Case No. 25-1750

In the United States Court of Appeals
for the Eighth Circuit

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,

Plaintiff,

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT,

Plaintiff-Appellant,

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, JEANNIE RITCHIE, in her official capacity as Dallas County Attorney, and NATHAN REPP, in his official capacity as Washington County Attorney,

Defendants-Appellees.

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

BRIEF OF APPELLANT

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I. SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Iowa Code § 727.8A creates a crime of a person trespassing and taking photos or making videos. Plaintiff-Appellant Iowa Citizens for Community Improvement ("ICCI") engages in non-violent civil disobedience, where it enters places open to the general public and stays after being asked to leave (a trespass). It records its protests to amplify its messages, including by posting the videos and photos on its website and social media. Recordings that communicate a point of view, particularly when used to present that message to others, are protected speech.

The district court held § 727.8A could be applied to ICCI consistent with the First Amendment. Its conclusion that § 727.8A is tailored is wrong. It stated § 727.8A legitimately protects property owners' right to exclude. But the undisputed record establishes property owners object to ICCI's presence, not its recordings. The district court also overlooked that Defendants failed to produce any evidence Iowa's legislature justified § 727.8A's reach prior to enacting the law. And, distinct from these errors in applying intermediate scrutiny, the district court never considered whether strict scrutiny was required, despite ICCI alleging § 727.8A was passed to suppress specific statements. The decision to grant Defendants' motion to dismiss and deny ICCI's cross-motion for summary judgment cannot be sustained.

ICCI requests oral argument of 20 minutes per side to present these interlocking legal, factual, and procedural issues on constitutional questions.

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not issue stock and has no parent corporations.

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II. JURISDICTIONAL STATEMENT

This case was filed under 42 U.S.C. § 1983 and § 1988, as well as the Constitution itself, providing the district court jurisdiction under 28 U.S.C. § 1331 and § 1343. *See, e.g.*, Joint Appendix ("App.") 6–31; R. Doc. 1, at 1–26 (Complaint). On March 19, 2025, the district court entered an Order and Judgment granting Defendants' motion to dismiss the action and denying ICCI's parallel motion for summary judgment. App. 109–31; R. Doc. 75, at 1–22, and R. Doc. 76. ICCI filed a notice of appeal from that final Order and Judgment on April 16, 2025, within the 30 days allowed by Federal Rule of Appellate Procedure 4(a)(1)(A). App. 132–34; R. Doc. 77, at 1–3. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

That jurisdiction enables this Court to review both the dismissal and the denial of summary judgment, even though the latter is not typically a final order. Not only did the district court enter one combined Order and Judgment, but it treated the issues as intertwined. It made factual findings in ICCI's favor and only granted dismissal because it believed that, as a matter of law, those facts were irrelevant. Therefore, "[this Court's] review of the grant of the motion to dismiss" will "impact the district court's denial of summary judgment," so both issues are before the Court. *Mo. Broad. Ass'n v. Lacy*, 846 F.3d 295, 299 n.4 (8th Cir. 2017).

III. STATEMENT OF ISSUES

1. Whether the district court erred in this as-applied First Amendment challenge by concluding § 727.8A was tailored under intermediate scrutiny, even though it found restricting speech like ICCI's did not serve the law's objectives.

    a. Most apposite cases and provisions: *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025); *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013); *People for the Ethical Treatment of Animals, Inc. ("PETA") v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

2. Whether the district court erred in this as-applied First Amendment challenge by concluding § 727.8A was tailored under intermediate scrutiny, when it recognized Defendants did not produce any evidence that Iowa determined it needed to restrict this volume of speech before enacting the law.

    a. Most apposite cases and provisions: *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *PETA v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023); *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016).

3. Whether the district court erred in dismissing this action without allowing ICCI to develop evidence § 727.8A was passed to suppress speech and thus

warranted strict scrutiny, rather than the intermediate scrutiny the district court applied.

a. Most apposite cases and provisions: *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Par v. Wolfe Clinic, P.C.*, 70 F.4th 441 (8th Cir. 2023).

IV. INTRODUCTION

Plaintiff-Appellant ICCI—an Iowa citizen group—seeks to raise awareness regarding its policy agenda through protesting in the public areas of corporate and political sites, until its staff and members are arrested as trespassers for refusing to leave. To increase the impact of those actions, ICCI and its members also openly record the protests, so ICCI can use the photos and videos they collect for the organization's social media and communications, to obtain traditional media coverage, and to document any mistreatment of the protesters.

Iowa Code § 727.8A imposes "significantly enhanced criminal sanctions compared with [Iowa's] general trespass law" against ICCI's staff and members who engage in the civil disobedience, if they also record the protests. App. 110; R. Doc. 75, at 2 (Combined Order). As the district court recognized, this Circuit's precedents provide photos and videos are protected as speech. App. 117–118; R. Doc. 75, at 9–10 (Combined Order).

Unsurprisingly therefore, § 727.8A has squelched ICCI's speech. Staff and members are afraid to record the civil disobedience and suffer the special consequences. This has deterred ICCI from carrying out additional non-violent civil disobedience and inhibited its and its members' ability to capture and share their messages.

ICCI brings this as-applied First Amendment challenge to protect its and its members' right to record the protests. Specifically, ICCI seeks to prevent Defendants from imposing § 727.8A's penalties when ICCI's staff and members engage in demonstrations where the protesters "stay[] at the location of the action after a person with actual or apparent authority asks ICCI and its members to leave," leading them to be labeled trespassers. App. 88; R. Doc. 69-1 ¶ 4 (Defendants' Response to Plaintiffs' Statement of Facts) (admitting this accurately describes ICCI's civil disobedience at issue). That is, ICCI seeks to act within the "tradition of non-violent civil disobedience" along the lines of lunch counter sit-ins, occupying space to draw attention to an issue by being willing to accept punishment for refusing to vacate. *Id.* ICCI merely contends Iowa cannot impose novel penalties that prevent protesters who risk arrest for their presence from recording and transmitting their messages.

The district court granted Defendants' motion to dismiss and rejected ICCI's cross-motion for summary judgment. The district court's discussion of the tailoring required cannot be reconciled with recent controlling authority in two ways. In fact,

if followed, both errors would place this Court at odds with other circuits. Moreover, the district court's own findings of fact establish that, when the correct law is applied, ICCI prevails.

First, the district court concluded ICCI could not state an as-applied claim because this Court's prior review of § 727.8A held the law advanced a legitimate end by punishing "that subset of trespassers who—by using a camera while trespassing—cause further injury to privacy and property rights." *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1081 (8th Cir. 2024). But the district court did not find ICCI fell within that subset. It found ICCI and its members trespass through their presence, not making unwanted recordings. The undisputed record also demonstrates ICCI's recordings do not interfere with privacy in other ways. For an application of a law to be tailored consistent with the intermediate scrutiny the district court applied, it must directly further the law's legitimate ends. ICCI proved its recordings bear no relation to the legitimate objectives of § 727.8A.

Second, the district court's focus on § 727.8A's valid applications led it to conclude Defendants did not need to produce evidence that before Iowa passed the law it determined the full scope of § 727.8A was warranted. To the contrary, recent Supreme Court precedent explains that under intermediate scrutiny the government needs to show that, before enacting a law, it possessed a reasoned basis for the law's

breadth. Here too, the district court analyzed the record, and its findings confirm Defendants cannot make that showing.

Separate and apart from the district court's mistakes in applying intermediate scrutiny, it dismissed the action without acknowledging ICCI's allegations that § 727.8A was passed to suppress speech, which would warrant strict scrutiny. As a result, ICCI never had the opportunity to conduct discovery to prove those allegations. That alone is reversable error.

In this manner, the district court's dismissal can be overturned due to its faulty understanding of tailoring. Likewise, even if the Court were to disagree with ICCI's discussion of intermediate scrutiny, ICCI is entitled to a remand to argue for a higher level of review. Yet, once the proper standards are applied, based on the district court's own description of the record, ICCI is entitled to judgment in its favor. Therefore, the most efficient course is for this Court to order judgment in favor of ICCI, preventing § 727.8A from being applied to ICCI's civil disobedience where it and its members refuse to vacate publicly accessible property after being asked to leave, but the property owners do not object to ICCI's recordings.

V. STATEMENT OF CASE

A. Iowa Code § 727.8A.

Section 727.8A criminalizes "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." Iowa Code § 727.8A. A first violation is an "aggravated misdemeanor," *id.* § 727.8A, a two-fold increase over the punishment for most trespasses under Iowa Code § 716.7, *id.* § 716.8(1). Section 727.8A's initial penalty also exceeds that for a person "knowingly trespass[ing]" with "the intent to commit a hate crime." *Id.* § 716.8(3).

As this Court explained, in Iowa, "[w]hen a general trespass does not involve injury to a person or property damage over $300," the penalty is "a fine between $105 and $855 and up to thirty days of imprisonment." *Animal Legal Def. Fund*, 89 F.4th at 1075. Under § 727.8A, where the sole additional element is that the person trespassing made a recording, the penalty is "a fine between $855 and $8,540 and up to two years of imprisonment." *Id.*

B. This Court's earlier facial decision in this matter.

ICCI and other Plaintiffs previously cross-moved for summary judgment in response to Defendants' first motion to dismiss. The district court issued a declaration and injunction against § 727.8A because it was facially invalid under the First Amendment. This Court reversed. It remanded for further proceedings on whether § 727.8A's prohibition on "using" a camera during a trespass violated the First Amendment when that provision is applied to Plaintiffs.

This Court recounted that ICCI and its members alleged they "travel to spaces generally open to the public or where the public is typically allowed," engage in "disruptive[] protest[s]," "are inevitably asked to leave," "refus[e]," and on this basis are labeled "trespassers." *Animal Legal Def. Fund*, 89 F.4th at 1078. "During these encounters, ICCI members intentionally record themselves . . . to increase their advocacy efforts, draw attention to their message, and reveal any violations of the law," such as mistreatment by arresting officers. *Id.* However, § 727.8A's punishment for recording has created "chilling penalties," keeping ICCI and its members from engaging in their desired advocacy. *Id.* (cleaned up).

As a result, this Court held ICCI sufficiently alleged standing to challenge § 727.8A's prohibition on using a recording device following a trespass. It is well-established that the "[f]reedom of speech includes expression through the making and sharing of videos." *Id.* at 1080 (citing *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023)). Therefore, ICCI "engage[s] in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution thereunder," producing an injury by keeping ICCI from engaging in its desired speech. *Id.* at 1077 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Moreover, despite Defendants noting that if § 727.8A were enjoined ICCI and its members would still be liable for trespass due to their unwanted presence on the property, this case would "relieve the plaintiffs of

[the] discrete injury" of "steep penalties" under § 727.8A—"even if it d[id] not relieve them of every injury." *Id.* at 1078.

And contrary to Defendants' arguments, the issues were ripe. Where "a plaintiff alleges a chill on speech, Article III standing and ripeness issues boil down to the same question." *Id.* at 1078–79 (cleaned up).

Notwithstanding the above, this Court explained ICCI could only challenge § 727.8A's prohibition on "using" a camera, not its separate prohibition on "placing" one. Those two provisions are distinct and "severable." *Id.* at 1076–77. Because ICCI did not allege that it or its members "*place[d]* cameras" and left them behind, only that the protesters "*us[ed]* cameras" during their civil disobedience, ICCI lacked standing to challenge the restriction on placing a camera. *Id.* at 1079.

Turning to the merits, the Court emphasized its review was highly limited. Because it was solely considering whether the "use" provision was facially valid, the Court did "not look beyond the text of the statute" or "examine how the Act applies to a plaintiff's particular circumstances." *Id.* at 1080. Moreover, a statute is facially lawful unless "no set of circumstances exists under which the Act would be valid," or the law "lacks any plainly legitimate sweep." *Id.* at 1079 (cleaned up).

With this background, the Court said the "use" provision survived facially. The Court would "assume the Act regulates a constitutional right," so it would survive if there was any instance it was "narrowly tailored to serve the State's

significant governmental interests," and it did not "burden substantially more speech than is necessary." *Id.* at 1080. Defendants explained the law sought to protect "the privacy interests of individuals on their property, preventing the theft of trade secrets and proprietary information, and deterring trespassers from wrongfully alighting onto a property to make a recording." *Id.* Those are "significant interest[s]." *Id.* Because the law captures people who "exacerbate" harms to "privacy and property interests . . . when they use a camera while committing their crime" of physical trespass, the restriction on recording "redress[es] [an] evil" and the law is facially tailored. *Id.* at 1082.

Nonetheless, this Court emphasized that in reaching this decision it was not considering the specifics of "Plaintiffs' First Amendment interests" in carrying out their particular speech prohibited by § 727.8A. *Id*. Instead, it was exclusively holding that the statute "survives intermediate scrutiny against Plaintiffs' facial challenge," and "remand[ing] for further proceedings" on whether the law survived as applied to Plaintiffs' particular activities. *Id.*

C. Proceedings on remand.

Following this Court's decision, several of the original Plaintiffs dismissed their actions. Two Plaintiffs remained, ICCI and PETA. They pressed their claims that § 727.8A's "use" provision could not be applied to their activities consistent with the First Amendment.

Plaintiffs and Defendants agreed to file new dispositive motions on those claims. App. 36; R. Doc. 59, at 3 (Joint Status Report). Defendants stated they wished to file a second motion to dismiss. *Id.* Plaintiffs stated they would again produce evidence supporting their claims and cross-move for summary judgment. *Id.*

The parties, with the district court's approval, agreed to proceed with these filings without discovery, reserving their rights to seek discovery. App. 35–36; R. Doc. 59, at 2–3. In particular, for efficiency, they agreed they would wait to see the other side's evidentiary filings in support of any motion for summary judgment before determining what discovery to seek. *Id*. They would only seek discovery pursuant to Federal Rule of Civil Procedure 56(d), allowing for discovery to create a dispute of fact in response to another's summary judgment motion. *Id.* Thus, while Defendants had an opportunity to request discovery to oppose ICCI's filing—which they did not—ICCI would need to wait for later briefing to obtain discovery. *See id.*

D. ICCI's evidence demonstrating § 727.8A unconstitutionally prohibits its speech.

As relevant to Defendants' second motion to dismiss, ICCI's Complaint explains the organization has a long history of engaging in non-violent civil disobedience to raise awareness regarding environmental and civil rights issues. App. 18–19; R. Doc. 1 ¶¶ 53–54. That non-violent civil disobedience occurs at

corporate and political sites related to the policies ICCI seeks to address. It occurs in areas open to all. *Id.* In these actions, ICCI's staff and members have repeatedly been accused of trespassing because of their unwanted physical occupancy. *Id.*

ICCI staff and members participating in this civil disobedience record it to enhance the impact of the protests. App. 19; R. Doc. 1 ¶ 55. They capture photos and videos to allow the staff's and members' messages to be shared with others. App. 19; R. Doc. 1 ¶¶ 55, 57. Further, the recordings ensure ICCI captures any illegal conduct experienced or witnessed by the protesters in response to their presence. App. 19; R. Doc. 1 ¶ 58.

The new penalties under § 727.8A, however, have inhibited ICCI's advocacy. App. 20; R. Doc. 1 ¶ 60. ICCI wants to engage in further non-violent civil disobedience where its staff's and members' physical presence could be labeled a trespass, and to record those protests to communicate their messages. Indeed, prior to § 727.8A being enacted, ICCI was considering such civil disobedience to protest factory farms in the counties that the Defendant County Attorneys represent. App. 20; R. Doc. 1 ¶¶ 61–62.

However, ICCI fears exposing its staff to § 727.8A's heightened penalties, and its members have declined to record the protests because of those penalties, although both staff and members explain they remain willing to be labeled trespassers due to their unwanted presence. Without the recordings, the protests are

less impactful. As a result, ICCI and its members have declined to engage in their desired speech. App. 19, 20–21; R. Doc. 1 ¶¶ 56, 62–64.

In fact, ICCI alleged, inhibiting such speech was the entire purpose for enacting § 727.8A. The law is part of a series of statutes designed to suppress negative publicity regarding industrial animal agriculture, which have been successfully challenged on that basis in Iowa and elsewhere. App. 6–9; R. Doc. 1 ¶¶ 2–15. Section 727.8A mimics statutes passed in other states following the initial legal challenges. These later statutes were crafted to achieve that same end, while making the text appear more neutral. App. 9; R. Doc. 1 ¶ 14. Still, both floor statements and testimony in support of § 727.8A explained it was meant to stop the "agendas" of animal activists who seek to document and publicize mistreatment at factory farms. App. 11–12; R. Doc. 1 ¶¶ 22–23.

As part of its summary judgment filings, ICCI and its members confirmed each of the allegations regarding ICCI's civil disobedience and provided additional details. App. 49–72; R. Doc. 65-3, at 3–26 (ICCI and member declarations). ICCI explained that its primary form of non-violent civil disobedience occurs on business property otherwise open to the general public. App. 51–52; R. Doc. 65-3 ¶ 17 (ICCI Decl.). For example, it protests on unfenced outdoor business property and in indoor areas where anyone can freely come and go, always entering during business hours. *Id.*; *see also* App. 88–89; R. Doc. 69-1 ¶ 5 (Defendants' Response to Statement of

Facts) (generally admitting this accurately describes "examples of" ICCI's civil disobedience at issue).

ICCI also noted it engages in a second distinct form of non-violent civil disobedience at public officials' homes. There, staff and members use walkways to approach the front door and stand and remain on the porch or at the doorstep. App. 51–52; R. Doc. 65-3 ¶ 17 (ICCI Decl.). The protesters do not move to other parts of the property nor enter the home. *Id.*

In either case, the reason these activities have been labeled a trespass is that ICCI and its members decline to leave the property when asked. App. 51; R. Doc. 65-3 ¶ 15 (ICCI Decl.); *see also* App. 88; R. Doc. 69-1 ¶ 4 (Defendants' Response to Statement of Facts) (admitting the civil disobedience at issue is designed to create a trespass through the protesters refusing to leave a location). Indeed, the purpose of ICCI's civil disobedience is to show that people cannot be "lock[ed] out" of decision making, by demonstrating citizens will claim space if their concerns are not considered. App. 56–57; R. Doc. 65-3 ¶ 41 (ICCI Decl.).

Staff and members record the protests using standard handheld devices, such as cameras and cellphones, to capture videos and still images. App. 53; R. Doc. 65-3 ¶ 21 (ICCI Decl.); *see also* App. 91; R. Doc. 69-1 ¶ 11 (Defendants Response to Statement of Facts) (admitting same). The staff and members capturing photos and videos focus on the people in the protests and do so without leaving the protest, as

the objective of the recordings is to capture the advocacy. App. 53, 54; R. Doc. 65-3 ¶¶ 22–23, 26 (ICCI Decl.); *see also* App. 92; R. Doc. 69-1 ¶ 14 (Defendants' Response to Statement of Facts) (admitting the recording are made "in the exact place ICCI's staff and members are physically standing"). The recorders also seek to document any illegal abuse of the protesters. App. 53, 54; R. Doc. 65-3 ¶¶ 22, 25 (ICCI Decl.).

ICCI uses the videos and images on its website, in social media, and at its events, and sends them to traditional media to facilitate coverage. App. 54; R. Doc. 65-3 ¶¶ 26–29 (ICCI Decl.). The recordings are a means for the organization and participants to communicate the message of the protests to ICCI's members and the public, and thereby encourage people to join the work. App. 54; R. Doc. 65-3 ¶ 30 (ICCI Decl.).

Both staff and members are now unwilling to engage in and record ICCI's civil disobedience because of § 727.8A's penalties. App. 55–56; R. Doc. 65-3 ¶¶ 33–39 (ICCI Decl.). As a result, ICCI has been deterred from planning and carrying out such civil disobedience. App. 56–57; R. Doc. 65-3 ¶¶ 39–41 (ICCI Decl.). But both staff and members would protest and record in the manner they have in the past, including in the counties Defendants represent, if the law were enjoined. App. 56, 57; R. Doc. 65-3 ¶¶ 40, 43–44 (ICCI Decl.); *see also* App. 65–72; R. Doc.

65-3, at 19–26 (member declarations confirming ICCI's statements regarding the nature of the actions, recordings, and chilling effect of § 727.8A).

E. The district court's decision on appeal.

In a consolidated opinion on the parties' filings, the district court granted Defendants' second motion to dismiss and denied Plaintiffs' parallel motion for summary judgment. App. 109–30; R. Doc. 75, at 1–22. The district court ruled for Defendants while acknowledging an as-applied challenge turns on § 727.8A's "application to these Plaintiffs' specific recording activities." App. 113; R. Doc. 75, at 5. Put another way, Plaintiffs' as-applied claims "require[] careful attention to the particular circumstances of [their] activities." *Id*. Accordingly, although it stated it was dismissing the action, it also noted its holding derived from "the[] facts" presented. App. 110; R. Doc. 75, at 2.

The district court's analysis required consideration of those facts because it rejected each of Defendants' threshold legal arguments: It concluded ICCI had standing, ICCI had ripe claims, and ICCI's recordings amounted to protected speech. The district court explained that the prior Eighth Circuit decision in this matter held ICCI had successfully alleged standing, and ICCI submitted uncontested declarations proving those same allegations. App. 112; R. Doc. 75, at 4; *see also* App. 115–16; R. Doc. 75, at 7–8 (explaining a chill on speech brought about by the statute is sufficient for standing (citing *Initiative & Referendum Inst. v. Walker*, 450

F.3d 1082, 1089 (10th Cir. 2006) (en banc))). Therefore "[t]he Eighth Circuit has already determined" standing as relevant to this case. App. 116; R. Doc. 75, at 8. That ICCI now seeks as-applied relief, rather than the facial relief it previously requested, has no impact on the standing analysis. App. 115; R. Doc. 75, at 7 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010)).

Moreover, as this Court explained in its prior decision in this matter as well as in others, once a First Amendment plaintiff establishes standing, that demonstrates their claim is ripe. App. 114–15; R. Doc. 75, at 6–7 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014); *Animal Legal Def. Fund*, 89 F.4th at 1077–78; *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 721 (8th Cir. 2021)).

Although this Court's prior opinion in this matter assumed the issue without directly addressing it, under other Eighth Circuit precedent, ICCI's and its members' recordings "undoubtedly" constitute speech protected by the First Amendment. App. 110; R. Doc. 75, at 2. Eighth Circuit authority provides "videos designed to 'affect public attitudes and behavior' are a 'medium for the communication of ideas,' making them protected expression." App. 117–18; R. Doc. 75, at 9–10 (quoting *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019)). Likewise, "photography and recording" used to "later 'inform the public'" on matters of

"public concern" are protected speech. App. 118; R. Doc. 75, at 10 (quoting *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021)).

The recordings of ICCI's protests are "precisely" what this line of authority holds protected by the First Amendment. *Id*. The recordings are designed to capture the "protest message." *Id.* ICCI creates those materials to "'inform the public' about matters of public controversy." *Id.* (cleaned up). Therefore, the recordings are "an important stage of the speech process," which the First Amendment protects as equivalent to pure speech. *Id.* (quoting *Ness*, 11 F.4th at 923). In fact, the recordings represent "the very speech the First Amendment most vigorously protects," speech contributing to policy debates. App. 119; R. Doc. 75, at 11 (citing *Snyder v. Phelps*, 562 U.S. 443, 451 (2011)).

Relatedly, the district court vetted and rejected Defendants' argument that there is an exception to the First Amendment for statutes that restrict speech alongside other conduct, like a trespass. App. 118–20; R. Doc. 75, at 10–12. "By singling out camera use for enhanced penalties," § 727.8A creates "additional penalties on expression," not just regulatable criminal conduct, the essence of what the First Amendment restricts. App. 118–19; R. Doc. 75, at 10–11. Indeed, the Tenth Circuit has already rejected that a law like § 727.8A can evade First Amendment review: "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." App. 119; R. Doc. 75, at 11 (cleaned up) (quoting *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1227–28 (10th Cir. 2021)). Further, the Supreme Court has "invalidated an ordinance" that prohibited speech facilitated by "unauthorized presence on private property." *Id.* (citing *Watchtower Bible & Tract Society of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002)); *see also* App. 120; R. Doc. 75, at 12 (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018), and *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017), as additional authority demonstrating "that the [u]se [p]rovision" must pass First Amendment review).

However, the district court concluded that when § 727.8A's "use" provision is applied to "the particular manner in which" ICCI records, § 727.8A survives the requisite First Amendment review. App. 121; R. Doc. 75, at 13. The district court employed intermediate scrutiny on the basis that the "use" provision's text "applies with equal force regardless of the message or viewpoint." App. 120; R. Doc. 75, at 12. Therefore, it stated, the sole requirements were that the law "(1) be narrowly tailored to serve a significant governmental interest and (2) leave open ample alternative channels for communication." *Id.* (cleaned up). The district court did not address that it was granting Defendants' motion to dismiss, and thus ICCI could not argue evidence impacted the level of scrutiny.

The district court then stated § 727.8A advances a legitimate governmental interest because the government can pass laws that punish people who violate property owners' "right to exclude," including enacting laws that target recordings inconsistent with property owners' decisions to limit activities on their land. App. 121; R. Doc. 75, at 13. "[T]he government[] asserted" the statute was meant to "protect[] property rights and privacy." *Id*. Where a recording "inva[des]" in a manner that is distinct from the trespasser's "physical entry" or "physical presence alone," the government has an interest in regulating those recordings. App. 122; R. Doc. 75, at 14.

The district court stated, "[t]he structure of the Act" means it can reach such recordings that "exacerbat[e] privacy and property intrusions." App. 127; R. Doc. 75, at 19. In other words, the law is tailored to the extent it enables property owners to "regulate surveillance activities" to which they object. App. 123; R. Doc. 75, at 15 (citing *Animal Legal Def. Fund v. Reynolds*, 89 F.4th at 1082).

Yet, recognizing its earlier statements that an as-applied challenge is a fact-intensive inquiry that requires courts to determine whether the law serves its objectives when used against the plaintiff's activities, it also considered the circumstances of ICCI's speech. It acknowledged and agreed with ICCI's description of its civil disobedience. The district court found that ICCI's protests result in trespasses because ICCI and its members "purposefully remain after being

asked to leave while continuing to record their activities." App. 124; R. Doc. 75, at 16. Their presence, not their recording, is the cause of property owners' concerns.

But, without acknowledging the internal inconsistency, it stated that, as applied to ICCI, the law properly achieved Iowa's goals because it prevented recording "when the property owner objects," penalizing that additional intrusion on the owner's wishes. App. 123; R. Doc. 75, at 15. The district court sought to bolster its analysis by stating "the State's interests in preventing recording are even stronger when the public has no right to access the venue in the first place." App. 124; R. Doc. 75, at 16 (quoting *Animal Legal Def. Fund*, 89 F.4th at 1082, in turn citing *Rice v. Kempker*, 374 F.3d 675, 678–79 (8th Cir. 2004)). It did not explain how that indicated preventing ICCI's recordings protected property owners' rights.

Next, the district court rejected ICCI's argument that Defendants needed to produce evidence establishing Iowa determined § 727.8A's breadth was warranted to achieve its ends. The district court stated, "[t]he State's interest in protecting private property from trespassers," and particularly from an intrusion through recording is "direct and substantial." App. 126; R. Doc. 75, at 18. Therefore, its evidentiary burden is reduced. *Id.*

On this basis, the district court concluded there was "sufficient evidence" because Defendants had shown a "real need for the [u]se [p]rovision." *Id*. It explained Defendants' briefing cited two news articles, which in turn identified that

prior to enacting § 727.8A there had been incidents of "trespass and recording." *Id.* (citing App. 33; R. Doc. 34, at 20 nn. 4–5 (excerpts of Defendants' Resistance to Motion for Summary Judgment)). That was enough to sustain the law.

Finally, the district court quickly concluded § 727.8A left open sufficient alternative methods of communication. App. 128–30; R. Doc. 75, at 20–22. It stated ICCI could produce "written accounts," and although such alternatives may lack the "impact" of the desired speech and require "tactical adjustments," they were sufficient. App. 129; R. Doc. 75, at 21.

On this basis, the district court held § 727.8A could be lawfully applied to the non-violent civil disobedience ICCI sought to protect.

VI. STANDARD OF REVIEW

"This court reviews *de novo* the grant of a motion to dismiss, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the non-moving party." *Par v. Wolfe Clinic, P.C.*, 70 F.4th 441, 445–46 (8th Cir. 2023) (cleaned up). To dismiss a case on the pleadings, it must "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 446.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The burden of demonstrating" a law "satisfies intermediate scrutiny falls

on the government." *Cornelio v. Connecticut*, 32 F.4th 160, 171 (2d Cir. 2022); *see also Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013) (similar). Therefore, the Federal Rules "mandate[] the entry of summary judgment" against the government if it "fails to make a showing sufficient" to create a dispute of fact in opposition to a plaintiff's motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(c) (where a summary judgment movant relies on the absence of evidence, an opposing party must introduce evidence to create a dispute of fact). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial," and the movant is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

VII. SUMMARY OF ARGUMENT

The district court's tailoring analysis rests on two legal errors. When they are corrected, the district court's own understanding of the record establishes ICCI should prevail. First, the district court wrongly treated the fact that § 727.8A has some lawful applications as dispositive of whether § 727.8A's restrictions on ICCI's speech properly advanced Iowa's objectives. Under intermediate scrutiny, a law can only be constitutionally applied if those applications "direct[ly]" advance the government's goals. *TikTok Inc. v. Garland*, 145 S. Ct. 57, 70 (2025). The district court held § 727.8A was tailored to prevent recordings "when the property owner objects." *E.g.*, App. 123; R. Doc. 75, at 15. The undisputed record proves that does

not occur with ICCI's speech. As the district court recognized, ICCI's declarations and Defendants' admissions confirm ICCI only seeks to protect its right to record where its staff's and members' presence, not their recordings, are the concern. In fact, Defendants produced nothing to show ICCI had ever recorded over another's objections, nor in manners inconsistent with any interest. A prohibition on recording cannot be constitutionally applied where the record does not establish the recordings intrude, as both the Fourth and Seventh Circuits have indicated. The district court can be reversed on this basis alone.

Second, the district court failed to require appropriate evidence to support § 727.8A. Contra the district court's statements, it was not enough for Defendants to show facts supported the need for *a* law. Defendants needed to show that Iowa determined restricting *this* amount of speech achieved its ends. *TikTok*, 145 S. Ct. at 71. While the quantum of evidence may vary based on the nature of the law, even where a statute "self-evident[ly]" advances a legitimate objective, some such evidence is required. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010). Despite bearing the burden, Defendants introduced no evidence Iowa had any basis to restrict speech like that of ICCI. What the district court relied on, "two examples of trespass and recording" identified in footnotes to a brief, App. 126; R. Doc. 75, at 18 (Combined Order), provides nothing of the sort. Indeed, it does not support the need for *any* restriction on speech, let alone this broad a

restriction on speech. Moreover, in relying on facts Defendants located for this litigation, but could not show actually supported the law's passage, the district court again diverged from two other circuits. Thus, the absence of evidence supporting the law is another independent basis on which to reverse.[1]

It was an additional error to dismiss this action without allowing ICCI to develop evidence that strict, not intermediate, scrutiny was required. Laws that are

[1] Throughout its intermediate scrutiny analysis, the district court also failed to acknowledge the secondary function of ICCI's recordings, to document any mistreatment of protesters. Another circuit has recognized that recordings are a "uniquely reliable and powerful" method of collecting evidence of mistreatment, whose "self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012). However, it appears that under this Circuit's precedent, the district court was correct in holding § 727.8A allows for adequate alternatives to ICCI's desired speech. That § 727.8A prevents ICCI from obtaining evidence of an equivalent persuasive value, and instead ICCI must turn to handwritten notes or the like, does not mean the law failed to allow for adequate alternative channels for the speech. Under this Court's authority, that a law undermines the quality of the expression is of no moment, if there are "'alternative avenues' of communicating the[] message" in some form. *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 918 (8th Cir. 2017). To the extent ICCI misunderstands this Court's standard, the district court's failure to evaluate how § 727.8A's limit on recordings alters the nature and usefulness of ICCI's speech would be reversable error. If not, however, ICCI reserves its right to argue for a different standard at an appropriate time. Indeed, the request for a standard that protects the right to record for evidence and recognizes that written speech is not a true substitute for recording, is currently pending before the Supreme Court. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1064–65 (9th Cir. 2023), *reh'g en banc granted, opinion vacated*, 95 F.4th 1152 (9th Cir. 2024), *and on reh'g en banc*, 125 F.4th 929 (9th Cir. 2025), *cert. petition docked sub nom. Project Veritas v. Vasquez*, No. 24-1061.

"facially content neutral," will still be considered content-based regulations of speech if they were "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (brackets in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Were this Court to reject all of ICCI's arguments regarding the constitutional analysis below, the district court still provided no reason to disregard the allegations in the Complaint that Iowa enacted § 727.8A to prevent speech against factory farms. ICCI reserved its right to develop and present evidence that supported this argument, and it is entitled to press its claim that strict scrutiny is required.

In sum, the district court did not properly apply the scrutiny it deemed appropriate. A complete and accurate application of intermediate scrutiny to the findings below establishes ICCI prevails. Regardless, dismissal was premature.

VIII. ARGUMENT

A. Restricting ICCI's speech does not directly advance § 727.8A's purpose, so the law is not tailored.

Laws restricting speech are not tailored under intermediate scrutiny unless they "serve the Government's" ends "in a direct and effective way." *TikTok*, 145 S. Ct. at 70; *see also id.* (under intermediate scrutiny a law must "promote[] a substantial government interest that would be achieved less effectively absent the

regulation"). In an as-applied challenge, this means the prohibitions on this particular type of speech must be "essential to the furtherance of" the "Government's 'asserted interest.'" *United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999).

Indeed, as this Court recognized in its earlier decision in this matter, what distinguishes as-applied challenges from facial ones is as-applied relief turns on "how the Act applies to a plaintiff's particular circumstances." *Animal Legal Def. Fund*, 89 F.4th at 1080. It is not enough for there to be a "set of circumstances" in which the law is constitutional, *id.* at 1079, the law needs to pass review considering the "particular" activities at issue, *Kaden v. Slykhuis*, 651 F.3d 966, 969 (8th Cir. 2011) (review of prison regulation subject to lesser scrutiny); *see also Ness*, 11 F.4th at 924 (conducting equivalent review under strict scrutiny).

Phelps-Roper demonstrates how to conduct the analysis of a law's distinct applications under intermediate scrutiny. This Court held that where the government's aim was to "protect[] the peace and privacy of funeral attendees," it could restrict "protest activities" at, but not "about" a funeral. 713 F.3d at 951. This Court had previously held limits on protests at funeral services and burial ceremonies properly achieved the government's objectives. *Id.* at 954. It recognized protests "about" a funeral could cause the same harms. *Id.* at 951. But it further acknowledged that protests "about" a funeral "may take place at a great distance from that funeral and have no chance of disrupting it." *Id*. As a result, a restriction

on protests "about" a funeral, such as those along the processional route, may not be "necessary to achieve the government's interest." *Id.* at 952–53. Therefore, to the extent the challenged laws prevented protests surrounding funerals, it was possible those applications regulated speech that did not produce the harms of concern. Therefore, those applications had not been shown to directly further the government's goals and were not tailored. *Id.*[2]

Similarly, this Court held a legitimate prison regulation prohibiting "lewd" material could not be applied to a book of impressionist artwork, *Matisse, Picasso and Modern Art in Paris*. *Sisney v. Kaemingk*, 15 F.4th 1181, 1193 (8th Cir. 2021). Because "[c]ommon sense does not suggest, and the defendants have offered no evidence to prove, a rational connection between banning pictures of artwork" and the rule's objectives, the ban could not be applied to these facts. *Id.* Correspondingly, a prisoner could object to the application of a legitimate rule censoring violent material, if it was applied to a "a Japanese Comic Book." *Kaden*, 651 F.3d at 968.

ICCI demonstrated restricting its recordings does not "directly" advance § 727.8A's legitimate ends of enforcing property owners' rules regarding the use of their land. *See TikTok*, 145 S. Ct. at 70. In fact, although the district court focused

[2] The *Phelps-Roper* panel explained such problems infected all applications of one of the two challenged provisions, rendering that provision facially invalid. With the other provision, the restriction on protests surrounding a procession was severable. That second law otherwise had a valid reach. *Phelps-Roper*, 713 F.3d at 954.

on the interest of property owners, the record also demonstrates restricting ICCI's recordings does not necessarily protect other rights. Thus § 727.8A's applications to ICCI are unconstitutional. *See Phelps-Roper*, 713 F.3d at 952–53. Indeed, the Fourth and Seventh Circuits have employed intermediate scrutiny to grant as-applied relief against prohibitions on recordings based on less substantial records. The district court's analysis cannot be sustained. Section 727.8A is not tailored as applied.

i. The record establishes ICCI's recordings do not cause harms.

Relying on this Court's prior decision in this matter, the district court stated § 727.8A advances a legitimate interest that justifies its restriction on speech when it helps effectuate "[p]roperty owners . . . right to exclude" not merely "physical presence" but unwanted "surveillance." App. 123; R. Doc. 75, at 15. However, ICCI established its speech at issue is designed to avoid and does not produce that intrusion.

ICCI's chilled civil disobedience amounts to its and its members' presence being unauthorized. App. 122; R. Doc. 75, at 14 (Combined Order); *see also* App. 88, R. Doc. 69-1 ¶ 4 (Defendants' Response to Statement of Facts). ICCI's staff and members do not seek to protest and record where property owners have prohibited recordings. *See also* App. 51; R. Doc. 65-3 ¶ 15 (ICCI Decl.). Nor is there any evidence to suggest they have ever overstepped and proceeded with unwanted recordings or would do so.

That absence of evidence is particularly glaring given the background rules against which § 727.8A was passed. Under that preexisting law, property owners could identify any basis to request a person to leave, including engaging in unwanted recording. Iowa Code § 716.7(2)(a). Even before § 727.8A, property owners could have demanded ICCI cease recording and, if they did not, ICCI and its members could have been punished as trespassers. Property owners could also post limits on their property's use. *Id.* § 716.7(2)(a)(2). Pre-§ 727.8A, they could have hung "no photography" signs that would have rendered recording a trespass, even if the recorder was never asked to stop recording. Defendants admit ICCI makes its recordings using open and obvious means, such as handheld cellphones and cameras. App. 91; R. Doc. 69-1 ¶ 11 (Defendants' Response to Statement of Facts). Therefore, that Defendants produced no record of property owners objecting to ICCI's recordings indicates the property owners affirmatively chose not to exercise their right to restrict the recordings. The recordings were not of concern.

In this manner, the undisputed history of ICCI's activities render this case like *Phelps-Roper*. Even if it is possible that restricting ICCI's recordings might theoretically prevent an unwanted intrusion on property that the district court said justified the law, the record shows the restrictions will not consistently have that benefit. *See Phelps-Roper*, 713 F.3d at 951. Therefore, the law is not tailored.

In fact, this case is even more like the extreme example of overreach in *Sisney*. To date, there is nothing to suggest restricting ICCI's recordings would ever produce the desired benefit. Defendants' failure to produce evidence that restricting speech like ICCI's has ever achieved Iowa's goal makes those applications of § 727.8A irrational to the point they could not stand even under the limited review of a prison regulation. *See Sisney*, 15 F.4th 1181, 1193. As the Supreme Court has explained, trespass laws that enable property owners to stop speech they wish to keep off their land—like Iowa's preexisting law—should provide "ample protection" for "the privacy of the resident." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). Thus, absent some real showing of need, the courts should not assume an additional regulation is sensible.

To sidestep the record, Defendants argued below that all recordings on another's property necessarily amount to an additional intrusion, no matter the surrounding facts or circumstances. This ignores the history of this case, which rejected the facial challenge, but remanded review of the law as applied to Plaintiffs. *Animal Legal Def. Fund*, 89 F.4th at 1082. Under Defendants' logic, there would be no reason for a remand; every application of the law would be valid.

Moreover, the statute cannot be said to advance the aim of protecting property when the owners do not seek to restrict the activity. If Defendants were right, § 727.8A constitutionally makes it a crime for a whistleblower to go into an

"employees-only" breakroom (a trespass) to record a theft. Applications of § 727.8A to speech like ICCI's are not tailored.

The district court similarly implied this Court's decision in *Rice* allows for broad restrictions on recordings whenever they occur on another's property. App. 124–25; R. Doc. 75, at 16–17. Not so. *Rice* held the government could enforce a limit on recording executions. 374 F.3d at 679. In other words, where the only relevant property owner, the government, affirmatively chose to prohibit recording without permission, it could do so consistent with the First Amendment. *Rice* does not support that the State can pass a general prohibition on recording on another's property, whether or not the owner objects.

"No [] tradition withholds protections from" speech on another's premises. *PETA v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 822 (4th Cir. 2023); *see also W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1189 n.7 (D. Wyo. 2018) ("speech interest" is equivalent whether the speech occurs on "private land" or "public land"). While the government is free to pass laws that survive scrutiny, "free speech" cannot be "subordinated" to advance other interests without that showing. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) (considering law addressing "foreign policy concerns").

Finally, even if this Court believes the above too narrowly focuses on Iowa's interest in protecting property owners' rights and overlooks the privacy interests of

third parties, ICCI's recordings do not interfere with those rights either. ICCI's recordings are made in areas accessible to the general public, where it is accepted anyone can view and record what they can see. App. 88–90; R. Doc. 69-1 ¶¶ 5–8 (Defendants' Response to Statement of Facts) (failing to offer contrary evidence).

Iowa recognizes the rights to privacy endorsed in the Restatement (Second) of Torts. *Bierman v. Weier*, 826 N.W.2d 436, 466 (Iowa 2013); *Est. of Bisignano v. Exile Brewing Co., LLC*, 694 F. Supp. 3d 1088, 1112 (S.D. Iowa 2023) (collecting other Iowa Supreme Court cases stating same); *see also ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) (relying on the Restatement (Second) of Torts to determine generally accepted common law rules regarding privacy). The Restatement explains there is no right to privacy where "matters about the plaintiff" are exposed in areas "exhibited to the public gaze." Restatement (Second) of Torts § 652B, cmts. (c)–(d) (1977). Recording does not invade privacy where one's "appearance is public and open to the public eye," be that on a sidewalk, in open commercial space, or in spaces of a home that are visible to passersby—such as what can be seen when approaching and knocking at a door. *Id.*[3]

[3] The district court objected to Plaintiffs citing Fourth Amendment law to demonstrate ICCI's protests do not interfere with protected expectations of privacy. App. 123; R. Doc. 75, at 15 (Combined Order); *see also Wabun-Inini v. Sessions*, 900 F.2d 1234, 1241 (8th Cir. 1990) (no expectation of privacy where a "person knowingly exposes to the public" activities at "home or office"); *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997) (what can be observed when a resident

Intermediate scrutiny requires that to restrict speech there be a direct fit between the law's means and its legitimate ends. It must be more than possible that the law will achieve that end. *Phelps-Roper*, 713 F.3d at 951. If the State fails to produce "evidence" of that connection, those applications fail First Amendment scrutiny. *Sisney*, 15 F.4th at 1193. ICCI's speech does not meet the test. Even extending beyond the interest the district court held supported § 727.8A, the law remains untailored as applied to ICCI.

ii. Other circuits have provided relief on similar bases.

To hold Iowa can punish ICCI's recordings to protect property and privacy that is not clearly impaired by the recordings would also place this Court at odds with both the Fourth and Seventh Circuits. In *PETA*, the Fourth Circuit considered a statute that prohibited recording, including hiding recording devices on private property. 60 F.4th at 830–31. It held those restrictions were not tailored under intermediate scrutiny to the extent they restricted the plaintiffs' recordings in "nonpublic" spaces that were not truly "private spaces." *Id.* at 833. Where the statute

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"open[s] the door" is not protected); *United States v. Titemore*, 437 F.3d 251, 259 (2d Cir. 2006). Courts have used Fourth Amendment law to examine whether a restriction on speech is tailored to protect privacy. *ACLU of Ill.*, 679 F.3d at 605; *see also Wabun-Inini*, 900 F.2d at 1241 (Fourth Amendment inquiry turns on whether there is a right to privacy "that society is prepared to recognize as reasonable" (cleaned up)). More importantly, the district court ignored that Iowa common law fully overlaps with Fourth Amendment law in this respect.

regulated recording information on private property, but the information's owners did not take steps to prevent its recording, the law could not be said to "fit any of the State's professed interests" of protecting property or privacy. *Id.* For instance, the law was not tailored where it restricted recording "documents laid out in the breakroom," because the document's treatment reflected a "fundamentally different" set of concerns from the law's objectives. *Id.* In contrast, where the law prevented recording "private calls in a manager's office," it was tailored. *Id.*

In restricting ICCI's recordings, § 727.8A likewise prohibits recording because of its location, without recognizing that not all activities on private property "intimate[]" the same "privacy interests." *See id.* Because ICCI's recordings are limited to those areas where the subjects have not asserted their interest against recording nor have a background expectation of privacy, § 727.8A restricts recordings where the "prohibitions are not tailored to any substantial government interest" to protect property or privacy. *See id.* To hold otherwise is to split with the Fourth Circuit.

The Seventh Circuit similarly held a law seeking to protect privacy was likely not tailored under intermediate scrutiny. That law "ma[de] it a felony to audio record 'all or any part of any conversation' unless all parties to the conversation g[a]ve their consent." *ACLU of Ill.*, 679 F.3d at 586. The Seventh Circuit prevented the law from

being applied to recordings where the speakers failed to take steps to secure the privacy of their statement. *Id.* at 606–07.

The Seventh Circuit recognized the State could constitutionally prohibit "accessing the private communications of another," but when the statute penalized recording where the speakers had not affirmatively worked to assert their "privacy interest," the law likely would fail intermediate scrutiny. *Id.* at 605–06. The court explained this limit on government authority was particularly sensible because the plaintiff "plans to record *openly*, thus giving" the people who are being recorded the ability to secure their privacy, if the interest exists. *Id.* at 607.

True, the recordings at issue in *ACLU of Illinois* were to be made in "public places"—although the Seventh Circuit did not define the term—but the Seventh Circuit explained the recordings' location was not dispositive of its holding. *Id.* at 606–07. Indeed, the dissent noted the majority would protect recordings in business "lobbies" and all places "in which there are other people about." *Id.* at 610, 613 (Posner, J., dissenting). Moreover, the majority recognized "private talk in public places is common," and the State could prohibit recording those conversations. *Id.* at 606. Even in a public place, a law would be tailored if it restricted recording what people have attempted to keep private. *Id.*

What rendered the statute likely untailored as applied was the State restricted recording conversations where the speakers' conduct did not show the conversations

were "in fact private." *Id.* Therefore, for such recordings, "the State has severed the link between the [] statute's means and its end," and the law likely could not be constitutionally applied in those circumstances. *Id.*

This case is no different. As in *ACLU of Illinois*, ICCI records openly, enabling people to object. For the civil disobedience at issue, the State has conceded private property owners' concerns are with ICCI's presence. ICCI recordings have not been shown to be objectionable. Moreover, ICCI has explained it seeks to protect its ability to record in areas where people have exposed themselves and their activities to public view. In regulating that speech, Iowa has severed the link between the restriction and protecting property or privacy interests.

* * *

The Fourth and Seventh Circuits have explained restrictions on recording meant to protect property and privacy are not tailored when the subjects have not taken steps to prevent the intrusion. Here, Iowa restricts speech to protect interests the supposed perpetrator (ICCI) does not seek to invade and the purported victims (property owners) do not claim. Nor does the speech invade a general expectation of privacy. That application of § 727.8A cannot be sustained under intermediate scrutiny.

B. Section 727.8A is not tailored because Defendants did not introduce evidence establishing Iowa evaluated the scope of the law.

Separate from the fact that § 727.8A's restrictions on ICCI's speech do not further Iowa's aims, the district court erred in dismissing the action because Defendants failed to show Iowa evaluated whether restricting this breadth of speech was needed to render the law effective, evidence that is required before a law can be held tailored under intermediate scrutiny. The district court diminished Iowa's burden. It claimed Iowa's interest in enacting § 727.8A is so clear—despite the disconnect between the law's means and ends discussed above—Defendants only needed to show the statute reached "two examples" of problematic conduct that arose before its passage, regardless of whether those examples actually informed the law. App. 126; R. Doc. 75, at 18. The district court misstated the standard. A correct analysis again proves that based on this record § 727.8A cannot stand as applied to ICCI's speech.

i. Intermediate scrutiny requires evidence the legislature determined restricting this amount of speech was warranted.

In *TikTok*, the Supreme Court reiterated that laws subject to intermediate scrutiny must be "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." 145 S. Ct. at 71 (quoting *Turner Broad. Sys., Inc. v. F.C.C. ("Turner II")*, 520 U.S. 180, 224 (1997)). There needs to be a "record [that] reflects" that before passing a law, the government determined

the restriction as drafted is designed to address the concerns. *Id.* at 70; *see also Turner Broad. Sys., Inc. v. F.C.C. ("Turner I")*, 512 U.S. 622, 666 (1994) (plurality opinion) (under intermediate scrutiny courts must ensure legislature "has drawn reasonable inferences based on substantial evidence").

While a law that plainly serves some legitimate functions will not require a "survey" that substantiates all the ways those harms manifest, tailoring still mandates "[e]vidence in the congressional record" that justifies the law's reach. *Milavetz*, 559 U.S. at 251. Thus, in *Milavetz*, the Court stated the evidentiary record was only "adequate" to support a law regulating "*misleading* commercial speech"—which is subject to "less exacting scrutiny" than intermediate scrutiny, *id.* at 249—because Congress had demonstrated the "pattern of advertisements" that would be misleading without the law's required disclosures, *id.* at 251. Likewise—although acknowledging the "latitude" provided to create content-neutral regulations, and having concluded there were no "less restrictive alternatives"—*TikTok* still relied on the fact Congress produced a record showing the restriction furthered the claimed national security objectives. 145 S. Ct. at 69–70, 71.

The district court recognized the Supreme Court required such evidence in *McCullen v. Coakley*, 573 U.S. 464 (2014), but stated that holding was less meaningful. It emphasized the law at issue in *McCullen* regulated speech on sidewalks, whereas § 727.8A restricts speech following an "unlawful act of

trespass," which the district court indicated made § 727.8A inherently more tailored. App. 126; R. Doc. 75, at 18.

Leaving aside the district court's analysis does nothing to diminish the statements in *TikTok, Milavetz*, or *Turner I* or *II*, the district court misread *McCullen*. In *McCullen*, the Court explained the evidentiary requirements of intermediate scrutiny exist because "the prime objective of the First Amendment is not efficiency" in legislating. 573 U.S. at 495. In other words, the need for evidence is not limited to restrictions in public forums. The evidentiary requirements are part of the First Amendment's means of protecting speech—and the district court found ICCI's speech is the sort the First Amendment most "vigorously protects," App. 119; R. Doc. 75, at 11.

Further, *McCullen* explained, the point of requiring evidence is not solely to ensure the restriction actually advances the government's goals, but also to require the government to pause before it tramples a right. 573 U.S. at 496 ("Given the vital First Amendment interests at stake, it is not enough for [the State] simply to say that other approaches have not worked."). The First Amendment means the government may not "too readily sacrific[e]" speech. *Id.* at 486 (cleaned up). The restrictions might be perfectly logical, and still the First Amendment requires the government demonstrate it is not acting by "the path of least resistance." *Id.*

The district court also indicated *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990), provides that whatever evidence is required, it does not need to come from the legislative record. That case, however, predates all the Supreme Court authority above. Moreover, that decision merely states legislatures need not produce a record that enables "plenary judicial review of legislation's necessity." *Id.* at 617. A legislative record was still required. *Doe* explains the law at issue was justified because it was "firmly supported by evidence in [the city council's] record." *Id*. at 617, 618; *see also Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969, 975 (8th Cir. 2014) (examining evidence in the legislative record to ensure the law passed intermediate scrutiny).

Moreover, consistent with the Supreme Court authority above that looked to the congressional record, several other circuits have explained that for the evidence to be sufficient, the government must prove it considered the evidence before passing the law. *See Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) (explaining "post-hoc rationalizations" cannot sustain scrutiny in "most any" circumstance). In the Fourth Circuit, it is "a nonnegotiable requirement" of intermediate scrutiny that there be "'actual evidence' in the legislative record that lesser restrictions will not do." *PETA*, 60 F.4th at 831–32 (quoting *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)). The Third Circuit has explained that "the protection of speech that heightened judicial scrutiny is meant to ensure []

would be meaningless" if the courts did not "ask the government . . . to justify its choice to prohibit speech" in the "legislative record." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 & n.18 (3d Cir. 2016).

In this manner, the district court erred as a matter of law in dismissing the action. Whatever limits there are on the evidentiary requirements, there is an evidentiary issue to be addressed. If nothing else, ICCI is entitled to a remand to cross-examine Defendants' evidence. Although, as discussed below, the insufficiency of Defendants' record is self-evident.

ii. On this record, § 727.8A is unconstitutional.

The record establishes Defendants cannot make the requisite evidentiary showing. The district court did not discuss any evidence from the legislative record because Defendants did not introduce any. That alone is fatal. Fed. R. Civ. P. 56(c) (requiring such a submission to counter Plaintiffs' summary judgment motion); *see also Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) (where the "State explicitly declined to introduce" any evidence the law fails intermediate scrutiny); *accord Cornelio*, 32 F.4th at 177.

To the extent this Court wants to go beyond what was introduced as evidence, in their brief below Defendants passingly referred to a total of fifty-eight seconds of floor statements. That involved a forty-six second clip of a single State Senator claiming Iowa's trespass law did not protect him from some unnamed event for

unstated reasons. There was also twelve seconds of another Senator providing an introduction to the remarks, without offering any additional detail.[4]

This record certainly does not amount to "factual findings" showing a basis for § 727.8A to reach the speech at issue here. *See TikTok*, 145 S. Ct. at 71. Indeed, these floor statements are so barren they could not support Iowa restricting *any* speech. They do not provide any explanation of the issue Iowa sought to address or how speech was implicated. Hence, the district court did not bother to acknowledge this citation.

Considering the authority the district court credited—two news articles Defendants also did not introduce as evidence, but cited in a footnote to a brief, App. 126; R. Doc. 75, at 18 (Combined Order) (citing App. 33; R. Doc. 34, at 20 nn. 4–5 (excerpts of Defendants' Resistance to Motion for Summary Judgment) in turn citing those articles)—does not change the conclusion. Those articles merely recount that, prior to Iowa passing § 727.8A, a single animal advocacy organization (not ICCI) had twice entered Iowa factory farms. While that group recorded their entry, none of the articles identified any harms from the recordings. To the extent the articles identified any harms at all distinct from the unwanted presence, they were the risk

[4] *Video: Iowa Senate Floor Debate of House File 775* at 9:08:36–9:08:48; 9:14:29–9:15:15, Iowa Legislature (April 6, 2021), available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20210406012724727&dt=2021-04-06&offset=27327&bill=HF%20775&status=r&ga=89.

to the biosecurity of the farm animals. Selected third-party reporting, particularly when it was not shown to be part of the legislative record, cannot amount to a factual finding in support of the law of any sort. And even were it, the articles offered no basis to restrict ICCI's or other speech.[5]

* * *

"Once it is apparent that heightened scrutiny applies, the government cannot be excused from the obligation to identify evidence that supports its restriction of a constitutional right. When a court simply accepts the government's assertions . . . the court undermines the protections of the First Amendment by watering down the intermediate scrutiny the court purportedly applies." *Cornelio*, 32 F.4th at 177–78 (cleaned up). On this basis too, the district court should be reversed.

C. The Court should remand for entry of judgment in favor of ICCI.

In light of the above, this Court could reverse and remand for further proceedings. To succeed on their motion, Defendants were required to show that it is "beyond doubt that the plaintiff can prove no set of facts in support of [the] claim

[5] *See* Donnelle Eller, *Animal Rights Group Claims Animal Neglect at Farm of Iowa Senator Who Backed Ag Gag Law*, Des Moines Register, Dec. 26, 2020, https://www.desmoinesregister.com/story/money/agriculture/2020/01/24/animalrights- group-claims-neglect-pigs-iowa-farm-ag-gag-supporter/4545787002/; Donnelle Eller, *Activists Arrested After Chaining Themselves Outside Iowa Facility Where Pigs Euthanized*, Des Moines Register, June 1, 2020, https://www.desmoinesregister.com/story/money/agriculture/2020/06/01/activists-protesting-pigeuthanasia-arrested-charged/5308820002/.

which would entitle [it] to relief." *Par*, 70 F.4th at 445–46. Given that the current record undermines the lawfulness of § 727.8A as applied, there certainly are a set of facts on which ICCI could prevail. Moreover, to rule against ICCI the district court needed to and did rely on facts from Defendants, which cannot form the basis for a dismissal. *See id.* To the extent this Court believes those facts could ever suffice, ICCI should have had the opportunity to contest them through discovery.

However, because the district court's analysis of ICCI's cross-motion for summary judgment was "intertwined" with its reasons for dismissal it would be equally appropriate, and more efficient, to reverse and direct judgment for ICCI. *See Mo. Broad. Ass'n*, 846 F.3d at 299 n.4. Defendants bore the burden of proof. *Phelps-Roper*, 713 F.3d at 949; *see also Cornelio*, 32 F.4th at 171. Thus, Defendants failure to introduce evidence to carry their burden warrants summary judgment in ICCI's favor. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). Here, there is not merely the absence of a record showing the restriction furthers Iowa's ends; Defendants admitted facts proving § 727.8A does not advance its goals as applied. *See, e.g.*, App. 88; R. Doc. 69-1 ¶ 4 (Defendants' Response to Plaintiffs' Statement of Facts) (admitting ICCI's civil disobedience at issue is designed to create a trespass through physically staying where its staff and members are not wanted—and not introducing any evidence the recordings are of concern). Thus, there are no more

steps to take. Defendants were required and failed to create a record to show they could carry their burdens. ICCI is entitled to a judgment in its favor.

D. At minimum, remand is required to develop the record.

Were the Court to reject all of ICCI's tailoring arguments, the district court still must be reversed to allow ICCI to challenge the district court's determination that intermediate rather than strict scrutiny was appropriate. The district court concluded § 727.8A was content neutral and warranted intermediate scrutiny based solely on the law's text. App. 120–21; R. Doc. 75, at 12–13. But that is only one of two ways in which a law must be content neutral. "[A] facially content-neutral law is nonetheless treated as a content-based regulation of speech if it . . . was 'adopted by the government "because of disagreement with the message the speech conveys."'" *TikTok*, 145 S. Ct. at 67 (quoting *Reed*, 576 U.S. at 162, in turn quoting *Ward*, 491 U.S. at 791). ICCI is entitled to develop a record to show that the text of § 727.8A was a pretext for targeting specific messages and therefore warrants strict scrutiny.

ICCI alleged that Iowa enacted § 727.8A as part of a series of laws aimed at activists' speech against factory farming, explaining both the law's background and legislative history confirm as much. App. 6–8, 9, 11; R. Doc. 1 ¶¶ 2–8, 14–15, 22–23. ICCI reserved its right to engage in discovery to prove such facts. App. 35; R. Doc. 59, at 2 (Joint Status Report). Neither the district court nor Defendants

questioned the sufficiency of ICCI's allegations. Thus, ICCI is entitled to proceed on this issue.

Allowing discovery is particularly appropriate because what records already exist support ICCI's contention. The news articles Defendants claimed justified § 727.8A's scope indicate the law was meant to stop activists who wished to reveal the inhumane conditions of industrial animal agriculture. That is the essence of a viewpoint discriminatory objective. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1233, 1236 (10th Cir. 2021) (law that treats "pro-animal facility viewpoints above anti-animal facility viewpoints" is viewpoint discriminatory).

As a result, if nothing else, the case should be reversed and remanded so ICCI can pursue its allegations that potentially require a different, more onerous analysis than that engaged in by the district court.

IX. CONCLUSION

For the foregoing reasons, the Court should direct judgment for ICCI based on the undisputed record. Alternatively, ICCI requests the Court remand for reconsideration of the intermediate scrutiny analysis in light of the appropriate legal standards and, to the extent necessary, for ICCI to be able to create disputes of fact. In addition, or the alternative, the Court should reverse and remand so that ICCI can work to prove § 727.8A was passed to discriminate against speech critiquing Iowa's

factory farms and thereby mandates strict scrutiny the district court never considered.

May 27, 2025

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X. STATUTORY TEXT

Iowa Code § 727.8A. Cameras or electronic surveillance devices--trespass

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the May 27, 2025, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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