chosen methods of communication, the First Amendment has never guaranteed trespassers the right to record while unlawfully present on another's property. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) (observing that "this Court has never held that a trespasser . . . may

exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only").

The Court finds that, as applied to PETA's and ICCI's activities, the Use Provision leaves open sufficient alternative channels for communication. Though requiring tactical adjustments, these alternatives still permit effective advocacy on issues central to the organizations' missions. *See Frisby*, 487 U.S. at 483 (holding that a restriction leaves open ample alternative channels of communication when it permits the more general dissemination of a message, even if it forecloses a speaker's preferred method).

Both organizations retain ample alternative channels for their expressive activities. ICCI can document its protests from adjacent public spaces, obtain contemporaneous written accounts, or secure permission to record. PETA likewise can pursue its animal welfare investigations through multiple lawful avenues such as customer-based investigations in areas where public access is permitted, documentary evidence through written reports, interviews with willing employees, and public records requests. Although these alternatives may lack the dramatic impact of surreptitious recording during trespass, they nevertheless enable both organizations to gather and disseminate information central to their advocacy missions. The Constitution does not privilege a speaker's preferred method when that method involves unlawful conduct.

The Eighth Circuit's observation that restrictions on videotaping have been upheld "even when the public has a general right to access the venue" provides a logical foundation for the Court's analysis. *ALDF II*, 89 F.4th at 1082. If recording restrictions can be constitutional in spaces where individuals have lawful access, then restrictions on recording while trespassing—where individuals have no lawful right to be present—have even stronger constitutional support. The First Amendment's protection for information-gathering has never extended to unlawful

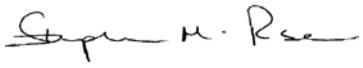
methods of collection, particularly when lawful alternatives remain available. *See id*. (citing *Lloyd Corp.*, 407 U.S. at 568). The First Amendment indeed protects the right to gather and disseminate information on matters of public concern, but that protection is qualified when the gathering method involves unlawful conduct, especially when the information could be otherwise obtained lawfully. *See PG Pub. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013) (noting that "the Supreme Court has held, time and again, that [the] First Amendment right of access to information is qualified and subject to limitations.").

III. CONCLUSION

Guided by the Eighth Circuit's analysis and applying intermediate scrutiny, the Court concludes that the Use Provision withstands these as-applied challenges. Accordingly, Defendants' Motion to Dismiss is GRANTED. [ECF No. 62]. Plaintiffs' Motion for Summary Judgment is DENIED. [ECF No. 65].

IT IS SO ORDERED.

Dated this 19th day of March, 2025.



STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT